

No. 08-4244  
(Consolidated with Nos. 08-4241 and 08-4243)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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OTIS McDONALD, ET AL.,  
Plaintiffs-Appellants,

v.

Dist. Ct. No. 08-C-3645

CITY OF CHICAGO,  
Defendant-Appellee.

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NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,  
Plaintiffs-Appellants,

v.

Dist. Ct. No. 08-C-3696

VILLAGE OF OAK PARK  
Defendant-Appellee.

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NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,  
Plaintiffs-Appellants,

v.

Dist. Ct. No. 08-C-3697

CITY OF CHICAGO,  
Defendant-Appellee.

Appeal from a Judgment of the United States District Court  
for the Northern District of Illinois  
The Hon. Milton I. Shadur, Senior District Judge

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## INTEREST OF AMICUS

The Institute for Justice (“IJ”) was founded in 1991 and is a public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society and advances legal protections for economic liberty, free speech, private-property rights, and school choice. While IJ does not litigate firearm-regulation cases, it has consistently advocated for a principled interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution as preventing state governments from violating the basic civil rights of their own citizens. As discussed in the Argument below, the right to armed self-defense is among these basic civil rights.<sup>1</sup>

## INTRODUCTION

The Supreme Court’s landmark decision in *Heller v. District of Columbia*, 128 S. Ct. 2783 (2008), which upheld the individual right to keep and bear arms enshrined in the Second Amendment, has raised serious questions about what limits, if any, the United States Constitution places on the ability of state and local governments to regulate citizens’ ownership and possession of firearms. As alluded to by the Supreme Court in *Heller*, and as recognized by the parties currently before

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<sup>1</sup> This brief is filed with the consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity other than Amicus or its counsel make any monetary contribution intended to fund the preparation or submission of this brief.

this Court, answering that question will require a reevaluation of decisions and doctrines left largely unexamined since the days of post-Civil War Reconstruction.

Amicus recognizes that there is a preliminary question of whether the incorporation issue in this case is controlled by the Supreme Court's decisions in *United States v. Cruikshank*, 92 U.S. 542 (1875), *Presser v. Illinois*, 116 U.S. 252 (1886), or *Miller v. Texas*, 153 U.S. 535 (1894), which employed pre-incorporation reasoning to conclude that the Constitution does not protect an individual's right to keep and bear arms from infringement by state and local governments. The McDonald-appellants and the NRA-appellants have both offered persuasive arguments that *Heller* requires a fresh analysis not only of prior Supreme Court case law, but also of this Court's decision in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) concerning the incorporation issue, and Amicus therefore does not repeat those arguments. Instead, this brief seeks to illuminate the incorporation analysis by describing in greater detail the relevant history of the Fourteenth Amendment, the original public understanding of that Amendment—including specifically the Privileges or Immunities Clause—and the evils the Amendment was intended to correct.

## **ARGUMENT**

The text, history, and original public understanding of the Privileges or Immunities Clause of the Fourteenth Amendment all demonstrate that it was specifically designed to prevent state and local governments from violating substantive rights held by citizens of all races and backgrounds. For over a century,

however, the Clause has been seen as little more than a dead letter, despite a nearly unanimous chorus of voices condemning the Supreme Court's unduly narrow and ahistorical interpretation of the Clause in the *Slaughter-House Cases*, and the existence of a near-consensus among academics and jurists (including a number of Supreme Court Justices) that the time is ripe for a reconsideration of the Privileges or Immunities Clause in an appropriate case. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting).

This is exactly such a case. Because the Privileges or Immunities Clause, like all constitutional amendments, must be examined in light of the evils its Framers were seeking to remedy, and because the historical record makes plain that the Framers of the Fourteenth Amendment were concerned with the right to armed self-defense, it is difficult to imagine a more clear-cut vehicle for reevaluating the proper role of Privileges or Immunities in the constitutional framework.

