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 FOR THE GOLDWATER INSTITUTE, SCHARF-NORTON CENTER FOR CONSTITUTIONAL GOVERNMENT, AND WYOMING LIBERTY GROUP AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, which is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute advances public policies that further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis. The Goldwater Institute has filed this brief because restoring the original meaning and purpose of the Fourteenth Amendment's privileges or immunities clause would be a crucial step in securing our Nation's heritage of

[1] Counsel of record for all parties have either filed a blanket consent letter to amicus briefs in this case or they have received notice at least 10 days before the due date of the amici's intention to file this brief and have consented. The parties' letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the amici and their counsel, has made a monetary contribution to the preparation or submission of this brief.

rightful liberty and constitutionally limited government.

The Wyoming Liberty Group believes that the great strength of Wyoming rests in the ambition and entrepreneurialism of ordinary citizens. While limited government is conducive to freedom, unchecked government promotes the suppression of individual liberty. In a state where the people are sovereign, the Group's mission is to provide research and education supportive of the founding principles of free societies. Its mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making. The Wyoming Liberty Group promotes the enhancement of liberty to foster a thriving, vigorous, and prosperous civil society, true to Wyoming's founding vision. The issues presented in this case are of interest to the Wyoming Liberty Group because they provide this Court with the chance to protect these fundamental rights through a reexamination and restoration of the Privileges and Immunities Clause.

SUMMARY OF ARGUMENT

1. *STARE DECISIS* DOES NOT COMPEL ADHERENCE TO *SLAUGHTERHOUSE* OR ITS PROGENY BECAUSE ITS ERRONEOUS INTERPRETATION OF THE PRIVILEGES OR IMMUNITIES CLAUSE HAS PROVEN UNWORKABLE.

2. THE NORMAL AND ORDINARY MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE INCORPORATES THE RIGHT TO KEEP AND BEAR ARMS AND OTHER GUARANTEES OF RIGHTFUL LIBERTY.

3. SHIFTING INCORPORATION OF THE RIGHT TO KEEP AND BEAR ARMS AND OTHER GUARANTEES OF RIGHTFUL LIBERTY TO THE PRIVILEGES OR IMMUNITIES CLAUSE IS WORKABLE.

4. SHIFTING INCORPORATION OF THE RIGHT TO KEEP AND BEAR ARMS TO THE PRIVILEGES OR IMMUNITIES CLAUSE IS CONSISTENT WITH FEDERALISM BECAUSE DUAL SOVEREIGNTY IS MEANT TO SECURE RIGHTFUL LIBERTY.

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ARGUMENT

The tragedy of our Constitution is that too many supposed "ink blots" have been judicially constructed. The *Slaughterhouse Cases*, 83 U.S. 36, 78 (1873), in particular, have long obscured the privileges or immunities clause of the Fourteenth Amendment. Nevertheless, the evidence is overwhelming that the clause was meant to restrain the states according to the same principles of rightful liberty as the federal government; including, at minimum, those undergirding the Bill of Rights, as well as the Civil Rights and Freedman's Bureau Acts of 1866. Had this fact been recognized in 1873, *Plessy v. Ferguson*, Jim Crow and the civil rights struggles of the twentieth century might have never been. The Court's recent ruling in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), would have itself largely ended the debate over the incorporation of the right to keep and bear arms. And the palladium of our Nation's heritage would have been that much more burnished today.

But sadly *Slaughterhouse* continues to obscure the proper relationship between state sovereignty and the Fourteenth Amendment's guarantee of rightful liberty. Rather than linking the protection of specific individual rights to an objective legal tradition protecting rightful liberty, *Slaughterhouse* requires courts to avert their eyes from the "privileges or immunities" of United States citizens and forces the due process and equal protection clauses to do double duty – to function not only as

auxiliary protections of rightful liberty, but also as oracles of specific legal rights. *Slaughterhouse* has thereby relegated the federal judiciary to seeking out the essences of free republican government like one-eyed wandering philosophers, without the guidance or restraint that should have been provided by the privileges or immunities clause. And after more than a century of meandering, incorporation jurisprudence is only beginning to approximate the protection of the range of liberties that the privileges or immunities clause was meant to protect since July 9, 1868, when the Fourteenth Amendment was adopted.

