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 CATO INSTITUTE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

United States Constitution

Rules of Court

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3(a), Cato Institute and Pacific Legal Foundation (PLF) respectfully submit this brief amicus curiae in support of Petitioners. Written consent was granted by all parties and lodged with the Clerk of this Court.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. This case is of central concern to Cato because the "incorporation" question implicates not only the right to keep and bear arms but larger issues regarding the origin, nature, and extent of all our natural rights and how the Constitution protects them.

PLF was founded more than 35 years ago and is the largest nonprofit legal foundation devoted to defending property rights and economic freedom. As part of its mission to protect the freedom of economic choice, PLF has set as one of its institutional missions the overruling of *Slaughter-House Cases*, 83 U.S. (16

[1] Pursuant to this Court's Rule 37.3(a), all parties consented to the filing of this brief. Letters evidencing consent have been filed with the Clerk of the Court. Counsel for all parties received 10 days notice.

Pursuant to Rule 37.6, Amici affirm that no counsel or party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amici, their members, or counsel made a monetary contribution to its preparation or submission.

Wall.) 36 (1873). PLF attorneys routinely seek redress on behalf of clients for violations of the Privileges or Immunities Clause, *see*, *e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). Both Cato and PLF attorneys have published scholarly articles addressing the doctrinal infirmities of *Slaughter-House*. *See*, *e.g.*, Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207 (2003); Kimberly C. Shankman, & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1 (1998)

SUMMARY OF ARGUMENT

Resolving the question presented requires the Court to reconsider the decision in the *Slaughter-House Cases*. Amici will therefore focus on explaining why that decision was wrong and why this Court should overrule it to restore force to the Privileges or Immunities Clause of the Fourteenth Amendment.

Slaughter-House was wrongly decided in 1873 and ought to be overruled now. That decision narrowly circumscribed the list of rights protected by the Privileges or Immunities Clause, contrary to the intentions of the Amendment's framers, and in direct contradiction to the developments in legal theory that underlay its adoption.

The Amendment was intended to constitutionalize the anti-slavery legal theory of "paramount national citizenship" shared by the political leaders of the victorious Union, and thereby to provide federal protection for a broad list of individual rights in the wake of the Civil War. But the *Slaughter-House* Court ignored the Amendment's constitutionalization of this view of federalism.

That refusal to recognize and protect federal rights also flouted the legislative history behind the drafting of the Fourteenth Amendment, and basic canons of legal interpretation. *Slaughter-House* handicapped efforts to protect former slaves and their descendants, led to significant distortions in subsequent cases, and essentially erased the Fourteenth Amendment's most important guarantee for individual rights. This case offers a crucial opportunity for the Court to restore the Privileges or Immunities Clause to its rightful and intended role as guardian of individual rights against state encroachment.

There is no reason for the Court to let the opportunity pass it by. Indeed, in the years since *Slaughter-House*, and particularly since the publication of Michael Kent Curtis' *No State Shall Abridge* (1986), legal scholars from diverse backgrounds have forged a consensus that *Slaughter-House* was wrong and ought to be overruled. Indeed, most of the members of this Court appear to have already taken that position in *Saenz v. Roe*, 526 U.S. 489 (1999). When it is clear, as it is with *Slaughter-House*, that a case is and has always been wrongly decided, *stare decisis* must give way.

It is true that *Slaughter-House*'s virtual negation of the Privileges or Immunities Clause contributed to the subsequent rise of the theory of substantive due process. But restoring the Privileges or Immunities Clause to its original scope would not result in the demise of substantive due process. The idea at the core of that doctrine—that the Due Process Clause imposes more than merely procedural limits on government power—was widely accepted when the Fourteenth

Amendment was enacted. Its authors rightly believed that the Due Process and the Privileges or Immunities Clauses would both provide meaningful protection for individual rights. The protections afforded by a reinvigorated Privileges or Immunities Clause might at times overlap with the Due Process Clause's substantive dimension, but overruling *Slaughter-House* would not warrant abandoning the long-standing recognition that due process of law "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

ARGUMENT

I

SLAUGHTER-HOUSE IGNORED THE DOCTRINE OF PARAMOUNT NATIONAL CITIZENSHIP THAT THE FOURTEENTH AMENDMENT'S AUTHORS INTENDED TO CONSTITUTIONALIZE

Scholars have identified a number of flaws in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36,[2] but its central error is that the Court ignored the Amendment's underlying premise: namely, a revolution in federalism that placed national authority over state autonomy and protected a wide array of national rights against state governments. The Amendment's authors sought to constitutionalize a particular doctrine of federal and state relations, called "paramount national citizenship," developed in the decades prior to the Civil War. Jacobus tenBroek, *The*

[2] *See Saenz*, 526 U.S. at 522 n.1 (Thomas, J., dissenting) (citing sources).

Antislavery Origins of the Fourteenth Amendment 71 (1951); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717, 719-39 (2003).

