No. 08-1521

In The
Supreme Court of the United States

OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

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

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Founded in 1991, the Institute for Justice is a public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and appropriate constitutional limits on the power of government, including restoring the Privileges or Immunities Clause to its proper role in the constitutional structure. Properly understood, the Privileges or Immunities Clause is neither a bottomless font of unenumerated rights nor an incomprehensible inkblot. Instead, it had a specific and well-documented purpose—one that remains equally relevant today and the fulfillment of which is a primary goal of the Institute for Justice.[1]

SUMMARY OF ARGUMENT

The Thirteenth Amendment brought an end to legal slavery in America, but not the culture of tyranny that surrounded and supported it. That was the

[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, Amicus affirms 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 Amicus, its members, or counsel made a monetary contribution to its preparation or submission.

job of the Fourteenth Amendment, which represented a direct order from the people of this country to their representatives in the federal government (including the judiciary) to protect freedom and secure the rule of law throughout the nation. That order was understood but not obeyed, plunging America into a shameful period of exploitation, violence, and oppression. This case presents the Court with a fresh opportunity to engage the history and text of the Fourteenth Amendment in order to apply its provisions—*all* of its provisions—according to their original purpose.

And that purpose is perfectly clear. After the Civil War, the states of the former Confederacy meant to keep newly free blacks in a state of constructive servitude. This entailed wholesale violation of individual rights, not only of black citizens but of their white supporters and Union loyalists as well. The solution to that problem, as embodied in the text of the Fourteenth Amendment, was to expand responsibility for protecting individual rights from the states to the federal government. No contrary interpretation —including the one embraced by five justices in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)— can be squared with the history and text of the Fourteenth Amendment.

The right to keep and bear arms was among the most frequently invoked by those who drafted and ratified the Fourteenth Amendment. Congress received reams of evidence that freedmen and white loyalists were being systematically disarmed in the South to make them more vulnerable to intimidation,

terror, and reprisals. This outraged members of Congress and the American public alike, and they determined to put a stop to it, which they did—or understood themselves to have done—through the Privileges or Immunities Clause of the Fourteenth Amendment. The Court did not honor that purpose initially, but it has the opportunity to do so now. For the reasons below, amicus respectfully urges the Court to follow the originalist path to enforcing the right to keep and bear arms as against the states and reject the comfortable but erroneous path of incorporation through substantive due process.

ARGUMENT

This case presents the Court with an opportunity to correct a long-standing error by restoring the Privileges or Immunities Clause of the Fourteenth Amendment to its proper role as a source of federally protected individual rights. Local officials in the Reconstruction South responded to the abolition of *de jure* slavery by establishing a state of *de facto* slavery. The Privileges or Immunities Clause was designed to end it. The Court's initial refusal to honor that purpose was a disaster for the people whose freedom the Clause was intended to redeem, and it continues to haunt the Court's jurisprudence more than a century later.

Like *District of Columbia v. Heller*, this case presents a legal challenge to a firearms ban that

requires no parsing of facts or debate over proper standards of review. The court of appeals held that the Fourteenth Amendment imposes no limits on state and local gun regulations, and the only question is whether that decision was correct. As explained below, the decision was not correct because it cannot be squared with the purpose, text, history, or original public understanding of the Fourteenth Amendment —particularly the Privileges or Immunities Clause.

I. Blacks And Whites Desperately Needed Judicial Protection Of Their Right To Keep And Bear Arms During Reconstruction, But They Never Got It.

Amicus takes as a given the historical evidence presented by other parties concerning the disarmament of freedmen and Union loyalists during Reconstruction. There is no dispute about the culture of tyranny and oppression that pervaded the South, nor the Reconstruction Republicans' commitment to ending it. The only question here is whether, in light of that history, the Fourteenth Amendment should be understood to protect a right of armed self-defense. Those who wrote and ratified the Amendment certainly thought so.