Slaughterhouse's interpretation of the privileges or immunities clause is neither progressive nor consistent with the meaning and purpose of the Fourteenth Amendment. Requiring the States to respect the same rightful liberty undoubtedly secured by the Bill of Rights, federal statutory law, the common law and nearly all state constitutions can hardly be seen as a threat to federalism. Moreover, only by restoring the privileges or immunities clause can the nature and scope of the right to keep and bear arms be vindicated as it was originally understood. In short, if the right result is to be reached for the right reasons in this case and for the benefit of future cases, *Slaughterhouse* and its progeny, *Cruikshank*, *Presser* and *Miller*, should be overturned.

I. *Stare Decisis* Does Not Compel Adherence To The *Slaughterhouse Cases.*

Stare decisis does not command adherence to decisions that represent the unworkable remnants of a clearly erroneous and abandoned doctrine. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). This Court may abandon a prior decision that has "come to be seen so clearly as error that its enforcement was for that very reason doomed." *Id.* Moreover, *stare decisis* has its strongest justification in preserving liberties that have been firmly entrenched in society. *Id.* Here, by contrast, adherence to *stare decisis* would have the opposite effect of diluting liberty and of contributing to incoherent jurisprudence that leaves vital liberties on shaky ground. For these reasons, *stare decisis* should not command adherence to the *Slaughterhouse Cases*.

Because of the result reached in the *Slaughterhouse Cases*, it is commonly believed that the Court refused to incorporate the Second Amendment to the states through the Fourteenth Amendment's privileges or immunities clause in *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886) and *Miller v. Texas*, 153 U.S. 535 (1894).[2] *See.,*

[2] Contrary to what is commonly believed, *Cruikshank*, *Presser* and *Miller* actually only offer *obiter dicta* on the issue of incorporation. In *Cruikshank*, this is made abundantly clear by the Court's specific ruling, which overturned the conviction of the white mob because, "[t]he Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, but this adds nothing to the rights of

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e.g., *Nat'l Rifle Assoc. of America, Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009), *cert. granted McDonald v. City of Chicago, Ill.*, 2009 WL 1631802 (2009); *Maloney v. Cuomo*, 554 F.3d 56, 57 (2nd Cir. 2009). This belief arises from the understanding that *Slaughterhouse* curtailed the universe of incorporated rights under the privileges or immunities clause to a set of legal rights that are somehow uniquely created by federal citizenship and distinct from contemporaneous understandings of civil

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one citizen as against another." *Id.* at 554-55. This statement proves that the lack of state action in *Cruikshank* determined its outcome and rendered any incorporation analysis purely gratuitous. Likewise, the result reached in *Presser* had nothing to do with incorporation because the Court's rationale in sustaining the appellant's conviction was simply that the contested conduct was not within the scope of the right to keep and bear arms, as understood under the Second Amendment. *Presser*, 116 U.S. at 264-265. Lastly, *Miller*'s reference to incorporation under the Fourteenth Amendment was wholly gratuitous because the Court dismissed that issue on procedural grounds, declaring, "And if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." 153 U.S. at 538. In sum, any interpolated musing over incorporation found in *Cruikshank*, *Miller* and *Presser* was totally unnecessary to the results reached in each case; moreover, any purported non-incorporation holding is logically precluded by the actual rationale used to reach the result of each case. Accordingly, notwithstanding subsequent cases that may have mistakenly relied upon *Cruikshank*, *Miller* and *Presser* as standing against incorporation of the Second Amendment, this Court should refuse to yield to such *obiter dictum*. *See, e.g.*, *Union Tank Line v. Wright*, 249 U.S. 275, 284 (1919).

rights. *Id.*; *Slaughterhouse Cases*, 83 U.S. 78-79; *Adamson v. California*, 332 U.S. 46, 52-53 (1947) (Black, J., dissenting). Exactly what *Slaughterhouse* meant by its interpretation of the privileges or immunities clause, if anything, is a genuine mystery – various commentators have offered equally plausible contradictory interpretations of the ink blot that is Justice Miller's majority opinion. But, as conceded by the Seventh Circuit below, there is no doubt the *Slaughterhouse* approach to *incorporation* is now "defunct." *Nat'l Rifle Assoc.*, 567 F.3d at 857-58.

