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# CITIZEN GUN RIGHTS: INCORPORATING THE SECOND AMENDMENT THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE

KENNETH A. KLUKOWSKI\*

## INTRODUCTION

The Supreme Court's 2008 holding in *District of Columbia v. Heller* that the Second Amendment guarantees an individual right to keep and bear arms will launch an avalanche of lawsuits. With thousands of laws at the state and federal levels regulating millions of firearms owned by millions of people in the United States, there are virtually unlimited fact patterns for cases. Perhaps no such question will be more consequential than whether the Second Amendment is incorporated against the states through the Fourteenth Amendment. This Article argues that the answer to the incorporation question is *yes*, but not for the reason some might believe. Those arguing that the Second Amendment should be incorporated through the Due Process Clause of the Fourteenth Amendment overlook the fact—explained in this Article—that there are two rights in the Second Amendment: one of political accountability and the other of self-defense. The Supreme Court should hold that the Second Amendment to the Constitution is incorporated through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause.<sup>1</sup> The Court can so hold without overturning precedent because the Court has never adopted a theory governing incorporation, and in so doing effectuate the purposes of both the Founding Fathers who adopted the Second Amendment and also the Framers of the Fourteenth Amendment.

On June 26, 2008, the U.S. Supreme Court held in *District of Columbia v. Heller* that the Second Amendment secures an individual right to keep and bear arms.<sup>2</sup> But as some predicted (including this author),<sup>3</sup> the Court's holding was narrow, merely addressing whether there is any actionable right under the Amendment. *Heller* left consequent legal questions to future cases.<sup>4</sup> Since studies estimate that perhaps 90 million people in this country currently possess almost 200 million firearms,<sup>5</sup> it is

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1. It must be noted at the outset that the term "incorporated" is used loosely here. Generally speaking, to "incorporate" through the Fourteenth Amendment means that the substantive federal right in question, derived from the Bill of Rights, has been substantively "incorporated" into the Due Process Clause, specifically. That being so, it is in a sense a misnomer to refer to "incorporating" through the Privileges or Immunities Clause, or for that matter any clause aside from the Due Process Clause. But this Article uses the term "incorporation" because that has become the general legal term of art when referring to provisions of the Bill of Rights being applied to state governments.

2. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799, 2821–22 (2008).

3. See Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence Of The Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 167, 178–82, 185–90 (2008).

4. See *Heller*, 128 S. Ct. at 2816–17.

5. BROOKINGS INSTITUTION, EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 3 (Jens Ludwig ed., 2003) (estimating that 200 million firearms are privately owned in the United States); John Lott, Jr., *Guns*

a safe assumption that the judiciary will face many cases, posing competing theories on the reach, breadth, and contours of the right to keep and bear arms. Second Amendment jurisprudence has rightly been described as “radically underdeveloped” or even “utterly undeveloped,”<sup>6</sup> to the point of being a “continuing embarrassment,”<sup>7</sup> inspiring the title of one early work.<sup>8</sup> Twelve years ago a leading Second Amendment scholar predicted, “The Supreme Court has developed no meaningful jurisprudence of the Second Amendment, but will almost certainly have to do so eventually.”<sup>9</sup> After *Heller*, it may be safe to drop the “almost” from that quote.

No question will have a greater impact than whether the Second Amendment has been incorporated against the states through the Fourteenth Amendment, constraining state and local governments as it does the federal government in how, and to what extent, governments can burden Second Amendment rights.<sup>10</sup> The incorporation question will be thrust upon the Court soon enough, since most regulatory issues remain with the states, even after the mushrooming of the federal government in the 1930s.<sup>11</sup>

The Second Amendment is the only provision of the Bill of Rights for which the Court has had the opportunity to answer the incorporation question, yet not fully resolved the issue.<sup>12</sup> This refusal to take up Second Amendment incorporation seems perfectly reasonable pre-*Heller*, because there was no recognized right at issue. Post-*Heller*, the Court cannot long avoid the question.

*Don't Kill Kids, Irresponsible Adults With Guns Do*, FOXNEWS.COM, Oct. 10, 2007, available at <http://www.foxnews.com/story/0,2933,301040,00.html> (referencing 90 million American firearm owners).

6. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 903 (3d ed. 2000) (referring to Second Amendment jurisprudence as “radically underdeveloped”); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1239 (1994) (referring to the case law as “utterly undeveloped”).

7. Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 191 (1999).

8. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

9. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 2 (1996).

10. See Klukowski, *supra* note 3, at 189–90.

11. Lund, *Past and Future*, *supra* note 9, at 47. In fact, as this Article was being edited, a panel of the Ninth Circuit held that the Second Amendment is incorporated through the Due Process Clause. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009). This decision effectively overrules a Ninth Circuit precedent to the contrary. See *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992). The *Nordyke* panel offers a reasonable explanation distinguishing its case from *Fresno Rifle*, see *Nordyke*, 563 F.3d at 447–48, but at the time of this writing it remains to be seen if the full Ninth Circuit will review the matter.

If not vacated by the full Ninth Circuit for en banc rehearing, the *Nordyke* decision creates a post-*Heller* circuit split with the Second Circuit. See *Maloney v. Cuomo*, 554 F.3d 56, 58–59 (2d Cir. 2009) (citing *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Bach v. Pataki*, 408 F.3d 75, 84, 86 (2d Cir. 2005) (holding that the Second Amendment does not apply to the states)). If so, this court split would make the issue more likely to be granted certiorari for Supreme Court review. See SUP. CT. R. 10(a).

Additionally, as this Article was being edited, the Seventh Circuit denied incorporation of the Second Amendment for the reasons argued in this Article in footnotes 521–24 and the accompanying text, and the National Rifle Association petitioned for certiorari. See *NRA of Am., Inc. v. City of Chi.*, 567 F.3d 856, 857–58, 860 (7th Cir. Jun. 2, 2009), *petition for cert. filed*, 77 U.S.L.W. 3679 (U.S. June 3, 2009) (No. 08-1497). This case is sufficiently similar to the D.C. gun ban at issue in *Heller* that the incorporation question would likely prove dispositive before the Supreme Court, as it did with the circuit court. At the time of this writing, *NRA v. Chicago* certainly has the potential to be an ideal case for the Supreme Court to consider the question of whether the Second Amendment is incorporated.

12. Lund, *Past and Future*, *supra* note 9, at 49 & n.111 (citing cases where the Court was offered Second Amendment cases challenging state laws but did not grant certiorari). A case that could be added to update Lund's list is *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003).

Thus far the Court has only incorporated provisions of the Bill of Rights through the Due Process Clause.<sup>13</sup> However, Due Process is only one route through which the Second Amendment can be incorporated, and it creates problems that could make the Supreme Court think twice before invoking due process to incorporate the Second Amendment. First, current due process jurisprudence is inconsistent and partially incoherent, which could lead to unpredictable results in cases concerning firearms. Furthermore, current incorporation doctrine also suggests that if the Court incorporates through the Due Process Clause, then the general test for firearm laws would be strict scrutiny,<sup>14</sup> a test that many would be reluctant to apply to guns. Additionally, current Supreme Court case law strongly suggests that incorporating the Second Amendment through the Due Process Clause would also grant aliens, possibly including illegal aliens, a constitutional right to demand firearms in the United States.<sup>15</sup> This has obvious implications for federal immigration policy. All of these problems are unavoidable if the Court incorporates through Due Process.

Nevertheless, the Second Amendment should apply to the states. The danger that the Second Amendment is designed to counter is as real from state and local governments as from the federal government.<sup>16</sup> Accordingly, the people require the same form of protection from each level of government. The Framers of the Second Amendment explicitly said as much when adopting the Bill of Rights.<sup>17</sup> There is a better way to incorporate the Second Amendment than through the Due Process Clause.

The alternative route for incorporating the Second Amendment is through the Privileges or Immunities Clause of the Fourteenth Amendment. Contrary to what many believe, the Privileges or Immunities Clause can be used as an effective vehicle for incorporating many rights, including Second Amendment rights. The Second Amendment can be incorporated through the Privileges or Immunities Clause because it is a right inhering in federal citizenship, as the Clause requires.<sup>18</sup> The Supreme Court should therefore incorporate the Second Amendment through the Privileges or Immunities Clause, virtually unconstrained by precedent. Justice Thomas wrote, “Because 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.”<sup>19</sup> The Court should do so to incorporate the Second Amendment, obviating all the problems arising from conventional due process incorporation.

This Article’s core premise is that the jurisprudential and scholarly groundwork has already been laid for incorporating the Second Amendment through the Privileges or Immunities Clause. There is no need to reinvent the incorporation wheel. The Privileges or Immunities Clause has recently been resuscitated,<sup>20</sup> so invoking it here would not be a departure from its current status. This Article also

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13. *See infra* Part III.

14. *See infra* Part V.A.1.

15. *See infra* Part V.A.2.

16. *See infra* Part V.B.

17. *See infra* Part V.C.2.a.

18. *See infra* Part IV.C.2.

19. *Saenz v. Roe*, 526 U.S. 489, 528–29 (1999) (Thomas, J., joined by Rehnquist, C.J., dissenting).

20. *See id.* at 499–500, 503 (majority opinion).

shows how incorporation can be done in a manner consistent with the *Slaughter-House Cases*,<sup>21</sup> so that precedent, too, can be preserved. And by incorporating through Privileges or Immunities, the Court can obviate all the baggage that comes with due process jurisprudence and incorporation doctrine. Finally, with *Heller* placing a newly cognizable right before the judiciary, the incorporation question is one the Court has not faced in the modern incorporation era.<sup>22</sup> The Court ought to take the cleaner, simpler approach of incorporating through the Privileges or Immunities Clause when the incorporation question comes before it.

Part I of this Article briefly explains the debate over the Second Amendment, and what the Supreme Court decided—and left undecided—in *District of Columbia v. Heller*. Part II explores the judicially-created chaos that currently surrounds the Due Process Clause, including substantive due process, and Part III shows the resulting confusion attending modern incorporation doctrine. Part IV then explains how incorporating through the Privileges or Immunities Clause is still possible after the *Slaughter-House Cases*, that this was the intent of Privileges or Immunities, and that incorporating through that clause is consistent with recent Supreme Court decisions. Part V then demonstrates why incorporating the Second Amendment through Privileges or Immunities is especially important, both to achieve the core purpose of the Second Amendment and also to avoid various problems that could arise from incorporating the Amendment through the Due Process Clause. Part V also examines additional arguments for and against incorporating the Second Amendment. Finally, Part VI concludes with observations about the future of Second Amendment rights in the new legal regime.

## I. WHERE *DISTRICT OF COLUMBIA V. HELLER* LEAVES THE SECOND AMENDMENT

In *District of Columbia v. Heller*,<sup>23</sup> the Court resolved the threshold question at the epicenter of the American debate on firearms: Whether the Second Amendment secures an individual right to private citizens to own and possess firearms. The Court held that it does.<sup>24</sup> This holding resolved the core question of a longstanding debate, but leaves many questions unanswered for future cases.

### A. *The Long Road to Heller*

The Second Amendment reads: “A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>25</sup> The very wording speaks of “the right of the people,” but prefaces that

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21. 83 U.S. (16 Wall.) 36 (1873).

22. As explained below in Part V.C.1.a, there are three nineteenth-century cases holding that the Second Amendment is not incorporated, but the leading case of the three (that served as the precedent for the other two) also states that the First Amendment is not incorporated either. These cases came down in the 1800s before the first incorporation case, and therefore their anti-incorporation conclusions were jettisoned by the Court a century ago and at most they raise only a minor obstacle to incorporating the Second Amendment.

23. 128 S. Ct. 2783 (2008).

24. *Id.* at 2821–22.

25. U.S. CONST. amend. II.

statement by referencing a militia. The debate on the meaning of this constitutional provision turns on the relationship of those two clauses.

There are three competing interpretations of the Second Amendment. The view adopted by the *Heller* Court is the individual-right view,<sup>26</sup> holding that the Second Amendment secures a private right to individual citizens, who are peaceable and law-abiding, to keep and bear arms for lawful purposes without any connotation of public service.<sup>27</sup> The opposing view is the collective-right theory, arguing that the Amendment only confers a “right” of the people acting collectively to bear arms when serving in an organized state militia, such as the National Guard.<sup>28</sup> The third is a nuanced version of the second, called the sophisticated collective-right view, arguing that the right to arms is possessed by individuals only in the context of equipping them to render state militia service.<sup>29</sup>

The very existence of the sophisticated collective-right view is a testament to recent scholarship. The idea of a collective right was so widely accepted, even twenty years ago, that retired Chief Justice Warren Burger called the idea of an individual right “one of the greatest pieces of fraud... that I have ever seen in my lifetime.”<sup>30</sup> By the time of *Heller*, the voluminous research that had been published on the Second Amendment so thoroughly demolished the collective-right model that, of the Justices on the *Heller* Court, five found an individual right,<sup>31</sup> four argued for a sophisticated collective right,<sup>32</sup> and not one supported a purely collective right. *Heller* thus enshrined Warren Burger’s “fraud” as the law of the land.

The only case before *Heller* in which the Court meaningfully dealt with the Second Amendment was *United States v. Miller*.<sup>33</sup> In *Miller*, the defendants transported a “sawed-off” (short barrel) shotgun across state lines,<sup>34</sup> violating the National Firearms Act.<sup>35</sup> *Miller* held that whether the weapon at issue was related to militia service was not a matter of judicial notice,<sup>36</sup> and remanded the case to develop the evidentiary record.<sup>37</sup> But the defendant, Mr. Miller, was killed in the interim,<sup>38</sup> and the case became moot.

The appellate circuits only gave nominal consideration to the Second Amendment for sixty-two years after *Miller*. None of the circuits examined the history surrounding the Amendment’s adoption, instead basing their cursory analysis simply on *Miller*. Of the nine courts examining the issue, four adopted the

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26. See *Heller*, 128 S. Ct. at 2788–99.

27. Klukowski, *supra* note 3, at 175.

28. *Id.*

29. *Id.* at 175–76.

30. The MacNeil/Lehrer NewsHour (PBS television broadcast Dec. 16, 1991).

31. See *Heller*, 128 S. Ct. at 2788–99 (opinion of Scalia, J., joined by Roberts, C.J., and Kennedy, Thomas, and Alito, JJ.).

32. See *id.* at 2822 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting).

33. 307 U.S. 174 (1939).

34. *Id.* at 175.

35. Pub. L. No. 73-474, 48 Stat. 1236-40 (1934) (codified as amended in scattered sections of 26 U.S.C.).

36. *Miller*, 307 U.S. at 178.

37. *Id.* at 183.

38. Sandra S. Froman & Kenneth A. Klukowski, *A Round in the Chamber: District of Columbia v. Heller and the Future of the Second Amendment*, 9 ENGAGE, Winter 2008, at 17 & n.38 (citing Stephan B. Tahmassebi, *The Second Amendment & the U.S. Supreme Court*, AMERICAN RIFLEMAN, May 2000, available at <http://www.nraila.org/Issues/Articles/Read.aspx?ID=7>).

collective-right model,<sup>39</sup> and the other five adopted the sophisticated collective-right model.<sup>40</sup>

Serious scholarship on the Second Amendment began to lay the groundwork for an eventual Supreme Court case on the issue. Several publications in the 1980s began to stir scholarly interest in carefully examining the Amendment.<sup>41</sup> The evidence quickly became so overwhelming that constitutional scholars began publishing works saying that despite their personal aversion, they were compelled to accept the individual-right view.<sup>42</sup> These developments led Justice Thomas to comment on the growing body of scholarship supporting an individual right.<sup>43</sup>

In 2001, the Fifth Circuit became the first federal appellate court to embrace the individual-right interpretation,<sup>44</sup> after a lengthy and detailed analysis.<sup>45</sup> Largely in rebuttal, the Ninth Circuit did a lengthy analysis of its own to reaffirm its support for a collective right in a 2002 opinion.<sup>46</sup> Both cases were denied certiorari.<sup>47</sup>

The D.C. Circuit then addressed the Second Amendment in a challenge to Washington, D.C.'s handgun ban. Six plaintiffs sued in *Parker v. District of Columbia*, where the district court dismissed the case.<sup>48</sup> The D.C. Circuit reversed,<sup>49</sup> holding that D.C.'s ban violated the Second Amendment.<sup>50</sup> With only one plaintiff found to have standing,<sup>51</sup> the Court granted certiorari under the name *District of Columbia v. Heller*.<sup>52</sup>

39. *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976).

40. *United States v. Wright*, 117 F.3d 1265, 1273–74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942).

41. See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984); Robert Dowd, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

42. See *Klukowski*, *supra* note 3, at 177 & nn.73–80. One scholar even acknowledged that his shift in position was partially due to one of these individual-right pioneers. See Levinson, *supra* note 8, at 1 n.\* (referencing Lund, *Political Liberty*, *supra* note 41).

43. *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring).

44. *United States v. Emerson*, 270 F.3d 203, 264–65 (5th Cir. 2001).

45. See *id.* at 218–60.

46. See *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002). Several judges disagreed with the panel. *Silveira*, 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting from the denial of rehearing en banc); *id.* at 583–85 (Kleinfeld, J., joined by Kozinski, O'Scannlain, and T.G. Nelson, JJ., dissenting from the denial of rehearing en banc).

47. *Silveira*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003); *Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

48. 311 F. Supp. 2d 103, 109 (D.D.C. 2004).

49. 478 F.3d 370, 401 (D.C. Cir. 2007).

50. *Id.* at 395.

51. *Id.* at 378.

52. 128 S. Ct. 645 (2007).

### B. *What Heller Held, and What It Did Not*

The Supreme Court affirmed the D.C. Circuit in *Heller*.<sup>53</sup> Justice Scalia's opinion for the Court examined sources contemporaneous with the Second Amendment's adoption,<sup>54</sup> and the original meaning of its terms as found in dictionaries and other authorities.<sup>55</sup> *Heller* held that the prefatory clause of the Second Amendment (referencing the militia) does nothing to limit the scope of the operative clause (referencing the right to bear arms),<sup>56</sup> stating that the prefatory clause's purpose is to resolve any ambiguities in the operative clause in a way that does not modify the Amendment's operative force.<sup>57</sup>

*Heller* resolves the threshold question of whether the Second Amendment secures an individual right. The right secured by the Second Amendment belongs to all American citizens,<sup>58</sup> so long as the citizen is law-abiding and responsible.<sup>59</sup> The Second Amendment secures a pre-existing right, rather than conferring one created by government.<sup>60</sup> *Heller* also found that *Miller* stands only for the proposition that the Second Amendment extends only to certain types of firearms,<sup>61</sup> opining that *Miller* held that the Second Amendment extends to almost all firearms that can be carried.<sup>62</sup>

But *Heller*'s holding is nonetheless narrow. The D.C. law struck down by the Court categorically banned all handguns,<sup>63</sup> and required long guns (shotguns and rifles) to be unloaded and disabled by being disassembled or bound by a trigger lock.<sup>64</sup> Finding an individual right, the Court held these provisions invalid.<sup>65</sup> But this categorical ban on readily usable firearms was the most restrictive in the nation,<sup>66</sup> and it was set in the context of a home. The plaintiff claimed that he desired

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53. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008).

54. *Id.* at 2795–2801.

55. *Id.* at 2788–91, 2795.

56. *Id.* at 2789–90.

57. *Id.* at 2789 (citing, *inter alia*, Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–21 (1998)).

58. *Id.* at 2791.

59. *Id.* at 2821. The term “responsible” is unusual, and potentially problematic. If someone is convicted of breaking the law, they could be determined not to be “law-abiding” in a manner consistent with due process. For example, the Court specifically stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons....” *Id.* at 2816–17 (dictum). This dictum has already been relied upon by at least one federal appellate court while this Article was being edited. See *United States v. Anderson*, 559 F.3d 348, 352 & n.6 (5th Cir. 2009), *cert. denied*, 77 U.S.L.W. 3679 (U.S. June 15, 2009) (No. 08-10391). Other circuits appear to agree, though at this point without exploring the issue in depth. See, e.g., *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009).

But what is “responsible?” If it means peaceable or otherwise non-threatening, then it is understandable from a standpoint of legal application. But “responsible” could mean does not get tickets for driving over the speed limit, or does not have excessive credit card debt, or has never fallen behind in child support. While it seems unlikely that a court would move in any of these directions, this term should nonetheless be clarified in a future case to foreclose the possibility of “responsible” being used as a catch-all that could unjustly deny Second Amendment rights to certain citizens.

60. *Heller*, 128 S. Ct. at 2800.

61. *Id.* at 2814.

62. *Id.* at 2791–92. This language must be qualified in light of the previous sentence and cite.

63. See D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).

64. *Id.* § 7-2507.02.

65. *Heller*, 128 S. Ct. at 2817–22.

66. Cf. Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. CIV. RTS. L.J. 229, 229 (2008) (referring to the D.C. ban as “extraordinarily restrictive”).

firearms for self-defense,<sup>67</sup> and the Court held that private citizens such as the plaintiff have such a right to self-defense.<sup>68</sup> The firearm at issue was a handgun, which is a common firearm that is ideally-suited to self-defense.<sup>69</sup> Therefore all this holding amounted to is a per se rule against absolute federal bans on common firearms within the home.

Many questions were left unanswered by *Heller*. For example, the question of who has standing to bring Second Amendment claims cannot be taken for granted.<sup>70</sup> The Court could have addressed standing in *Heller*, but chose to defer the issue,<sup>71</sup> leaving open what sort of injury suffices to bring a Second Amendment case.<sup>72</sup> Another issue arises from Dick Heller's decision not to challenge D.C.'s licensing and registration requirements,<sup>73</sup> leaving open the question of what sorts of licensing or registration scheme would pass constitutional muster.

Those aside, what is the standard of review? The Court said only that the rational-basis test would not be applied in *Heller*,<sup>74</sup> but might a different rule apply outside of the home? Further, *Heller* says, in dictum, that firearms can be prohibited in sensitive locations, such as schools and government buildings.<sup>75</sup> What are these buildings, and can government bar all firearms from them? Although the Court holds that the Second Amendment protects all bearable arms,<sup>76</sup> it also says (in dictum) that disallowing the carrying of "dangerous or unusual" firearms is permissible.<sup>77</sup> These are guns; they are all intrinsically dangerous. Which weapons qualify as "dangerous or unusual?" And are they completely unprotected

67. *Heller*, 128 S. Ct. at 2788.

68. *Id.* at 2817.

69. *Id.* at 2817–18.

70. *Heller* is called *Heller* instead of *Parker* because, of the six plaintiffs in the original lawsuit, only Dick Heller was found to have standing, to the exclusion of the other five, including the originally named Shelly Parker. See *Parker v. District of Columbia*, 478 F.3d 370, 378 (D.C. Cir. 2007). Even then the panel was divided on the issue of Mr. Heller's standing. See *id.* at 402 n.2 (Henderson, J., dissenting). Moreover, an earlier case challenging the same statute was dismissed 2–1 for lack of standing. See *Seegars v. Gonzales*, 396 F.3d 1248, 1255–56 (D.C. Cir. 2005); *id.* at 1256–57 (Sentelle, J., dissenting).

71. The plaintiffs denied standing by the *Parker* panel filed a cross-petition for certiorari, which was denied. *Parker*, 478 F.3d 370, *cert. denied*, 128 S. Ct. 2994 (2008).

72. "To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2768 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Standing is part of the Article III case-or-controversy requirement, *id.*, must be established by the party asserting the court's jurisdiction, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006), and must be satisfied before a court addresses the merits. *Id.* at 341.

Thus far, only the complete deprivation of any Second Amendment rights, as seen in the categorical ban imposed by D.C., has been found sufficient to confer standing, and even then several judges on the D.C. Circuit voted against standing in the two appellate cases challenging the ban. See *Parker*, 478 F.3d 370 at 402 n.2 (Henderson, J., dissenting); *Seegars*, 396 F.3d at 1255–56. Others suggested that standing might be possible in such a case, but only if the plaintiff had more fully exhausted possible administrative remedies. See *Seegars v. Gonzales*, 413 F.3d 1, 1 (D.C. Cir. 2005) (Ginsburg, C.J., concurring in the denial of rehearing en banc). It is unclear at this point what sort of firearm regulations short of a complete ban, or what sort of burden short of a complete deprivation, would be found sufficient to give rise to a justiciable case.