In the antebellum period, two parties formed with competing visions of the nature of federal-state relations and of the rights that accompanied federal citizenship. These parties coalesced into the secessionist states' rights party, and the Free Soil party that became the Republican party. Following the Union victory in the Civil War, Republican leaders amended the Constitution, through the Fourteenth Amendment in particular, to ensure that their constitutional doctrine of nationality and individual rights would be permanently preserved as part of this nation's supreme law. To understand what was at stake in *Slaughter-House*, and why that decision erred, it is necessary to review the Republican constitutional theory of "paramount national citizenship."

A. The Theory of Paramount National Citizenship

The theory of paramount national citizenship had two components. First, the Republican authors of the Fourteenth Amendment believed that the whole people of the United States made up a single, sovereign nation. *See* Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 Ark. L. Rev. 347, 367 (1995) (opponents of slavery "argued that national citizenship was not dependent upon state citizenship, but was paramount to it"). States' rights advocates, by contrast, held that sovereignty lay primarily with each individual state and that federal authority was delegated by the states. *See*, *e.g.*, John C. Calhoun,

Speech on the Force Bill, in *Union and Liberty: The Political Philosophy of John C. Calhoun* 443-44 (Ross M. Lence ed., 1992).

Second, Republicans believed that natural and traditional common law rights appertained to Americans' *federal*, and not their *state* citizenship, while states' rights partisans held that states enjoyed almost limitless power to define, protect, and limit individual rights. *Compare* Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 Wis. L. Rev. 610, 658-59 ("[A]bolitionist[s] . . . evolve[d] . . . the concept of a paramount national citizenship" under which "[t]he federal government . . . had not only the *power*, but the *duty* to protect the fundamental rights of life, liberty, and property."), *with* Calhoun, *Speech on the Oregon Bill*, in Lence, *supra*, at 568 ("[I]ndividual liberty, or freedom, must be subordinate to whatever power may be necessary to protect society against anarchy within or destruction from without.").

The Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses represent the Republicans' attempt to constitutionalize, respectively, (1) the primacy of federal citizenship and (2) federal protection for the broad array of individual rights attendant upon that citizenship. *See* Zietlow, *supra*, at 720 ("Bingham and other antislavery constitutionalists believed that the federal Constitution authorized northern states to bestow citizenship upon free blacks, and provided for those rights to be protected by the federal government."). *Slaughter-House*'s primary flaw lay in failing to give effect to this overriding purpose, thereby sabotaging

the most important constitutional aspect of Union victory in the Civil War.

1. The Authors of the Fourteenth Amendment Believed That American Citizenship Was Primary and State Citizenship Secondary

The authors of the Fourteenth Amendment were guided by a belief that either the Declaration of Independence or the Constitution itself made the people of the United States into a single unified nation. This unified nationality, they believed, distinguished the Constitution from the Articles of Confederation, which had operated more like a treaty binding otherwise sovereign states. *See generally* Akhil Reed Amar, *America's Constitution: A Biography* 5-53 (2005); Daniel Farber, *Lincoln's Constitution* 26-91 (2003).

The framers of the Constitution left a long trail of evidence that they indeed meant for the Constitution to create a new national identity. Alexander Hamilton observed in *The Federalist* that the "great and radical vice" of the Articles of Confederation was that it only allowed Congress to legislate "for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES," *The Federalist* No. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and was therefore "a mere treaty . . . and not a government, which is only another word for POLITICAL POWER AND SUPREMACY." *Id.* No. 33 at 204. The 1787 Constitution represented, by contrast, a direct act by the people of the United States, acting as a unified, sovereign whole.

James Madison echoed this point when he explained that while under the Articles of

Confederation, Congress's power proceeded from "the dependent derivative authority of the legislatures of the states," while under the Constitution it would come "from the superior power of the people." 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 94 (Jonathan Elliot ed., 1836). Likewise, Pennsylvania delegate James Wilson explained that the new federal government was not a league of sovereign states, but a union of the whole American people. *See*, *e.g.*, 2 *id.* at 456 ("I consider the people of the United States as forming one great community."). Indeed, Wilson took the view that the American Union predated the Articles of Confederation, and that pursuant to the Declaration of Independence, "the *United Colonies* were declared to be free and independent states . . . . [T]hey were independent, not *individually*, but *unitedly*, and that they were confederated, as they were independent states." 5 *Debates on the Adoption of the Federal Constitution* 213 (Jonathan Elliot ed., 1845).

Thus where the Articles of Confederation created only "a league" of independent "sovereigns," the Constitution "converted their league into a government," causing "the whole character in which the States appear" to "under[go] a change." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824); *see also Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793) (opn. of Jay, C.J.) ("[T]he people, in their collective and national capacity, established the present Constitution."); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-04 (1819) (The Constitution "proceeds directly from the people . . . and bound the state sovereignties.").

This nationalist conception of the Constitution was widely accepted at the time of ratification, but beginning in 1798 with the Virginia and Kentucky Resolutions, and again during the Nullification Crisis of the 1830s, southern political leaders began to formulate a competing, states' rights theory of the Constitution. *See generally* William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina* 164-73 (1965).[3] According to that theory, the states were "distinct, independent, and sovereign communities" each of which had obtained a separate independence from the British crown. *See* Calhoun, *A Discourse on the Constitution and Government of the United States*, in Lence, *supra*, at 86. Upon declaring independence,

> sovereignty was transferred from the king to each of the thirteen [colonies] . . . . As an agent for the states, the Continental Congress conducted the war, but the states retained the sovereign power. Then, the sovereign peoples of the thirteen states entered into a mutual agreement to create a federal government, all the while retaining their separate sovereignty.