For over a century, the Court has bypassed and abandoned *Slaughterhouse* in favor of selective incorporation through the due process clause. Ironically, the selective incorporation doctrine has incorporated most of the rights and restraints on government guaranteed by the Bill of Rights, often based on considerations of the very federal and common law traditions seemingly rejected by the majority in *Slaughterhouse* as a source of privileges or immunities. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. State of La.*, 391 U.S. 145, 149 n.14 (1968). All that functionally remains of the *Slaughterhouse Cases* today is the refusal to interpret the Fourteenth Amendment's privileges or immunities clause as referencing and incorporating all of the privileges or immunities objectively guaranteed by federal law. But separating the privileges or immunities clause from incorporation doctrine has generated anything but workable results.

If preserving the rule of law is truly the standard by which to measure "workability" under the doctrine of *stare decisis* (*see Casey*, 505 U.S. at 854)*, Slaughterhouse*'s principal result of shunting modern incorporation doctrine to the Fourteenth Amendment's due process and equal protection clauses has proven unworkable. No one pretends, for example, that a common legal principle unites the due process holdings of *Lochner*, *Caroline Products*, *Roe*, *Glucksberg* and *Lawrence* or the equal protection holdings of *Plessy*, *Korematsu*, *Brown*, *Williamson*, *City of Cleburne* and *Grutter*.[3] As these cases illustrate, the due process and equal protection clauses have undeniably served to protect both state-sponsored tyranny and rightful liberty; sometimes at the same time. The clauses have proven unreliable, inconsistent and often inexplicable guarantors of rightful liberty against state action. This is because by precluding incorporation through the privileges or immunities clause, *Slaughterhouse* has forced the due process and equal protection clauses to do far more than they were meant to do.

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[3] *Compare Lochner v. New York*, 198 U.S. 45 (1905) *with U.S. v. Caroline Products, Inc.,* 304 U.S. 144, 154 n.4 (1938); *Roe v. Wade*, 410 U.S. 113 (1973); *Glucksberg*, 521 U.S. 145; and *Lawrence v. Texas*, 539 U.S. 558 (2003); *compare Plessy v. Ferguson*, 163 U.S. 537 (1896) *with Korematsu v. United States,* 323 U.S. 214 (1944); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Although they are not devoid of substance, the due process and equal protection clauses were not meant to serve as a fount of all legal rights that would be constitutionally protected against state action. The Fourteenth Amendment's due process clause, like the clause found in the 5th Amendment and most state constitutions, was originally meant to serve as a general prohibition on government dressing up acts of tyrannical "will" as "law."[4] Like the Magna Carta's "law of the land" provision, this guarantee of

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[4] *See, e.g.*, *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276-77 (1855) (stating "[the 5th Amendment's due process clause] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will"); *Ex parte Law*, 15 F.Cas. 3, 10 (S.D. Ga. 1866) (observing "[b]y operation of the legislative will alone, the petitioner is already adjudged . . . without due process of law"); *Cohen v. Wright*, 22 Cal. 293, 318 (1863) (stating "'due process of law' have a distinct legal signification, clearly securing . . . essential rights [that] cannot be taken away by any mere declaration of legislative will"); *Denny v. Mattoon*, 84 Mass. 361, 377-82 (Mass. 1861) (observing "an act of legislation, operating retrospectively and purporting to give efficacy and validity to acts and processes which have been adjudged void . . . takes away from a subject his property, not by due process of law or the law of the land, but by an arbitrary exercise of legislative will"); *Taylor v. Porter & Ford*, 4 Hill 140, 144-45 (N.Y. 1843) (observing "[u]nder our form of government the legislature is not supreme . . . [t]he security of life, liberty and property, lies at the foundation of the social compact; and to say that . . . 'legislative power' includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established").