73. D.C. separately requires licensing and registration of firearms. *Heller*, 128 S. Ct. at 2853–54. Dick Heller chose not to challenge this regulatory scheme, so the Court assumed without deciding that such a program is valid. *Id.* at 2819.

74. *Id.* at 2817 n.27.

75. *Id.* at 2817.

76. *Id.* at 2791–92.

77. *Id.* at 2817. This dictum adds that such restrictions are presumptively valid. *Id.* at 2817 n.26.

(contradicting the statement regarding all bearable arms) or are they subject to a lower level of constitutional protection? If so, then what is that level?

Of all these questions, none could have a greater impact on gun rights than whether the Second Amendment is incorporated against the states by the Fourteenth Amendment. Does the Second Amendment constrain only the federal government, or does it also limit the actions of state and local government? Therefore it is to that question that this Article now turns.

## II. THE JUDICIALLY-CREATED CHAOS SURROUNDING THE DUE PROCESS CLAUSE

Many of the problems related to incorporating federal rights against the states are due to the chaos that the judiciary has created with the Due Process Clause of the Fourteenth Amendment.<sup>78</sup> Not often does something that by its own diction would appear to have such a clear yet narrow meaning become so much more. Ironically, the Court's due process jurisprudence has also harmed the Fourteenth Amendment, leaving the Privileges or Immunities Clause in a dormant state because the function that would otherwise be served by that clause has instead been shunted to the Due Process Clause.

Most of the Bill of Rights has been incorporated against the states, always through the Due Process Clause.<sup>79</sup> The vast majority of those cases were decided by the Warren Court.<sup>80</sup> The Warren Court presided over the heyday of substantive due process, as the Court discovered new rights not mentioned in the constitutional text<sup>81</sup> and laid the foundation for more rights,<sup>82</sup> while dissenting Justices argued for still more rights.<sup>83</sup>

78. U.S. CONST. amend. XIV, § 1, cl. 3.

79. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (Fifth Amendment Double Jeopardy Clause); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (Sixth Amendment right to a jury trial); *Washington v. Texas*, 388 U.S. 14, 17–19 (1967) (Sixth Amendment right to compel witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment Confrontation Clause); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment right against cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (the exclusionary rule under the Fourth Amendment); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (First Amendment Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (First Amendment Free Exercise Clause); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (First Amendment right to assembly); *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931) (First Amendment Free Press Clause); *Gitlow v. New York*, 268 U.S. 652 (1925) (First Amendment Free Speech Clause); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (Fifth Amendment Takings Clause).

80. Of the fifteen cases spanning seventy-two years cited in note 79, nine of them were Warren Court decisions from only an eight-year period in the 1960s.

81. E.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding a right to privacy from penumbras in the Bill of Rights). It must be noted that in cases like *Griswold*, the Court found the locus of these new rights to be outside of the Fourteenth Amendment Due Process Clause. See *id.* at 481–86. But the reasoning in cases like *Griswold* laid the intellectual predicate for subsequent cases, and also incorporated these rights against actions of the states.

82. E.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Roe v. Wade*, 410 U.S. 113, 129 (1973).

83. E.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 588–89 (1972) (Marshall, J., dissenting) (arguing that if a person applies for a job with the government, the applicant is presumptively entitled to the job and therefore the government is required either to hire the applicant or to offer a valid reason for not hiring). Cf. *TRIBE*, *supra* note 6, at 1330 & n.41 (citing, *inter alia*, Erwin Chemerinsky, *Making the Right Case for a Constitutional Right to Minimal Entitlements*, 44 *MERCER L. REV.* 525, 538 (1993)).

The Due Process Clause declares that no person shall be deprived “of life, liberty, or property, without due process of law.”<sup>84</sup> The plain meaning of its text includes only process.<sup>85</sup> That procedural purpose has been the understanding of Due Process since its adoption.<sup>86</sup> As shown in Part IV.A.2, the debates surrounding its adoption provide no support for the proposition that it entails substantive rights, speaking instead of every person having procedural protections that must be satisfied before being deprived of life, liberty, or property.<sup>87</sup> Due Process was meant to secure nothing more.<sup>88</sup>

Nevertheless, the Court went beyond the process aspect of due process to find substantive rights implicit in the non-substantive term “due process.” The judiciary has indeed gone beyond simply finding substantive rights to develop substantive due process doctrine into one of the most powerful forces in American law. The substantive aspect of the Due Process Clause rivals—if not overshadows—its procedural aspect.<sup>89</sup>

The ascendance of substantive due process is the story of the rise and fall of *Lochner v. New York*,<sup>90</sup> where a 5–4 Court struck down a law limiting weekly work hours in bakeries to sixty hours.<sup>91</sup> Although acknowledging that states can codify public health policy in labor laws,<sup>92</sup> the Court found in the Due Process Clause an implied right to make employment contracts.<sup>93</sup> The Court found that this right overcame New York’s police power,<sup>94</sup> inaugurating a new era in which rights not expressly found in the Constitution could be used to invalidate state laws. This era was supposedly short-lived.<sup>95</sup>

In reality, the reasoning of *Lochner* subsequently resurfaced—although the Court has attempted to curb *Lochner*’s impact by saying that if an express constitutional provision can be the locus of a liberty interest, then courts must look to that provision, instead of substantive due process.<sup>96</sup> *Lochner*’s proposition of substantive due process can be found throughout the twentieth century. Most laypersons would

84. U.S. CONST. amend. XIV, § 1, cl. 3.

85. See TRIBE, *supra* note 6, at 1318; Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 24 (1998).

86. See generally HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 55–97 (1908).

87. See *id.* at 96.

88. But see generally Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 999–1005 (1990) (arguing that the original meaning of “due process” implicitly carried a substantive element).

89. Some believe that the power manifest in substantive due process has had deleterious effects on procedural due process as judges, finding their substantive due process power “pretty scary,” have concurrently narrowed procedural protections under the Due Process Clause. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 20 (1980); see also TRIBE, *supra* note 6, at 1318–19 & n.35.

90. 198 U.S. 45 (1905), *overruled in part by* *Day-Brite Lightning, Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Scrupa*, 372 U.S. 726 (1963).

91. *Id.* at 52, 64.

92. *Id.* at 53.

93. *Id.*

94. *Id.* at 57–58.

95. The Court abrogated *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage law), and expressly abandoned it in *Ferguson v. Skrupa*, 372 U.S. 726, 730–31 (1963) (upholding a Kansas statute regulating debt adjusting).

96. *Albright v. Oliver*, 510 U.S. 266, 273 (1994).

tell you that the idea of a constitutional right to abortion comes from *Roe v. Wade*.<sup>97</sup> A lawyer trying to explain that *Roe* is derived from *Griswold v. Connecticut*<sup>98</sup> may get a blank stare. A scholar going further by saying that *Roe*'s roots should be traced to footnote four in *Carolene Products*,<sup>99</sup> or *Lochner*,<sup>100</sup> will (unfortunately) receive a blank stare from some lawyers.<sup>101</sup>

But the true roots of modern activist decisions such as *Roe* or *Lawrence v. Texas*<sup>102</sup> predate *Lochner*. Without going as far back as *Dred Scott*,<sup>103</sup> as Robert Bork and Antonin Scalia do,<sup>104</sup> the origin of these controversial opinions may be the *Slaughter-House Cases*.<sup>105</sup> If the Privileges or Immunities Clause had not been seemingly emasculated by *Slaughter-House*,<sup>106</sup> then the Court would never have had to use another provision of the Fourteenth Amendment to apply federal rights of action to the states.<sup>107</sup>

However, the Court continued the *Lochner* legacy of substantive due process, developing a multi-tier framework to govern suits involving state burdens on protected rights. At the lower end of this framework is rational-basis review,<sup>108</sup> under which a law triggering the test is presumptively constitutional,<sup>109</sup> and is upheld so long as the law is rationally related to advancing any legitimate state interest.<sup>110</sup> At the higher end of the framework is strict scrutiny,<sup>111</sup> which often

97. 410 U.S. 113 (1973) (invalidating a Texas abortion restriction as violating a federal right).

98. 381 U.S. 479 (1965) (finding an implied fundamental right to privacy in the Bill of Rights).

99. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that burdens on constitutional rights might be subject to heightened scrutiny).

100. *Lochner v. New York*, 198 U.S. 45 (1905).

101. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939 (1973) (describing *Roe* as a resurgence of *Lochner*'s flawed methodology).

102. 539 U.S. 558 (2003) (finding an implied right to homosexual activity).

103. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857), (holding that the Constitution does not recognize African-Americans as citizens) *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

104. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (paperback ed. 1997); SCALIA, *supra* note 85, at 24 & n.31.

105. 83 U.S. 36 (1873).

106. As explained below, many argue that *Slaughter-House* rendered Privileges or Immunities impotent. See *infra* Part IV.C.

107. Cf. TRIBE, *supra* note 6, at 1319.

108. The rational-basis test finds its roots in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

109. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); see also *Carolene Prods.*, 304 U.S. at 152.

110. See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656–57 (1981). This is also the test applied under the Equal Protection Clause if the question presented does not entail a suspect or quasi-suspect class. *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). The rational-basis test is deferential, see *Lyng v. UAW*, 485 U.S. 360, 370 (1988) (referring to rational-basis review as “quite deferential”), where the state need not prove that its action will further the asserted interest, only that the legislature “rationally could have believed” that the action would do so. *W. & S. Life Ins.*, 451 U.S. at 672.

111. Heightened scrutiny, suggested in footnote four of *Carolene Products*, was acted upon in *Korematsu v. United States*, 323 U.S. 214 (1944), *conviction set aside by writ of coram nobis*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). In *Korematsu*, the Court ruled that laws restricting the rights of a single racial group are subject to “the most rigid scrutiny” and that wartime restrictions on such rights could only be upheld if “commensurate with the threatened danger.” *Id.* at 216, 220. The Court used this standard in upholding the internment of Japanese-Americans during World War II. *Id.* at 223–24. Although *Korematsu* does not cite *Carolene Products*, apparently it is the first post-*Carolene Products* Supreme Court case where heightened scrutiny was applied. At least some Justices subsequently marked this as the beginning of strict scrutiny. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 351

applies to fundamental rights,<sup>112</sup> under which a state action is presumptively unconstitutional,<sup>113</sup> and will only be upheld if narrowly tailored to achieve a compelling state interest.<sup>114</sup> The Court has subsequently developed a middle tier of intermediate scrutiny,<sup>115</sup> the test for which varies according to the type of legal challenge.<sup>116</sup>

This three-tier system is not as complete or reliable as one might hope. Some rights are subject to multiple levels of scrutiny depending on the type of burden imposed.<sup>117</sup> For others, the test varies based on the severity of the burden imposed.<sup>118</sup> Other rights do not fit into any of the three levels, having their own unique tests that appear ad hoc.<sup>119</sup> Moreover, occasionally when a given test is

(2003) (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part). However, the Court first used the term “strict scrutiny” in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that strict scrutiny is necessary under the Equal Protection Clause to avoid invidious discrimination).

112. See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (noting that government interference with fundamental rights triggers strict scrutiny).

113. See *United States v. Am. Library Ass’n*, 539 U.S. 194, 235 (2003) (stating that a government action burdening the Free Speech Clause is “presumptively invalid owing to strict scrutiny”); cf. *Davenport v. Wash. Educ. Ass’n*, 127 S. Ct. 2372, 2381 (2007) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

114. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (applying strict scrutiny to a racial-preference program).

115. Although intermediate scrutiny is often invoked in certain equal-protection matters, see *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.”), it also applies to certain due process claims. *E.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (applying intermediate scrutiny to content-neutral regulations on speech).

116. Intermediate scrutiny involving the Equal Protection Clause requires the challenged action to be substantially related to advancing important government interests. *Craig v. Boren*, 429 U.S. 190, 197 (1976). However, intermediate scrutiny is a higher hurdle when involved in free speech issues, where the challenged government action must be narrowly tailored (as opposed to merely being “substantially related”) to achieving a significant government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

It is unclear whether laws triggering intermediate scrutiny are presumptively valid or invalid. At least two cases seem to say that laws under this test are presumptively unconstitutional, because the burden is shifted to the party seeking to uphold the law (which presumably would be the government). *Heckler v. Mathews*, 465 U.S. 728, 744 (1984) (“[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing... that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982) (internal quotation marks omitted)).

117. For example, free speech is subject to at least five levels of scrutiny. Restrictions on speech that discriminate against a particular viewpoint are per se invalid. *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Regulations on content are subject to strict scrutiny. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). Content-neutral regulations are subject to intermediate scrutiny. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968). Speech in a limited public forum can be further restricted to conform to the forum’s intended purpose. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995). Finally, in a nonpublic forum, any restriction on speech is acceptable so long as it is reasonable. *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992).

118. For example, voting is a fundamental right. See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992). Severe burdens on voting are subject to strict scrutiny. *Id.* Burdens that are neither severe nor discriminatory need only be reasonable so long as the interest advanced is important. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1612 (2008) (citing *Burdick*, 504 U.S. at 433–34).

119. The clearest example of this is abortion. *Roe v. Wade* established its trimester framework for abortion that was sui generis in constitutional law. See 410 U.S. 113, 163–65 (1973). *Roe* suggested this trimester framework was a form of strict scrutiny, see *id.* at 155, 163, and some Justices subsequently equated the *Roe* test with strict scrutiny. *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 934 (1992) (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part). But in *Casey*, a fractured Court seemed to downgrade abortion to some form of lesser right, see *id.* at 925 & nn.1–2 (noting that the statutes upheld in *Casey* would not survive strict scrutiny); *id.* at 951–53, 966 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in judgment in part and dissenting in part) (denying there is any right to abortion but, if there were,

invoked, the results are so plainly irreconcilable with existing case law using that test, that the case appears to be a results-driven expedient.<sup>120</sup> The end result is that due process is attended by an exceptionally complex framework that is rife with internal tensions and inconsistencies.

### III. CONFUSION AND INCONSISTENCIES IN CURRENT INCORPORATION DOCTRINE

Yet this flawed due process jurisprudence is central to incorporation doctrine. Heretofore the Due Process Clause has been the sole vehicle for incorporating provisions of the Bill of Rights against state and local governments. This is a form of substantive due process, as the Court finds that certain liberty interests in the Bill of Rights are also substantive elements of the Due Process Clause.<sup>121</sup>

Perhaps no constitutional doctrine is more consequential in the lives of ordinary Americans than incorporation.<sup>122</sup> People speak their minds, practice their faith, and expect to be secure in their homes and persons with a full range of procedural safeguards to protect them if they find themselves in an unfortunate situation. While many federal rights have state analogs that might render them redundant, modern Americans derive comfort from going about their daily affairs under a panoply of federal protections.

Incorporation is the key to these protections. It concerns “the very nature of our Constitution,”<sup>123</sup> having “profound effects for all of us.”<sup>124</sup> The first time the Court was confronted with whether the Bill of Rights could be asserted against the states, in *Barron v. Mayor of Baltimore*, Chief Justice John Marshall labeled the question an issue “of great importance.”<sup>125</sup> And yet as Professor Akhil Amar notes,<sup>126</sup> the *Barron* Court’s decision to not apply the Bill of Rights against the states was perfectly defensible, especially in light of the fact that the Constitution already specified certain prohibitions on state action such as bills of attainder and ex post facto laws.<sup>127</sup> Indeed, Chief Justice Marshall had previously referred to Article I,

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it would be subject to rational-basis review), and jettisoned *Roe*’s trimester framework in favor of an “undue burden” test. *Id.* at 878–79 (plurality opinion).

120. For example, the Court found a Nebraska partial-birth abortion ban to be unconstitutional as an undue burden on abortion, *see Stenberg v. Carhart*, 530 U.S. 914, 929–30 (2000), but subsequently upheld a virtually identical federal partial-birth abortion ban, *see Gonzales v. Carhart*, 127 S. Ct. 1610, 1627 (2007).

121. Tracing the development of substantive due process is beyond the scope of this Article. The gradual evolution of this doctrine, from its beginnings in the mid-1800s to its full development in the 1900s, resulted from the case law development of the various clauses of Section 1 of the Fourteenth Amendment. *See* TRIBE, *supra* note 6, at 1332–43. By 1927, substantive due process had become sufficiently developed that Justice Brandeis noted that “it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.” *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

122. William Van Alstyne, *Forward* to MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* ix (1986) (opining that “it is difficult to imagine a more consequential subject”).

123. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 934 (1965).

124. *Id.*

125. 32 U.S. (7 Pet.) 243, 247 (1833).

126. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1199 (1992).

127. U.S. CONST. art. I, § 10.

Section 10, as a “bill of rights” against the states.<sup>128</sup> From the structure of Sections 9 and 10 of Article I, Marshall distills, as a rule of construction, that constitutional provisions specifically prohibiting “Congress” or “the United States” are solely federal,<sup>129</sup> while those beginning with words such as “no State shall” are applicable against the states,<sup>130</sup> and provisions that do not specify a level of government presumptively constrain only the federal government.<sup>131</sup> Regardless of whether this theory is correct, it shows that various theories concerning which federal rights are operable against the states were discussed early in American law.

Few dispute that some form of incorporation is necessary to America’s federal system.<sup>132</sup> Justice Holmes went so far as to say that he believed the constitutional system could survive without judicial review of federal action, but not without review of state action.<sup>133</sup> Years later, Justice Brennan wrote that he considered the Warren Court’s incorporation of various criminal procedure issues to be more important than its other landmark decisions,<sup>134</sup> which is quite a statement when one considers the impact of that Court on desegregation<sup>135</sup> and reapportionment.<sup>136</sup> Erwin Griswold went further, comparing the significance of the incorporation cases to *Marbury v. Madison* itself.<sup>137</sup>

The scope of the Bill of Rights had been long-settled before the Fourteenth Amendment altered the federalist framework. As mentioned above, the first time the Court considered whether the Bill of Rights applied to state or local government was *Barron v. Baltimore*, where the Court held that the Bill of Rights constrains only federal action, not state or local action,<sup>138</sup> a holding reaffirmed later that same year in *Livingston v. Moore*.<sup>139</sup> Having settled the basic demarcation of the Bill of Rights’ reach, the question becomes to what extent the Fourteenth Amendment redrew those lines. Part of that debate is what test the Court can employ to decide which rights are incorporated by the Fourteenth Amendment.

Most provisions of the Bill of Rights have been incorporated under varying tests,<sup>140</sup> with unpredictable results. Several provisions have not been incorporated.

128. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138–39 (1810).

129. *E.g.*, U.S. CONST. art. I, § 9, cl. 8 (“No title of nobility shall be granted by the United States....”).

130. *E.g.*, U.S. CONST. art. I, § 10, cl. 1 (“No state shall enter into any treaty, alliance, or confederation... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.”).

131. *See* Amar, *Fourteenth Amendment*, *supra* note 114, at 1198–99 & nn.23–28 (citing *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 248, 250 (1833)); THE FEDERALIST No. 83, at 503 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

132. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1134 (1991).

133. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295–96 (1920). While this does not directly speak to incorporation, it raises the principle of federal power constraining the actions of the states, which is the principal element of incorporation.

134. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U.L. REV. 535, 536 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 492–93 (1977).

135. *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

136. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

137. Erwin N. Griswold, *Due Process Problems Today in the United States*, in THE FOURTEENTH AMENDMENT 161, 164 (Bernard Schwartz ed., 1970).

138. 32 U.S. (7 Pet.) 243 (1833).

139. 32 U.S. (7 Pet.) 469, 552 (1833) (“[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states....”).

140. *See* sources cited *supra* note 79.

The Court has held that the Fifth Amendment right to only be tried for a felony after being indicted by a grand jury is not incorporated,<sup>141</sup> nor is the Seventh Amendment.<sup>142</sup> The Court has not held whether two Eighth Amendment provisions are incorporated: the Excessive Bail Clause<sup>143</sup> and the Excessive Fine Clause. Likewise, the Court has never held whether the Third Amendment is incorporated.<sup>144</sup>

Part III will explore current incorporation doctrine—such as it is—that the Supreme Court employs. Part III.A explains the two different theories on which rights are incorporated, and Part III.B explains the potentially conflicting tests for incorporation.

#### A. General Incorporation Through the Due Process Clause

To this day, all of the provisions in the Bill of Rights that have been applied against the states have been incorporated through the Due Process Clause.<sup>145</sup> Whether the entire Bill of Rights has been incorporated, or only parts of it, or whether there are implied constitutional rights that are incorporated, is, in some ways, an ongoing debate. Though a series of cases addresses this debate,<sup>146</sup> the issue is far from settled.<sup>147</sup>

The Supreme Court had incorporated five provisions of the Bill of Rights by 1947,<sup>148</sup> but never articulated a test for which constitutional provisions constrained state action until that year. There are two competing theories of incorporation, both articulated in *Adamson v. California*.<sup>149</sup> The first is the theory of total incorporation, where Justice Hugo Black argued, in an extraordinarily long dissent, that the Fourteenth Amendment was intended to incorporate the entire Bill of Rights against the states.<sup>150</sup> Justice Felix Frankfurter had an entirely different approach, select

141. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Hurtado v. California*, 110 U.S. 516, 538 (1884).

142. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916).

143. *See Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989). A plurality of the Court has suggested that this right might be incorporated. *See Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008) (plurality opinion of Roberts, C.J.).

144. The Third Amendment has been held incorporated by the Fourteenth Amendment by one federal appellate court. *See Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982). But the Supreme Court has never taken up the question.

145. The right under the Privileges or Immunities Clause to immediately receive full benefits of state citizenship upon taking up residence in a state, *see Saenz v. Roe*, 526 U.S. 489, 499–500, 503 (1999), is not an enumerated provision in the Bill of Rights. Therefore, although it involves applying a federal right to the states, *Saenz* is not an incorporation case.

146. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 162–71 (1968) (Black, J., concurring).

147. The issue is certainly settled in the sense that the long line of incorporation cases show that the concept of incorporating federal rights is settled precedent. However, applying the Bill of Rights to the states remains unsettled in the sense that, as shown throughout Part III: (1) the Court has shifted between various tests on incorporation, (2) the Court has never adopted a coherent theory governing incorporation, (3) the Court has never definitively repudiated the reasoning underlying the concept of incorporating the Bill of Rights *in toto*, and (4) as shown in Part IV, the Court has not closed the door on using the Privileges or Immunities Clause to apply the Bill of Rights to the states.

148. *See supra* note 79. Four of these clauses were First Amendment provisions, and another was the Takings Clause.

149. 332 U.S. 46 (1947).

150. *Id.* at 68–123 (Black, J., dissenting); *see also* HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 34–42 (1968). The total-incorporation theory continues to find support today. *See generally, e.g.,* Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation*

incorporation, under which the Fourteenth Amendment was intended to incorporate certain rights against the states, which may include some found in the Bill of Rights but is not necessarily limited to those enumerated rights.<sup>151</sup> Justice Brennan later refined this approach to argue that the Fourteenth Amendment incorporated only fundamental rights, and that each Bill of Rights provision must be scrutinized for fundamentality.<sup>152</sup> Although never repudiating Black, in each incorporation case the Court followed an approach similar to Frankfurter's—that the Fourteenth Amendment addresses matters that are “fundamental to the pursuit of justice”<sup>153</sup> and “essential to ‘a fair and enlightened system of justice.’”<sup>154</sup>

### B. *The Conflicting and Uncertain Tests for Incorporation*

The greatest problem with incorporation doctrine is that, strictly speaking, there is no doctrine. Incorporation jurisprudence is a collection of disjointed cases, not a cogent narrative. The Court has never adopted a unifying theory that governs incorporation.<sup>155</sup> Rather, incorporation gives every appearance of ad hoc decision making.

For over two decades the Court used no test in incorporating rights. Early cases used verbiage such as referring to the right in question as “among the fundamental

*of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000).

151. *Adamson*, 332 U.S. at 59–68 (Frankfurter, J., concurring); see also Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

152. See *Cohen v. Hurley*, 366 U.S. 117, 154–60 (1961) (Brennan, J., dissenting). While some label this a third position splitting the difference between Black and Frankfurter, see, e.g., Amar, *Fourteenth Amendment*, *supra* note 126, at 1196, it is instead a refined version of Frankfurter's selective-incorporation model.

153. *Adamson*, 332 U.S. at 62 (Frankfurter, J., concurring).

154. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). It should be noted that the Establishment Clause is an anomaly to this incorporation approach, which is not surprising because the Court's opinion incorporating that clause, *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), was written by the apologist for total incorporation, Justice Black, and was handed down the same year as *Adamson*.