Farber, *supra*, at 34. States therefore were empowered to define and limit citizenship, *see* Calhoun, *Speech on*

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[3] Although Madison authored the Virginia Resolutions, he repudiated the states' rights theory, believing that it "would convert the federal government into a mere league which would quickly throw the states back into a chaos out of which not order a second time but lasting disorders of the worst kind could not fail to come." James Madison, Letter from James Madison to Richard Rush, Jan. 17, 1829, *quoted in* Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 134 (1989).

the Force Bill, *supra*, at 443-44, and with it, the sphere of individual liberty.

Calhoun and his states' rights allies considered it "a great and dangerous error to suppose that all people are equally entitled to liberty." Calhoun, *A Disquisition on Government*, in Lence, *supra*, at 42. Instead, states gave people liberty as "a reward reserved for the intelligent, the patriotic, the virtuous and deserving." *Id.*

In this view, states were the principals of which the federal government was the agent; states possessed ultimate sovereignty, and the rights of citizens were protected by virtue of their *state* citizenship. The conflict between the nationalist and states' rights interpretations was obviously one of the leading causes of the Civil War, because if states retained their essentially sovereign character, and were superior to the Union, they must also be free to dictate the nature of citizenship, expand or contract rights, and secede from the Union to defend that autonomy. Freehling, *supra*, at 165-66; Amar, *America's Constitution*, *supra*, at 38-53.

2. Republicans Held That Protections for Individual Rights Flow from National, Not State, Citizenship

Just as Republicans and states' rights advocates clashed over the *location* of sovereignty, so they also disputed the *nature and limits* of that sovereignty. If, as Republicans believed, Americans were federal citizens first and citizens of states only secondarily, then it also followed that American citizenship entitled them to federal protection for their individual rights,

regardless of their state of residence. *See* Zietlow, *supra*, at 729.

Perhaps the most important advocate of this view was former President John Quincy Adams, whose 1839 pamphlet *The Jubilee of the Constitution*[4] emphasized that Americans' rights were protected not because they were citizens of states as such, but because they were Americans. Because the colonies declared independence collectively, Adams contended, *id.* at 20, whatever legitimate authority Parliament formerly possessed over American subjects—and whatever responsibility it had for protecting their common law and natural rights—was transferred to the *Union*, not to individual states:

> Independence was declared. The colonies were transformed into States. Their inhabitants were proclaimed to be *one people*, renouncing all allegiance to the British crown . . . [and] all claims to chartered rights as Englishmen. Thenceforth their charter was the Declaration of Independence. Their rights, the natural rights of mankind. Their government, such as should be instituted by themselves, *under the solemn mutual pledges of perpetual union*, founded on the self-evident truths proclaimed in the Declaration.

Id. at 9. Thus American national identity was indivisible from protections for the individual rights articulated in the Declaration and the common law.

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[4] *The Jubilee of the Constitution* was one of the most popular publications of the era, selling more than 8,000 copies in a matter of weeks. *See* Paul C. Nagel, *John Quincy Adams: A Public Life, A Private Life* 372 (1997).

Many political and legal leaders influenced by Adams would later form the Republican party.[5] Like him, they believed that the Declaration of Independence had created the American nation, and that this national citizenship entitled all Americans to protection for their common law and natural rights. *See* Zietlow, *supra*, at 722.

The states' rights view, by contrast, held that states were both the locus of American sovereignty and the entities responsible for defining and guaranteeing individual rights. One chief advocate of this position was Jeremiah Sullivan Black, who after serving as Chief Justice of Pennsylvania, United States Attorney General and Secretary of State under President James Buchanan, and advisor to President Andrew Johnson, represented the State of Louisiana in the *Slaughter-House Cases*. *See* William Norwood Brigance, *Jeremiah Sullivan Black* 200-01 (1934).

Black's state's rights views were reflected in his decision in *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853). The Declaration of Independence, wrote Black, transferred "[t]he transcendant [*sic*] powers of Parliament" to the states, who therefore enjoyed "supreme and unlimited" power. *Id.* at 160. Thus "[i]f the people of Pennsylvania had given all the authority

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[5] Adams exerted a powerful influence over the rising generation of anti-slavery politicians, particularly William Seward—who published the first biography of Adams, *see* John M. Taylor, *William Henry Seward: Lincoln's Right Hand* 69-70 (1991)—Charles Sumner—Adams' closest protégé, *see* David Donald, *Charles Sumner and the Coming of the Civil War* 152-53 (1960)—and Abraham Lincoln, who served with Adams in Congress and was an enthusiast for Adams' constitutional doctrines; *see* William Lee Miller, *Arguing About Slavery* 448-49 (1995).

which they themselves possessed, to a single person, they would have created a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat." *Id.* Although Black conceded that Pennsylvanians had "delegated a portion" of their allegedly limitless power to the federal government, *id.*, he concluded that states retained "a vast field of power . . . full and uncontrolled," and that "[t]heir use of [that power] can be limited only by their own discretion." *Id.* at 161.