"due process of law" legitimately blocks the most blatant abuses of government power; and, in that respect, the clause was undoubtedly meant to protect fundamental rights.[5]

But the general principles of the due process clause, which stand firmly against the likes of summary executions and arbitrary confiscations of property, are often ill-equipped to help courts articulate specific constitutional guarantees of rightful liberty that stand against subtler or more remote threats of abusive state action. Likewise, what the equal protection clause specifically guarantees against state action depends entirely on what differences are deemed "material" or "immaterial" and what rights are deemed "fundamental" or "non-fundamental;" and making this judgment call requires more than contemplation of the principle of "equality under the law" alone can provide. Consequently, if incorporation is not moored to an objective legal framework, such as that which is

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[5] *See, e.g.*, *Murray*, 59 U.S. at 276-77 (observing "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta"); *Wilkinson v. Leland*, 27 U.S. 627, 657-58 (1829) (stating "[i]n a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded"); *Wynehamer v. People*, 13 N.Y. 378, 392-93 (1856) (stating [t]o say, as has been suggested, that the law of the land, or "due process of law," may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity").

encompassed by the privileges or immunities clause (as discussed in the next section), incorporation necessarily becomes an *ad hoc* and lawless exercise.

In short, while the due process and equal protection clauses do legitimately furnish a crucial check against the worst excesses of tyrannical state government, they lack sufficient content to identify specific rights reliably and consistently without risking arbitrary manipulation in accordance with subjective judicial preferences. For this reason, relying on the due process and equal protection clauses to guard against the abuse of state action is more likely to produce the rule of men and not law – much like what would happen if our unified court system abandoned principles of law in favor of exclusive reliance on equitable maxims to resolve all disputes.

Consequently, if one presumes that protecting the rule of law is the threshold principle upon which the doctrine of *stare decisis* rests, the *Slaughterhouse Cases* must be overturned so that the Fourteenth Amendment's privileges or immunities clause can supply the specific legal content that the due process and equal protection clauses lack, when they are pressed into service under selective incorporation doctrine. Doing anything else would enshrine an abandoned and unworkable doctrine that, history shows, has undermined and will continue to undermine the meaning of the Fourteenth Amendment and the values of our Republic.

II. The Privileges Or Immunities Clause Clearly Incorporates The Right To Keep And Bear Arms And Other Liberties Ignored By *Slaughterhouse*.

The majority opinion in *Slaughterhouse* blotted-out the privileges or immunities clause by giving it an obscure interpretation that could not possibly have been shared by the framers or ratifiers of the Fourteenth Amendment. It is likely that the majority was motivated not by adherence to the text, meaning or purpose of the clause, but by a desire to avoid further acrimony and conflict with the Southern states during the tumultuous Reconstruction Era. Accordingly, as requested by Justices ranging from Hugo Black to Clarence Thomas, it is now time to reconsider *Slaughterhouse*, as well as the meaning and purpose of the Fourteenth Amendment's privileges or immunities clause. *Compare Adamson*, 332 U.S. at 74-75 (Black, J., dissenting) (observing "[i]n my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights") *with Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting) (stating "[b]ecause I believe that the demise of the Privileges or Immunities Clause has contributed in

no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case").

The Constitution "was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931). "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Heller*, 128 S. Ct. at 2789. Accordingly, the interpretation of a constitutional provision, like a statute, begins with the text. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006). If the normal and ordinary meaning of the text is clear, the Court need go no further. *Id.*

Beginning with the text, section 1 of the Fourteenth Amendment says in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST., AMEND. 14. The normal and ordinary meaning of "privileges or immunities" is clear, despite its obstruction by *Slaughterhouse*.

When the Fourteenth Amendment was adopted, "privileges" and "immunities" were widely used legal terms, for which Blackstone was regarded as the

authoritative source of their normal and ordinary meaning. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1205 (1992) (observing "[w]ould-be lawyers began their training with Blackstone's Commentaries, not United States Reports"); *see generally Heller*, 128 S. Ct. at 2798 (stating "Blackstone, whose works, we have said, 'constituted the preeminent authority on English law for the founding generation' ") (citing *Alden v. Maine*, 527 U.S. 706, 715 (1999)). According to Blackstone, the terms "privileges" and "immunities" referred to rights of personal security, personal liberty and private property, as recognized by civil law – what are more commonly called civil rights today. *See* BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Vol. 1, 129 (19th ed. 1836) (J.E. Hovenden, editor), *available at* http://books.google.com (last visited November 4, 2009). Specifically, Blackstone described the meaning of "privileges" and "immunities" as follows:

> Thus much for the declaration of our rights and liberties. The rights themselves, thus defined by these several statutes [Magna Carta, Petition of Right, English Bill of Rights and Act of Settlement] consist in a number of private *immunities*; which will appear, from what has been premised, to be no other, than either that residuum of *natural liberty*, which is not required by the laws of society to be sacrificed to public convenience; or else those *civil privileges*,

> *which society hath engaged to provide, in lieu of the natural liberties so given up by individuals*. . . . And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free-will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

Id. (emphasis added). This meaning is confirmed by Justice Washington's discussion of the "privileges and immunities" clause in *Corfield v. Coryell*, 6 F.Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), as well as by the usage evidenced in numerous published cases before and contemporaneously with the adoption of the Fourteenth Amendment.[6] Accordingly, an examination

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[6] *See, e.g., Jackson v. People*, 9 Mich. 111, 1860 WL 2650, * 4 (Mich. 1860) (affirming common law guarantees as "the immunity of life, liberty and property"); *Jones v. Robbins*, 74 Mass. 329, 344 (Mass. 1857) ("these privileges, as intended to be secured by the American constitutions . . . [include] '[t]he right of personal security is guarded by provisions transcribed into the constitutions in this country from Magna Charta and other fundamental acts of the English parliament, and enforced by additional and more precise injunctions' "); *Bryan v. Walton*, 14 Ga. 185, 1853 WL 1662, * 13 (Ga. 1853) (rejecting argument that manumission of a slave resulted in the former slave enjoying "all the rights, privileges and immunities which are incident to freedom, among the free white inhabitants of this country");

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State v. Claiborne, 19 Tenn. 331, 1839 WL 2264, * 6 (Tenn. 1838) (discussing "[w]ho then is a citizen? . . . certainly among the Romans, where the term had its origin, a citizen was entitled to all the privileges, immunities, and rights, civil and political. Free negroes have always been a degraded race in the United States, having the right, it is true, of controlling their own actions and enjoying the fruits of their own labor, but deprived of almost every other privilege of the free citizen, and constituting an inferior caste in society, with whom public opinion has never permitted the white population to associate on terms of equality, and in relation to whom the laws have never allowed the enjoyment of equal rights, or the immunities of the free white citizen"); *Douglas v. Stevens*, 1 Del.Ch. 465, 1821 WL 183, * 3-4 (De. 1821) (observing "the words 'privileges and immunities' comprehend all the rights, and all the methods of protecting those rights which belong to a person in a state of civil society, subject, to be sure, to some restrictions, but to such only as the welfare of society and the general good require. . . . The rights of enjoying and defending life and liberty, of acquiring and protecting reputation and property, – and, in general, of attaining objects suitable to their condition, without injury to another, are the rights of a citizen; and all men by nature have them . . . There are, therefore, established certain other subordinate rights of the citizen, which serve principally as barriers to protect and maintain inviolate those great and primary rights. The preservation of these original rights includes the preservation of the subordinate rights, – the privileges and immunities which it was intended by the Constitution of this State to preserve to its citizens, and by the Constitution of the United States to preserve, in each State, to the citizens of the other States, for the protection of the primary rights before mentioned. The right of enjoying and defending life consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and in resisting, even to the commission of homicide, where such resistance is necessary to save one's own life . . . Therefore, this privilege belongs to us, and, by the Constitution of the United States, to every other citizen of the United States in common with us") (citing Blackstone's Commentaries); *Harry v. Decker*, 1 Miss. 36, 1818 WL 1235, * 1

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of the text and common usage reveals that the ordinary and normal meaning of the "privileges or "immunities" clause was "[n]o State shall make or enforce any law which shall abridge the rights of citizens of the United States to personal security, personal liberty and private property, which are recognized under federal law."