To the extent evidence of original understanding sheds useful light on the meaning of words in the Constitution, it would be difficult to find a stronger link than the one between the Fourteenth Amendment and the right to arms. Stephen Halbrook has

documented that link extensively,[2] and his conclusions are shared by Akhil Amar, who notes that "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to . . . affirm the full and equal right of every citizen to self-defense."[3] Between 1775 and 1866, Professor Amar explains, "the poster boy of arms morphed from the Concord minuteman to the Carolina freedman."[4]

The link between the Fourteenth Amendment and the right to arms is so powerful precisely because the evils the Fourteenth Amendment was intended to prevent—including the lynching of forcibly disarmed whites and blacks who presumed to resist Southern tyranny—are so stark. Words in the Constitution should be interpreted with an eye toward the particular evils they were meant to remedy, and the evils that prompted the Fourteenth Amendment are truly horrifying. In one Kentucky town, for example, it was reported that the "marshal [took] all arms from returned colored soldiers and [was] very prompt in shooting the blacks whenever an opportunity occur[red]," while outlaws made "brutal attacks and raids upon freedmen, who [were] defenseless, for the

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[2] *See, e.g.*, Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) and sources cited at viii nn. 15-17.

[3] Akhil Reed Amar, THE BILL OF RIGHTS 264 (1998).

[4] *Id*. at 266.

civil law-officers disarm the colored man and hand him over to armed marauders."[5]

The outrages of the Reconstruction South are well-known today, and they were well-known at the time. Scholarship confirms that the American public was well aware of those outrages and meant to end them. A recent survey of contemporaneous print media notes that "[i]n terms of depth of coverage, the grievance that stands out the most in the popular press is the disarmament of blacks, and of white Union veterans."[6]

Unfortunately for those whom the Fourteenth Amendment was intended to protect, the courts refused to enforce its provisions consistent with original public understanding, an abdication for which many Americans paid a terrible price.

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[5] House Ex. Doc. No. 80, 39th Cong., 1st Sess. at 236-239 (1866).

[6] David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 Whittier L. Rev. 695, 705 (2009).

II. The Fourteenth Amendment Does Not "Incorporate" The Second Amendment—It Protects The *Pre-Existing* Right To Arms From State And Local Governments.

Though its opinion was tainted by the *Slaughter-House* majority's misreading of the Fourteenth Amendment three years before, the Court expressed an important truth in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), namely, that the right to arms "is not a right granted by the Constitution" and is not "dependent upon that instrument for its existence." That understanding was confirmed in *District of Columbia v. Heller*,[7] which noted that the Second Amendment did not grant but instead "codified a *pre-existing* right" to keep and bear arms.

The same is true of the *Fourteenth* Amendment right to arms: It is not in any way "dependent upon" the Second Amendment for its existence. Instead, the Fourteenth Amendment protects from state interference the same pre-existing right to arms that the Second Amendment "codified" against the federal government. Thus, in seeking to understand the Fourteenth Amendment right to arms, one looks not to the Second Amendment, but to the exact same right

[7] 128 S. Ct. 2783, 2797 (2008).

noted in *Cruikshank* and *Heller—as it was understood by the Reconstruction-era ratifying public*.

But instead of relying on the original public understanding of the Privileges or Immunities Clause to identify and protect individual rights under the Fourteenth Amendment, the Court, after several decades of inaction, eventually began "incorporating" against the states various provisions from the first eight amendments using the oft-maligned theory of "substantive due process."

While the doctrine of substantive due process has a more substantial pedigree than most of its critics recognize (tracing its roots to "law of the land" provisions that date back to the Magna Carta and are found in many state constitutions today[8]), it is nevertheless perfectly clear that substantive due process is doing a great deal of work today that the Privileges or Immunities Clause was meant to do. Among the results of that mistake has been to expose the Court's individual rights jurisprudence to substantial criticism, particularly from people who—unlike those who wrote and ratified the Fourteenth

[8] *See, e.g.*, Bernard H. Siegan, ECONOMIC LIBERTIES AND THE CONSTITUTION 24-25, 42-43 (1980); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315 (1999).