It is, however, somewhat inaccurate to frame the question before this Court as whether the Second Amendment's right to keep and bear arms is "incorporated" against the states. As discussed below, the proper analysis asks two slightly different questions. Part I below addresses whether the Privileges or Immunities Clause should be understood to protect substantive rights. Part II addresses whether those rights include a right to keep and bear arms—a right that, given the Framers' and ratifiers' demonstrated concerns about protecting the ability of newly freed slaves and others to defend themselves, is best viewed as a right to armed self-

defense. The answer to both questions is a resounding “yes”—the Privileges or Immunities Clause of the Fourteenth Amendment protects substantive rights from incursion by state and local governments, and the right of citizens to keep and bear arms for self-defense is among the most important of those rights.

### I. **The Privileges or Immunities Clause Protects Substantive Rights.**

The Privileges or Immunities Clause is elegant in its simplicity<sup>2</sup> and was, in the words of John Hart Ely, “probably the clause from which the [F]ramers of the Fourteenth Amendment expected most . . . .” John Hart Ely, *Democracy and Distrust* 22 (1980). The Fourteenth Amendment was, like the 1866 Civil Rights Bill and the Freedmen’s Bureau Bill considered by the same Congress, meant to remedy a particular set of evils in the Reconstruction South, and the Privileges or Immunities Clause was an integral part of that remedy. Unfortunately, the Supreme Court’s discussions of the Clause have not yet reckoned with the Clause’s historical purpose—an oversight that the Court implicitly recognized in *Heller* and that this case provides the first opportunity to address post-*Heller*. *Heller* makes clear that cases like *Cruikshank* failed to “engage in the sort of Fourteenth Amendment inquiry required by” modern jurisprudence, 128 S. Ct. at 2813 n.23, sending a strong signal that it intends that this issue be analyzed under the Fourteenth Amendment—not just the Due Process Clause—in light of historical evidence. Below, Amicus undertakes precisely that analysis.

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<sup>2</sup> The Fourteenth Amendment begins: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .” U.S. Const. Am. XIV.

**A. The Privileges or Immunities Clause Is an Essential, Substantive Element of the Fourteenth Amendment.**

Any analysis of the Fourteenth Amendment must begin by examining the evils that Amendment was meant to combat. *Cf. Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) (“In the construction of the constitution, we must . . . examine the state of things existing when it was framed and adopted . . . to ascertain the old law, the mischief and the remedy”) (citation omitted).

Contemporaneous news reports bring home the shocking extent to which states in the Reconstruction South used the so-called Black Codes to keep newly freed blacks and antislavery whites in a state of penury and terror. Discharged Union soldiers were forcibly stripped of their weapons; South Carolina law prescribed flogging for any black who broke a labor contract; others prevented blacks from practicing trades or even leaving their employer’s land without permission; minors in Mississippi were “taken from their parents and bound out to the planters”; white Union sympathizers often had their property seized or found themselves banished from a state outright. *See* David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, at 8-12 (2009), available at <http://ssrn.com/abstract=1322323> (hereinafter, Hardy, *Original Popular Understanding*) (collecting these and other examples from contemporaneous news accounts). For many, if not most, freedmen, life as a “free” man cannot have seemed much better than life as a slave. *Cf.* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Reviving the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L.

Rev. 1, 72 (1996) (noting the Reconstruction South’s additional abuse of the right to “free speech, the right to hold religious meetings and the right to bear arms”).

Against this backdrop, the Fourteenth Amendment is best viewed as striking at three different categories of evils in the post-Civil War South. First, it was meant to prevent states from locking newly freed slaves out of *political* society—an end accomplished by stripping the states of their power to define “citizenship,” effectively overruling the *Dred Scott* case.<sup>3</sup> See Don E. Fehrenbacher, *The Dred Scott Case* 579-81 (1978). Second, the Fourteenth Amendment was meant to prevent states from discriminating against newly freed slaves by, for example, deliberately refusing to provide black citizens with police protection. *See, e.g.*, David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years* 349 (1985). And, finally, it was meant to prevent states from locking freedmen and others out of *civil* society by stripping them of certain rights—such as the right to assemble, to pursue a common occupation, or to arm themselves—that Congress viewed as inherent in the definition of what it means to be a free man.