This anomaly should be noted because it has ramifications for incorporating the Second Amendment. The strongest argument against incorporating the Second Amendment would be that it is a federalism provision, an argument that Justice Scalia has suggested he might find persuasive. See Antonin Scalia, *Response*, in SCALIA, *supra* note 85, at 137 n.13.

The Establishment Clause was intended as such a federalism provision. *Everson* gives no historical or legal rationale for incorporating that clause. Justice Black only cites one case in support. 330 U.S. at 8 (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)). However, *Murdock* was a case involving the Free Exercise Clause, not the Establishment Clause. 319 U.S. at 108–09, 114. *Murdock* was therefore overbroad in its statement that the First Amendment is incorporated, see *id.* at 108, as it was not true to that date vis-à-vis the Establishment Clause. Such a general statement is hardly a compelling rationale for incorporating the Establishment Clause. The evidence against incorporating the Establishment Clause has been noted both by members of the Court and also by scholars. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in judgment); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, J.J., dissenting); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1873 (1833); Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 258 (2008); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436–37 (1990).

This Establishment Clause anomaly should not impede incorporating the Second Amendment. There is ample support for incorporating the Second Amendment, as shown in the remainder of this Article. As the Framers of the Fourteenth Amendment contemplated the right to bear arms but did not so contemplate the Establishment Clause, the evidence that the Establishment Clause was intended as a federalism provision does not provide a rationale for refusing to incorporate the Second Amendment.

155. Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 CONST. COMM. 701, 716 (2000).

personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States,”<sup>156</sup> or “essential to the nature of a free state.”<sup>157</sup> Thus the post-*Adamson* incorporation period began with no clear test for incorporation.

When the Court has used a test, it has meandered between at least three. Each is a test for fundamentality, as the Court has only incorporated fundamental rights. The first test often invoked, from *Palko v. Connecticut*, is whether the right in question is “implicit in the concept of ordered liberty.”<sup>158</sup> Another, from *Moore v. East Cleveland*, is whether the right in question is deeply rooted in the history and traditions of the American people.<sup>159</sup> Both of these were invoked together as a two-part test in *Washington v. Glucksberg*.<sup>160</sup>

But in one of the most recent cases, *Duncan v. Louisiana*,<sup>161</sup> the test shifted. The Court in *Duncan* first used the test of whether the right in question is “fundamental to the American scheme of justice,”<sup>162</sup> restated in a footnote as whether a criminal procedure in question “is necessary to an Anglo-American regime of ordered liberty.”<sup>163</sup> Because the issue in *Duncan* was a criminal procedural question and the footnoted test specifically mentioned procedures, it is possible that the *Duncan* test for incorporation could be limited to criminal procedure. The law is unclear. In the only post-*Duncan* case where the Court has incorporated a Bill of Rights provision,<sup>164</sup> the Court invoked *Duncan* as the rule.<sup>165</sup> But that case was also a criminal procedure case,<sup>166</sup> so the question remains as to whether criminal procedural matters are subject to a different test, or whether *Duncan* has replaced the *Palko* test. If it did, however, then why did the 1997 *Glucksberg* case invoke the earlier *Palko* test from 1937, conjoined with the *Moore* test from 1977, instead of the *Duncan* test from 1968?<sup>167</sup> If *Duncan* supplanted *Palko*, then *Glucksberg* should

156. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause while upholding a statute criminalizing advocacy of overthrowing the government). It can be argued that this part of *Gitlow* is dictum, in which case free speech was incorporated in *Stromberg v. California*, 283 U.S. 359, 368 (1931).

157. *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*151 (1765)) (incorporating the Free Press Clause to invalidate a Minnesota nuisance statute as applied to newspaper allegations of politicians associating with gangsters).

158. 302 U.S. 319, 325–26 (1937).

159. 431 U.S. 494, 503 (1977) (plurality opinion).

160. 521 U.S. 702, 721 (1997) (holding that there is no right to assisted suicide). It should be noted that *Glucksberg* was a case involving implied fundamental rights, not incorporation. However, the Court has to this point only incorporated fundamental rights, so the question remains the same.

161. 391 U.S. 145, 149 (1968) (incorporating the Sixth Amendment right to a jury trial).

162. *Id.*

163. *Id.* at 149 n.14.

164. *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the Double Jeopardy Clause).

165. *Id.* at 794.

166. *Id.*

167. Two items of note: first, *Benton* holds that “Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.” *Id.* But the only necessary inconsistency is with *Palko*’s holding that the Double Jeopardy Clause is not incorporated. *Palko v. Connecticut*, 302 U.S. 319, 322 (1937). But could it be that the Court also intended to replace the *Palko* test, finding that test inconsistent? *Benton* is unclear.

Adding still more confusion to the situation, the Ninth Circuit decision referenced in note 11 that came down as this Article was in final editing cites *Duncan*, *Moore*, and *Glucksberg*. See *Nordyke v. King*, 563 F.3d 439, 450 (9th Cir. 2009). This panel reasons that *Duncan* replaced *Palko*, *id.* at 449, 450 n.9, but does nothing to explain why, if *Duncan* did in fact replace *Palko*, *Glucksberg* uses *Palko* instead of *Duncan*. All this reinforces my primary contention that current incorporation doctrine is disjointed, inconsistent, and confusing, and should be reexamined by the Supreme Court.

have applied *Duncan*, instead of *Palko*. Some may contend that there is in fact only one incorporation test, and that these are merely varying articulations of it.<sup>168</sup> But while some may speculate, the Supreme Court is silent, and therefore so is the law.

#### IV. INCORPORATING THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE IS PREFERABLE TO INCORPORATING THROUGH THE DUE PROCESS CLAUSE

As a general rule, incorporating provisions of the Bill of Rights through the Privileges or Immunities Clause is preferable to incorporating through the Due Process Clause. While various legal protections apply to the states through Due Process or Equal Protection, the meaning of “privileges or immunities” and the history of the Fourteenth Amendment make the Privileges or Immunities Clause the ideal vehicle for incorporation.

The Reagan Justice Department examined the original meaning of the Clause in a 1987 report.<sup>169</sup> This report found that the “privileges” referenced in the Clause are likely privileges held by American citizens as a result of their national citizenship, and are not held by natural persons who are not American citizens.<sup>170</sup> The report also found that the privileges or immunities referenced in the Clause could refer to the rights enforceable against the federal government from the Bill of Rights.<sup>171</sup> The report also noted a competing theory that the privileges or immunities in the Clause are natural rights or common law rights that are not originally derived from the constitutional text.<sup>172</sup> This position surely comes in part from Justice Washington’s commentary when riding circuit in *Corfield v. Coryell*, where he wrote, pre-Fourteenth Amendment, that the Constitution protected “those privileges and immunities that are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.”<sup>173</sup>

Some believe, perhaps by selectively adopting parts of the second theory just mentioned, that the Clause should be used for finding and constitutionalizing new, unenumerated rights,<sup>174</sup> such as the right to privacy.<sup>175</sup> Seeing how that has already been accomplished through substantive due process (attended by a great deal of controversy), and that some jurists are quick to assert that this merely facilitates constitutionalizing personal preferences,<sup>176</sup> a vastly preferable course is to use

168. *But see Nordyke*, 563 F.3d at 449, 450 n.9; Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 195 (2008); Lund, *Past and Future*, *supra* note 9, at 53 (arguing that *Duncan* likely replaced the *Palko* test).

169. OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GEN., WRONG TURNS ON THE ROAD TO JUDICIAL ACTIVISM: THE NINTH AMENDMENT AND PRIVILEGES OR IMMUNITIES CLAUSE 28–31 (1987) [hereinafter OFFICE OF LEGAL POL’Y].

170. *Id.* at 28–29 & nn.103–04 (citing AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed., 1828)).

171. *Id.* at 30.

172. *Id.* at 31.

173. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (opinion of Washington, J.) (dictum).

174. ELY, *supra* note 89, at 28.

175. Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, 1972 WASH. U. L.Q. 405, 419.

176. *E.g.*, *Silveira v. Lockyer*, 328 F.3d 567, 568–69 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

Privileges or Immunities to incorporate a right that the Constitution does in fact secure.

Probably concerned with avoiding such runaway results, Justice Thomas, with Chief Justice Rehnquist, cautioned that before the Court reanimates the Privileges or Immunities Clause, “we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant.”<sup>177</sup> Therefore Part IV will demonstrate that the Privileges or Immunities Clause was originally concerned with incorporating rights against the states, and can still do so. Parts IV.A & B explain the adoption of the Clause along with the rest of the Fourteenth Amendment, proving that the Clause was clearly intended and designed to incorporate rights. Part IV.C then shows how this can be done without overturning precedent, including the *Slaughter-House Cases*, and Part IV.D shows how such an outcome would be consistent with recent legal developments.

#### A. Development of the Privileges or Immunities Clause

It is undisputed that the Privileges or Immunities Clause was intended to incorporate certain rights against the states; although there is debate over which rights it incorporated, and whether some or all of those rights are contained in the Bill of Rights.

##### 1. The Article IV Privileges and Immunities Clause

For the reasons set forth below, it is impossible to understand the Privileges or Immunities Clause of the Fourteenth Amendment without a basic understanding of the Privileges and Immunities Clause of Article IV. That provision reads, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>178</sup>

There are two competing views of the Privileges and Immunities Clause of Article IV.<sup>179</sup> The first view is a Lockean, natural-law understanding that employs language that foreshadows verbiage later used by the Court to identify fundamental rights.<sup>180</sup> This language designating fundamentality is also of a type used in incorporating provisions of the Bill of Rights through the Due Process Clause.<sup>181</sup> This natural-rights view had many adherents among the Framers of the Fourteenth Amendment.<sup>182</sup>

The Privileges and Immunities Clause in the Constitution is a streamlined version of a similar clause in the Articles of Confederation.<sup>183</sup> The Articles of Confederation used expansive language in guaranteeing privileges and immunities, stating in part:

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177. *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., and Rehnquist, C.J., dissenting). Prior to *Saenz*, the Clause was long considered a “dead letter.” See, e.g., Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 144 (1949).

178. U.S. CONST. art. IV, § 2, cl. 1.

179. See TRIBE, *supra* note 6, at 1295.

180. See *infra* Part IV.B.1. See generally Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995).

181. See *supra* Part III.B.

182. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 74–75, 78–83 (1993).

183. See OFFICE OF LEGAL POL’Y, *supra* note 169, at 32.

The better to secure and perpetuate mutual friendship . . . among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce. . . .<sup>184</sup>

It was therefore intended to foster comity between the citizens of the various newly-minted states.<sup>185</sup> Charles Pinckney, who proposed the Article IV Privileges and Immunities Clause, stated during the Constitutional Convention that the Article IV language was modeled on the language from the Articles of Confederation.<sup>186</sup>

This opinion was also held by other Framers. So important was building rapport between the former colonies and facilitating their embrace of each other that Alexander Hamilton referred to the Privileges and Immunities Clause as “the basis of the union.”<sup>187</sup> This “comity-based construction” is a competing view of the Clause.<sup>188</sup>

The Privileges and Immunities Clause subsequently developed into a form of equal-rights guarantee, whereby the citizens of one state traveling in another state are on equal footing with the citizens of that second state.<sup>189</sup> The Court explains that the Clause secures “to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy,”<sup>190</sup> so long as the right at issue is “basic” or “fundamental.”<sup>191</sup>

Some argue that this equal-protection reading is likewise the proper understanding of the Privileges or Immunities Clause.<sup>192</sup> However, that argument proves too much in that it would render the Equal Protection Clause unnecessary and without effect.<sup>193</sup> Therefore this reading must be rejected.

Even during the antebellum constitutional period, some authorities suggested Second Amendment rights should be constitutionally enforceable against the states through Article IV Privileges and Immunities. For example, Justice Washington advocates that the Clause refers to “fundamental” privileges and immunities,<sup>194</sup>

184. ARTICLES OF CONFEDERATION, art. IV, § 1 (U.S. 1777).

185. OFFICE OF LEGAL POL’Y, *supra* note 169, at 32 (noting that this provision is sometimes referred to as the Comity Clause).

186. *Id.* at 33 & n.114 (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (Max Farrand ed., 1911)).

187. THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

188. TRIBE, *supra* note 6, at 1295.

189. Wildenthal, *supra* note 150, at 1085–86.

190. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); *accord Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); *see also Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 279–80 (1985); *Austin v. New Hampshire*, 420 U.S. 656, 660–61 (1975).

191. *See, e.g., Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 387–88 (1978) (holding that the Privileges and Immunities Clause applies to rights that are “fundamental” or “basic to the maintenance or well-being of the Union”).

192. *See, e.g., John Harrison, Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1390 & n.15 (1992).

193. *Cf. infra* Part IV.B.2.

194. This language is quite similar to language the Court uses when incorporating fundamental rights through the Due Process Clause. *See supra* Part III.B.

including as a protected liberty, citizens being able to “obtain happiness and safety.”<sup>195</sup> The possession of arms is an effective means to secure such safety.

Taken alone, the Article IV Privileges and Immunities Clause seems insufficient to incorporate the Second Amendment. However, building on that foundation, the Fourteenth Amendment augmented Article IV to directly curtail state action.

## 2. Creation of the Fourteenth Amendment

The Fourteenth Amendment was passed in the aftermath of the Civil War. Though the Thirteenth Amendment had abolished slavery, there was debate over whether it could compel the states to treat the newly-freed blacks as anything other than slaves, denying them the rights of free people. While some disagree on exactly what rights are incorporated against the states through exactly what clause, the Fourteenth Amendment was intended to incorporate federal rights against the states. The Fourteenth Amendment was originally proposed in separate sections of the Civil Rights Bill, not as a constitutional amendment.<sup>196</sup> But as shown below, it soon became apparent that only a constitutional amendment could accomplish the desired result.

### a. Events Leading to the Proposal of the Fourteenth Amendment

Slavery was abolished in the United States when the Thirteenth Amendment was adopted in 1865,<sup>197</sup> but that was only the beginning of reintegrating the former slave states. On December 4, 1865, the first postwar Congress convened, and considered forming a joint committee of fifteen members to “inquire into the condition of the States which formed the so-called confederate States of America, and report whether they or any of them are entitled to be represented in either House of Congress.”<sup>198</sup> On December 13, 1865, the Joint Committee on Reconstruction was created,<sup>199</sup> comprised of nine representatives and six senators.<sup>200</sup> Its primary function was to examine whether the states that had seceded were entitled to congressional delegations,<sup>201</sup> though its activities were not limited to that question. It first proposed the Freedmen’s Bureau Bill, section 7 of which authorized the military occupation of Southern states under presidential authority, to be implemented by the War Department, to protect and enforce the civil rights of former slaves.<sup>202</sup>

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195. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (opinion of Washington, J.) (dictum).

196. FLACK, *supra* note 86, at 55. There were several versions of the Civil Rights Bill. The final version used language mirroring the Fourteenth Amendment. *See* Act of Apr. 9, 1866, ch. 31, 14 Stat. 27–30 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (2006)).

197. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”). Secretary of State William Seward announced the Thirteenth Amendment had been ratified on Dec. 18, 1865. 2 ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 648 (1935).

198. CONG. GLOBE, 39th Cong., 1st Sess. 6 (1865).

199. *Id.* at 30, 46–47.

200. *Id.* This committee was also known as the Committee of Fifteen or the Reconstruction Committee. FLACK, *supra* note 86, at 60.

201. MCLAUGHLIN, *supra* note 197, at 648.

202. CONG. GLOBE, 39th Cong., 1st Sess. 209–10 (1866).

Then on January 5, 1866, Senator Lyman Trumbull introduced the Civil Rights Bill to secure citizens' rights for freed blacks,<sup>203</sup> augmenting the Freedmen's Bureau Bill. Although the two bills had many similar provisions,<sup>204</sup> the Freedmen's Bureau Bill only applied to the former Confederate States, and only until those states were considered fully restored, while the Civil Rights Bill would permanently apply to every state in the country.<sup>205</sup> On January 11, 1866, these bills were referred to the Senate Judiciary Committee,<sup>206</sup> where Senator Trumbull was chairman.<sup>207</sup> Many at that time considered these measures unconstitutional,<sup>208</sup> to which others replied that Section 2 of the Thirteenth Amendment<sup>209</sup> gave Congress the power to pass any laws that would end discrimination and ensure that former slaves enjoyed full rights.<sup>210</sup>

The first Civil Rights Bill was vetoed by President Andrew Johnson on February 19, 1866, because he considered it unconstitutional.<sup>211</sup> Another objection was that it left "civil rights" undefined.<sup>212</sup> The record suggests that civil rights did not include political rights<sup>213</sup> (such as voting, which would explain why the Fifteenth Amendment would later be required specifically for voting rights), but did include natural rights.<sup>214</sup> Others also considered the bill unconstitutional,<sup>215</sup> and voted against it for that reason even though they supported its policy goals.<sup>216</sup> One historian asserts that those voting against it for this reason included many who were accounted the most able members of Congress.<sup>217</sup>

A second version of the bill was also vetoed, but Congress overrode that veto.<sup>218</sup> Thus the Civil Rights Act became law on April 9, 1866.<sup>219</sup> But concerns over the statute's constitutionality remained, as the legislation went beyond the textual mandate of any constitutional provision (as the Supreme Court later defined the limits of the Thirteenth Amendment).<sup>220</sup> While the Freedmen's Bureau Bill could

203. *Id.* at 129 (introducing S. No. 60 & S. No. 61).

204. FLACK, *supra* note 86, at 32.

205. *Id.*

206. CONG. GLOBE, 39th Cong., 1st Sess. 184 (1866).

207. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 7 (1949). While cited for historical content, please note that, as shown in Part V, *infra*, Fairman's core thesis is incorrect.

208. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 415–19 (statement of Sen. Davis); *see also* MCLAUGHLIN, *supra* note 197, at 654.

209. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

210. CONG. GLOBE, 39th Cong., 1st Sess. 321–23 (statement of Sen. Trumbull).

211. *Id.* at 915–17 (veto message of President Johnson).

212. *Id.* at 916.

213. *See* CONG. GLOBE, 39th Cong., 1st Sess. 476 (statement of Sen. Trumbull); *id.* at 1151 (statement of Rep. Thayer); *id.* at 1157 (statement of Rep. Thornton).

214. *See id.* at 1117–18 (statement of Rep. Wilson).

215. *See, e.g., id.* at 600–01 (statement of Sen. Guthrie); *id.* at 604–05 (statement of Sen. McDougall).

216. *See* FLACK, *supra* note 86, at 29–34.

217. *Id.* at 40. That assertion is of course subjective. Historical accounts of that era may lead others to different results. *See generally* ERIC FONER, RECONSTRUCTION 1863–1877: AMERICA'S UNFINISHED REVOLUTION (1989); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869 (1974).

218. FLACK, *supra* note 86, at 18.

219. Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (2006)).

220. *See* The Civil Rights Cases, 109 U.S. 3, 20–23 (1883) (holding that the Thirteenth Amendment's effect was limited to eliminating the badges and incidents of slavery).

be justified as a wartime measure because it was temporary and applied solely to the states formerly in rebellion, and was thus predicated on Article I's anti-insurrection provision,<sup>221</sup> the permanence and national scope of the Civil Rights Act required additional constitutional justification.<sup>222</sup>

b. The Adoption of the Fourteenth Amendment

A constitutional amendment was required.<sup>223</sup> Professor Amar notes that during the 1860s when the Civil Rights Act and the Fourteenth Amendment were considered, many in Congress were unaware that the Court had held that the Bill of Rights does not constrain the states.<sup>224</sup> This explains why *Barron* was mentioned in the debates relating to the adoption of the Fourteenth Amendment, as supporters of the proposed amendment explained its necessity.<sup>225</sup>

The Fourteenth Amendment was the work product of many members of Congress.<sup>226</sup> Congressman John Bingham was the principal author of its first section.<sup>227</sup> Bingham, from Ohio, was considered one of the finest constitutional lawyers in the House of the 39th Congress,<sup>228</sup> and introduced what would become Section 1 of the Amendment.<sup>229</sup> This is significant in looking to Bingham's comments and intentions for Section 1, because although there are competing claims to the authorship of other parts of the Amendment,<sup>230</sup> there is no dispute over Section 1.<sup>231</sup> Bingham was among those who voted against the Civil Rights Bill because he considered it unconstitutional, despite supporting its provisions.<sup>232</sup>

When President Andrew Johnson vetoed the Civil Rights Act of 1866, he stated that he did so in part because it was beyond the power of the federal government to enact such a statute.<sup>233</sup> Some members of Congress had not considered the legislation's unconstitutionality, erroneously believing that the Bill of Rights already applied to the states.<sup>234</sup> The members who did understand the impact of *Barron* therefore decided that a constitutional amendment was needed to effectuate the purposes of Reconstruction. Bingham explained that Congress's lack of authority to protect civil rights "makes plain the necessity of adopting this amendment."<sup>235</sup>

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221. U.S. CONST. art. I, § 8, cl. 15.

222. See Fairman, *supra* note 207, at 8.

223. McLAUGHLIN, *supra* note 197, at 655.

224. Amar, *Fourteenth Amendment*, *supra* note 126, at 1205.

225. E.g., CONG. GLOBE, 39th Cong., 1st Sess. 84 app. (1871) (statement of Rep. Bingham) (explaining how *Barron* had influenced his choice of diction in drafting the Fourteenth Amendment in 1866).

226. FLACK, *supra* note 86, at 55.

227. Amar, *Fourteenth Amendment*, *supra* note 126, at 1233.

228. FLACK, *supra* note 86, at 68.

229. *Id.* at 70.

230. *Id.* at 69–71.

231. *Id.*

232. *Id.* at 35. In fact, Bingham went further than most, as he considered political rights such as voting to fall under the aegis of civil rights, and thought suffrage should be secured under that heading by the Fourteenth Amendment and appropriate legislation. *Id.* at 31.

233. CONG. GLOBE, 39th Cong., 1st Sess. 916 (1866) (veto message of Pres. Johnson).

234. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 193 (2004).

235. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

The Fourteenth Amendment was introduced on the same day in both congressional chambers on February 13, 1866.<sup>236</sup> Bingham explained what he designed Section 1 to address when it was introduced in the House: “Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution.”<sup>237</sup> The Amendment was passed by Congress on June 13, 1866.<sup>238</sup>

The Fourteenth Amendment overruled *Dred Scott*,<sup>239</sup> but the debate over the Fourteenth Amendment was not about citizenship per se. *Dred Scott* held that blacks were not citizens,<sup>240</sup> and was expressly overruled in the Fourteenth Amendment’s Citizenship Clause.<sup>241</sup> But although citizenship was debated in 1866,<sup>242</sup> the record of the Amendment’s adoption does not focus on whether blacks were citizens.<sup>243</sup> The arguments instead primarily concerned the rights of such citizenship, and separately, due process and equality for all persons.

Critical to this Article’s thesis is the stark distinction maintained throughout the adoption of the Fourteenth Amendment between the Privileges or Immunities Clause and the Due Process Clause. In each of the versions of the Fourteenth Amendment considered in Congress, there were always two classes of persons.<sup>244</sup> There were always references to the legal entitlements held by citizens, in contradistinction to rights of due process and equal protection that extended to all persons, whether citizens or not.<sup>245</sup> Such a reading of the Fourteenth Amendment is further supported by the common nineteenth-century distinction between the rights of citizens versus non-citizens.<sup>246</sup>

### B. Privileges or Immunities Versus Due Process

One of the four provisions in Section 1 of the Fourteenth Amendment is the Privileges or Immunities Clause,<sup>247</sup> while another is the Due Process Clause.<sup>248</sup> Entire classes in law school are solely concerned with the rules, statutes, and doctrines based on the Due Process Clause. Every Bill of Rights provision that has been incorporated thus far has been incorporated through the Due Process Clause.

Nevertheless, Privileges or Immunities is a far better vehicle for the incorporation of some—if not all—federal rights. Michael Kent Curtis even argues that the Clause

236. *Id.* at 806 (introducing S. Res. 30 in the Senate); *id.* at 813 (introducing H.R. 63 in the House).

237. *Id.* at 1034 (statement of Rep. Bingham).

238. MCLAUGHLIN, *supra* note 197, at 655.

239. TRIBE, *supra* note 6, at 1298.

240. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 587 (1857).