Black's interpretation of state power is the opposite of the Republican view of limited state power and paramount national citizenship. According to that view, the principles of the Declaration of Independence prohibited states from exercising "full and uncontrolled power" over any individuals. Indeed, according to Adams, "sovereignty, thus defined, is in direct contradiction to the Declaration of Independence, and incompatible with the nature of our institutions." John Quincy Adams, *An Oration Addressed to the Citizens of the Town of Quincy on the Fourth of July, 1831*, at 35 (1831).

B. The Fourteenth Amendment Was Intended to Constitutionalize the Republicans' National Rights Views

The Fourteenth Amendment's authors sought to insert into the Constitution what they believed had always been constitutional law. In their eyes, "United States citizenship was created by or evidenced in the Constitution," and this citizenship "was panoplied with indestructible privileges and immunities" which "consisted of the natural and inalienable rights of men to 'the enjoyment of personal security, personal liberty, and private property.'" tenBroek, *supra*, at 90. They

believed all Americans were entitled to the protection of natural and civil rights due to their participation in the federal body politic, and that states had no legitimate power to abridge those rights. Finally, they expected the Amendment to provide all Americans with protections for their rights—including, but not limited to, those specified in the Bill of Rights—against infringement by their own states. Zietlow, *supra*, at 722. As Congressman John Bingham explained, the Fourteenth Amendment would permit

> the speedy restoration to their constitutional relations of the late insurrectionary States, under such perpetual guarantees as will guard the future of the Republic by the united voice of a united people . . . . [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy . . . . [M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever.

Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).

During the debate over the Amendment's ratification, one Ohio Congressman explained to his

constituents that "citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them . . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected." *Quoted in* Curtis, *supra*, at 138-39 (citation omitted). Likewise, Bingham contended that it would give the federal government "power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." *Cong. Globe*, 39th Cong., 1st Sess. 2542 (1866).

Perhaps no figure was more eloquent in explaining the Republican doctrine of the indivisibility of federal citizenship and individual rights than Charles Sumner, who told the Senate in 1875,

> No longer an African, [the emancipated slave] is an American; no longer a slave, he is a common part of the Republic, owing to it patriotic allegiance in return for the protection of equal laws. By incorporation within the body-politic he becomes a partner in that transcendant unity, so that there can be no injury to him without injury to all. Insult to him is insult to an American citizen. Dishonor to him is dishonor to the Republic itself . . . . Our rights are his rights; our equality is his equality; *our*

> *privileges and immunities are his great freehold.*

Charles Sumner, *Equality Before the Law Protected by National Statute*, *in* 14 Charles Sumner, *The Works of Charles Sumner* 407 (1883) (emphasis added).

These quotations indicate what recent scholars have called "the basic tenets of Republican thought with their roots in the Declaration of Independence," namely, "a commitment to natural rights based on a premise of equality as the foundation of civil liberty; an appreciation for the limits of democratic government and for the need to protect minority rights." Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1, 24 (1998). Civil War era Republicans took literally Webster's famous injunction, "Liberty and Union . . . one and inseparable!"—to them, political union and individual liberty were inseparable. *The Webster-Hayne Debate on the Nature of the Union* 136 (Herman Belz ed., 2000).

Unsurprisingly, Bingham and other Republicans rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). As Professor Akhil Amar notes, these "*Barron* contrarians" believed that the federal Bill of Rights referred to rights that all Americans possessed, and that "[a]n honest state court would be bound . . . to respect [this] declaration[]." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 148-49 (1998).

It is now widely recognized—thanks largely to the evidence mustered by Professor Curtis and other scholars—that the Fourteenth Amendment's authors

intended to overturn *Barron* and provide federal protection against state actions that deprived individuals of their natural and civil rights. *See* Curtis, *supra*, at 83; Zietlow, *supra*, at 737. Because antebellum Republicans believed that Americans were Americans first and citizens of states second, they also believed that, just as the Revolution transferred sovereignty from the crown to the nation as a whole, so citizens' rights were also vested by virtue of their *national* and not their *state* citizenship. This theory was hotly disputed throughout the early nineteenth century, but Republicans expected the Fourteenth Amendment to settle that dispute. *Id.* at 719-20.

The structure of the Amendment's first section testifies to this intent. It begins by defining American citizenship, a matter on which the original Constitution was silent, *see* Amar, *America's Constitution*, *supra*, at 381, and then proclaims that national citizenship is primary, and state citizenship secondary and derivative; persons to whom it applies "are citizens of the United States and of the State wherein they reside." The next clause then asserts that states may not abridge the rights appertaining to federal citizenship.

In 1867, leading antislavery lawyer Joel Tiffany explained that the original Privileges and Immunities Clause in Article IV barred states from violating natural rights: "the constitutional rights of every citizen of the nation are supremely binding" on the states. "Every citizen of a state being also a citizen of the nation, has national rights," and because "national authority extend[s] . . . over every member of the national family," each person may "inhabit whatever state he pleases and to enjoy all privileges and

immunities of a citizen therein." *A Treatise on Government* 372 (1867). But Republicans believed the original Privileges or Immunities Clause was unenforceable against states, in the same way that the Taney Court had ruled the Fugitive Slave Clause to be unenforceable. Curtis, *supra*, at 63-64 (citing *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860)). Thus Republicans believed a new amendment was necessary make a ban on state abridgement of rights effective.