This last goal is perhaps best encapsulated in a statement by Congressman John Bingham, the Fourteenth Amendment’s principal author:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. . . . It is the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same

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<sup>3</sup> The integration of freed slaves into *political* society was, of course, not complete without the introduction of the Fifteenth Amendment two years after the introduction of the Fourteenth.

shall be abridged or denied by the unconstitutional acts of any State.

CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866); *see also* Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol. 1, 25-26 (1998) (evaluating the Clause in light of contemporaneous congressional statements and modern scholarship). Contemporaneous sources, such as articles and editorials from the nation's leading newspapers, confirm that Congressman Bingham's interpretation represented the dominant view of the Fourteenth Amendment's purpose and effect. Hardy, *Original Popular Understanding*, at 15-23 (detailing media coverage of debates over the Amendment); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Woodbridge) (amendment would empower Congress to protect "the natural rights which necessarily pertain to citizenship").

Congressman Bingham's words in the House of Representatives were also echoed in the Senate. In introducing the amendment, Senator Jacob Howard relied extensively on Justice Bushrod Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1823), to illustrate what substantive rights would be protected from state interference by the Fourteenth Amendment. *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866) (Statement of Sen. Howard) (discussing the meaning of Article IV's "privileges and immunities" as described in *Corfield* and explaining that the "great

object” of the Fourteenth Amendment is to “restrain the power of the states and compel them at all times to respect these great fundamental guarantees”). And there could be no doubt about the source of these protections, in Senator Howard’s view: “This is [the Amendment’s] first clause,” he said, “and I regard it as very important.” *Id.*

The Framers’ view of the Privileges or Immunities Clause as the source of the Fourteenth Amendment’s substantive protections was equally manifest during the ratification campaigns in the states. Historian Michael Kent Curtis quotes a Republican congressman discussing ratification in Ohio:

I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of Southern slaveholders . . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected.

Michael Kent Curtis, *No State Shall Abridge* 138-39 (1986) (quoting Congressman Columbus Delano) (emphasis added).

The Privileges or Immunities Clause, then, was viewed by its Framers as not just requiring equal treatment, but as protecting a certain set of substantive rights from infringement by the states. Equally importantly, it was originally understood by the general public, who ultimately ratified the Amendment through their state representatives, to do exactly that. See Hardy, *Original Popular Understanding*, at 15-23 (detailing media coverage of debates over the Amendment). Perhaps the most

succinct popular interpretation of the Privileges or Immunities Clause prior to its ratification comes from a lengthy pseudonymous essay in the New York Times credited only to “Madison”:

What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of *habeas corpus* to take, hold, and dispose of property, either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.

*Id.* at 21 (quoting Madison, *The National Question: The Constitutional Amendments—National Citizenship*, The New York Times, Nov. 10, 1866 at 2, col.2-3). This interpretation was not contested; even opponents of the proposed Amendment opposed it because they believed it would provide federal protection for individual rights. See Hardy, *Original Popular Understanding* at 23 (quoting the Cumberland, Md., *Alleghanian*, in 1868, warning its readers that “[o]ne of the privileges of citizens of the United States is the RIGHT TO VOTE”) (emphasis in original). Thus, the public perception of the Clause (as gauged by the mass media and the absence of any credible counternarrative) was remarkably in tune with the perception of congressional leaders.

Again, the importance of looking to the evils the Amendment was to remedy becomes clear. It is obvious from the contemporaneous understanding of the

Privileges or Immunities Clause that any attempt to list all of the rights protected by the Clause would be futile. *Cf. Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1823) It is equally obvious, however, that the Clause was meant to cure particular evils and, therefore, to protect rights directly related those evils. As demonstrated in Part II below, those rights unquestionably included a right to armed self-defense.