Amendment—would prefer a more limited role for the federal courts in protecting individual liberty.[9]

To be sure, there is overlap among the Due Process, Privileges or Immunities, and Equal Protection Clauses, and in some cases the same conduct might well be covered by all three provisions.[10] Some have even described those provisions as "mostly but not entirely duplicative."[11] After all, as Professor Richard Aynes points out, the Reconstruction Republicans responsible for drafting the Fourteenth Amendment had, in the preceding decades, repeatedly seen their attempts to protect individual rights through the Constitution come to naught.[12] For instance, they had argued that the Privileges and Immunities Clause of Article IV provided substantive protection for individual rights, only to have that argument

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[9] *See* Michael Kent Curtis, NO STATE SHALL ABRIDGE 64, 146 (1986) (recounting statements of, respectively, members of Congress and state governors regarding the rights-protecting nature of the Privileges or Immunities Clause); John Hart Ely, DEMOCRACY AND DISTRUST 18-20 (1980) (criticizing "substantive due process" as a contradiction in terms).

[10] *E.g.,* Nelson Lund, *The Second Amendment and Original Meaning Jurisprudence*, 8 Preview U.S. Sup. Ct. Cas. 392 (2008) ("The outcome [of analyzing the right to keep and bear arms under the Privileges or Immunities Clause] might be the same as that derived by substantive due process analysis . . . .").

[11] *See, e.g.,* Richard Aynes, *Ink Blot or Not: the Meaning of Privileges And/Or Immunities*, 11 J. Const. L. 1295, 1305-06 (2009) (quoting Jacobus tenBroek, EQUAL UNDER LAW 239 (1965)).

[12] *Id.* at 1306.

rejected in *Dred Scott v. Sanford*.[13] They also believed, again mistakenly, that the Thirteenth Amendment represented an end to black servitude in the South.[14] After experiencing one frustration after another, "it was clear that [Reconstruction Republicans] had good reason to build in multiple, redundant provisions" to the Fourteenth Amendment.[15]

That redundancy notwithstanding, precision and fidelity to constitutional text require a careful re-examination of the Fourteenth Amendment in order to determine which provision most plausibly protects the "pre-existing" right to keep and bear arms. A candid review of the relevant history leaves no room for doubt—it is the Privileges or Immunities Clause.

III. The Privileges Or Immunities Clause Aimed To Eliminate Constructive Servitude By Protecting The Rights Most Incompatible With It.

To enslave a class of people requires three basic things: destroy their self-sufficiency, prevent them from fighting back, and silence any opposition. Southern states did all of those things both before and after the Civil War, and the point of the Fourteenth Amendment was to make them stop. A key mechanism for doing so was to include a provision in the

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[13] 60 U.S. (19 How.) 393 (1857).

[14] Aynes, *supra* note 11, at 1306.

[15] *Id.*

Fourteenth Amendment that would force states to respect people's basic civil rights, including those rights most necessary for personal security and autonomy. The Privileges or Immunities Clause was designed to do just that.

That said, the Court need not—indeed, should not—attempt to create a complete and comprehensive new doctrine for the Privileges or Immunities Clause in this case. As demonstrated by the petitioners' and NRA respondents' briefs, there is near-universal agreement that the Clause was both intended and publicly understood to prevent states from forcibly disarming law-abiding citizens. No further analysis is needed to answer the question presented.

Amicus respectfully submits that the Court should decline the invitation of other amici to go further and hold that the Privileges or Immunities Clause does *no more than* protect those rights enumerated in the first eight amendments to the Constitution. That invitation should be resisted primarily because it would require the Court to grapple with—or simply ignore, as Justice Miller did in *Slaughter-House*—a great deal of historical evidence and legal argument far beyond what is necessary to answer the specific question at issue here. As was the case in *District of Columbia v. Heller*, the question presented here is both narrow and specific; there is simply no need for the Court to describe the full ambit of the Privileges or Immunities Clause, and indeed the unfortunate

results of its first encounter with the Clause would seem to counsel particular modesty now.[16]

Moreover, such a limited conception of privileges or immunities would be wrong on the merits in any event. There is ample historical evidence that the purpose of the Fourteenth Amendment, and particularly the Privileges or Immunities Clause, was not merely to provide for the mechanistic "incorporation" of the first eight amendments (it would have been easy enough to say so), but instead to redress a whole host of laws, practices, customs, and mores whose common purpose was to destroy the ability of newly freed slaves to become self-sufficient members of society. History shows that it would have been impossible to identify, fix, and proscribe the entire host of state laws, local ordinances, and regulations that collectively made up the infamous "Black Codes" designed to keep freedmen in a state of penury and terror. Thus, for example, many states adopted laws that kept blacks from practicing trades or even leaving their employer's land without permission;[17] others adopted vagrancy laws that, in practice, made it illegal to be unemployed, and therefore illegal to look

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[16] *Cf. Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . .").