The new Privileges or Immunities Clause was therefore "the primary vehicle through which [the Amendment's framers] intended to force the states to obey the commands of the Bill of Rights." Curtis, *supra*, at 130. *See also* Shankman & Pilon, *supra*, at 25 (The Amendment's authors "said repeatedly that the purpose of the amendment was not simply to define United States citizenship but to include under that privilege, for blacks and whites alike, a broad array of rights against state interference."). The premise on which the Amendment's authors based that effort was their belief that the American Revolution had transferred sovereign power, and with it, responsibility for protections of individual rights, from Parliament to the American *nation* and *not* to the individual states.

The Fourteenth Amendment "extend[s] the protection of the National government over the common rights of *all* citizens of the United States," and "recognize[s], if it did not create, a National citizenship." *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 140 (1873) (Field, J., concurring). This national citizenship "is primary, and not secondary," and the Amendment protects national privileges or immunities, "which embrace the fundamental rights belonging to

citizens of all free governments" from abridgement by state laws. *Id.* at 140-41.

C. The *Slaughter-House* Majority Ignored the Fourteenth Amendment's Fundamental Shift in the Understanding of Sovereignty and Thus the Nature of the Rights the Amendment Protects

Once the political philosophy underlying the Fourteenth Amendment is clear, the fundamental error in the *Slaughter-House Cases* becomes manifest: the decision embraced the overthrown states' rights view rather than the national citizenship perspective that the Fourteenth Amendment was crafted to constitutionalize. In short, the *Slaughter-House* majority denied that the Amendment was meant to "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," 83 U.S. (16 Wall.) at 78. Yet, as we have seen, that was *precisely* the Amendment's purpose: to constitutionalize the Republican theory of paramount national citizenship and the rights attendant on that citizenship.

In its *Slaughter-House* brief, coauthored by Jeremiah Black, author of the *Sharpless* decision, Louisiana argued that for the Court to rule that states could not infringe nationally recognized rights of individual liberty "would break down the whole system of confederated State government" by curtailing state autonomy. Brief of Defendants in Error at 15, *Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House*, 1872 WL 15119 (U.S. 1872) (Nos. 60, 61, 62). This argument

was, of course, the same argument rejected by the authors of the Fourteenth Amendment, who intended the Amendment as "a sweeping mandate to invalidate future state misconduct." Amar, *America's Constitution*, *supra*, at 390.

The *Slaughter-House* majority worried that enforcing paramount national citizenship would "degrade the State governments by subjecting them to the control of Congress." 83 U.S. (16 Wall.) at 78. Yet this was not a valid argument against enforcing the Amendment's clear mandate. As one contemporaneous critic of the decision noted, those worries "ought to have been addressed to Congress when the amendment was proposed . . . . If such was to be the effect of the amendment, it was so because the American people had so decreed, and it was not the province of the court to defeat their will." William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S.L. Rev. 558, 579-80 (n.s. 1879).

Moreover, the Court's federalism concerns were exaggerated. While the "fundamental reordering would have changed federalism, it would not have destroyed it." Shankman & Pilon, *supra*, at 40. States would still retain most of the machinery of government power, including the police power. "[T]hey simply had to exercise [power] in ways that respected the rights of individuals—their rights as Americans." *Id.* at 40-41.

Slaughter-House's refusal to acknowledge that the Fourteenth Amendment constitutionalized the theory of paramount national citizenship influenced it to make the critical error of narrowly defining the realm of rights protected by the Amendment. The *Slaughter-House* majority correctly observed that "there is a

difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such," and that the Privileges or Immunities Clause protected "only the former," 83 U.S. (16 Wall.) at 74-75. But it refused to give this understanding any practical meaning because it narrowly construed the rights that make up the "privileges or immunities of citizens of the United States."

According to the majority, the rights attaching to federal citizenship included the rights to travel to the seat of government; to demand federal protection on the high seas; to peaceably assemble for redress of grievances; to use navigable waters; to change one's state of residence; and "the rights secured by the thirteenth and fifteenth articles of amendment." *Id.* at 80. This list left off a number of fundamental national rights, including most prominently the common law right to pursue a gainful occupation free from the interference of state-imposed monopolies. Incredibly, the *Slaughter-House* majority ignored this right while simultaneously acknowledging its existence at common law, *see id.* at 65-66 (citing *The Case of Monopolies*, (1602) 77 Eng. Rep. 1260 (K.B.)). But it did so because it regarded this right as one "belong[ing] to citizens of the States as such, and . . . left to the State governments for security and protection." *Id.* at 78.