241. U.S. CONST. amend. XIV, § 1, cl. 1.

242. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088, 1153, 1266, 1757, 1832–33 (1866) (statements of Reps. Woodbridge, Thayer, and Raymond, Sens. Trumbull and Lawrence).

243. FLACK, *supra* note 86, at 71, 73. *But see* Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 308–16 (2000) (arguing that the Citizenship Clause was intended as a font of many federal rights and that the congressional debates largely centered on citizenship).

244. FLACK, *supra* note 86, at 63.

245. *Id.*

246. Harrison, *supra* note 192, at 1390 & n.15 (referencing various examples).

247. U.S. CONST. amend. XIV, § 1, cl. 2.

248. U.S. CONST. amend. XIV, § 1, cl. 3.

was a congressional attempt to “correct” what some considered the mistake in *Barron v. Baltimore*, restoring what they considered the proper constitutional effect of compelling states to uphold constitutional rights.<sup>249</sup> But if contemplating the Due Process Clause is like drinking at the end of a fire hose because of its voluminous case law, then considering the Privileges or Immunities Clause is like squeezing water from a desert cactus. There is much less material to consider, making it more difficult to interpret.

But that does not mean that examining Privileges or Immunities and comparing it to Due Process is unhelpful. Both clauses were written into the Fourteenth Amendment for a reason, and both have distinct meaning. That meaning may have been obfuscated by current incorporation doctrine, but that does not erase it, or even make it hard to find.

There is no persuasive reason why the Second Amendment—or any Bill of Rights provision—should as a normative matter be incorporated through the Due Process Clause instead of the Privileges or Immunities Clause. Professor Nelson Lund seems puzzled that, though he expects academic disdain toward the Second Amendment to result from the self-evident hostility many professors have toward guns, the same explanation would not apply to exploring Privileges or Immunities in that there is no antipathy to that provision in the academy.<sup>250</sup> He hypothesizes that exploring Due Process instead of Privileges or Immunities stems from the professoriate thinking that it is “more fun to spend one’s time coming up with arguments and theories that explain why the Constitution should be interpreted to produce what we’re sure would be a better world than to figure out what its makers meant by what they said.”<sup>251</sup>

Perhaps the reality may be more cynical than even Professor Lund allows. By their very text, the Privileges or Immunities Clause applies only to citizens, while the Due Process Clause applies to every human being.<sup>252</sup> Perhaps some believe that there are no rights that should be limited to American citizens; any right good enough for an American is good enough for every human being.<sup>253</sup> Hence, constitutional rights should be incorporated through the Due Process Clause so that they apply to all persons, not just Americans.

However, this view is incongruent with distinctions made between citizens and non-citizens since the Framing. Denying certain privileges to persons who are not citizens in no way degrades them or devalues their worth. Equal under the law does not always mean identical. The Supreme Court has long recognized the difference between the rights of citizens versus non-citizens. As the Court said in *Johnson v. Eisentrager*:

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249. Book Note, *A Radical Intent*, 101 HARV. L. REV. 869, 870 (1988) (reviewing CURTIS, *supra* note 122).

250. Lund, *Outsider Voices*, *supra* note 155, at 717.

251. *Id.*

252. Compare U.S. CONST. amend. XIV, cl. 2, with U.S. CONST. amend. XIV, cl. 3.

253. For example, Professor Louis Henkin posits that “the provisions of the Bill of Rights are not rights of citizens only but are enjoyed by non-citizens as well.” Louis Henkin, “*Selective Incorporation*” in *the Fourteenth Amendment*, 73 YALE L.J. 74, 78 n.16 (1963).

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society....

But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction, that gave the Judiciary power to act.<sup>254</sup>

Thus, non-citizens' enjoyment of some rights is directly correlated to the extent of their identification with the American nation, and the Supreme Court emphasizes that non-citizens' presence on American soil is a *sine qua non* of the judiciary even having jurisdiction to enforce rights for non-citizens.<sup>255</sup> Yet current incorporation doctrine does not recognize this distinction. Nowhere in Fourteenth Amendment jurisprudence is such a principle evident.

Herein lies the key to incorporation. An explication of the Privileges or Immunities Clause illuminates this distinction.

### 1. The Meaning of "Privileges or Immunities"

Begin with definitions. While perhaps no phrase is used more often in law than "due process," few people of any profession use "privileges or immunities." However, "privileges or immunities" had a discernable meaning in 1866 when it was proposed.

At the time the Fourteenth Amendment was adopted, the words "privileges" and "immunities" were defined in dictionaries as rights and freedoms.<sup>256</sup> This is also true in modern dictionaries.<sup>257</sup> It was also true long before the Fourteenth Amendment. In his *Commentaries*, Blackstone equates "privileges" and "immunities" with rights.<sup>258</sup>

The Framers' statements further define the terms. Senator Jacob Howard, during the congressional debates, said:

Such is the character of the privileges or immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press;...*the right to keep and bear arms*....

254. *Johnson v. Eisentrager*, 339 U.S. 763, 770–71 (1950).

255. *But see Boumediene v. Bush*, 128 S. Ct. 2229, 2262, 2275 (2008) (holding that the writ of habeas corpus extends to non-citizens held by the U.S. military as enemy combatants at Guantanamo Bay, Cuba). Although the Court engages in a lengthy discussion to argue that U.S. control is so comprehensive in Guantanamo Bay that it amounts to "de facto sovereignty" (in contradistinction to "de jure sovereignty") in an attempt to distinguish *Boumediene* from *Eisentrager*, *see id.* at 2257–62, this analysis is so strained that it appears untenable. *Id.* at 2298–2299 & n.3, 2300–02 (Scalia, J., dissenting). If *Eisentrager* cannot be distinguished, then to the extent that it is inconsistent with *Boumediene*, *Eisentrager* has been overruled *sub silentio* (or abrogated at the very least), creating doubt as to the precedential value of the *Eisentrager* passage quoted above.

256. Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, 19 HARV. J.L. & PUB. POL'Y 443, 444 (1995).

257. *Id.* at 444 n.9 (citing 12 OXFORD ENGLISH DICTIONARY 522, 691 (2d ed. 1989)).

258. *See* 1 BLACKSTONE, *supra* note 157, at \*127–45.

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by...the first eight amendments of the Constitution....<sup>259</sup>

According to Howard, while the full list is difficult to determine, it minimally includes the Bill of Rights. And the Amendment's supporters argued that their opponents' goal was to prevent protections from the first eight amendments from being extended to constrain state and local action.<sup>260</sup>

The Clause could have been meant to incorporate rights in addition to those found in the Bill of Rights, which would explain why a broad phrase like "privileges or immunities" would be used instead of the term "Bill of Rights."<sup>261</sup> This would leave to future courts or Congresses the task of exposing those rights.<sup>262</sup> Some courts at the time held this view,<sup>263</sup> concluding that "The clause is best seen...as incorporating the Bill of Rights against state governments without implying the exclusivity of that set of guarantees."<sup>264</sup>

In the *Slaughter-House Cases* (explored below in Part IV.C), the Court states that the rights comprising the privileges or immunities of citizens are "more tedious than difficult to enumerate."<sup>265</sup> But to give some idea, the Court quotes *Corfield* to list:

They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless, to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through, or to reside in, any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions that are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental.<sup>266</sup>

The *Slaughter-House* Court also stated that "rights which are fundamental...have always been held to be in the class of rights which the State governments were created to establish and secure."<sup>267</sup> The Court distinguished such rights from the "privileges or immunities of citizens," which are those "belonging to a citizen of the United States as such."<sup>268</sup> However, it does not necessarily follow that fundamental

259. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) (emphasis added).

260. *Id.* at 1090 ("[Opponents of] this amendment oppose the grant of power to enforce the bill of rights.") (statement of Rep. Bingham).

261. See CURTIS, *supra* note 122, at 125.

262. Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 427 (1990).

263. *E.g.*, *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871).

264. TRIBE, *supra* note 6, at 1302.

265. 83 U.S. (16 Wall.) 36, 117 (1873).

266. *Id.* at 117 (quoting *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (opinion of Washington, J.)).

267. *Id.* at 76.

268. *Id.* at 75.

rights protected by the states are unprotected by the Clause.<sup>269</sup> If a right thus secured by state governments is also manifestly a right against the federal government, then it could concurrently be a right of federal citizens *per se*, and yet also apply against the states. Such a right could be one that state governments are intended to secure, but also one that the federal government must safeguard as being among the “privileges or immunities” of federal citizenship. As explained in Part V.B, the Second Amendment is such a right.

A final point to note here is the 1860s mindset in contradistinction to the 1780s. During the original ratification debates the preeminent concern was constraining the new central government being erected in far-off New York City,<sup>270</sup> reminiscent perhaps of colonial government under a far-off Crown. The Bill of Rights was drafted in 1789 to allay concerns over the scope of this new central government in its ability to override a citizen’s state government.<sup>271</sup> However, in the ensuing years large swaths of territory under the American flag existed as territories, not states. Many of those territories subsequently became states in their own right. Federal territories were directly governed by the Bill of Rights, just as the Bill of Rights directly applies to the District of Columbia today.<sup>272</sup> Professor Amar writes that after the Civil War, when the Fourteenth Amendment was proposed, if you were a senator from a state like Ohio (formerly a territory), it would seem odd to you that the protections Ohioans enjoyed under the Bill of Rights when Ohio was a territory could be stripped away by your state when Ohio attained statehood, especially since your federal government anteceded your state government.<sup>273</sup> It was therefore natural for a congressman in 1866 to think that the proposed Fourteenth Amendment would apply the Bill of Rights to the states.

Finally, the record reveals that “rights, liberties, privileges, and immunities, seem to have been used interchangeably.”<sup>274</sup> That fact, taken with the above material from both case law and the literature concerning the Clause, suggests the purpose of Privileges or Immunities was to apply substantive rights against the states.

## 2. Separate Meanings of the Two Clauses

Each provision of the Constitution has a distinct meaning.<sup>275</sup> If this tenet is applied to every provision across the seven articles of the original Constitution, then it follows *a fortiori* that it applies all the more to the four clauses adopted simultaneously in Section 1 of the Fourteenth Amendment. While there are

269. *Contra Saenz v. Roe*, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting).

270. Amar, *Against the States*, *supra* note 256, at 448.

271. *Id.*

272. *See* *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (applying the Second Amendment directly to the District of Columbia); *Pernell v. Southall Realty*, 416 U.S. 363, 369–80 (1974) (applying the Seventh Amendment directly to the District of Columbia).

273. Amar, *Against the States*, *supra* note 256, at 449.

274. CURTIS, *supra* note 122, at 64–65.

275. *See* *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....”). This principle is used often in interpreting statutes. *See, e.g.,* *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (applying “one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant” (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (internal quotation marks and brackets omitted)).

provisions in the Constitution that may be redundant, it strains credulity that Section 1 would include four distinct clauses written as one unit, where one or more were surplusage because they had no separate meaning. Viewed through that lens, it becomes increasingly clear that the Privileges or Immunities Clause applies substantive rights for citizens, while the Due Process Clause secures procedural safeguards for the life, liberty, and property for all persons regardless of citizenship.

In 1859, two years before the Civil War, John Bingham forecasted what he would later do in drafting Section 1. Speaking of federal protection against state action, Bingham distinguished citizens' rights from natural rights when he identified two types of constitutional rights—one being the “wise and beneficent guarantees of political rights to the citizens of the United States, as such, and [the other] of natural rights to all persons, whether citizens or strangers.”<sup>276</sup> Two separate clauses secure these respective rights.

It was widely accepted by many legal authorities in the 1860s that embraced a broad application of the Bill of Rights, including many who supported broadly incorporating rights by creating the Fourteenth Amendment, that the Bill of Rights applied to citizens.<sup>277</sup> Yet the Framers of the Fourteenth Amendment also wished to extend certain legal protections, such as due process, to aliens.<sup>278</sup> Therefore one clause, the Privileges or Immunities Clause, incorporates certain rights to citizens, and two others, the Due Process Clause and the Equal Protection Clause, incorporate other rights both to citizens and to non-citizens. As Congressman Bingham stated:

Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens...? Is it not [also] essential...that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?<sup>279</sup>

This naturally invites the judiciary to create two separate, though related, lines of jurisprudence: one for citizens and one for all persons. Accordingly, the Court's explication of the latter rights of due process and equal protection do nothing to stop the Court from likewise exploring the former rights of citizenship.

As explained in Part V.B.2, Professor Amar advances the theory that these rights of citizenship are political rights. The greatest challenge to Amar's theory, however, ironically comes from its primary source: the history surrounding the Fourteenth Amendment's adoption. The debates surrounding the drafting, revising, and proposing of the Amendment form the bulk of Amar's evidence. Yet those same debates constantly distinguish civil rights from political rights, with civil rights being covered by the Privileges or Immunities Clause, but political rights, such as voting, being specifically excluded, therefore necessitating the adoption of the

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276. CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. Bingham).

277. See Amar, *Fourteenth Amendment*, *supra* note 126, at 1223 & nn.135–38 (citations omitted).

278. *Id.* at 1224; James W. Ely, Jr., *Due Process Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 394 (2005).

279. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. Bingham).

Fifteenth Amendment.<sup>280</sup> That notwithstanding, it would be simplistic to say that political rights were not included in the Fourteenth Amendment. While some members of Congress believed they were, others did not.<sup>281</sup> There were floor speeches supporting both sides of that question. There is no clear answer, and the fact that Congress soon thereafter proposed what became the Fifteenth Amendment to secure the quintessential political right—voting—reveals a weakness in Amar’s thesis.<sup>282</sup>

The Framers of the Fourteenth Amendment deliberated on the difference of citizens’ rights versus the rights of all persons, as reflected by early drafts of the Fourteenth Amendment.<sup>283</sup> In *Heller* the Court recognized that “the people” has a political connotation,<sup>284</sup> further supporting this position. Though it is possible to arrive at different conclusions about exactly where the citizen/person line is drawn, it is clear that Privileges or Immunities concerned the former, while Due Process governed the latter.

### 3. The Privileges or Immunities Clause Was Intended to Incorporate Certain Rights

Having defined “privileges or immunities” and seen that the clauses of Section 1 have separate meanings, the next question concerns the purpose of Privileges or Immunities. This task is made more difficult because the congressional debates surrounding the Fourteenth Amendment used generalizations, obscuring the Amendment’s meaning.<sup>285</sup>

As early as 1859, John Bingham stated his belief that “whenever the Constitution guaranties to its citizens a right...such guarantee is in itself a limitation upon the States.”<sup>286</sup> Yet he understood that *Barron v. Baltimore* barred extending the Bill of Rights to the states.<sup>287</sup> Congressman Bingham thus stated plainly that the purpose of the Fourteenth Amendment was to overrule *Barron*. Bingham explained on the House floor that Section 1 was intended to supersede *Barron*, stating:

In reexamining the case of *Barron*, Mr. Speaker,...I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight...amendments to the Constitution...the Chief Justice said: “Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.”....

280. U.S. CONST. amend. XV (providing that the right to vote shall not be denied on account of race).

281. Compare FLACK, *supra* note 86, at 31 (citing members who believed that political rights were included), with, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1151–53 (1866) (statement of Sen. Thayer) (denying that voting rights were included).

282. This is not to say that the argument is so weak that it ought not to be considered persuasive. It is possible that the majority of the Fourteenth Amendment’s adopters considered political rights entailed by that amendment, but still supported the Fifteenth Amendment as an insurance policy.

283. Amar, *Fourteenth Amendment*, *supra* note 126, at 1225 & n.146 (quoting BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 51 (1914)); see also FLACK, *supra* note 86, at 63–64.

284. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–91 (2008).

285. See CURTIS, *supra* note 122, at 15.

286. CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859) (statement of Rep. Bingham).

287. 32 U.S. 243 (1833).

Acting upon this suggestion I did imitate the framers of the original Constitution...to the letter [in drafting] the first section of the fourteenth amendment as it stands in the Constitution....<sup>288</sup>

John Bingham had come to accept that his personal beliefs as to the nature of the Bill of Rights were insufficient; an amendment was needed.<sup>289</sup>

When proposing the Fourteenth Amendment and working for its adoption, Congressman Bingham elaborated on those sentiments, saying:

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States...?<sup>290</sup>

The critical sentence is the last, where Bingham speaks of citizenship *privileges* being a barrier to the action of state governments.

This message is consistent over time. Several years later, Congressman Bingham again restated his own view of incorporation when he said that:

[T]he privileges and immunities of citizens of the United States, as contradistinguished 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 powers of the States, until made so by the fourteenth amendment.<sup>291</sup>

Such statements are not dispositive, of course. But they illustrate the tenor of the public debate around Privileges or Immunities, and at a minimum show that at least some of the provisions from the Bill of Rights were considered incorporated by the Clause.

Nor is the historical record limited to discussion of the application of just an isolated right or two to the states. The above references are to multiple amendments in the Bill of Rights. The Privileges or Immunities Clause was therefore intended to incorporate a "broad array" of individual rights,<sup>292</sup> including the enumerated provisions in the Bill of Rights.<sup>293</sup> Accordingly, it is a far more natural vehicle for incorporation than the Due Process Clause.

288. CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (statement of Rep. Bingham).

289. William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 52 (1954).

290. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham).

291. CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (statement of Rep. Bingham).

292. TRIBE, *supra* note 6, at 1299.

293. See generally CURTIS, *supra* note 122.

C. *Incorporating Through the Privileges or Immunities Clause Is Still Possible After the Slaughter-House Cases*

The issue of incorporation took an unexpected turn shortly after the Fourteenth Amendment's passage that sent the issue in an unforeseeable direction. The Court took up the question of whether certain rights were incorporated against the states through the Privileges or Immunities Clause in the *Slaughter-House Cases*. Though many authorities cited throughout this Article contend that *Slaughter-House* virtually denuded the Clause of any effect, that proposition is untrue. A thoughtful analysis of *Slaughter-House* shows that the Court merely declined to adopt an exceptionally-broad reading of the Clause. The Court subsequently embarked on substantive due process, incorporating rights through Due Process, thereby obviating the need to consider alternative routes of incorporating rights and thus never revisiting Privileges or Immunities. But *Slaughter-House* did not foreclose the possibility that Privileges or Immunities could be effectual for incorporating rights against the states.

1. What Really Happened in the *Slaughter-House Cases*

On April 14, 1873, the Supreme Court handed down a landmark decision in several consolidated cases decided in one opinion styled the *Slaughter-House Cases*.<sup>294</sup> At issue in *Slaughter-House* was a Louisiana statute that created a monopoly over the slaughter of animals within city limits.<sup>295</sup> Those challenging the law argued that it violated their right to exercise their profession, contravening the Privileges or Immunities Clause.<sup>296</sup> The Court said that it is the right and duty of legislatures to regulate slaughtering within cities, and rejected the contention that butchers were being "deprived of the right to labor in their occupation."<sup>297</sup> Noting that states regulate "unwholesome trades" in dense population centers for public health,<sup>298</sup> the Court found no constitutional violation.<sup>299</sup> The Court reasoned, "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."<sup>300</sup> The Court continued that the plaintiffs' argument "rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same."<sup>301</sup> Comparing the privileges or immunities of U.S. citizens to those of state citizens, the Court ruled "that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, *whatever they may be*, are not intended to have any additional protection by this paragraph of the amendment."<sup>302</sup> Therefore:

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294. 83 U.S. (16 Wall.) 36 (1873).

295. *Id.* at 60.

296. *Id.*

297. *Id.* at 61.

298. *Id.* at 82.

299. *Id.* at 66.

300. *Id.* at 74.

301. *Id.*

302. *Id.* (emphasis added).

If, then, 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 the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.<sup>303</sup>

Finding that the right to engage in the butchering trade is not encompassed by the U.S. Constitution, the Court held that the Louisiana statute does not violate the Clause.<sup>304</sup>

Thus the Court declined its first opportunity to give the Fourteenth Amendment a broad reach, which would have thrown open the floodgates. This has led some to say that *Slaughter-House* “construed the Privileges or Immunities Clause so narrowly as to pave the way for its virtual elimination from the body of the Constitution.”<sup>305</sup>

## 2. Incorporation Is Still Possible Under the *Slaughter-House* Cases as Long as the Right Inheres in Federal Citizenship

However, Justice Miller’s majority opinion in *Slaughter-House* contains language that allows a number of rights to be incorporated through the Privileges or Immunities Clause. Justice Miller includes among these rights habeas corpus, peaceable assemblies, and seeking redress for grievances.<sup>306</sup> This part of the opinion is dictum, as it was unnecessary for resolving the question of the butchers’ constitutional rights. But it reinforces that *Slaughter-House* is fairly read as allowing incorporation through the Clause, leaving open what rights could be incorporated for future cases. At the very least, *Slaughter-House* cannot be read as barring incorporation through the Clause.<sup>307</sup>

It is difficult to overstate the difference between what *Slaughter-House* actually held, versus what many scholars characterize *Slaughter-House* as holding. The idea that the Fourteenth Amendment did not fundamentally alter the federal–state

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303. *Id.* at 75.

304. *Id.* at 81.

305. *TRIBE*, *supra* note 6, at 1303.

306. *Slaughter-House*, 83 U.S. (16 Wall.) at 79. It should be noted that Justice Miller’s reference to petitioning the government was specifically the right to petition the national government. However, this is reasonable in light of the fact that he was writing of the rights of national citizenship. There is nothing in that reference that would restrict the right to petition to national matters; *Slaughter-House* says nothing to suggest that the right to petition does not mean the right to petition government generally, which would then include state and local governments as well.

307. *See, e.g.*, *ELY*, *supra* note 89, at 196–97 & n.59. Indeed, *Slaughter-House* need not be read as an anti-incorporation case, in that no specific Bill of Rights provision was at issue. *See Wildenthal*, *supra* note 150, at 1064. Some argue that “privileges or immunities” should also include rights arising from federal statute. *E.g.*, William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 *MINN. L. REV.* 153, 191–93 (2002).

However, this approach must be rejected because it opens the door for Congress to constitutionalize current policy preferences by passing a statute, and then having private parties invoke Privileges or Immunities as entailing that policy. Although Congress can confer statutory rights that are subordinate to the Constitution, the Fourteenth Amendment cannot and should not be read as empowering Congress to create constitutional rights on par with rights guaranteed in the constitutional text, as this would enable Congress to override the Constitution’s text by an ordinary statute. This could facilitate Congress circumventing the arduous amendment process with all its democratic safeguards, and should be denied.

balance was, at most, only suggested by *Slaughter-House*,<sup>308</sup> it was not the Court's holding. But those who seek to use the Fourteenth Amendment as a cornucopia of boundless unenumerated rights go too far. It is a strawman argument to say that the Fourteenth Amendment must either incorporate essentially no rights or almost every right imaginable. The truth lies between, in that various rights are incorporated, but only those meeting certain criteria. While various criteria have (inconsistently) been advanced for incorporating through the Due Process Clause, the text of *Slaughter-House* provides the starting point for tracing the scope of Fourteenth Amendment incorporation.

Several clauses in the Constitution have been held nonjusticiable, often because they concern political questions.<sup>309</sup> However, *Slaughter-House* did not render Privileges or Immunities nonjusticiable. Instead, it limited its scope to a certain set of rights. While this set excludes almost all unenumerated rights,<sup>310</sup> some authorities suggest or advocate that provisions of the Bill of Rights could be incorporated through Privileges or Immunities. Justice Hugo Black, who supported total incorporation of the Bill of Rights,<sup>311</sup> believed the Clause to be an effective vehicle for such incorporation.<sup>312</sup>

Some may say that *Slaughter-House* precludes the possibility of incorporating a provision of the Bill of Rights through the Privileges or Immunities Clause, but that is simply not the case. The *Slaughter-House* majority sought to maintain the federal system of constitutional governance. The butcher plaintiffs were asking the Court to declare that a state law granting a monopoly over slaughtering animals violated the federal Constitution.<sup>313</sup> The majority was correct in concluding that "such a construction...would [render the Court] a perpetual censor upon all legislation of the States...with the authority to nullify [any laws] it did not approve."<sup>314</sup> Such an interpretation of the Fourteenth Amendment would also empower Congress, through Section 5, to override state law at will by legislatively finding a federal right and passing a law carrying it into effect.<sup>315</sup> The result would be that both the federal legislature and the federal courts could supersede state law whenever they chose, severely degrading—if not effectively eradicating—state sovereignty, as states would henceforth only retain laws that the federal branches chose not to override.<sup>316</sup> However, it goes too far to say that the Court must disallow incorporating through Privileges or Immunities to avoid this anti-federalism result.