Federal law recognized many rights of personal security, liberty and property, independently of state law at the time the Fourteenth Amendment was adopted on July 9, 1868; including the rights secured by the first nine amendments to the Bill of Rights and guaranteed by the Civil Rights and Freedman's Bureau Acts of 1866. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 9, 1866); Freedman's Bureau

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(Miss. 1818) (referring to the Northwest Ordinance of 1787 as setting out "the privileges and immunities of freemen"); *Campbell v. Morris*, 3 H. & McH. 535, 565-66 (Md. 1797) (equating "privileges and immunities" with "civil right[s], which a man as a member of civil society must enjoy"); *cf. Mitchell v. Harmony*, 54 U.S. 115, 143 (1851) (Daniel, J., dissenting) (quoting Blackstone as describing the right to jury trial as "the most transcendent privilege which any subject can enjoy or wish"); *Ex parte Vallandigham*, 28 F.Cas. 874, 901 (S.D. Ohio 1863) (counsel arguing: "[h]ow, then, did they [the Founders] secure liberty? In the order of securities we find, first, certain declaratory clauses. It is one step toward establishing and securing rights to agree upon them and declare them. The citizens of each state shall be entitled to all the privileges and immunities of the several states . . . "); *Northwestern Bank v. Nelson*, 42 Va. 108, 1844 WL 2861, *12 (Va. 1844) (discussing discovery in litigation as a "privilege essential to the immunities and liberties of the citizen").

Act of 1866, ch. 200, 14 Stat. 173 (July 16, 1866). Indeed, the Fourteenth Amendment, the Civil Rights and Freedman's Bureau Acts of 1866 were clearly cut of the same cloth. *See* Cong. Globe, 39th Cong., 1st sess., 2465 (1866) (Thayer) ("[t]he amendment 'incorporat[ed] in the Constitution of the United States the principle of the civil rights bill which has lately become a law' "); *see also Bell v. Maryland*, 378 U.S. 226, 292-93 (1964) (Goldberg, J., concurring) (tracing the Fourteenth Amendment to the Civil Rights Act and Freedman's Bureau bill).

The Fourteenth Amendment was drafted and adopted because of constitutional concerns over whether Congress had the power to grant United States citizens the privileges or immunities set out in the Civil Rights and Freedman's Bureau Acts. Cong. Globe, 39th Cong., 1st sess., 2542 (1866) (Bingham) ("There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply . . . It is the power in the people, the whole people of the United States . . . 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"). Accordingly, the interpretive doctrine of *in pari materia* compels reading into the Fourteenth Amendment's privileges or immunities clause the various personal rights guaranteed by the two Acts, not the least of which is the "constitutional right to bear

arms" – as expressly guaranteed by section 14 of the Freedman's Bureau Act of 1866. *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727, 733 (1885) (holding "[a]s the clause in the Constitution and the act of the legislature relate to the same subject, like statutes *in pari materia*, they are to be construed together") (citations omitted).[7] Consideration of extrinsic evidence of the meaning of the clause only reinforces this interpretation of the privileges or immunities clause.

Contemporaneous legislative history confirms that the privileges or immunities clause was meant to incorporate the rights of personal security, liberty and property secured by the Bill of Rights, federal law and the common law, including the right to keep and bear arms. *See* Cong. Globe, 39th Cong., 1st Sess., 340, 430, 432, 813, 816, 1118, 1183, 1263, 1291, 1294, 1629, 1838, 1972 (1866). The prefactory words, "[n]o State shall make or enforce any law," after all,

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[7] *See generally In re Tveten*, 402 N.W.2d 551, 554 (Minn. 1987) ("'Statutes relating to the same subject are presumed to be imbued with the same spirit and to have been passed with deliberation and full knowledge of all existing legislation on the subject and regarded by the lawmakers as being parts of a connected whole. Statutes are *in pari materia* when they relate to same matter or subject even though some are specific and some general and even though they have not been enacted simultaneously and do not refer to each other expressly. Where two acts *in pari materia* are construed together and one contains provisions omitted from the other, the omitted provisions will be applied in the proceeding under the act not containing such provisions, where not inconsistent with the purpose of the act.' ") (citing 6 Dunnell, Supp. § 8984).

replicate the language that Justice Marshall held would have been necessary to enforce the liberties guaranteed by the Bill of Rights against the States in *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. 243 (1833). Moreover, Senator Howard famously described Section 1 of the Fourteenth Amendment as:

> [A] general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States . . . [including] the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; the right of the people peaceably to assemble and petition the government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms. . . . [in order] to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st sess., 2765-66 (1866) (emphasis added). Lastly, transcripts of ratification debates in the states, contemporaneous media accounts of those debates and subsequent statements of the framers of the Fourteenth Amendment all confirm that the amendment was meant and publicly understood as protecting against state action all of the rights enjoyed by United States citizens under federal law, including the right to keep and bear arms. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 132-52 (1986) (discussing numerous media accounts, ratification debates and

reported contemporaneous public statements by public officials).[8]