In general, the majority's list of rights was vastly underinclusive because it refused to recognize that the Amendment's authors considered federal citizenship to include unenumerated individual rights, including rights inherited from the English common law, as well as natural rights. Senator John Sherman, for example,

explained that the Privileges or Immunities Clause would protect

> the ordinary rights of citizenship, which no law has ever attempted to define exactly, the privileges, immunities, and rights, (because I do not distinguish between them, and cannot do it,) of citizens of the United States, such as are recognized by the common law, such as are ingrafted in the great charters of England, some of them ingrafted in the Constitution of the United States, some of them in the constitutions of the different States, and some of them in the Declaration of Independence.

Cong. Globe, 42d Cong., 2d Sess 844 (1872). Sherman explained that Courts interpreting the Clause would consult not only the Constitution, but also "the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England." *Id.* In these sources, courts would "find the fountain and reservoir of the rights of American as well as of English citizens." *Id. See also* Zietlow, *supra*, at 738-39 (Authors of the Privileges or Immunities Clause "intended to incorporate the bill of Rights . . . [and] encompass a 'natural rights' theory of the fundamental rights of citizenship.").

Sherman's explanation could be traced to *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823). That decision defined the privileges and immunities of citizens in broad terms of natural and common law rights belonging "of right, to the citizens of all free governments." *Id.* at 551. Throughout the period of writing and ratification, the Amendment's authors frequently cited Justice Bushrod Washington's decision

in *Corfield*, in defining the phrase "privileges or immunities." David R. Upham, *Note: Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 Tex. L. Rev. 1483, 1530 (2005); Curtis, *supra*, at 168; Amar, *Bill of Rights*, *supra*, at 176-80.

Senator Jacob Howard quoted from *Corfield* when he explained that the new Privileges or Immunities Clause would provide for "'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'" as well as "the personal rights guarantied and secured by the first eight amendments of the Constitution." *Cong. Globe*, 39th Cong., 1st Sess. 2765 (1866) (quoting *Corfield*, 6 F. Cas. at 551-52). The *Corfield* understanding of federal rights gave the Amendment's Privileges or Immunities Clause far more power as a protection against state oppression. Yet, it was ignored by *Slaughter-House*'s cramped reading.[6]

The *Slaughter-House* Court's desire to protect "the traditional antebellum balance of state and federal powers," led it "to continue interpreting the Fourteenth

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[6] In light of Professor Amar's conception of the Privileges or Immunities Clause as applying both 'more and less' of the freedoms in the Bill of Rights to the state, it is misleading to view the Privileges or Immunities Clause as a mechanical device that injects the amendments of the Bill of Rights into state law. In fact, the term incorporation is anachronistic. Rather, the Privileges or Immunities Clause places a limitation on what liberties the states could infringe. Josh Blackman & Ilya Shapiro, *Opening Pandora's Box? Privileges or Immunities, The Constitution in 2020, and Properly Incorporating the Second Amendment*, 8 Geo. J.L. & Pub. Pol'y ___ (Forthcoming 2010), *available at* http://papers.ssrn.com/abstract_id=1503583 (last visited Nov. 18, 2009).

Amendment narrowly—and thus to refrain from limiting the autonomy of state legislatures in exercising police powers—throughout the 1870s, 1880s, and early 1890s." David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 Mercer L. Rev. 563, 615 (2009). One consequence was to undermine the legal foundation of the federal government's commitment to racial equality in southern Reconstruction. Eric Foner, *A Short History of Reconstruction* 223-25 (1990).

For instance, in *United States v. Cruikshank*, 92 U.S. 542, 551 (1875), the Court relied on *Slaughter-House* in rejecting the argument that state officials who led a white mob to murder more than 100 black Louisianans had deprived the victims of their rights of federal citizenship. *See generally* Charles Lane, *The Day Freedom Died* (2008). Although the victims had been peaceably assembling to protest grievances, as well as bearing arms and exercising other Bill of Rights freedoms, the Court relied on *Slaughter-House* to conclude that protection of these rights "remain[ed] . . . subject to State jurisdiction." 92 U.S. at 551.

The result in *Cruikshank* was directly contrary to the intention of the Fourteenth Amendment's framers; Senator Howard, for example, specifically identified "the right of the people peaceably to assemble and petition the Government for a redress of grievances" and "the right to keep and to bear arms" as rights protected under the Privileges or Immunities Clause. *Cong. Globe*, 39th Cong., 1st Sess. 2765 (1866). By narrowly defining the federal rights protected from state encroachment under the concept of "privileges and immunities," the *Slaughter-House* decision "had a

devastating effect on human rights under the Constitution. Our basic liberties were placed at the mercy of state laws and state officials." Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 Akron L. Rev. 1051, 1079 (2009).

Jeremiah Black's biographer observed afterward that with the success of his states' rights argument in *Slaughter-House*, the Privileges or Immunities Clause "was severed from the Constitution," thus restoring "State sovereignty" and "leav[ing] Louisiana free to deal with Carpetbaggers in her own way." Brigance, *supra*, at 201-02. This is true: the decision's most profound flaw lay in its undermining of the Fourteenth Amendment's primary purpose: namely, to constitutionalize the Republican theory that every American possesses a paramount national citizenship that brings with it a broad list of individual rights, privileges, and immunities, protected against infringement by states.