**B. The *Slaughter-House Cases* Wrongly Eviscerated the Privileges or Immunities Clause.**

Of course, the Supreme Court's interpretation of the Privileges or Immunities Clause in *Slaughter-House* cannot be reconciled with the original public understanding of that Clause on the part of those who drafted and ratified it, which is presumably why nearly "everyone" agrees it was wrong. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 627 (1994). As one in-depth historical analysis determined, the *Slaughter-House* majority's conclusions "should have been seriously doubted by anyone who read the Congressional debates of the 1860s." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 503 (1988) (noting that the *Slaughter-House* majority's conclusions "should have been seriously doubted by anyone who read the Congressional debates of the 1860s"). Thus, while recognizing that *Slaughter-House* has not yet been overturned, Amicus shares with many others the conviction that it was wrongly decided and should be reevaluated in an appropriate case. E.g., *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting); *Brennan v. Stewart*, 834 F.2d

1248, 1256 (5th Cir. 1988) (observing that “it would be more conceptually elegant” to think of the substantive rights currently protected through the Due Process Clause as “privileges or immunities of citizens of the United States”). The Fourteenth Amendment analysis demanded in this case in the wake of *Heller* is precisely the vehicle for that reevaluation.

*Slaughter-House* considered the constitutionality of a Louisiana law that compelled New Orleans butchers to do their work at a privately owned facility that charged them a fee for the privilege. 83 U.S. at 59-60. Among other things, butchers challenging the statute claimed it violated their right to earn a living under the Privileges or Immunities Clause of the recently enacted Fourteenth Amendment. *Id.* at 66. Writing for a 5-4 majority, Justice Miller rejected that argument on the grounds that the Privileges or Immunities Clause should not be construed to protect basic civil rights from state infringement, but rather a limited class of rights arising from a person’s national—as opposed to state—citizenship. *Id.* at 78-79. According to Miller, those national rights included the right to come to the seat of government and assert “any claim [a citizen] may have upon” it; the right of free access to seaports, subtreasuries, land offices, and courts of justice in the several states; protection of the federal government while on the high seas or within the jurisdiction of a foreign government; the right to peaceably assemble and petition for redress of grievances; *habeas corpus*; the right to use the navigable

waters of the United States; and the right to become a citizen of any state.<sup>4</sup> *Id.* at 79-80.

As Justice Field noted in dissent, Justice Miller’s construction rendered the Privileges or Immunities Clause a “vain and idle enactment, which accomplished nothing.” *Id.* at 96; see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992) (noting that Miller’s reading had “strangl[ed] the privileges or immunities clause in its crib”). The breadth and near unanimity of scholarship rejecting Justice Miller’s construction is staggering. Indeed, several commentators have stated without significant exaggeration that “everyone” agrees Miller’s opinion was wrong. *E.g.*, Aynes, *supra*, at 627; Thomas B. McAfee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986) (“this is one of the few important constitutional issues about which virtually every modern commentator is in agreement”); see also Derek Shaffer, Note, *Answering Justice Thomas in Saenz: Granting the Privileges for Immunities Clause Full Citizenship Within the Fourteenth*

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<sup>4</sup> It is worth noting that, notwithstanding the modern consensus that rights of “national citizenship” are wholly divorced from common-law rights, nothing in *Slaughter-House* itself actually compels that result. That is, nothing in the opinion precludes finding the right to armed self-defense to be both a right of “national citizenship” within Justice Miller’s formulation *and* a right of state citizenship. The notion that rights of national citizenship must be independent from, rather than overlapping with, rights of state citizenship actually originates in *Cruikshank*, rather than *Slaughter-House*. See *Cruikshank*, 92 U.S. at 550-51; Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739, 744 & n.28.

*Amendment*, 52 Stan. L. Rev. 709, 711 (2000) (reviewing near-unanimity among scholars). This rejection of *Slaughter-House* is shared by renowned scholars like John Hart Ely, Laurence Tribe, Akhil Amar, and others.<sup>5</sup>

Even contemporaneous legal scholars who liked the *Slaughter-House* result shared this recognition of the Framers' and ratifiers' understanding of the Privileges or Immunities Clause as protecting specific, substantive rights. For example, 19th-century legal scholar Christopher Tiedeman wrote soon after *Slaughter-House* was decided to laud the Supreme Court for having "dared to withstand the popular will as expressed in the letter of the amendment." David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 Mo. L. Rev. 93, 121 (1990) (quoting Christopher G. Tiedeman, *The Unwritten Constitution of the United States* 102-103 (1890)). In short, the Supreme Court's interpretation of the Privileges or Immunities Clause in *Slaughter-*