The narrowness of the *Slaughter-House* holding is seen in its list of possibly incorporated rights. There were no First Amendment or habeas issues in *Slaughter-*

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308. See *TRIBE*, *supra* note 6, at 1321.

309. *E.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., concurring) (asserting that the Guaranty Clause, U.S. CONST. art. IV, § 4, is a nonjusticiable political question).

310. OFFICE OF LEGAL POL'Y, *supra* note 169, at 6.

311. See *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting).

312. *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

313. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 61–63 (1873).

314. *Id.* at 78.

315. See *id.* This would also have the effect of enabling Congress to amend the Constitution by ordinary statute, circumventing the amendment process. See *supra* note 307.

316. See *Slaughter-House*, 83 U.S. (16 Wall.) at 78.

*House*. The plaintiffs there did not assert any enumerated right;<sup>317</sup> they were pushing the Court to find an implied right devoid of textual support. Further, while there are significant public health issues involved in slaughtering animals today, in the 1870s those issues were far more significant because of the lack of antibiotics and refrigeration. Laws governing public health are part of the police power.<sup>318</sup> And while states have police power,<sup>319</sup> the federal government does not.<sup>320</sup> The police power was mentioned in *Slaughter-House*,<sup>321</sup> and doubtlessly augmented whatever federalism concerns the Court had in deciding the case. Instead of barring incorporation through Privileges or Immunities—a possibility scuttled by the dictum regarding First Amendment rights being among the rights characterizing federal citizenship<sup>322</sup>—*Slaughter-House* holds that whatever the rights incorporated through

317. At least one other writer has noted the significance of that fact. See Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 685 (2000).

318. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

319. *Id.*

320. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919). This is a general proposition where the several states are involved. Congress does have a basis for asserting police power for the District of Columbia or over federal territories. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (quoting *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953)); see also U.S. CONST. art. I, § 8, cl. 17; cf. *North Dakota v. United States*, 495 U.S. 423, 429 n.2, 430–32 (1990) (discussing how the federal government exercises police power regarding the consumption of alcohol in national parks and military bases).

321. 83 U.S. (16 Wall.) at 62–63.

322. *Id.* at 78–79. This dictum is quite significant. In recently deciding to incorporate the Second Amendment through Due Process instead of Privileges or Immunities in the case discussed in note 11, *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), the Ninth Circuit concluded that *Heller* precluded using Privileges or Immunities for the right to bear arms. *Id.* at 446–47. The panel read *Slaughter-House* as holding that Privileges or Immunities only pertains to rights created under the Federal Constitution as an aspect of federal citizenship, while Due Process protected rights that predated the Constitution. *Id.* Noting that in *Heller* the Supreme Court stated that the Second Amendment right to self-defense was a pre-existing right at the time the Constitution was adopted, the Ninth Circuit concluded that Privileges or Immunities does not incorporate the Second Amendment. *Id.* at 447 (citing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008)).

But such a reading of *Slaughter-House* is difficult to reconcile with the dictum from *Slaughter-House* referenced in this footnote. Does the Ninth Circuit suggest that the writ of habeas corpus, or the First Amendment rights to peaceably assemble and petition government, were first created by the Constitution and did not antecede the Constitution? That must be so, if the panel's reading is correct, because these rights are referenced in this *Slaughter-House* dictum as among the privileges and immunities of federal citizenship. 83 U.S. (16 Wall.) at 79. But if these rights were derived from English common law, or acknowledged in America before 1789, then the Ninth Circuit is incorrect in asserting that Privileges or Immunities cannot incorporate rights that existed before the Constitution was adopted, because the very case that the panel cites, *Slaughter-House*, is also the case that would defeat the circuit court's position.

And in fact, the Supreme Court declared the right of assembly to be a pre-existing right. See *United States v. Cruikshank*, 92 U.S. 542, 551 (1876) (“The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. . . . It was not, therefore, a right granted to the people by the Constitution.”). In more recent years, Justices of the Supreme Court have stated that the other First Amendment right mentioned in the *Slaughter-House* dictum, the right to petition for redress, likewise predates the Constitution. See *Adderly v. Florida*, 385 U.S. 39, 49 & n.2 (1966) (Douglas, J., joined by Warren, C.J., and Brennan and Fortas, JJ., dissenting) (referring to the fact that “[t]he right to petition for the redress of grievances has an ancient history”).

Moreover, the origin of habeas corpus voluminously fills the pages of the *United States Reports*, all supporting the undisputed fact that the writ preceded the U.S. Constitution. As recently as the Court's 2007 Term, this discussion of the pre-American origins of the Great Writ dominated a lengthy opinion in a watershed case. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2244–51 (2008); *id.* at 2303–07 (Scalia, J., dissenting). It has also figured prominently in other recent decisions. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 502–04 (2004) (Scalia, J., dissenting). So habeas corpus was a pre-existing right when the Constitution was adopted. Yet habeas is listed in the *Slaughter-House* dictum as being among the privileges and immunities of U.S. citizens, entailed in the

Privileges or Immunities might be, that list does not include a commercial/labor right against monopolies where public health and the local economy are concerned.<sup>323</sup> Far from “denying the provision any significant content,”<sup>324</sup> *Slaughter-House* simply drew a line in the sand on a narrow matter, and future Courts did not revisit the Clause to expose *Slaughter-House*’s narrowness. Although few have questioned the conclusion of scholars that the Clause lacks meaningful effect, the Court is not bound by this post-hoc gloss invented by the legal academy.

Rather than precluding incorporation, *Slaughter-House* limits the rights that can be incorporated through Privileges or Immunities to those inhering in federal citizenship.<sup>325</sup> *Slaughter-House* stands for the proposition that certain rights distinctive to national citizenship are to be applied to the states through the Privileges or Immunities Clause,<sup>326</sup> establishing the test of whether the right in question inheres in federal citizenship. Which rights belong on that list is a largely unanswered question, though a *Slaughter-House* dissent suggests that many could be included.<sup>327</sup> All we know from *Slaughter-House* is that state laws granting monopolies over food services inside cities do not violate the Clause, a holding influenced by the fact that businesses slaughtering animals are mostly governed by state law. Also, even though the Court differentiated between federal and state citizenship, nowhere does it state that there can be no overlap of rights derived from the former with those derived from the latter.<sup>328</sup> Indeed, there is an overlap.<sup>329</sup> More recently, the Court has held that the right to receive equal benefits immediately upon moving to a new state, derived from the right to interstate travel, is such an overlapping federal right.<sup>330</sup> Beyond that, what is and is not covered by the Clause remains an open question to be answered by the judiciary.

Federal citizenship is rarely referenced in the original Constitution,<sup>331</sup> and had no express textual definition until the Fourteenth Amendment.<sup>332</sup> Even after the Amendment’s adoption, the rights pertaining to federal citizenship remain undefined in many respects. One unfortunate foundation for defining national

Privileges or Immunities Clause. 83 U.S. at 79. Hence, the *Nordyke* opinion’s statement that Privileges or Immunities does not concern rights that predated the Constitution must be incorrect, and therefore so is the theory on incorporation promulgated in that suit.

323. Cf. Wildenthal, *supra* note 150, at 1080–81, 1094–95.

324. TRIBE, *supra* note 6, at 1316.

325. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 162–63 (1988); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717, 746–49 (2003). I should note that my theory on the purpose and proper role of the Privileges or Immunities Clause, in terms of the rights entailed in citizenship, differs from these two, but I agree that the record is clear that the Clause was intended to incorporate the rights of federal citizens against the states. See Book Note, 89 COLUM. L. REV. 1966, 1967 (1989) (reviewing NELSON, *supra*, at 155–64).

326. 83 U.S. (16 Wall.) at 79 (referencing rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws”).

327. See *id.* at 112–19 (Bradley, J., dissenting).

328. Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 744.

329. Richard L. Aynes, *Freedom: Constitutional Law: Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 648 (1994).

330. *Saenz v. Roe*, 526 U.S. 489, 499–500, 503 (1999). The right to interstate travel is also in the dictum list in *Slaughter-House*, 83 U.S. (16 Wall.) at 79.

331. See U.S. CONST. art. I, § 2; U.S. CONST. art. II, § 1.

332. See U.S. CONST. amend. XIV, § 1.

citizenship was *Dred Scott*, where the Court declared that only U.S. citizens could bring suit in federal court, and that blacks could not bring suit because they were not citizens of the federal government.<sup>333</sup> While *Dred Scott* was superseded by the Fourteenth Amendment,<sup>334</sup> the proposition stands that there are rights inherent in federal citizenship distinct from those of state citizenship.

### 3. Therefore at Least Some Rights Could Be Incorporated Through the Privileges or Immunities Clause Without Overruling *Slaughter-House*

Advocates of reviving the Privileges or Immunities Clause posit that the single greatest barrier to doing so is stare decisis.<sup>335</sup> This position rests on the premise that *Slaughter-House* would have to be overruled.<sup>336</sup> Setting aside *Saenz v. Roe*<sup>337</sup> where the Court certainly used the Clause to significant effect, that argument is simply inaccurate.

As just shown, there is a tremendous difference between much of the scholarly commentary on *Slaughter-House* vis-à-vis where *Slaughter-House* actually leaves the Privileges or Immunities Clause. The Court is obliged to consider only the latter under stare decisis, not the former. The current state of the Clause, or at least the pre-*Saenz* state, was that “the Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House* Cases.”<sup>338</sup> Perhaps, but not in the Court’s holding, so not in a way that precludes the Court bringing it back into effectuality.

The Court decides cases based on what it actually said in previous cases, not on the post-hoc gloss that law professors overlay on the Court’s decisions in later years. It therefore does not matter that many authorities believe that *Slaughter-House* nullified the Privileges or Immunities Clause. What does matter is what the Court actually said in *Slaughter-House*, and what the Court said in that case can reinvigorate the Clause.

Such a holding would abrogate what has long been the effect of *Slaughter-House*, but again it does not require overruling,<sup>339</sup> and therefore stare decisis need not be an obstacle to incorporating through Privileges or Immunities. Much of the *Slaughter-House* opinion is dicta.<sup>340</sup> A proposition repeated in dicta but never as the basis for judgment is not entitled to stare decisis protection.<sup>341</sup> Any argument that

333. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 427 (1857).

334. TRIBE, *supra* note 6, at 1298.

335. *Id.* at 1321; Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 71, 73–74 (1989).

336. TRIBE, *supra* note 6, at 1321 & n.4, 1322; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995); *cf.* Levinson, *supra* note 335, at 73.

337. 526 U.S. 489 (1999) (finding in the Privileges or Immunities Clause a right to be treated as a full citizen in any state immediately upon taking residence in that state).

338. *Id.* at 521 (Thomas, J., joined by Rehnquist, C.J., dissenting).

339. Newsom, *supra* note 317, at 648.

340. *Saenz*, 526 U.S. at 516 (Rehnquist, C.J., joined by Thomas, J., dissenting); *see also* David P. Currie, *The Reconstruction [sic] Congress*, 75 U. CHI. L. REV. 383, 400 n.108 (2008); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1072–75 (2000); Rich, *supra* note 307, at 196–98 (2002).

341. *Gonzales v. United States*, 128 S. Ct. 1765, 1774 (2008) (Scalia, J., concurring in judgment) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545–46 (2005)).

*Slaughter-House* must be overruled, or even limited to its facts, thus misunderstands the holding in *Slaughter-House*.<sup>342</sup> By not defining the rights of national citizenship and holding only that local laws impacting the butchering profession are not among them, the Court left wide open the opportunity to explicate the rights of national citizenship. While three obscure cases must be overruled to incorporate the Second Amendment, *Slaughter-House* is not one of them, and the reasoning of those cases has long since been rejected by the Court.<sup>343</sup> The Court could simply hold that various rights are rights of national citizenship. The Court should do so for the Second Amendment, and can do so consistent with *Slaughter-House*.

D. *Incorporating Through the Privileges or Immunities Clause Would Be Consistent with Recent Court Actions*

Incorporating a constitutional provision such as the Second Amendment through the Privileges or Immunities Clause would be consistent with recent Court action. The formerly moribund Privileges or Immunities Clause has recently been resuscitated by the Court. In addition, recent years have seen several other constitutional provisions reemerge into modern jurisprudence. This trend bodes well not only for Privileges or Immunities but also for the Second Amendment, as both have not heretofore been major issues in American law, but are now poised to be dual focal points of constitutional development.

The Court has recently revived Privileges or Immunities, inaugurating an entirely new era. There was no fixed meaning to the Clause when it was ratified in 1868. The Supreme Court ruled on it in 1873, taking what many characterize as a narrow view of the Clause.<sup>344</sup> Then, with the advent of substantive due process there seemed no reason to revisit the Clause,<sup>345</sup> so it sat dormant. But with *Saenz v. Roe* in 1999, the Court brought the Clause back into modern jurisprudence, and by using it to strike down a state law, the Court affirmed that the Clause can have significant power. However, that one case is all that has been done under the Clause thus far, analogous to where *Heller* leaves the Second Amendment today. And just as *Heller* leaves the door wide open for exploring the contours of the Second Amendment, so too *Saenz* leaves the door just as open for exploring the contours of the Privileges or Immunities Clause in the Fourteenth Amendment.

And the Court has recently changed direction in several other areas of law that were thought settled. For decades after the New Deal and World War II, the Court read the Commerce Clause so broadly that it is a bold statement to say that the

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342. Robert Palmer, while agreeing that federal rights can be incorporated through Privileges or Immunities without overruling *Slaughter-House*, Palmer, *supra* note 328, at 740–41, argues that the Clause was stripped of incorporation potential by *United States v. Cruikshank*, 92 U.S. 542 (1876). Palmer, *supra* note 328, at 762. Assuming arguendo that Palmer is correct, this need not bar incorporation. The Court jettisoned most of *Cruikshank* long ago when it incorporated other rights, *see infra* Part V.C.1.a, and signaled in *Heller* that it was willing to jettison the remainder. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2812–13 & n.23 (2008). Ergo, to the extent *Cruikshank* is inconsistent with incorporation doctrine and the arguments explored in this Article, it should be overruled. The Court as it is currently constituted appears prepared to do so.

343. *See infra* Part V.C.1.a (discussing *Miller v. Texas*, 153 U.S. 535 (1894), *Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Cruikshank*, 92 U.S. 542 (1876)).

344. *See supra* Part IV.C.1.

345. *See supra* Part II.

provision even nominally constrained federal action.<sup>346</sup> However, two recent decisions, *United States v. Lopez*<sup>347</sup> and *United States v. Morrison*,<sup>348</sup> may have substantially shortened the reach of the Commerce Clause, although that reach may have since been thrust back to its outer limits in *Gonzales v. Raich*.<sup>349</sup> The Court has also now reinvigorated the Tenth Amendment, which could have been thought a de-facto dead letter, by barring federal law from tasking state and local officials with law enforcement in *United States v. Printz*.<sup>350</sup> Likewise, longstanding doctrine governing the interpretation of the Eleventh Amendment has recently been altered by *Seminole Tribe v. Florida*,<sup>351</sup> and then again in *Alden v. Maine*.<sup>352</sup> The Second Amendment has become the latest beneficiary of this trend with *Heller*.<sup>353</sup> And just as *Alden* continued the work begun in *Seminole Tribe* several years after *Seminole Tribe* was decided, so too can the Court continue the work it began in *Saenz* and *Heller* when it faces its next Second Amendment case.

There has also been renewed interest in the Privileges or Immunities Clause in recent years, making the Clause an effective vehicle for applying substantive federal rights to the states. The Clause was developed in the aftermath of the Civil War at the center of Congress's efforts to declare and protect federal rights on a national scale.<sup>354</sup> The Framers of the Fourteenth Amendment designed the Privileges or Immunities Clause to protect rights in a manner distinct from the protections of the Due Process Clause.<sup>355</sup> Based on this constitutional design in the Fourteenth Amendment, the Supreme Court can incorporate the Second Amendment through Privileges or Immunities without overturning the *Slaughter-House Cases*.<sup>356</sup> The *Slaughter-House* holding was narrowly limited by the questions presented in that case,<sup>357</sup> and the Court promulgated the test that rights could be applied to the states through the Privileges or Immunities Clause if the right in question inhered in federal citizenship.<sup>358</sup> However, should the Court deem *Slaughter-House*

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346. See *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942).

347. 514 U.S. 549, 558–59 (1995), *superseded by statute*, 18 U.S.C. § 922(q)(2)(A) (2006), (holding that under the Commerce Clause, Congress can only regulate (1) the channels of interstate commerce, (2) instrumentalities of interstate commerce or objects moving in interstate commerce, and (3) activities having a substantial relation to commerce if they substantially affect that commerce).

348. 529 U.S. 598, 604, 615, 617 (2000) (holding that the Commerce Clause only reaches economic activity).

349. 545 U.S. 1, 17–22 (2005) (invalidating a California medical marijuana statute). *Raich* seems to be a move back in the direction of an expansive reading of the Commerce Clause, holding that the federal law being invoked to preempt California's statute was within the scope of the Commerce Clause because the test should be only if Congress could rationally have believed that the action in question would substantially affect interstate commerce, rather than actually having such an effect. *Id.* at 21–22. Such a low bar, whereby a challenger must prove that Congress's action was not even rational, makes it much more difficult to succeed in a Commerce Clause challenge.

350. 521 U.S. 898 (1997) (holding that the Tenth Amendment does not allow the federal government to commandeer state law enforcement). It should also be noted that *Printz* extended and elaborated on the line of reasoning regarding the Tenth Amendment articulated in another then-recent case, *New York v. United States*. See 505 U.S. 144, 155–59 (1992).

351. 517 U.S. 44 (1996).

352. 527 U.S. 706 (1999).

353. Klukowski, *Armed by Right*, *supra* note 3, at 178.

354. See *supra* Part IV.A.

355. See *supra* Part IV.B.

356. See *supra* Part IV.C.3.

357. See *supra* Part IV.C.1.

358. See *supra* Part IV.C.2.

undeserving of stare decisis protection, given the apparent consensus that the Clause does not mean what the *Slaughter-House* Court said it meant,<sup>359</sup> the Court could simply discard *Slaughter-House* and incorporate the Second Amendment through the Clause anyway.

#### V. THE SECOND AMENDMENT, IN PARTICULAR, MUST BE INCORPORATED THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE

The incorporation issue takes on added significance regarding the Second Amendment. As the foregoing Parts show, the Privileges or Immunities Clause is a superior vehicle for incorporation vis-à-vis the Due Process Clause. Privileges or Immunities can be thought of as “an empty and unused vessel which affords the Court full opportunity to determine its contents without even the need for pouring out the precedents that already clog the due process and equal protection clauses.”<sup>360</sup>

At this point, the issue of incorporating the Second Amendment could simply turn on a choice between past practice versus first principles. The foregoing material in Part IV sets forth a clear narrative that strongly argues for incorporating any provision of the Bill of Rights—including but not limited to the Second Amendment—through Privileges or Immunities. However, Parts II & III demonstrate that there is at this point more than a century of case law wherein the Supreme Court has exclusively used Due Process as the vehicle for incorporation. Perhaps with the benefit of hindsight the Court would choose to employ Privileges or Immunities if it were to do it all over again. But such hypothesizing is idle speculation at this point. The reality remains that Privileges or Immunities is better suited for incorporation, but Due Process has been the method employed to date. And so the Court will have a choice to make, once it is squarely faced with the question of applying the Second Amendment to the actions of state and local governments.

There are also several reasons, peculiar to the Second Amendment, that strongly counsel in favor of incorporating the Amendment’s rights through Privileges or Immunities. Part V.A discusses several legal and policy problems that would attend incorporating gun rights through the Due Process Clause. Part V.B explains how the core purpose of the Second Amendment is to hold government in check, which is a right reserved to American citizens. Finally, Part V.C explores several supplemental arguments regarding incorporating the Second Amendment.

##### *A. Due Process Would Implicate Certain Problems Peculiar to Firearms*

There are several distinctive problems that could attend incorporating the Second Amendment through Due Process, though they do not bar such incorporation. The Court must apply the law as it is. If some aspects of that law are problematic, the Court must deal with them in due time. However, the Court is no doubt cognizant

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359. *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) (“[L]egal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873.”). *Contra* Wildenthal, *supra* note 150, at 1067 (rejecting the position articulated by Justice Thomas).

360. Kurland, *supra* note 175, at 420.

of the law of unintended consequences, and so to the extent it can avoid problems, it will. Therefore the Court must consider three problems peculiar to gun rights.

### 1. Applying Strict Scrutiny to All Gun Laws, or Disingenuous Distinction

This Article argues that the Second Amendment entails not only an individual right, but a fundamental right.<sup>361</sup> Finding Second Amendment rights to be fundamental also has implications for the level of scrutiny attending Second Amendment challenges.

The *Heller* Court did not decide what level of scrutiny should attach to Second Amendment questions, because it held that the D.C. gun ban at issue in *Heller* would fail under any meaningful standard of review.<sup>362</sup> The general rule is that strict scrutiny applies to burdens on fundamental rights,<sup>363</sup> though free speech is an example of a fundamental right where the laws burdening it are often not subject to strict scrutiny.<sup>364</sup> When the Court invoked the right to interstate travel under the Privileges or Immunities Clause, it applied strict scrutiny to strike down that law,<sup>365</sup> suggesting that this level of review holds true across the Fourteenth Amendment regardless of the clause implicated in the case. Therefore, finding Second Amendment rights to be fundamental means that strict scrutiny will likely be the test for at least some types of gun laws.

However, strict scrutiny is a hurdle that few laws survive. So often does it prove unbeatable that cases describe strict scrutiny as “strict in theory, but fatal in fact.”<sup>366</sup> Therefore the Supreme Court must be concerned about the possibility of thousands of firearm regulations being subject to such a test, especially since laws subject to that test are presumptively invalid,<sup>367</sup> shifting the burden to the government to defend them.

Though it is beyond the scope of this Article, the multi-level system of review in free speech jurisprudence would work well for the Second Amendment.<sup>368</sup> A multi-tier system similar to free speech rules could be applied to Second Amendment questions, regardless of which clause of the Fourteenth Amendment is used for incorporation. The Court in *Heller* suggests that it might consider such a possibility, comparing free speech rights under the First Amendment with Second Amendment rights.<sup>369</sup> The Court then suggests it again, noting that possession of firearms by certain dangerous people or in certain sensitive locations may still be subject to regulations that would be impermissible for ordinary firearms, and also

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361. See *infra* Part V.B.1.

362. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

363. *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968).

364. See *supra* Part II.

365. Lund, *Outsider Voices*, *supra* note 155, at 719; see also *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

366. *E.g.*, *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 552 (1989) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)) (internal quotation marks omitted). It should also be noted, however, that the Court emphasizes that strict scrutiny is not always fatal. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2817 (2007) (citing *Grutter v. Bollinger*, 539 U.S. 306, 326–37 (2003); *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995)). However, it is called “strict” for a reason, and is designed to be exceedingly difficult to meet.

367. See *supra* notes 111–14 and accompanying text.

368. See Klukowski, *Armed By Right*, *supra* note 3, at 186–88.

369. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008).

that it may allow stricter regulation of especially dangerous firearms.<sup>370</sup> Therefore strict scrutiny could be the rule for core exercises of the right, just as it is for core exercises of free speech.<sup>371</sup> And lower scrutiny—perhaps intermediate—could apply for incidental burdens and possibly other unusual circumstances,<sup>372</sup> while conversely some burdens could also be per se invalid for situations where even strict scrutiny is insufficient to vindicate Second Amendment rights.<sup>373</sup>

## 2. Unlimited Firearm Rights to Non-citizens

Another concern with incorporating through the Due Process Clause is its implications for public policy. Among the enumerated rights in the Constitution, the

370. *Id.* at 2816–17.

371. *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002) (applying strict scrutiny to a law burdening free speech).

372. As this Article was being edited, a federal trial court applied intermediate scrutiny to a federal firearm regulation. *See United States v. Bledsoe*, No. SA-08-CR-13(2)-XR, 2008 WL 3538717, at \*4 (W.D. Tex. Aug. 8, 2008) (order denying motion to dismiss indictment). The district court distinguishes state action constituting a *proscription* of a constitutional right from a *restriction* of that same right. *See id.* at \*3. The court reasons that the Supreme Court in *Heller* was dealing only with the former, not the latter. *Id.* at \*3. The court cites no support whatsoever for the proposition that burdens on constitutional rights can be differentiated between proscriptions and restrictions.