II

IN ADDITION TO IGNORING THE LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT, THE *SLAUGHTER-HOUSE* MAJORITY VIOLATED BASIC RULES OF CONSTITUTIONAL INTERPRETATION

The *Slaughter-House* Court's decision to narrowly define the realm of national rights protected by the Privileges or Immunities Clause is particularly disturbing because it occurred without any reference to the legislative history of the Fourteenth Amendment. In dissent, Justice Field cited the debates in the

Congressional Globe and discussed the doctrine of paramount national citizenship, *see* 83 U.S. (16 Wall.) at 92-95, but the majority ignored this history. Instead, it resorted to a rhetorical question: "Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?" *Id.* at 77. The Court answered by alleging that extreme consequences would result from such a purpose, and concluded that "no such results were intended." *Id.* at 78.

In addition, the approach in *Slaughter-House* violated two other, related rules of constitutional interpretation. First, courts must avoid construing a constitutional amendment so that it merely replicates another constitutional provision, *cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (courts should not interpret statutes so as to make them redundant). Second, constitutional interpretations must give effect to every word in the provision at issue. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

The *Slaughter-House* decision is irreconcilable with both canons. After all, if the Privileges or Immunities Clause protects only the narrow list of previously recognized federal constitutional rights, then it has no more effect than the Supremacy Clause. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 636 (1994). The Supremacy Clause already deprived states

of any power to interfere with the right to travel to the capital, the right to protection on the high seas, or other federal citizenship rights. Thus the majority's interpretation rendered the clause "a vain and idle enactment." *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

The majority's interpretation also failed to give effect to every provision of the Amendment. This is made clear by the later decision in *Cruikshank*, where the Court held that the Privileges or Immunities Clause "adds nothing" to the rights of citizens, 92 U.S. at 554, but merely protects the preexisting First Amendment right to petition Congress. *Id.* at 552. The right of peaceable assembly for any *other* purpose, the Court continued, is *not* guaranteed by the First Amendment—and therefore is not a privilege or immunity of federal citizenship protected from state interference. Thus "the people must look to the States" for protection of this right. *Id.* Yet if the Amendment provided no protection beyond the right to petition *Congress*, then the Amendment had no effect beyond what the First Amendment already provided. Sadly, this meant that citizens were abandoned with the disingenuous advice to seek redress from the very state governments that were oppressing them.

III

OVERRULING *SLAUGHTER-HOUSE* WOULD NOT THREATEN THE VITALITY OF SUBSTANTIVE DUE PROCESS

In the years following *Slaughter-House*, federal courts often turned to the Due Process Clause to protect substantive rights against state interference. But it is *not* true that the theory of substantive due

process only worked as a substitute for the lifeless Privileges or Immunities Clause. The theory of substantive due process was well understood and generally accepted at the time of the Amendment's ratification. Although the two clauses overlap in some ways, and although some cases decided on due process grounds would have been more properly decided as privileges or immunities cases, a revival of meaningful protection for individual rights under the Privileges or Immunities Clause should augment, and not displace, the theory of substantive due process.[7]

The legal theory now called "substantive due process" was given that name only in the 1940s. G. Edward White, *The Constitution and the New Deal* 241-68 (2000). For more than a century before that, however, the theory was widely accepted by state and federal courts. *See Washington v. Glucksberg*, 521 U.S. 702, 756-58 (1997) (Souter, J., concurring) (citing cases); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process*, 58 Emory L.J. 585, 669 (2009) ("[O]ne widespread understanding of the due process clause of the Fifth Amendment in 1791 included judicial recognition and enforcement of

[7] The constitutional avoidance canon cannot warrant incorporating the Second Amendment through the Due Process Clause instead. Any decision might utilize due process as a substitute for the Privileges or Immunities Clause, but this can only delay, and not avoid, the need to reassess *Slaughter-House*. Restoring the Privileges or Immunities Clause to its proper place in the constitutional structure would ground the Supreme Court's rights-protecting jurisprudence in a textually and historically sound foundation without rejecting the doctrine of substantive due process. Indeed, substantive rights would instead be properly grounded in the text, history, and original public meaning of the Constitution. This would provide greater clarity and credibility in the context of rights jurisprudence.

unenumerated natural and customary rights against congressional action."); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 946 ("[T]he 'procedure only' interpretation of the [Due Process Clause] cannot be sustained by the historical facts.").

Contrary to the claims of some legal scholars, *see*, *e.g.*, Robert H. Bork, *The Tempting of America* 31 (1990), the initial appearance of substantive due process in this Court was not *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), but Daniel Webster's oral argument in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), almost a half century earlier. Webster explained that the terms "law of the land" or "due process of law"[8] meant that

> every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land . . . . The administration of justice would be an empty form, an idle ceremony.

Id. at 581-82.

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[8] The two phrases were understood as synonymous since before the founding era. *See* Riggs, *supra*, at 950.

The theory of substantive due process simply holds that when a lawmaker acts in excess of constitutional authority, those acts do not qualify as "law," but only as force, usurpation, or arbitrary action; enforcing such a non-law against an individual would therefore deprive that individual of life, liberty, or property without due process *of law*.