[17] *See* David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-1868*, at 8-12 (2009), 30 Whittier L. Rev. 695, 705 (2009).

for work.[18] Notably, not just freedmen but also many whites were affected by this culture of oppression. As Akhil Amar has explained, Southern officials responded to the formal abolition of slavery by using government power to "resurrect[ ] a caste system [that] would also require repression of any whites who might question the codes or harbor sympathy for blacks."[19] The Fourteenth Amendment—particularly its Privileges or Immunities Clause—was a direct response to Southern tyranny and a very deliberate attempt to protect individual rights whose enjoyment is indispensable to personal security and autonomy.

Contrary interpretations of the Privileges or Immunities Clause—suggesting that the Clause be read only to require that states grant or deny rights to all citizens equally[20] or respect the first eight amendments to the Constitution[21]—cannot be squared with the historical record or original public meaning. After all, as Michael Kent Curtis has observed, "in the South, the ideal solution to the problem of speech

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[18] These are only a handful of examples. For an extensive discussion of Southern efforts to limit freed slaves' economic opportunities and mobility, see David E. Bernstein, ONLY ONE PLACE OF REDRESS 8-27 (2001).

[19] Akhil Reed Amar, THE BILL OF RIGHTS 162 (1998).

[20] *See, e.g.,* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385 (1992).

[21] *E.g.*, Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art* (Legal Studies Paper No. 2009-29) (August 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457360.

about slavery was compelled silence"—a solution fully applicable to blacks and whites equally.[22] And the animating purpose of the Privileges or Immunities Clause, the elimination of constructive servitude, could not be achieved by enforcing only the narrow set of rights already enumerated in the existing Constitution.

This last point is best illustrated by the sheer variety of laws invented by Southern governments to prevent freed slaves from enjoying the personal autonomy that was to have been theirs upon ratification of the Thirteenth Amendment. To take just one example, starting with Virginia in 1870, Southern states began to pass increasingly restrictive regulations of "emigrant agents"—people who attempted to recruit freedmen to leave their plantations by promising higher wages and better working conditions on understaffed Western plantations, eventually making it illegal or practically illegal for people to even *offer* these economic opportunities to poor workers.[23] Those and other laws had the express (though not always expressed) purpose of binding former slaves to the very same plantations they had worked during slavery, and upon essentially the same terms. That was anathema to the people who wrote and

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[22] Curtis, *supra* note 9, at 217.

[23] *See* Bernstein, *supra* note 18, 10-21.

ratified the Fourteenth Amendment, and it is abundantly clear that they intended to confer upon the federal courts not only the power but the duty to ensure the freedom, security, and autonomy of all American citizens by protecting them from the tyranny of local governments.

But the Court need not decide those issues now because the question presented by this case is simple and straightforward: Does the Privileges or Immunities Clause protect a right to keep and bear arms? History shows that it does. That is the only question the Court need answer in this case.

IV. Interpreting The Privileges Or Immunities Clause According To Its Original Public Meaning Would Clarify And Improve The Court's Individual Rights Jurisprudence.

The *Slaughter-House* majority's failure to interpret the Privileges or Immunities Clause consistent with original understanding caused a dislocation in the Court's rights jurisprudence that has never been satisfactorily addressed, let alone corrected. As petitioners explain on pages 26 through 33 of their brief, the Privileges or Immunities Clause was meant to rectify what its proponents considered to be a serious defect in then-current constitutional doctrine by empowering federal courts to protect citizens' basic civil rights from infringement by local officials. But the *Slaughter-House* majority refused to honor that

purpose, a fact that was immediately recognized by the decision's supporters and critics alike. Indeed, legal scholar Christopher Tiedeman actually praised the majority opinion for having "dared to withstand the popular will as expressed in the letter of the amendment."[24]

Slaughter-House was, by any meaningful definition of the word, "activist," in the sense that the five justices in the majority substituted their preference for what we would call minimalism for the contrary will of the people, as lawfully expressed in their founding document through the ratification of the Fourteenth Amendment. That was an act of usurpation, not modesty.[25] Indeed, the majority's argument is overtly consequentialist: Justice Miller correctly warns that a broad reading of the Privileges or Immunities Clause would "radically change[ ] the whole theory of the relations of the State and Federal governments to each other,"[26] which he plainly considers unwise, but which was nevertheless *precisely*

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[24] David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 Mo. L. Rev. 93, 121 (1990) (quoting Christopher G. Tiedeman, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 102-03 (1890)).