The *Bledsoe* court is not alone in applying intermediate scrutiny. *See, e.g., United States v. Moore*, No. 3:09cr18, 2009 WL 1033363, at \*3 (W.D.N.C. Apr. 17, 2009); *United States v. Miller*, No. 08-cr-10097, 2009 WL 499111, at \*6 (W.D. Tenn. Feb. 26, 2009); *United States v. Radencich*, No. 3:08-CR-00048(01)RM, 2009 WL 127648, at \*4 (N.D. Ind. Jan. 20, 2009); *United States v. Schultz*, No. 1:08-CR-75-TS, 2009 WL 35225, at \*5 (N.D. Ind. Jan. 5, 2009). As of the time of this writing, all the federal courts taking up the question of what standard of review is appropriate for Second Amendment claims have been district courts. This is not surprising, given how recent the *Heller* decision is, and circuit courts should begin weighing in on this issue in the coming months.

It is also worth noting that at least one district court claims to apply strict scrutiny to Second Amendment claims. *See United States v. Engstrom*, No. 2:08-CR-430, 2009 WL 975286, at \*3 (D. Utah Apr. 17, 2009). The court upheld the criminal statute at issue. *Id.* at \*6.

On a separate note, in the *Nordyke* case discussed above in note 11, the Ninth Circuit did not specify a level of scrutiny. *See Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). Yet the panel there was clearly not applying strict scrutiny, as it did not reference narrow tailoring or compelling state interests. *Nordyke* instead engaged in an analysis reminiscent of the approach used under the Free Speech Clause with the public forum doctrine. *See supra* note 117. If so, this should be taken as additional support for the proposition that the multi-level framework used in free speech cases could be imported into Second Amendment jurisprudence.

373. An example of a situation where strict scrutiny would be insufficient protection for Second Amendment rights is *National Rifle Ass'n of America, Inc. v. Nagin*, No. 2:05-cv-4234 J(2), 2006 U.S. Dist. LEXIS 275 (E.D. La. Jan. 3, 2006) (consent order granting permanent injunction and dismissing remaining claims). The National Rifle Association brought suit when, during the chaos of Hurricane Katrina in 2005, New Orleans' Mayor Ray Nagin ordered local law enforcement to go door-to-door to all residences believed to contain firearms, and to confiscate all such firearms from their owners, effectively disarming all the law-abiding citizens remaining in the city. *See generally* Stephen P. Halbrook, "Only Law Enforcement Will Be Allowed To Have Guns": *Hurricane Katrina And The New Orleans Firearm Confiscations*, 18 GEO. MASON U. CIV. RTS. L.J. 339 (2008).

It is possible that this action could survive strict scrutiny. *See supra* notes 111–14 and accompanying text (discussing the elements of strict scrutiny). The City of New Orleans could argue that the disintegration of social order caused by the maelstrom of Hurricane Katrina made securing and pacifying the city a compelling interest. The city could then further argue that confiscating all civilian firearms advanced the compelling interest of securing the city. Such an argument may well be deemed sufficient to satisfy strict scrutiny.

Therefore the level of protection for Second Amendment rights in such emergency circumstances should be higher than strict scrutiny to prevent disarmament during times when citizens would most need the right and the means to defend themselves. If the rebuttable presumption of invalidity that accompanies strict scrutiny were elevated to an irrebuttable presumption, then this would create a rule whereby wholesale firearm confiscations would be per se invalid. Such a per se rule would mean that gun confiscations are never permissible under the Second Amendment, analogous to the per se rule under the First Amendment whereby viewpoint discrimination is never permissible. *See supra* note 117.

right to bear arms is sui generis in that it carries the inherent power to take life; firearms are unavoidably dangerous; guns can kill. Thus, a constitutional right to own guns carries unique policy implications.

Therefore it is possible to argue that at least certain aspects of Second Amendment rights are intended to be reserved to American citizens. The Amendment's prefatory clause references "the people" and announces the civic purpose of maintaining the security of a free state.<sup>374</sup> Though that civic purpose is not exclusive, as the Supreme Court noted,<sup>375</sup> it does announce an important purpose for the right nonetheless.<sup>376</sup> As will be explained in detail in Part V.B.2, the Second Amendment entails a political right of public accountability. Such political rights are properly restricted to citizens. Since the Privileges or Immunities Clause expressly applies only to citizens, and the Due Process Clause applies to persons without referencing citizenship, this makes Privileges or Immunities the more natural vehicle for incorporating this right.

Additionally, a key part of Professor Amar's reasoning in designating the Second Amendment a "political right" is that the Second Amendment references "the people," as does the First Amendment rights to petition and assembly, which Amar posits are likewise citizens' political rights.<sup>377</sup> Such a view is consistent with the arguments of a number of individual-right advocates that "the people" should be read *in pari materia* throughout the Bill of Rights, which would mean that "the people" must carry the same meaning in the First, Second, Fourth, Ninth, and Tenth Amendments.

Unfortunately for advocates of a single meaning for "the people," case law erects an obstacle to this argument. The Court stated in *United States v. Verdugo-Urquidez* that:

"[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>378</sup>

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374. U.S. CONST. amend. II.

375. *Heller*, 128 S. Ct. at 2789.

376. Justice Scalia's opinion says that the prefatory clause states the reason for codifying the right to bear arms. *Id.* at 2801. But the reason for putting a right into print is not necessarily the sole purpose for the right. There could be multiple purposes for a right, and yet only one of those purposes also calls for codification. In this case, the right is one of self-defense against both public and private violence, *id.* at 2799, but the purpose for codifying it was to prevent the disarmament that was historically used in England to suppress political opponents. *Id.* at 2800.

377. Amar, *Constitution*, *supra* note 132, at 1163; accord *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (asserting that the rights of assembly and of seeking redress are rights of federal citizenship).

378. 494 U.S. 259, 265 (1990) (citations omitted).

Since that time, *Verdugo-Urquidez* has been invoked to hold that at least some (if not all) aliens in this country have Fourth Amendment rights as part of “the people.”<sup>379</sup> Compounding this complication, *Verdugo-Urquidez* has been invoked by several appellate courts examining the question of whether the Second Amendment confers an individual right, suggesting “the people” has one uniform meaning throughout the Bill of Rights.<sup>380</sup>

This position has a provocative application in the current national debate over immigration. The Supreme Court has assumed, without deciding, that “the people” in the Fourth Amendment includes illegal aliens in the United States.<sup>381</sup> Though this assumption was not part of the Court’s holding,<sup>382</sup> and thus is not controlling, it was both strongly suggested by a plurality in *Immigration and Naturalization Service v. Lopez-Mendoza*,<sup>383</sup> and four dissenting Justices in that case expressly argued that illegal aliens are protected by the Fourth Amendment as part of “the people.”<sup>384</sup> This weight of persuasive authority led the appellate court in *Verdugo-Urquidez* to hold that illegal aliens are part of “the people” under the Fourth Amendment,<sup>385</sup> and in reversing the Ninth Circuit’s judgment the Supreme Court did not vacate or negate that part of the Ninth Circuit opinion,<sup>386</sup> leaving at least one current casebook to state that a majority of the Justices considered illegal aliens to be part of “the people” if they lived in the United States.<sup>387</sup> While that casebook’s statement misreads the opinions of at least two of the Justices that its authors cite (Justice Kennedy<sup>388</sup> and Justice Stevens<sup>389</sup>) the fact remains that *Verdugo-Urquidez* is sufficiently unclear that such a misreading is possible. If “the people” in the Fourth Amendment is the same as “the people” in the Second Amendment, then this could lead to the bizarre and extraordinarily troubling result of finding that illegal aliens

379. *E.g.*, *United States v. Portillo-Aguirre*, 311 F.3d 647, 650 (5th Cir. 2002) (finding Fourth Amendment rights for resident aliens); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 528 (6th Cir. 2002) (finding Fourth Amendment rights for resident aliens).

380. *E.g.*, *Parker v. District of Columbia*, 478 F.3d 370, 382 (D.C. Cir. 2007).

381. *Verdugo-Urquidez*, 494 U.S. at 263.

382. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 1041–50 (1984).

383. *Id.* at 105–51 (plurality opinion of O’Connor, J.).

384. *Id.* at 1051 (Brennan, J., dissenting); *id.* at 1055 (White, J., joined in part by Stevens, J., dissenting); *id.* at 1060 (Marshall, J., dissenting).

385. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1223–24 (9th Cir. 1988).

386. *See Verdugo-Urquidez*, 494 U.S. at 266–69, 271 (reasoning that the Fourth Amendment does not apply against non-citizens on foreign soil). Most of the Court’s discussion in this part of its opinion focuses on the fact that this search of an alien’s property was on foreign soil. The Court’s analysis here seems driven by geography, not citizenship, and also by distinguishing the reach of the Fourth Amendment from that of the Fifth and Sixth Amendments. *See id.* at 265.

387. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 33 (8th ed. 2007).

388. *Id.* Justice Kennedy stated that he believed the Fourth Amendment governed all searches and seizures, not merely searches and seizures of “the people.” *Verdugo-Urquidez*, 494 U.S. at 276 (Kennedy, J., concurring). Justice Kennedy never says whether illegal aliens are part of “the people,” only that whether they are or not is irrelevant. *Id.*

389. SALTZBURG & CAPRA, *supra* note 387, at 33. Justice Stevens expressly noted that “comment on illegal aliens’ entitlement to the protections of the Fourth Amendment [is not] necessary to resolve this case,” *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in judgment) and restricted his opinion to “aliens who are lawfully present in the United States,” *id.*

have a constitutional right to possess guns. In fact, such an argument has now been made in federal court.<sup>390</sup>

Of course, the Court can partially resolve that issue by holding that “the people” does not include illegal aliens when that question is presented. Such a ruling resolves the problem of illegal aliens possessing firearms. However, *Verdugo-Urquidez* cites a long line of cases for the proposition that non-citizens have constitutional protections if they are on American soil and have “developed substantial connections with this country.”<sup>391</sup> This may entitle many lawful aliens to purchase firearms. However, at least one state, Indiana, currently restricts the carrying of concealed handguns by non-citizens.<sup>392</sup>

Therefore, incorporating the Second Amendment through Due Process might strike down Indiana’s law and any such similar statutes across the country.<sup>393</sup> Incorporating through Privileges or Immunities would not mean that only American citizens could bear arms. States could choose to allow non-citizens full access to firearms. But the choice would be a public policy decision for state legislatures; aliens would not be able to assert a constitutional right to own firearms.

There is no place for xenophobia in a free society such as America. Part of the drive to extend the Bill of Rights *in toto* to non-citizens could be to further distance the law from *Dred Scott*, which held *inter alia* that the Fifth Amendment Due Process Clause, along with the rest of the Bill of Rights, only protects citizens.<sup>394</sup> It is important not to throw the baby out with the bathwater. Just because some parts of the Bill of Rights extend to aliens, it does not necessarily follow that no parts of the Bill of Rights are reserved to citizens, or incorporated to the states to protect only citizens. Whatever its motivation, the Court should not risk unintended consequences by mooring incorporation of the Second Amendment to Due Process when Privileges or Immunities is available.

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390. See, e.g., *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 WL 4534226 (W.D.N.C. Oct. 6, 2008) (rejecting the argument that Second Amendment’s protection extends to illegal aliens); *United States v. Boffil-Rivera*, No. 1:08-cr-20437-DLG (S.D. Fla. entered Aug. 12, 2008) (Magistrate’s Report and Recommendation). It is critical to note that while neither of these cases extended Second Amendment rights to the aliens in question, they gave no legal rationale for doing so and these cases are still ongoing. It should also be noted that these opinions were handed down within several months of *Heller*, and so more such decisions will likely be forthcoming.

391. *Verdugo-Urquidez*, 494 U.S. at 271 (citing *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (First Amendment); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92 (1931) (Just Compensation Clause); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (Fifth and Sixth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Fourteenth Amendment)).

392. See IND. CODE ANN. § 35-47-1-7 (West 2008). Of course, all *Heller* secures is the right to have a handgun within the home, so *Heller* does not invalidate the Indiana statute, but a subsequent case might.

393. I say “might” because any possible invalidation of this state law presupposes that private Second Amendment rights include a right to carry a handgun in public, which is currently an open question. The Court long ago stated that the Second Amendment does not protect carrying a concealed weapon in public. See *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897) (dictum). But this statement was dictum because the case did not concern the carrying of concealed weapons or the Second Amendment, and therefore the Court has never squarely faced the issue.

394. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 404, 449 (1857).

### 3. Current Due Process Jurisprudence Is Inconsistent at Best, Incoherent at Worst

A final reason to use a channel other than the Due Process Clause for incorporation is that, as discussed above, due process jurisprudence is convoluted and at times borders on incoherence. A gun case is no time to experiment. Incorporating through Due Process implicates the entirety of due process jurisprudence. The Court should circumvent this body of law, with its tangled web of inconsistencies, by taking another route.

One aspect of this concern comes from those invoking due process protections. Many criminals use guns while committing crimes, and many of their arguments during prosecution invoke the Due Process Clause. At some point the Court will need to address these due process concerns. It would be prudent to forestall that day to a time when the judiciary will have the benefit of experience in applying Second Amendment principles.

#### *B. Core Purpose of Second Amendment Is to Hold Federal Government in Check*

The Second Amendment is intended to serve two purposes: to enable people to defend themselves against criminals, and to enable “the people” to defend themselves against government force, both foreign and domestic. While two centuries of almost-unbroken domestic peace and stability, juxtaposed with America having the most powerful military in history, has caused the latter purpose to recede as a concern relative to the former, it was nonetheless foremost in the Framers’ minds in 1791,<sup>395</sup> and was still a concern in 1868.<sup>396</sup> The interpretive principles of originalism include the “context of the revolutionary struggle” and the Framers’ political philosophy.<sup>397</sup> Therefore from an originalist viewpoint any interpretation of the Amendment must include this concern.

Early Americans were deeply concerned with the possibility of an oppressive central government. They had just escaped such a government after the war against Great Britain. The fear of exchanging one oppressor for another was very much on the minds of the Framers, shown by the space devoted in *The Federalist* to reassuring Americans that the new Constitution would not threaten their liberty. Often *The Federalist* gave this assurance by reminding the people that their right to arms enabled them to keep the government in check. That is what led James Madison to explain that if the federal government were to ever threaten the rights of American citizens, that government would “be opposed [by] a militia amounting

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395. See, e.g., 1 ANNALS OF CONG. 778 (Joseph Gales ed., 1789) (statement of Rep. Gerry) (“What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty...Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins.”); see also, e.g., THE FEDERALIST No. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961) (“[The Constitution preserves] the advantage of being armed, which the Americans possess over the people of almost every other nation...[where] the governments are afraid to trust the people with arms.”); cf., e.g., THE FEDERALIST No. 24, at 156 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Though a wide ocean separates the United States from Europe, yet there are various considerations that warn us against an excess of confidence or security.”).

396. See *infra* Part V.B.4.

397. David F. Forte, *The Originalist Perspective*, in HERITAGE GUIDE, *supra* note 278, at 16.

to near half a million of citizens with arms in their hands.<sup>398</sup> This number refers to most of the able-bodied adult male population of the country at the time,<sup>399</sup> which, by law, is what the militia was,<sup>400</sup> and largely still is.<sup>401</sup> The idea of armed citizens as a bulwark against tyranny is why Madison described, as an advantage, the American citizenry “being armed, which the Americans possess over the people of almost every other nation.”<sup>402</sup>

Some would object that in modern times, an armed citizenry would not be effective at keeping at bay a professional military force armed with military weaponry.<sup>403</sup> Such statements misunderstand the effect of having vast numbers of people armed with guns. The purpose of the Second Amendment is not necessarily to automatically preclude tyranny;<sup>404</sup> it is simply to credibly deter tyranny.<sup>405</sup>

This purpose applies to government per se, which includes both national governments and also smaller sovereignties, such as states. Referring to the “chief palladium of constitutional liberty,” Madison said, “the people who are the authors of this blessing, must also be its guardians.”<sup>406</sup> Threats to liberty can come from state governments as easily as from the federal government. Protecting liberty is both the right and the duty of citizens; it is one of the rights protected by the Privileges or Immunities Clause. Hence the Second Amendment ensures that “the people” of the United States will always be able to act as guardians of their liberty, retaining supremacy over every level of government.

In the 1860s this ideal was codified in laws to protect citizens against state governments. The Freedmen’s Bureau Act,<sup>407</sup> passed by the same Congress that proposed the Fourteenth Amendment,<sup>408</sup> included among the protections that blacks should have as U.S. citizens “full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security...including the constitutional right to bear arms.”<sup>409</sup>

### 1. The Second Amendment Right Is Fundamental

The Supreme Court has now held that the Second Amendment is an individual right, but not whether that right is fundamental.<sup>410</sup> Some argue that fundamental rights precede the government, and the purpose of legitimate government is to

398. THE FEDERALIST No. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961).

399. Cf. THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, reprinted in 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425 (3d ed. 1937) (statement of George Mason, June 14, 1788) (“Who are the militia? They consist now of the whole people....”).

400. Act of May 8, 1792, ch. 33, 1 Stat. 271.

401. See 10 U.S.C. § 311(a) (2006).

402. THE FEDERALIST No. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961).

403. See Amar, *Constitution*, supra note 132, at 1164.

404. See Lund, *Past and Future*, supra note 9, at 3, 13–14, 19.

405. Lund, *Political Liberty*, supra note 41, at 115.

406. Letter of James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 14 THE PAPERS OF JAMES MADISON 218 (R. Rutland & C. Hobson eds., 1977).

407. See supra Part IV.A.2.a.

408. STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at vii (1998).

409. Freedmen’s Bureau Act, ch. 184, 14 Stat. 173, 176 (1866) (emphasis added).

410. See supra Part I.B.

secure such rights.<sup>411</sup> All the evidence surrounding the liberty interests entailed by the Second Amendment lead to the conclusion that it is a fundamental right, and the question of fundamentality has important ramifications for incorporating the right.

The Second Amendment is fundamental under any of the tests the Court has employed to find fundamental rights. As explained in Part III.B, it is unclear whether the test is if the right is implicit in the concept of ordered liberty,<sup>412</sup> necessary to an Anglo-American regime of ordered liberty,<sup>413</sup> deeply rooted in American history and tradition,<sup>414</sup> fundamental to the American scheme of justice,<sup>415</sup> or some combination of the above.<sup>416</sup> Whichever it is, the Second Amendment is at the heart of the American constitutional model. The *Heller* Court recognized that the right to arms was considered fundamental to Englishmen when the Constitution was adopted.<sup>417</sup> The Court gave no reason why this would not also translate into a fundamental right in the American system.

Hobbes considered the one fundamental right of a person to be the right of self-defense.<sup>418</sup> This right was also mentioned by others whose writings had a formative impact on the Framing, such as Locke<sup>419</sup> and Montesquieu.<sup>420</sup> There is a right to self-defense in the Bill of Rights, which some argue could have its locus in the Ninth Amendment,<sup>421</sup> if not the Second Amendment. But the right to self-defense should not be confused with the right to choose any means for self-defense. While self-defense presupposes some means of effectuating that defense, it is not a necessary concomitant that this right entails choosing a specific instrumentality for self-defense. That is why the right to arms was an auxiliary right in England,<sup>422</sup>

411. *E.g.*, Edwin Meese III, *The Meaning of the Constitution*, in HERITAGE GUIDE, *supra* note 278, at 2. Others may disagree with Attorney General Meese, noting that rights such as the right to a jury trial are inherently rights that coincide with government, rather than precede government, because they can only be exercised within organized society.

412. *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *overruled in part by* *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

413. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

414. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

415. *Duncan*, 391 U.S. at 149.

416. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Some jurists have found Second Amendment rights to be fundamental without specifying a test. *E.g.*, *Kasler v. Lockyer*, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring) (“[S]urely, the right to preserve one’s life is at least as fundamental as the right to preserve one’s privacy.”). The Ninth Circuit has recently applied a different combination of these tests to find that the Second Amendment is a fundamental right. *See Nordyke v. King*, 563 F.3d 439, 457 & n.17 (9th Cir. 2009), and the Second Circuit rejected the argument that the Second Amendment is a fundamental right without specifying a test. *See United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 258 n.1 (2d Cir. 2004) (citing *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984)), *vacated and remanded*, 544 U.S. 1029 (2005).

417. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008).

418. THOMAS HOBBS, *LEVIATHAN* 146 (Marshall Missner ed., Pearson Education 2008) (1651).

419. *See* JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* § 16 (Thomas P. Pearson ed., Liberal Arts Press 1952) (1690).

420. *See* CHARLES-LOUIS DE SECONDAT, *BARON DE MONTESQUIEU, DE L’ESPRIT DES LOIS* [THE SPIRIT OF THE LAWS] bk. X, ch. 2 (Legal Classics Library 1984) (1748).

421. *E.g.*, James Warner, *Disarming the Disabled*, 18 GEO. MASON U. CIV. RTS. L.J. 267, 282–83 (2008) (arguing that an alternative locus for the right of self-defense would be the Ninth Amendment, with self-defense being among the rights retained by the people yet not specifically enumerated in the Bill of Rights).

422. *See* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1003–04 (1995).

because access to arms was a means to an end (of self-defense), as opposed to self-defense per se, which was a primary right.<sup>423</sup>

Thus far the Court has only incorporated rights that are fundamental. Each time the Court faces incorporation it asks whether the right is fundamental,<sup>424</sup> and each of the tests given above is merely a different definition for fundamental rights. When the Court has denied incorporation, it has done so on the grounds that the right in question—though binding at the federal level—is not fundamental and thus does not apply to the states.<sup>425</sup>

Under any of the tests applied by the Court, the right to bear arms is fundamental. Gun ownership has an honorable and storied past since the founding of the republic,<sup>426</sup> so it is deeply-rooted in American history and tradition. The record is clear that many of the Framers considered the right to bear arms essential to the American scheme of liberty,<sup>427</sup> and used language suggesting that the right is necessary to ensure the perpetuity of any system of ordered liberty.<sup>428</sup> Therefore whatever test is employed, the result is a fundamental right.<sup>429</sup>

423. *See id.*

424. *E.g.*, *Malloy v. Hogan*, 378 U.S. 1 (1964) (holding that the Fifth Amendment right against self-incrimination is a fundamental right).

425. *E.g.*, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (holding that the Fifth Amendment right to not be tried for a felony without first being indicted by a grand jury is not incorporated because it is not fundamental).

426. *See* *United States v. Emerson*, 270 F.3d 203, 236–45 (5th Cir. 2001); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition*, 87 TEX. L. REV. 7, 49–56 (2008).

427. *See, e.g.*, George Mason, Virginia Convention, June 14, 1788, reprinted in THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, in COMMENTARIES ON LIBERTY, FREE GOVERNMENT AND AN ARMED POPULACE, 1789–1792, at 401 (David E. Young, ed., 2d ed. 1995) [hereinafter THE ORIGIN] (“Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them....Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.”); *A Democratic Federalist*, PHILADELPHIA PA. HERALD, Oct. 17, 1787, reprinted in THE ORIGIN, *supra*, at 46 (“[T]he federal rulers are vested with each of the three essential powers of government....What then will there be to oppose their encroachments? Should they ever pretend to tyrannize over the people, their *standing army* will silence every popular effort; it will be theirs to explain the powers which have been granted to them....[T]he liberty of the people will be no more....”).

428. *E.g.*, John Hancock, N.Y.J., Jan. 28, 1790, reprinted in THE ORIGIN, *supra* note 427, at 731 (“A well regulated and disciplined militia, is at all times a good objection to the introduction of that bane of all free governments—a standing army.”).

Professor Lund makes the additional point that the prefatory clause of the Second Amendment includes a restatement of the test for fundamentality. Lund, *Anticipating Incorporation*, *supra* note 168, at 194. The Amendment’s phrase, “necessary to the security of a free State” is quite similar to the phrase “necessary to an Anglo-American regime of ordered liberty.” *Id.* (quoting U.S. CONST. amend. II; *Duncan v. Louisiana*, 391 U.S. 149 n.14 (1968)). By this reasoning, it would be a simple matter for the Supreme Court to equate these two phrases, and in so doing incorporate the Second Amendment.