Thus in *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874), decided only one year after *Slaughter-House*, this Court explained that legislative action that exceeds constitutional authority is "not legislation" even though done "under the forms of law." Instead, it is "a decree under legislative forms," and as such deprives persons of their rights without due process *of law*. *Accord*, *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877) ("[C]an a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail."); *Hurtado v. California*, 110 U.S. 516, 536 (1884) ("Arbitrary power . . . is not law . . . . The enforcement of [constitutional] limitations by judicial process is the device of self-governing communities to protect the rights of individuals . . . against the violence of public agents transcending the limits of lawful authority."). The term "substantive due process" is thus misleading, because the focus in such cases is not on the *process*, but on whether or not the deprivation of rights was in accordance with an exercise of legislative authority that qualifies as *a "law."*

This doctrine does not depend in any way on the outcome of *Slaughter-House*. Instead, the Due Process Clause independently prohibits the legislature from acting arbitrarily—and certain legislative acts

are so inherently unfair or arbitrary that, notwithstanding their *formal* legislative enactment, they do not *substantively* conform to the definition of law. Professor Cass R. Sunstein has written that the Due Process Clause, along with other constitutional provisions, prohibits legislatures from "distributi[ng] . . . resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984). This ban on arbitrary legislative action has both procedural and substantive dimensions, and although it sometimes overlaps with the protections provided by the Privileges or Immunities Clause, that prohibition has its own constitutional source and validity.

In addition to its theoretical independence from the Privileges or Immunities Clause, substantive due process also has its own historical pedigree, which cannot be accounted for on the theory that substantive due process was devised simply to patch the hole that *Slaughter-House* tore in the Fourteenth Amendment. Indeed, the same year that the Amendment was ratified, and four years *before* the *Slaughter-House* decision, Thomas M. Cooley quoted Daniel Webster's definition of the term "due process of law," concluding that the Due Process Clause protected substantive rights against unprincipled or arbitrary legislation. *A Treatise on Constitutional Limitations* 353 (1868). In subsequent decades, this Court often quoted Cooley and Webster when applying the Due Process Clause. *See*, *e.g.*, *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Hovey v. Elliott*, 167 U.S. 409, 418 (1897); *Hurtado*,

110 U.S. at 535-36; *Ex parte Wall*, 107 U.S. 265, 289 (1883); *Beckwith v. Bean*, 98 U.S. 266, 295 (1878).

The Fourteenth Amendment's framers were familiar with the concept of substantive due process, and mentioned it during the ratification debates. Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 Drake L. Rev. 911, 934 (2008) (Leading Republicans "read the Due Process Clause as protecting substantive rights."). Congressman Bingham, for example, explained that "due process of law" referred to "law in its highest sense, that law which . . . is impartial, equal, exact justice; that justice which requires that every man shall have his right." *Cong. Globe*, 39th Cong., 1st Sess. 1094 (1866). *See also id.* at 2459 (Rep. Stevens) (Due Process Clause prevents states from "*unlawfully* depriving [persons] of life, liberty, or property" (emphasis added)); *id.* at 340 (Sen. Cowan) (due process of law meant that "the rights of no free man, no man not a slave, can be infringed in so far as regards any of the great principles of English and American liberty"); *id.* at 1294 (Rep. Wilson) (due process included the "great civil rights" referred to in the Civil Rights Act of 1866); *id.* at 1833 (Rep. Lawrence) (due process means that "there are [] rights . . . which are inherent, and of which a State cannot constitutionally deprive him").

When asked to define "due process of law," Congressmen John Bingham and William Lawrence responded by pointing to established case law, *id.* at 1089 (Rep. Bingham), 1833 (Rep. Lawrence). By that time, substantive due process was a well established legal principle. *See Glucksberg*, 521 U.S. at 756-58 (Souter, J., concurring) (citing cases).

Indeed, Congressman Lawrence cited *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829), *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), *People v. Morris*, 13 Wend. 325, 328 (N.Y. Sup. Ct. 1835), *Taylor v. Porter & Ford*, 4 Hill 140, 147 (N.Y. Sup. Ct. 1843), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), for the proposition that "every citizen has [] 'absolute rights'" that legislatures may not violate. *Cong. Globe*, 39th Cong., 1st Sess. at 1833.

Although Reconstruction-era Republicans intended the Privileges or Immunities Clause as the "substantive heart of the amendment," Shankman & Pilon, *supra*, at 26, they correctly understood that the "due process of law" clause would *also* forbid the government from arbitrary actions that violate individuals' natural and civil rights. By overruling *Slaughter-House* to restore the Privileges or Immunities Clause, the Court will not endanger due process precedent, but will simply reestablish the original understanding that both clauses protect the constitutional, natural, and common law rights of federal citizens against state interference.

CONCLUSION

The *Slaughter-House Cases* was wrong when it was decided. It ignored the fundamental change in constitutional order represented by the Union victory in the Civil War and subsequent amendment to the Constitution. It ignored all relevant legislative history, rendered the Privileges or Immunities Clause redundant of the Supremacy Clause, and failed to give effect to all provisions of the Fourteenth Amendment. Considerations of *stare decisis* do not counsel in favor

of retraining this plain error in constitutional law. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). The *Slaughter-House Cases* should be overruled and the judgment below *reversed*.

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Respectfully submitted,

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