[25] *See* Clark M. Neily III, *The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 Harv. J.L. & Pub. Pol'y ___ (forthcoming Dec. 2009).

[26] *Slaughter-House Cases*, 83 U.S. 36, 78 (1873).

what those who wrote and ratified the Clause intended.

Depriving Americans of the Privileges or Immunities Clause they understood themselves to have adopted has had pernicious consequences for the country and for this Court's jurisprudence. Left without a historically grounded means of protecting individual rights, the Court has found itself protecting certain rights in one era and then abandoning them in another, and also the opposite: rejecting other rights initially, only to protect them later. Even where the Court has protected rights, it has often seemed to do so in a somewhat ad hoc manner—determining, for example, that the scope and analysis of the rights enumerated in the first eight amendments should nearly always be identical when those rights are applied against the states.[27]

The last point bears emphasis in this context. It seems entirely reasonable to suppose that one conception of the right to arms might apply as against a sovereign that possesses a general police power, like the states, whereas a different conception might apply against a sovereign that does not (or at least is not supposed to) wield such power, like the federal government. While that question need not be answered now, it will certainly arise in future cases and

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[27] *See*, *e.g.*, Tinsley E. Yarbrough, MR. JUSTICE BLACK AND HIS CRITICS 98-101 (1988) (discussing internal debates among Justices Black, Rutledge, and others over "incorporation" of the Bill of Rights).

cannot be answered properly in the context of traditional incorporation doctrine.

Strengthening the ties between the Court's jurisprudence and the Constitution's actual text and history is the first step in undoing the errant history initiated by *Slaughter-House*—not to *eliminate* this Court's protection for individual rights, but to *cement* it. A proper reading of the Privileges or Immunities Clause would not only increase the perceived legitimacy of the Court's individual-rights jurisprudence, it would give content to that jurisprudence. The public discussions of the Fourteenth Amendment were striking both in their specificity and their legalism. The debates in Congress and at ratifying conventions, as well as contemporary press accounts, are replete with references to specific doctrines and even court cases the Framers meant to overturn, along with the specific evils the Amendment was meant to prevent; as a result, the rights protected by the Privileges or Immunities Clause can be rooted solidly in both text and history, as can their limits.[28] Protecting rights through the Privileges or Immunities Clause would allow claims of right to rise—or fall—on the basis of the history and text of the Constitution itself, helping blunt the criticisms

[28] *Cf. Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must . . . examine the state of things existing when it was framed and adopted . . . to ascertain the old law, the mischief and the remedy") (internal citation omitted).

of those who claim, mistakenly, that all individual rights jurisprudence is necessarily subjective.

The Privileges or Immunities Clause is neither a meaningless nullity nor a freewheeling source of rights pulled from thin air. Relying on the Clause would help the Court determine the proper scope of its role in protecting individual rights against violation by local governments and would make that role more stable and difficult to assail as well. The solution to cries of "judicial activism" is not to abandon judicial review altogether, nor is it to remain doggedly attached to an incorporation doctrine that is both ahistorical and functionally problematic. The solution is found in the place where this Court, in its best moments, has always looked first: the text of the Constitution.[29]

[29] *Cf. Baltimore & O. R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting) ("[N]otwithstanding the great names which may be cited in favor of [an erroneous] doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States . . . .").

CONCLUSION

The Fourteenth Amendment was understood by those who ratified it to protect the right to arms against violation by state governments. This case presents a singular opportunity to honor that purpose consistent with the amendment's original public meaning of the Privileges or Immunities Clause. Amicus respectfully urges the Court to begin that process by overruling *Slaughter-House* and holding that the right to arms is among the privileges or immunities of United States citizenship that no state may abridge.

Respectfully submitted,

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