Professor Lund’s argument, however, is for incorporating the Second Amendment through the Due Process Clause. *Id.* at 191–96. But as explained above in Part V.A.2, entailing due process jurisprudence in cases involving gun rights would carry significant complications, and therefore ought to be eschewed if a superior route for incorporation could be utilized. The Privileges or Immunities Clause provides such a vehicle.

429. As a coda to this discussion, if the Second Amendment only secures a right to self-defense, with no political/civic aspect, then one could argue that it should be incorporated under the Due Process Clause instead of the Privileges or Immunities Clause.

The concept of a right to self-defense finds support in English law, providing insight into the Second Amendment. The Supreme Court found that the English Bill of Rights of 1689 secured an individual right to self-defense. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008), following in the aftermath of a series of disarmaments that left Englishmen defenseless. *See* JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS*

Therefore it is possible that the Second Amendment would be incorporated only if it is held to be a fundamental right. The Court has only incorporated such rights through Due Process, and Parts IV.A and B strongly suggest that this is true for incorporating rights through Privileges or Immunities as well. As many scholars argue, the Second Amendment secures such a right,<sup>430</sup> and therefore ought to be incorporated.

## 2. The Second Amendment Primarily Secures a Right to Political Participation, and Separately Secures a Right to Self-Defense

The Second Amendment secures two rights. One is self-defense, which is the focus of most Second Amendment literature. The other right, referenced by the Amendment's prefatory clause, is a political right. It is a right that enables the electorate to hold the government accountable and even to replace it if necessary.<sup>431</sup> As *Heller* puts it, the right to bear arms protects individuals against both public and private violence.<sup>432</sup>

Exactly which rights are political is a debatable question. Professor Amar makes the point that freedom of speech and the press are such rights because they specifically prohibit Congress from abridging personal or press communication.<sup>433</sup> This allows the elected government to be criticized, thereby impacting politicians' ability to retain office. Various authorities seem to consider the right to assemble

OF AN ANGLO-AMERICAN RIGHT 99–117 (1994). William Blackstone's *Commentaries on the Laws of England* was a leading treatise in America when the U.S. Bill of Rights was adopted. MEMORANDUM OPINION FOR THE ATTORNEY GENERAL, WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT 15 (Aug. 24, 2004), <http://www.usdoj.gov/olc/secondamendment2.pdf>. It was also the foremost authority on the English constitution. Lund, *Past and Future*, *supra* note 9, at 14. Blackstone wrote that the right to arms was a necessary concomitant of "the natural right...[t]o self-preservation." 1 BLACKSTONE, *supra* note 157, at \*144.

This proposition finds support from both ancient and medieval times. Warner, *supra* note 421, at 269–74 (citing HUGO GROTIUS, DE JURE BELLIC PACIS [THE LAW OF WAR AND PEACE] (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625); PLATO, THE LAWS, in THE COLLECTED DIALOGUES OF PLATO 1429 (Edith Hamilton & Huntington Cairns eds., Bollingen Found. 1961) (360 B.C.)). This sentiment is so ubiquitous that some literature characterizes self-defense as a human right. *E.g.*, David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43 (2008).

430. *E.g.*, Lund, *D.C.'s Handgun Ban*, *supra* note 66, at 249–50.

The Second Amendment has focused so heavily on self-defense that some posit that only arms suited to self-defense are protected by the Second Amendment. *E.g.*, Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151, 157–60 (Winter 1986); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 148 (Winter 1986). It should be noted that variations of this theory suggest the right to bear arms may not be strictly limited to self-defense. *See* Kates, *Handgun Prohibition*, *supra* note 41, at 258–61.

If the right to arms is a natural right or human right, it is difficult to explain why it should be limited to citizens instead of all persons. If all persons possess this right, then Due Process is the appropriate vehicle. Assuming arguing the right to self-defense is universal, it does not necessarily follow that the right to choose any instrumentality of self-defense is likewise universal. This would justify restricting firearm rights to citizens, keeping it within Privileges or Immunities. Non-citizens may still retain access to firearms, but as a policy choice by legislatures, not a constitutional right.

431. *See* THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776); *Kasler v. Lockyer*, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring) (noting the Framers' intention of "assuring an armed citizenry capable of...quelling tyrannical leaders").

432. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798–99 (2008); *accord Kasler*, 2 P.3d at 602 (Brown, J., concurring) ("Extant political writings of the period repeatedly expressed a dual concern: facilitating the natural right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders.").

433. Amar, *Constitution*, *supra* note 132, at 1142.

as one of these political rights as well,<sup>434</sup> if for no other reason than that the Constitutional Convention was such an assembly, and preserving the right to thus assemble would ensure that the people could convene to amend the Constitution if necessary.<sup>435</sup>

The Second Amendment secures both rights. The predominant right is a political right, specifically securing political participation and accountability.<sup>436</sup> The other is a natural right to self-defense.<sup>437</sup> While both rights overlap—or are complimentary—they are nonetheless distinct, and implicate different provisions of the Fourteenth Amendment.

The right with the most textual support in the Second Amendment is a political right. It secures democracy by guaranteeing political participation, ensuring that the electorate can manifest its will against rulers who turn on the citizenry. It serves to maintain political accountability, by adding a self-executing aspect to the concept that “whenever any form of government becomes destructive of [the people’s] rights [without their consent], it is the right of the people to alter or to abolish it.”<sup>438</sup>

This view is evinced by the correlation with other Framing-era political rights. It is true, as many gun-control advocates argue, that maintaining firearms was associated with being considered part of the militia. As the Supreme Court has noted, far from being a small select body like America’s modern National Guard, the militia consisted of all able-bodied males.<sup>439</sup> Discussing the Second Amendment, Professor Tribe notes that “the ‘militia’ included all able-bodied, property-owning white males who enjoyed the defining political rights of citizenship: the ability to vote, hold public office, and serve on juries.”<sup>440</sup> One can derive from Tribe’s list the principle that the primary right to bear arms is coextensive with other rights of citizenship. As access to such rights has expanded over the years, the right to arms should expand with them. As Professor Amar explains, “arms-bearing and suffrage were intimately linked 200 years ago and have remained so for two centuries.”<sup>441</sup> The right is a political right, reserved to citizens.

The assertion that one of the Second Amendment’s rights is political is not in derogation of the proposition that there is also a self-defense right in the Amendment.<sup>442</sup> There are compelling arguments for a self-defense right contemplated by the Framers and codified in the Amendment,<sup>443</sup> and the Court has

434. *Id.* at 1152 n.99 (quoting 3 JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* [THE SOCIAL CONTRACT], ch. XII (1762)); *id.* 1153–54 & nn.102–10 (citations omitted).

435. *Id.* at 1155.

436. *Cf. Heller*, 128 S. Ct. at 2798–99, 2801. Some might say that Justice Scalia’s opinion calls into question the political right entailed by the Second Amendment. Perhaps the majority seeks to distance itself from any insinuation of condoning revolution. But *Heller* acknowledges the prefatory clause’s meaning is purely political, and led to the codification of the right. *See id.* at 2797–2802. Thus, while *Heller* may cast doubt on the political right entailed by the Amendment, it by no means rejects it. This should be revisited in a future case.

437. *Id.* at 2801.

438. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

439. *Heller*, 128 S. Ct. at 2799–2800.

440. TRIBE, *supra* note 6, at 898 & n.212 (citing *Perpich v. U.S. Dep’t of Defense*, 496 U.S. 334, 341 (1990); Amar, *Constitution*, *supra* note 132, at 1164; Levinson, *supra* note 8, at 647).

441. Amar, *Constitution*, *supra* note 132, at 1164 n.152.

442. Some assert that the political right precludes a self-defense right. *See, e.g.*, TRIBE, *supra* note 6, at 899 (explaining this argument). *Contra* Halbrook, *What the Framers Intended*, *supra* note 430.

443. *E.g.*, Warner, *supra* note 421, at 269–77.

now found such a right.<sup>444</sup> But even if there was no such right in 1791, there could be after 1868. Amar contends that the Framers did not intend a self-defense right in the original Second Amendment, but that when the Fourteenth Amendment was adopted, its creators did intend to establish a non-military, non-revolutionary, private civil right to self-defense in the Second Amendment.<sup>445</sup>

The Framers thus had two separate justifications for the right to arms. The Glorious Revolution was relatively recent history for the Framers,<sup>446</sup> transpiring less than a century before American independence. They had this self-defense understanding from their English tradition, and the English Bill of Rights heavily informed the drafting of the American Bill of Rights.<sup>447</sup> In the aftermath of the American Revolution, these students of John Locke and Montesquieu would have foremost in their minds the people's need to hold their government in check, as seen in the express reference in the Declaration of Independence to abolishing and replacing unjust government.<sup>448</sup> These twin justifications fulfill the two purposes of the Amendment: deterring tyranny and facilitating self-defense.<sup>449</sup>

This political right cannot be dismissed because, of the two rights, it is the one accompanied by an express textual reference in the Second Amendment. Some argue that when the Constitution refers to "the people" it speaks of collective rights that the people express as a whole, while references to each "person," "freeman," or "man" refers to individual rights.<sup>450</sup> An alternative reading is that "the people" refers to political rights,<sup>451</sup> while "person" could refer to non-political rights such as due process and equal protection. If so, it should then be noted that rights such as speech and press are often exercised by persons individually, and collective entities such as "the press" are in fact comprised of individuals, often acting *qua* individuals. But this theory encounters turbulence when it reaches the Fourth Amendment, a criminal procedural safeguard that nonetheless references "the people," giving rise to the danger that every right could then shortly find itself designated a political right because such procedural rights are rights against state action,<sup>452</sup> and rights against actions by the state, by definition, carry political connotations. Such a position could destroy any distinctions between rights, and so either approach might be sufficiently attended by difficulty as to be unhelpful. Then again, this latter approach also argues that such a collective right of "the people"

444. *Heller*, 128 S. Ct. at 2788.

445. See AKHIL AMAR, *THE BILL OF RIGHTS* 258–66 (2000).

446. The "Glorious Revolution" in England saw King James II driven from the throne in 1688, and Parliament voting to support William of Orange and his wife Mary crowned as king and queen. Shortly thereafter, the British adopted a Bill of Rights that enumerated specific rights that Englishmen could assert against government power. See generally EDWARD VALLANCE, *THE GLORIOUS REVOLUTION: 1688—BRITAIN'S FIGHT FOR LIBERTY* (2008).

447. See generally MALCOLM, *supra* note 429.

448. See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

449. Lund, *Past and Future*, *supra* note 9, at 3; see also *Kasler v. Lockyer*, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring).

450. E.g., Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right To Bear Arms*, 71 J. AM. HIST. 22, 31 (1984).

451. See Amar, *Constitution*, *supra* note 132, at 1176.

452. Though Professor Amar then proceeds to make a historically-based argument as to why the Fourth Amendment should be considered something of a political right. See *id.* at 1176–77 & nn.201–09.

need not be a solely collective right,<sup>453</sup> so perhaps this model can be incorporated into the individual-right model in a way that could address many objections raised by some collective-right theorists.

Professor Amar points out that Senate rules circa 1866 disallowed foreigners to petition the Senate because petition was a right “of the people,”<sup>454</sup> providing further evidence that this phrase could refer exclusively to citizens. If “the people” can petition the Senate because the Senate is answerable to “the people,” then the term refers only to American citizens, not all people who happen to be in the country.

The Supreme Court has all but adopted this argument in *Heller*. The Court notes that the Framers’ concern was that government would disarm the people to avoid being held accountable.<sup>455</sup> The Court also says that the prefatory clause of the Second Amendment, while not limiting its scope, announced the reason it was codified.<sup>456</sup> As the Court puts it, the meaning of that prefatory clause is that the Second Amendment was intended to “safeguard against tyranny.”<sup>457</sup>

This argument applies *a fortiori* against the states. The purpose of incorporating the Second Amendment against the states finds support in the Framing era. Madison argued in *The Federalist* No. 10 that states presented a greater danger of oppressing unpopular minorities within state boundaries than did the federal government.<sup>458</sup> If this is true, then to whatever extent citizens should be protected against oppression from the federal government, the need to be protected from state governments could be even greater.<sup>459</sup>

### 3. Right Inhering in Federal Citizenship

This need makes evident why the right to bear arms is a right inhering in federal citizenship, allowing it to be incorporated under the *Slaughter-House Cases*. It is a fundamental right that the Framers of the Second Amendment intended for citizens. The Supreme Court used such terminology at the time when speaking of constitutional rights, as seen in the infamous *Dred Scott* decision which refers to provisions in the Bill of Rights as “rights and privileges of the citizen.”<sup>460</sup> The Framers of the Fourteenth Amendment referenced it as applying to citizens and intended to constrain the states.<sup>461</sup> Now in the Supreme Court’s sole examination of the Second Amendment, the Court speaks of it as a right of citizens. Long before that, although the Federalists and Anti-Federalists differed on many issues, they

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453. *Id.* at 1177.

454. Amar, *Fourteenth Amendment*, *supra* note 126, at 1226 & n.151 (citing U.S. CONST. amends. I, II, IV, IX, X).

455. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008).

456. *Id.*

457. *Id.* at 2802.

458. Amar, *Constitution*, *supra* note 132, at 1148.

459. *Cf.* 1 ANNALS OF CONG. 755 (J. Gales ed. 1834) (Aug. 17, 1789). Madison’s actual word choice in his House floor speech was that it is “equally necessary” to protect against the states, *id.*, but if the danger is greater, then the need is correspondingly greater as well.

460. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 449 (1857).

461. *See supra* Parts IV.B.2 & 3.

shared the conviction that the federal government should not be able to disarm the citizenry because an armed population helped protect liberty.<sup>462</sup>

This focus on the right to arms being a right of citizens is also seen from the right's intended reach. At least some Framers intended to limit the right to arms to citizens that were law-abiding and peaceable.<sup>463</sup> This reflects the ideal of a virtuous citizenry being a prerequisite to republican government,<sup>464</sup> where the people are sovereign over the government, holding them accountable and ensuring that only republican forms of government would be permitted in the United States.

The Second Amendment secured to the people the right to alter or to abolish their government, if necessary.<sup>465</sup> “[T]he simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people....”<sup>466</sup> The Second Amendment is therefore a “doomsday provision,”<sup>467</sup> operating as a “safeguard against tyranny”<sup>468</sup> to prevent the people losing control of their country to a government intent on maintaining rule by force of arms. The political component of the right to bear arms is that it is a right to ensure that American government is by the consent of the governed.

Certain rights—even rights that are fundamental—are restricted to citizenship. The most obvious example of a fundamental right so restricted is voting. While the Court has held this right fundamental,<sup>469</sup> and requires that severe burdens on the right to vote be subjected to strict scrutiny,<sup>470</sup> only American citizens ages eighteen and above can vote.

What, then, is the constitutional line for restricting certain rights to citizens, while other rights apply indiscriminately to all “the people” associated with the United States, or alternately, to every person in the United States? The key element might be whether the right in question is essential to our form of government. The Declaration of Independence says that a just government's legitimacy is “derived from the consent of the governed.”<sup>471</sup> The most obvious expression of popular consent is being elected by voters in a free and fair election. The Declaration thus provides the rationale for limited voting rights to citizens, and it also provides the basis for the Second Amendment's political purpose.

This right to hold rulers accountable and even remove tyrannical rulers if necessary is a “transcendent sovereign right” of the American people.<sup>472</sup> It should then follow that the specific textual right designed as an insurance policy on the people's sovereignty—the right to remove the government by force—is

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462. See Nelson Lund, *To Keep and Bear Arms*, in HERITAGE GUIDE, *supra* note 278, at 320.

463. Cress, *supra* note 450, at 34 (noting that Samuel Adams, cousin to future president John Adams, believed that only “peaceable citizens” had a right to arms).

464. Cf. U.S. CONST. art. IV, § 4.

465. Cf. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

466. *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

467. *Id.* at 570.

468. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2802 (2008).

469. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

470. *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005).

471. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

472. See Amar, *Constitution*, *supra* note 132, at 1133.

fundamentally an intrinsic part of our national system and thus a right inhering in national citizenship.<sup>473</sup>

#### 4. Special Concern in Reconstruction

The concept of enabling citizens to defend themselves against the action of states was especially prevalent during Reconstruction. As explained in Part IV.A, the constant concern during the adoption of the Fourteenth Amendment was to empower blacks, especially in the South, to enjoy the full liberties and protections of American citizens. The Fourteenth Amendment's Framers were concerned with blacks being safe and secure, both from lawless elements in society and also from their own state governments. The Second Amendment secures the most effective means to protect against both.

That is why Second Amendment rights came up with such frequency during Reconstruction. The Second Amendment right to bear arms was specifically mentioned as one of the civil rights Congress intended to restore to blacks. One congressman made this point on the House floor.<sup>474</sup> Another said that granting citizenship to blacks would secure rights of interstate travel, testifying in federal court, and keeping firearms.<sup>475</sup> The congressional debate centered on ending oppression of blacks by state governments.<sup>476</sup> In that debate, the right to keep and bear arms was specified as one of the "privileges or immunities" of citizens to be protected by Section 1 of the Fourteenth Amendment.<sup>477</sup> Since it is already clear that the Framers of the Fourteenth Amendment did not believe the Due Process Clause protected substantive rights, the Privileges or Immunities Clause is therefore the provision they intended to secure that right against the states.

Further evidence is found in the language of the Civil Rights Act of 1866 and its congressional deliberations. The Civil Rights Act states that citizens, "shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. . . ."<sup>478</sup> This language is mirrored in much of the congressional debate of the Civil Rights Bill, where empowering citizens for self-defense was an express consideration.<sup>479</sup>

Perhaps the single strongest historical argument for incorporating the Second Amendment is that the Southern states had a long history of oppressing blacks after slavery.<sup>480</sup> Southern slave states endeavored to prevent even *free* blacks from

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473. *Cf.* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This does not imply that the government must arm the citizenry and train them in the use of arms. It creates no governmental obligation, instead only preserving the right of the people to choose whether or not to bear arms and to become proficient in using them.

474. CONG. GLOBE, 39th Cong., 1st Sess. 654 (1866) (statement of Rep. McKee).

475. *Id.* at 1266 (statement of Rep. Raymond).

476. FLACK, *supra* note 86, at 96.

477. *Id.*

478. Act of Apr. 9, 1866, 14 Stat. 27.

479. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence) ("[Civil rights include] the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property.").

480. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 335–58 (1991); see generally HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 41.

keeping weapons.<sup>481</sup> Therefore securing an individual right was necessary to protect them.

Some say that the Second Amendment militia “was carefully designed to protect liberty through localism.”<sup>482</sup> It is more accurate to say that the Second Amendment was designed to protect liberty through individualism. The Amendment empowers an individual citizen to be self-sufficient in being able to protect himself, his family and property against any who would threaten them, his nation against foreign invasion, or his liberty against his government. Though it is certainly true that it is easier to flee a locality than a nation,<sup>483</sup> some Framers were concerned that smaller political units could pose a greater threat to liberty than national governments.<sup>484</sup> During Reconstruction the concern was not protecting local units of government, but rather protecting individuals.

This wariness of government per se is consistent with the republican ideal of representative government. The Second Amendment’s prefatory clause pronounces a republican principle of governance.<sup>485</sup> That principle dictates wariness against all forms of government, whether of a vast nation or a smaller (yet still vast vis-à-vis the individual) state or city. The preamble speaks of what is “necessary to a free state,”<sup>486</sup> including all units of government that constitute the state, which as found in Hobbes’s *Leviathan*, is the organized power of government over man, not just a specific level of government that we designate the national level.<sup>487</sup> States, no less than nations, can threaten life, liberty, or property, and thus what is necessary to secure liberty against one level of government is equally necessary to secure that same liberty against another level of government.<sup>488</sup>

While some might say that such a reading of the Second Amendment as something more than a federalism provision is due to “our modern day fixation on individual rights,”<sup>489</sup> to force a federalism-only gloss on the individual-right model of the Second Amendment is to blithely ignore the profound distrust that the Framers of the Second Amendment had toward all forms of government, not just national government. Such statements also cannot account for the debates surrounding the adoption of the Fourteenth Amendment, because the particular concern of the Framers in protecting blacks against local oppression is fatal to the federalism-only view.

John Bingham, author of the Privileges or Immunities Clause, said that the Fourteenth Amendment was needed to protect citizens of certain states from tyranny from their own state government.<sup>490</sup> If the principal purpose of the Second Amendment was as an insurance policy against an oppressive government, then

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481. Amar, *Against the States*, *supra* note 256, at 448.

482. *E.g.*, Amar, *Constitution*, *supra* note 132, at 1171.

483. *Id.*

484. *E.g.*, THE FEDERALIST No. 10 (James Madison).

485. Amar, *Constitution*, *supra* note 132, at 1171 & n.184 (quoting 1 ANNALS OF CONG., *supra* note 395, at 750 (statement of Rep. Gerry) (“What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty.”)).

486. U.S. CONST. amend. II, cl. 1 (emphasis added).

487. *See generally* HOBBS, *supra* note 418.

488. *See* Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1, 3–6 (2007).

489. Amar, *Constitution*, *supra* note 132, at 1175.

490. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

Bingham's statements further support the idea that the Second Amendment was very much in the mind of 1866 lawmakers as they proposed the Fourteenth Amendment, and was intended to extend the Second Amendment's protective power to hold state governments in check. The Fourteenth Amendment was designed to create federal protections "to protect the citizens of a state against the state itself."<sup>491</sup> It is difficult to conceive what protection could be more effective than the right to keep and bear arms.

Stephen Halbrook wrote a book arguing, like this Article, that the Second Amendment should be incorporated through the Privileges or Immunities Clause.<sup>492</sup> But Halbrook identifies the right at issue as self-defense, and he argues that it should be incorporated through Privileges or Immunities because every citizen has a constitutional right to protect himself.<sup>493</sup> Throughout the book Halbrook has a race-focused rationale, whereby the Fourteenth Amendment protects blacks equally with other Americans. He reasons that the Framers of the Fourteenth Amendment intended blacks to be citizens and also intended to protect their civil rights, including a right to self-defense; ergo, self-defense is a right of citizenship, and so is incorporated through Privileges or Immunities. Halbrook states that:

the constitutional right to bear arms was perhaps considered as the most fundamental protection for the rights of personal liberty and personal security, which may explain its unique mention in the Freedmen's Bureau Act. To the framers of the Fourteenth Amendment, human emancipation meant the protection of this great human right from all sources of infringement, whether federal or state.<sup>494</sup>

Halbrook's thesis is only partially correct. While the Second Amendment should be incorporated through Privileges or Immunities, a right to self-defense would find its locus in the Due Process Clause under the Court's modern substantive due process jurisprudence, not Privileges or Immunities.<sup>495</sup> There is no compelling reason why, if self-defense is so universal that Halbrook refers to it as a "human right,"<sup>496</sup> it should be denied to non-citizens. The idea of self-defense being a natural right has deep roots in Anglo-American law, as evidenced by Blackstone's *Commentaries*.<sup>497</sup> Halbrook's thesis would be more defensible if he argued that self-defense is a right of citizenship, but by characterizing it as arising from natural law and human rights, he removes it from the realm of citizenship and makes it a right

491. MCLAUGHLIN, *supra* note 197, at 656.

492. HALBROOK, *THAT EVERY MAN BE ARMED*, *supra* note 41, at 6, 10–11, 40–43, 139–40 (arguing and citing various authorities supporting that the right to bear arms is a right pertaining to citizenship).

493. *Id.* at 153.

494. HALBROOK, *FREEDMEN*, *supra* note 408, at 43–44 (internal quotation marks omitted).

495. Halbrook's argument is stronger as an originalist argument, that self-defense should be incorporated through Privileges or Immunities because all substantive rights incorporated under the Fourteenth Amendment should be incorporated through Privileges or Immunities, while the Due Process Clause constrains only state procedural actions. But while that argument may be true as a normative matter, the reality is that the Court is simply not going to undo over a century of substantive due process jurisprudence or totally rewrite incorporation doctrine on every right that has thus far been incorporated, and that massive body of precedent cannot be ignored in formulating the argument for how and why the Second Amendment should be incorporated.

496. HALBROOK, *FREEDMEN*, *supra* note 408, at 44.

497. 3 BLACKSTONE, *supra* note 157, at \*4 ("Self-Defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.").

that transcends national boundaries. The only way to make his case is to argue that the right to self-defense, while possessed by all persons, does not include the right to choose the instrumentality of that defense, that being reserved to citizens. But that argument proves too much, as it then naturally follows that a self-defense right in Privileges or Immunities would likewise not entail the right to choose the instrumentality, in which case there would still be no concomitant right to arms. In addition, the concept of protecting a discrete racial group on equal terms with other racial groups has been completely subsumed by the Equal Protection Clause, and the Court is not going to revisit the issue when the concept has thus been fully addressed.