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[8] *See* Cong. Globe, 42nd Cong., 1st sess., 334, 370, 380, 448, 475-76 (1871) (Maynard, Bingham, Hawley, Dawes) ("privileges and immunities . . . referred to 'all the privileges and immunities declared to belong to the citizen by the Constitution itself. . . . those privileges and immunities which all Republican writers of authority agree in declaring fundamental and essential to citizenship."); Cong. Globe, 41st Cong., 2d sess., appendix 84 (1871) (Bingham) ("Mr. Speaker; that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contra distinguished from citizens of a state, are chiefly defined in the first eight amendments to the Constitution of the United States. . . . These eight articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment"); 42nd Cong., 2d sess., 843-44 (1872) (Sherman) ("What are those privileges and immunities? Are they only those defined in the Constitution, the rights secured by the amendments? Not at all . . . . [courts should look] first at the Constitution of the United States as the primary foundation of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England . . . and so on back to the earliest recorded decisions of the common law"); 2 Cong. Rec. appendix 242 (1874) (Norwood) (stating "any state might have established a particular religion, or restricted freedom of speech and of the press, or the right to bear arms . . . [but] the instant the fourteenth amendment became a part of the Constitution, every State was from that moment disabled from making or enforcing any law which would deprive any citizen of a state of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution").

Taken together, the privileges or immunities clause was clearly meant to restrain state sovereignty according to the same principles of rightful liberty secured by federal law at the time the Fourteenth Amendment was adopted, including those secured by the Bill of Rights and those protected by the Civil Rights and Freedman's Bureau Acts of 1866. Emphatically, this includes the right to keep and bear arms, among many other contemporaneously-recognized civil rights.[9] This conclusion is supported by the clear meaning of the text of the Fourteenth Amendment as publicly understood in the 19th Century, the purposes explicitly given for the privileges or immunities clause as disclosed by the statements of the framers of the Fourteenth Amendment, and evidence of the public understanding of those purposes as revealed by media accounts and ratification debates.

[9] The most immediate object to which the Civil Rights and Freedman's Bureau Acts were directed was the protection of economic liberties against the notorious "Black Codes" increasingly enacted by southern governments. Those laws were designed to oppress newly emancipated blacks and to maintain a cheap and servile labor supply by negating the most essential attributes of free labor, freedom of enterprise, private property rights and freedom of contract. Of course, these rights were squarely at issue in *Slaughterhouse* and indirectly in *Plessy* – and they were eviscerated.

III. Shifting Incorporation Of The Right To Keep And Bear Arms And Other Rights Ignored By *Slaughterhouse* And Its Progeny To The Privileges Or Immunities Clause Is Workable.

The methodology for incorporating specific guarantees of rightful liberty to restrain state sovereignty under the Fourteenth Amendment would focus on identifying and applying explicit guarantees of personal rights found in federal law when the Fourteenth Amendment was adopted on July 9, 1868. As illustrated above, proof of the federal guarantee of the right to keep and bear arms for all United States citizens, as evidenced by the Second Amendment and the Freedman's Bureau Act of 1866, would be sufficient grounds in and of itself for enforcing that right against the states under the Fourteenth Amendment. And the scope of that right would be dictated by its contemporaneous public meaning as determined by the legal framework from which it arose; i.e., by the original meaning of the Second Amendment and the legal traditions it rests upon, including the common law understanding of the right to self-defense and defense against tyranny.

This process of identifying and applying explicit legal guarantees of personal rights and freedoms under the privileges or immunities clause would be almost mechanical, and not selective in the usual sense. It would require the incorporation of all personal rights that were, in fact, shown to be protected by federal law. And it would not distinguish

between so-called "fundamental" and "non-fundamental" rights – which is faithful to the founding perspective that rightful liberty was a unified whole, and that the enumeration of specific rights was not meant to deny the existence of others. But the observation that incorporation through the privileges or immunities clause would properly cease to be selective in the usual sense does not mean that there would be wholesale invalidation of state and local laws, in total disregard of our system of dual sovereignty.