The only argument that could justify this approach is to bifurcate the right to arms into two rights: self-defense versus instrumentalities. Under this approach, the right to self-defense could be a natural right that is fundamental and should extend to all persons regardless of citizenship, in which case that right should be recognized under due process and equal protection principles. But the liberty to choose a firearm as the instrumentality of self-defense, which is an auxiliary right under the English system,<sup>498</sup> is a right of citizens that could be incorporated through the Privileges or Immunities Clause.

### *C. Additional Arguments For and Against Incorporation*

There are several final arguments both for and against incorporation that must be considered in a full treatment of this issue.

#### *1. Arguments Against Incorporation*

There are several arguments against incorporating the Second Amendment. Some of these arguments counsel against incorporating through the Privileges or Immunities Clause, and others would bar incorporation through any part of the Fourteenth Amendment. While these arguments are not without merit, they are nonetheless unpersuasive.

As previously noted, the strongest argument against incorporating the Second Amendment is that it is a federalism provision. If the Second Amendment was to deter a despotic central government then it would have no application to the states; its focus would be solely national. As many argue that the Establishment Clause is a federalism provision,<sup>499</sup> so too can it be argued that the Second Amendment has a similarly national scope. If so, then the Amendment would not logically apply to the states.

One argument that has not received much attention is to argue in favor of state police power. As discussed previously, the police power enables states to regulate public health and safety.<sup>500</sup> Now that *Heller* has held that Second Amendment rights can be asserted against the federal government, another factor in incorporating the Second Amendment concerns police power. The concept of firearm rights against states raises the question of what should be the proper balance between the state

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498. See generally Cottrol & Diamond, *supra* note 422.

499. See *supra* note 154.

500. See *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919).

police function and the individual's right to arms.<sup>501</sup> There is a countervailing interest that opponents of the Amendment can use in a case challenging state law. This argument finds additional strength from the fact that the *Slaughter-House Cases*, long-used as a talismanic anti-incorporation case,<sup>502</sup> invokes the police power in refusing to extend federal power to the state law at issue in that case.<sup>503</sup>

#### a. Case Law

The Supreme Court has thrice stated that the Second Amendment only constrains federal action, not state action.<sup>504</sup> However, those cases came down in the era of *Barron v. Baltimore*,<sup>505</sup> where the Court held that the Bill of Rights only limits federal power.<sup>506</sup> That era ended long ago, and even during that era some state courts nonetheless extended Bill of Rights protections to state matters.<sup>507</sup> It was unclear for many years whether the anti-incorporation statements in this trio of cases discussing the Second Amendment constituted part of the Court's holding.<sup>508</sup>

The Court clarified that question in *Heller*. Though Justice Scalia makes clear in *Heller* that the Court was not deciding the incorporation question,<sup>509</sup> he does say that the earlier cases held the Second Amendment was not incorporated.<sup>510</sup> Therefore, incorporating the Second Amendment requires overruling those parts of *Miller v. Texas*, *Presser v. Illinois*, and *United States v. Cruikshank*. However, he also notes that those cases likewise stated that the First Amendment was not incorporated.<sup>511</sup> It is thus clear that the Court has long since abandoned the reasoning in those cases. They have been effectively abrogated for decades, as *Lochner* was abrogated in 1937.<sup>512</sup> Just as *Lochner* was not expressly overruled until many years later (1963, to be exact),<sup>513</sup> so too these cases can be explicitly repudiated when the incorporation issue is again presented to the Court. The Court in *Heller* suggested it would welcome the opportunity to do so.<sup>514</sup>

Stare decisis should not bar overruling the *Cruikshank* line of cases. Stare decisis requires that precedent be adhered to unless there is a special justification for

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501. Cf. Lund, *To Keep and Bear Arms*, in HERITAGE GUIDE, *supra* note 278, at 321.

502. See *supra* Part IV.C.1.

503. 83 U.S. (16 Wall.) 36, 117 (1873).

504. *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 264–66 (1886); *United States v. Cruikshank*, 92 U.S. 542, 551 (1876). *Cruikshank* ruled that the Second Amendment did not apply to the states, and both of the later cases reaffirmed *Cruikshank* as the controlling precedent.

505. 32 U.S. (7 Pet.) 243 (1833) (holding that the Fifth Amendment did not apply to a municipal law regulating wharfs in the harbor).

506. *Id.* at 247.

507. E.g., *Nunn v. Georgia*, 1 Ga. 243, 250 (1846).

508. See Lund, *Outsider Voices*, *supra* note 155, at 715 & nn.42–43 (arguing the Court's statements regarding incorporation in *Presser* and *Cruikshank* were not part of their holdings).

509. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008) (noting that “*Cruikshank*’s continuing validity on incorporation” was not an issue in *Heller*).

510. *Id.* at 2812–13.

511. *Id.* at 2813 n.23.

512. See *supra* note 95.

513. See *supra* note 95.

514. See *Heller*, 128 S. Ct. at 2809–11.

overruling it;<sup>515</sup> it is not an inexorable command.<sup>516</sup> It is simply a policy reflecting that it is usually better for a rule of law to be settled, than to be settled correctly.<sup>517</sup> There are exceptions, denoted by “usually.” Stare decisis is not as high a hurdle where constitutional questions are involved.<sup>518</sup> Further, the Court has held that stare decisis “does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law.”<sup>519</sup> The change and development regarding this constitutional question is obvious: no rights were incorporated in 1876, while over a dozen rights are now incorporated,<sup>520</sup> and in a manner inconsistent with *Cruikshank*. Therefore *Cruikshank* is a textbook example of a case fit to be overruled.

However, lower courts are another story. Until such time as it is overruled, lower courts considering Second Amendment challenges to a state or local government action may well regard *Cruikshank* as controlling,<sup>521</sup> in which case it is dispositive.<sup>522</sup>

Some argue that *Cruikshank* can be read as only barring incorporation through Privileges or Immunities, leaving open the possibility of incorporating through Due Process.<sup>523</sup> But there are two problems with this argument. The first is that *Cruikshank* does not confine its language to Privileges or Immunities, simply holding that the Second Amendment does not apply to the states.<sup>524</sup> Although this

515. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

516. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citation omitted).

517. *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

518. *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (citation omitted).

519. *Agostini*, 521 U.S. at 235–36.

520. *See supra* note 79.

521. *Agostini*, 521 U.S. at 223–38.

522. Lund, *Anticipating Incorporation*, *supra* note 168, at 186–87. There are other arguments that may still allow for Second Amendment rights to be extended through arguments not addressed, and therefore not rejected, in *Cruikshank*. *See id.* at 188 (citations omitted).

523. *E.g.*, Lund, *Anticipating Incorporation*, *supra* note 168, at 199. As this Article was being edited, the Ninth Circuit adopted this reasoning to incorporate the Second Amendment through the Due Process Clause. *See Nordyke v. King*, 563 F.3d 439, 448, 457 n.16 (9th Cir. 2009); *cf.* notes 11, 167, 322, 372 & 416 (discussing *Nordyke*).

524. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). As this Article was being edited, the Second Circuit adopted this reasoning in denying incorporation to the Second Amendment. *See Maloney v. Cuomo*, 554 F.3d 56, 58–59 (2d Cir. 2009). However, although it was the first federal appellate court to examine a Second Amendment incorporation claim post-*Heller*, surprisingly the Second Circuit panel did nothing to explore this issue. By contrast, Judge O’Scannlain’s opinion in *Nordyke*, joined by Judges Alarcon and Gould, thoroughly explored the incorporation issue. *See Nordyke*, 563 F.3d at 446–57. The per curiam opinion in *Maloney*, for a panel consisting of Judges Pooler, Sotomayor, and Katzmann, did nothing to ventilate the issues entailed by incorporation or consider whether the nineteenth-century precedent the panel cited is still good law, devoting only one paragraph to the issue. *See Maloney*, 554 F.3d at 58–59. This decision may well receive intense scrutiny, given that, also as this Article was being edited, Judge Sotomayor was nominated to fill the vacancy created by the retirement announcement of Justice David Hockett Souter. *See* President Barack Obama, Remarks by the President in Nominating Judge Sonia Sotomayor to the U.S. Supreme Court (May 26, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/). It should be noted that the *Maloney* panel’s conclusion was consistent with another Second Circuit decision with Judge Sotomayor sitting on the panel. *See United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 258 n.1 (2d Cir. 2004) (holding that the Second Amendment is not a fundamental right), *vacated and remanded*, 544 U.S. 1029 (2005). Although the *Maloney* panel’s conclusion might have been compelled by *Agostini*, 521 U.S. at 237 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)), *see supra* notes 521–22 and accompanying text, a much more thorough discussion of such a significant constitutional question seems warranted. The hallmarks of well-crafted judicial opinions include that

statement could be read narrowly because the Court gave no indication that it was specifically contemplating Due Process, and case law suggests the Court was focused on Privileges or Immunities when considering such claims during this period,<sup>525</sup> a natural reading of *Cruikshank* suggests that its statement extends to all of the Fourteenth Amendment. Second, if incorporating the Second Amendment through Due Process is permissible for lower courts under *Cruikshank*, that would still leave the Second Amendment freighted with all of the problems set forth in Part V.A. The Second Amendment should instead be incorporated through Privileges or Immunities, free of the baggage that accompanies Due Process incorporation.

Therefore although the Second Amendment should be incorporated, Privileges or Immunities remains the ideal route. With *Cruikshank* and its progeny still on the books, the lower federal courts therefore may have no choice but to wait until the Supreme Court takes up the issue.

#### b. Charles Fairman

Professor Fairman argues that the Fourteenth Amendment does not incorporate provisions of the Bill of Rights against the states.<sup>526</sup> He quotes Joseph Story to

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they ventilate the relevant legal issues and fairly consider the pertinent arguments, providing clear reasoning as to which arguments the court finds persuasive, and why. *Maloney's* cursory opinion did not even attempt to explore the issues raised in the case.

In this regard, the *Maloney* opinion is strikingly similar to another recent Second Circuit opinion involving Judge Sotomayor. See *Ricci v. DeStefano*, 264 Fed. Appx. 106 (summary order), *withdrawn and replaced by* 530 F.3d 87 (per curiam), *rev'd*, 129 S. Ct. 2658, 2681 (2009). In *Ricci*, the constitutional issues raised by a city throwing out an entire firefighter-promotion program because of the racial composition of the highest-achieving test-takers were disposed of in a single paragraph of a brief summary order, see 264 Fed. Appx. at 107, and then later replaced by an equally brief per curiam opinion, see 530 F.3d at 87. This cursory treatment prompted a strongly-worded dissent from another Second Circuit judge when the full court declined to rehear the case en banc, see *Ricci*, 530 F.3d 88, 92 (2d Cir. 2009) (Cabranes, J., dissenting from the denial of rehearing en banc), including the extraordinary statement that the panel opinion “tersely adopts the reasoning of a lower court” to “insulate[] [the judgment] from further judicial review.” *Id.* at 101. It is possible that portions of this dissent could likewise be appended to the *Maloney* opinion.

Contrast the Second Circuit panel’s approach in *Maloney* to the one employed by a jurist in an earlier case involving firearms. Judge Janice Rogers Brown currently serves on the U.S. Court of Appeals for the D.C. Circuit, and before that was a justice on the California Supreme Court. See U.S. Court of Appeals for the District of Columbia Circuit, About the Court, Judges, <http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judge+-+JRB> (last visited May 10, 2009). During her tenure on the California court, then-Justice Brown wrote the opinion when the court considered a challenge to a California ban on various types of firearms on state (not federal) constitutional grounds. See *Kasler v. Lockyer*, 2 P.3d 581, 583 (Cal. 2000). Justice Brown also wrote separately from her own majority opinion, however, to explore the issue of possible developments in Second Amendment jurisprudence, including surveying relevant scholarly literature. *Id.* at 601–05 (Brown, J., concurring). Even though the California plaintiffs did not raise a federal constitutional issue and so did not invoke the Second Amendment, Justice Brown saw the relevance of the Second Amendment and so added this material to the opinion. Such an examination was helpful in that there had been considerable then-recent scholarly developments concerning the Second Amendment, and Justice Brown clearly thought such material worthy of being discussed by the judiciary when deciding a case that invoked firearm rights. Such judicial treatment helped to lay a firm foundation upon which the U.S. Supreme Court could eventually consider the Second Amendment, which the Court did eight years after *Kasler* in *Heller*.

525. See *Miller v. Texas*, 153 U.S. 535, 538 (1894) (discussing how the Fourteenth Amendment impacted the Second and Fourth Amendments “as pertaining to citizens of the United States”).

526. See Fairman, *supra* note 207, at 138–39. Fairman limits his argument to the Privileges or Immunities Clause, but this was before most of the Bill of Rights was incorporated through the Due Process Clause. His argument is anti-incorporation, not just anti-incorporation through a specific clause.

support his contention that the Article IV clause was merely intended to ensure equal treatment under the law.<sup>527</sup> He further supports this reading by quoting antebellum state cases.<sup>528</sup>

However, Fairman never addresses the obvious flaws in this position. Justice Story was commenting only on the Article IV Privileges and Immunities Clause; the Fourteenth Amendment would not exist until decades later. Fairman's characterization of that clause's effect is addressed in our modern Constitution by the Equal Protection Clause. But each constitutional provision is presumed to have separate and distinct meaning.<sup>529</sup> Therefore the Privileges or Immunities Clause of the Fourteenth Amendment must be given separate meaning from the Equal Protection Clause. If Story's meaning is covered under the Equal Protection Clause, then it violates the presumption of antisuperfluosity to say Privileges or Immunities has no separate meaning. Further, the state cases Fairman cites were pre-Fourteenth Amendment, so they did not purport to interpret Privileges or Immunities, and were not even federal cases.<sup>530</sup> The weakness inherent to these citations is instructive of just how thin the evidence is favoring Fairman's position.

The greatest flaw in Fairman's position, however, is fatal to his anti-incorporation argument. Fairman extensively examines various floor speeches made during Congress's debates over the Fourteenth Amendment,<sup>531</sup> and also state ratification debates.<sup>532</sup> Despite this enormous amount of material, Fairman's argument fails for two reasons.

First, his speeches are cherry-picked. Many pro-incorporation comments were made during the congressional debates,<sup>533</sup> and surprisingly Fairman even quotes a couple of them without acknowledging their pro-incorporation content.<sup>534</sup> Fairman also tries to pit one speaker against another when their statements can be reconciled.<sup>535</sup>

527. *Id.* at 12 (quoting 2 STORY, *supra* note 154, § 1806 ("The intention of this clause was to confer on [citizens of each state]... a general citizenship, and to communicate all the privileges and immunities which citizens of the same State would be entitled to under like circumstances.")).

528. *Id.* at 13–54 (quoting *Abbot v. Bayley*, 6 Pick. 89 (Mass. 1827); *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797)).

529. *See Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....") (citations and internal quotation marks omitted); *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.").

530. *Id.* at 177 ("It is emphatically the province and duty of the [federal] judicial department to say what the law is.").

531. *See Fairman, supra* note 207, at 28–50.

532. *Id.* at 81–132; *see also Duncan v. Louisiana*, 391 U.S. 145, 165 (1968) (Black, J., concurring).

533. *See supra* Part IV.B.3.

534. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham); *see also Wildenthal, supra* note 150, at 1072 & nn.71, 73 (criticizing Fairman's portrayal).

535. For example, Fairman says "unless the first eight amendments enumerate 'rights that attach to all free governments,' [one speaker's] understanding is to be counted as opposed to that of [another speaker]." Fairman, *supra* note 207, at 63. However, Fairman never acknowledges the possibility that both speakers could consider the first eight amendments to attach to free governments, which would reconcile the statements and show both speakers are in agreement. The language later employed by the Court in incorporating the Bill of Rights is strikingly similar to this language, suggesting the Court reconciles these statements.

Second, legislative history is not a sound basis for constitutional interpretation. Legislative history should not be accorded interpretive weight when the meaning of the terms is intrinsically discernable.<sup>536</sup> The weight of the evidence is that “privileges or immunities” encompasses the Bill of Rights.<sup>537</sup> Therefore, at a minimum, the Clause was intended to incorporate substantive rights.

Ironically, it is something beyond Fairman’s ken that dooms his argument. In quoting a lengthy portion from Senator Jacob Howard’s congressional remarks, he includes:

[I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.<sup>538</sup>

This does not speak against incorporation through Privileges or Immunities; it would bar incorporation under any provision of the Fourteenth Amendment, including Due Process. Since the Court has incorporated over a dozen clauses from the Bill of Rights,<sup>539</sup> mostly after Fairman published his article, it is beyond question that the Court does not accept this premise. This passage specifically mentions the Takings Clause as one such unincorporated provision. Yet the Takings Clause was the first Bill of Rights provision to be incorporated,<sup>540</sup> a decision that was reasserted as recently as *Kelo v. City of New London*.<sup>541</sup> Therefore, this argument fails, because not only is Fairman incorrect from an originalist interpretation, but also the Court has rejected Fairman’s conclusion by repeatedly incorporating specific provisions that Fairman argues are not incorporated.

## 2. Arguments for Incorporation

In addition to the arguments explored in this Article favoring incorporation, several collateral points should be added. While none are dispositive, each provides an additional rationale for incorporating the right to bear arms.

### a. Founding-Era Arguments for Incorporation

There are arguments for applying the Second Amendment against the states from the time the Second Amendment was adopted. This Article focuses on how the

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536. SCALIA, *supra* note 85, at 31; *see also* *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063–64 (2009) (stating that if the language of a law is plain and unambiguous, it must be applied according to its terms); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

537. *See supra* Part IV.B.1.

538. Fairman, *supra* note 207, at 57 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard)).

539. *See supra* note 79 (listing incorporation cases).

540. *See* *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

541. 545 U.S. 469, 472 n.1 (2005).

Fourteenth Amendment applies the right to bear arms to the states. However, there is also evidence from when the Second Amendment was ratified showing that the Framers may have originally intended the right to bear arms to directly apply against the states. While not exhaustive, the examples below represent many such statements made during that time.

William Rawle is a prominent constitutional authority from the time of the Framing. Rawle was held in such legal esteem among the Framers that President George Washington offered him the position of U.S. Attorney General during the critical formative period of America's first administration, an offer Rawle declined.<sup>542</sup> But as a member of the Pennsylvania Assembly that voted to ratify the proposed Bill of Rights, in his famous exposition of the Constitution Rawle wrote of the Second Amendment:

In the second article, it is declared, that a *well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent....[W]hile peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country....

The corollary, from the first position, is, that *the right of the people to keep and bear arms shall not be infringed*.

The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.<sup>543</sup>

Note how Rawle speaks to first principles. Rather than narrow remarks directed against some easily-discerned policy concern, Rawle frames the right to bear arms as essential to free government. He then proceeds to characterize disarming citizens as a tactic resulting from a "blind pursuit of inordinate power." While this is self-evidently possible for any level of government, not just federal government, Rawle then goes on to specify that he believes the Second Amendment constrains state government as well as federal.

#### b. Credibility of the Judiciary

A final argument in favor of incorporating through the Privileges or Immunities Clause is that it will increase the institutional strength and integrity of the judiciary. A significant part of the courts' effectiveness in fulfilling their constitutional role in our governmental framework is the credibility that the public attaches to their work. In a country governed by the rule of law, where the judiciary is an independent branch that cannot be overridden by the legislature or the executive, it is essential that the judgments and opinions of the judiciary demand respect. Continuing to inconsistently employ discredited *Lochner*-type substantive due process principles detracts from that credibility.

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542. Hardy, *supra* note 41, at 613 (citing ELIZABETH KELLY BAUER, COMMENTARIES ON THE CONSTITUTION 1790-1860, at 15 (1965); MEMOIRS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA 55 (1840)).

543. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (2d ed. 1829).

Jurists ought not to believe that they can decide individual issues according to their personal policy preferences, being called out by dissenting jurists with scathing criticism, without such decisions having the aggregate effect of diminishing the judiciary's capacity to fulfill its essential role. Some sitting on the Court have made precisely this point.<sup>544</sup> The solution is not for dissenters to remain silent, but instead for majority opinions to not give cause for such dissent. While some would say that it is merely the way substantive due process is employed that gives rise to such statements, others suggest that substantive due process per se is the problem. There is a "danger that the potential disillusionment occasioned by the courts' continued use of an interpretive theory that is both textually and historically suspect will lead judges to abdicate, in whole or in part, their role as the guarantors of individual rights."<sup>545</sup> Incorporating the Second Amendment through Privileges or Immunities instead of Due Process would help wean the law away from substantive due process, and would be a step in the right direction.

## VI. CONCLUSION

The Second Amendment secures the right to protect life, liberty, and property against those who would seek to unjustly take them. That threat often comes from criminals. Therefore the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment secures a right of self-defense and defense of others.<sup>546</sup> However, those who adopted the Second Amendment—and those who adopted the Fourteenth Amendment—knew that sometimes that threat comes from the government. When it does, the people must be able to protect themselves.

This applies to all levels of government. For the Framers of the Second Amendment, the threat came from a national government. For the Framers of the Fourteenth Amendment, the threat came from state governments. The *Heller* Court suggests that it recognizes this, quoting Justice Joseph Story for the proposition that the Second Amendment is necessary to a free polity,<sup>547</sup> addressing government per se and therefore encompassing all levels and forms of government. Therefore the Second Amendment was focused on enabling the people to protect themselves against nations, and the Fourteenth Amendment focused on extending that protection to include the states.

Supporters of finding implied fundamental rights in the Constitution should welcome reviving the Privileges or Immunities Clause. Some scholars believe that the Privileges or Immunities Clause provides a far stronger foundation upon which to enact public policy, which reorders society through the courts, than the Due

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544. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1001–02 (1992) (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., dissenting).

545. *TRIBE*, *supra* note 6, at 1318.

546. 128 S. Ct. 2783, 2811 (2008).

547. *Id.* at 2800–01.

Process Clause,<sup>548</sup> especially since these decisions would no longer carry the odious shades of *Lochner*.<sup>549</sup>

Some express concern that incorporating through Privileges or Immunities would render Due Process superfluous.<sup>550</sup> Why the controversy? First, only in an ivory tower could one become concerned about whether alternate legal theories render a pre-existing philosophical construct less important. Most people—including most lawyers (and their clients)—are far more concerned with practical application and how it impacts the welfare of individuals and groups. Second, the argument is wrong. There are hundreds of settled precedents interpreting or applying Due Process, some governing critical aspects of American jurisprudence. Any future cases employing Privileges or Immunities will work no mischief against this case law, so none should fear that Due Process will fade into obscurity in the wake of judicial exploration of Privileges or Immunities.

Some conservative jurists have expressed deep concern over the potential for judicial mischief that a revitalized Privileges or Immunities Clause could spawn,<sup>551</sup> with one even calling it a “dormant volcano.”<sup>552</sup> While that may be true, Privileges or Immunities could not surpass what the Court has done in recent years through the Due Process Clause (all decided after Justice Thomas and Judge Wilkinson expressed their opinions).<sup>553</sup> It cannot be a sound canon of constitutional interpretation that the Supreme Court should not explicate a constitutional provision for fear of how that provision might be abused.

The Second Amendment should be incorporated against the states, but there are difficulties with doing so through the Due Process Clause. Now that the Privileges or Immunities Clause has been revived, it provides the ideal route for the Court to incorporate Second Amendment rights without triggering any of the challenges inherent in due process jurisprudence. Therefore the Supreme Court ought to incorporate the Second Amendment through the Privileges or Immunities Clause, extending the rights entailed by the Second Amendment to all Americans.

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548. E.g., TRIBE, *supra* note 6, at 1319–20; Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L. REV. 1143, 1147 (1992); Gerhardt, *supra* note 262, at 442.

549. Chemerinsky, *supra* note 548, at 1147.

550. TRIBE, *supra* note 6, at 1327–30.

551. Saenz v. Roe, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting).

552. J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 43, 51 (1989).

553. See, e.g., Lawrence v. Texas, 539 U.S. 558, 579 (2003); Grutter v. Bollinger, 539 U.S. 306, 344 (2003); Stenberg v. Carhart, 530 U.S. 914, 930 (2000).