IV. Shifting Incorporation Of The Right To Keep And Bear Arms And Other Guarantees Of Rightful Liberty To The Privileges Or Immunities Clause Is Consistent With Federalism.

The Fourteenth Amendment did not repeal the Tenth Amendment. The balance struck by the Fourteenth Amendment between state sovereignty and protection of rightful liberty requires respect for legitimate exercises of the state's police power, combined with a watchful eye on oppressive state laws. In fact, the *Slaughterhouse* dissenters, whose views are consistent with the understanding of privileges or immunities set forth here, were careful to distinguish proper exercises of a state's police power and violations of civil rights, such as economic liberty, that transgress that power. *See, e.g.*, *Slaughterhouse Cases*, 83 U.S. at 84-85 (Field, J., dissenting). And in hard cases, preserving federalism's vertical separation of powers between the

federal government and the States may justify restraint. At the same time, however, the Seventh Circuit was wrong to reject incorporation of the Second Amendment based on the proclamation that federalism is "an older and more deeply rooted tradition" than is the right to keep and bear arms. *N.R.A.*, 567 F.3d at 860. Where two constitutional principles are at issue, the judicial task is not to determine which embodies an "older tradition" and ignore the other, but to harmonize them in accordance with more fundamental common principles.

Refusing to recognize the meaning and purpose of the privileges or immunities clause, as did the majority in the *Slaughterhouse Cases* and as did the Seventh Circuit below, is hardly consistent with constitutionalism, the rule of law or preserving rightful liberty – all of which are principles consistent with and more fundamental than federalism. The undeniable truth is that the Fourteenth Amendment significantly altered the original constitutional balance of power between the federal and state governments, at least as it pertains to protecting rightful liberty from state action. Moreover, federalism has never been an end-in-itself. *U.S. v. Lopez*, 514 U.S. 549, 576 (1995); *New York v. United States*, 505 U.S. 144, 182 (1992) (observing "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power' ").

Federalism has always been aimed at securing rightful liberty from tyranny – federal or state. *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (holding "[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty"); *see* Federalist No. 51 (Madison) (arguing "[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."). Accordingly, the goal of preserving federalism should not trump the rightful liberty the Constitution was meant to protect, including the right to keep and bear arms.

Any risk that the federal government would overextend the privileges or immunities clause to unduly restrain or invade state sovereignty in ways unanticipated and not intended by the framers and ratifiers of the Fourteenth Amendment would be reasonably minimized by limiting incorporated privileges or immunities to those clearly of the same type that were explicitly guaranteed by federal law at the time the Fourteenth Amendment was adopted – categories well-defined by the common law. And restoring the original meaning and purpose of the

privileges or immunities clause poses no risk of transforming the Fourteenth Amendment into a source of federal police powers because the Fourteenth Amendment's prefatory language, "No State shall make or enforce any law," ensures that the clause would remain directed to restraining state action.

Lastly, it is important to emphasize that shifting the incorporation of constitutional rights to the Fourteenth Amendment's privileges or immunities clause would not deprive non-citizens of constitutional protections from state laws. This is because the Fourteenth Amendment's due process and equal protection clauses would continue to protect all "persons" regardless of citizenship status. Non-citizens and citizens alike would thereby continue to be protected from abuses of state power under settled law interpreting those clauses. *Casey*, 505 U.S. at 854-55.

CONCLUSION

The *Slaughterhouse Cases* have distorted the Fourteenth Amendment for well over a century, tethering both rightful liberty and state sovereignty to bungie-cord jurisprudence interpreting the due process and equal protection clauses, rather than an objective legal framework. The jurisprudential ride has been both nauseating and exhilarating, but it has certainly never tracked the steady path promised by constitutionalism and the rule of law.

This case provides a unique opportunity to ground the Fourteenth Amendment in its original meaning and purpose, thereby restoring stability and predictability to constitutional law and its dedication to securing rightful liberty. It all begins by recognizing that *Slaughterhouse* and its progeny, *Cruikshank*, *Presser*, and *Miller*, are not worthy of *stare decisis*, and that the privileges or immunities clause guarantees the right to keep and bear arms.

RESPECTFULLY SUBMITTED this 23rd day of November, 2009.

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