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<sup>5</sup> John Hart Ely, *Democracy and Distrust* 22 (1980) ("[T]here is not a bit of legislative history that supports the view that the Privileges or Immunities Clause was intended to be meaningless. Yet the *Slaughter-House* interpretation persists to the present day."); 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) ("it does not trouble me that the *Slaughter-House Cases* would have to be overruled" in order to abandon substantive due process and protect liberties using the Privileges or Immunities Clause, because "I have elsewhere explained my view that the *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause") (internal citation omitted); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992) (noting that Miller's reading "has the effect of rendering the privileges or immunities clause wholly unnecessary" and "strangl[ed] the privileges or immunities clause in its crib").

*House* is impossible to square with the text, history, intent, and public understanding of that provision. The Supreme Court in *Heller* acknowledged that its earlier discussions of the Fourteenth Amendment's protection of firearm rights failed to engage in the proper analysis. *See Heller*, 128 S. Ct. at 2813 n.23. Given the Supreme Court's acknowledgment that its earlier treatments of this issue under the Fourteenth Amendment are incorrect, this Court can and should adopt an interpretation of the Amendment that accurately reflects its original constitutional understanding.

## **II. The Privileges or Immunities Clause Protects the Right to Armed Self Defense.**

The Supreme Court's discussion of the interaction between the Fourteenth Amendment and the right to keep and bear arms in *Heller* is illuminating in at least two important respects. First, it underscores the fact that, when evaluating the scope of a constitutional provision, it is critical to examine the evils that the Framers of that provision were trying to remedy. *See, e.g., Talley v. California*, 362 U.S. 60, 64-65 (1960) (upholding a right to anonymous speech under the First Amendment by reference both to concerns over British press-licensing laws and the anonymity used by the Framers themselves in publishing the Federalist Papers); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted . . . to ascertain the old law, the mischief and the remedy.") (internal citation omitted).

Second, it begins the important historical analysis necessary to a proper understanding of the Fourteenth Amendment. *See Heller*, 128 S. Ct. at 2809-11. While the Court's historical analysis was entirely accurate, it was limited by the fact that the issue of incorporation was not presented in *Heller*. Amicus provides a fuller analysis below.

**A. The Congress of 1866 Specifically Intended the Privileges or Immunities Clause to Prevent State and Local Governments from Disarming Law-Abiding Citizens.**

As discussed above, the Congress of 1866 devoted enormous attention to problems afflicting newly freed slaves and white abolitionists in the former Confederate states, both by drafting the Fourteenth Amendment and by introducing two related pieces of legislation: the Freedmen's Bureau Bill and the Civil Rights Bill. That effort was based in part on the voluminous evidence presented to the Congress concerning systematic efforts by Southern states to disarm freedmen and white abolitionists alike in order to make them easier to terrorize and, upon many occasions, lynch. And contrary to the revisionist history presented by the District of Columbia and its amici in *Heller*, those disarmament campaigns were often carried out by local militias.

For example, many witnesses before a variety of constitutional committees, including the Joint Committee on Reconstruction—the same committee that drafted the Fourteenth Amendment—testified that recalcitrant states in the Reconstruction South routinely sought to disarm newly freed blacks and other citizens in order to prey upon these vulnerable populations. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st

Sess. 78-79 (Dec. 19, 1865) (discussing report denouncing southern abuses, including local ordinances providing that “no freedman who is not in the military service shall be allowed to carry firearms, or any kind of weapon” without special permission); House Ex. Doc. No. 70, 39th Cong., 1st Sess., at 236-39 (1866) (report that in Kentucky town the “marshall takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs,” while outlaws “make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders”); *Report of the Joint Comm. On Reconstruction*, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 3, at 32 (1866) (hereinafter, *Report of the Joint Comm.*) (recounting testimony from military officer that local militias in Mississippi “were ordered by the adjutant general of the State to disarm the negroes and turns their arms into the arsenals.”); *id.* at 39 (report from the Freedmen’s Bureau that the “Militia Organizations in . . . South Carolina (Edgefield) were engaged in disarming the negroes. . . . In southwestern Georgia, I learned that the militia had done the same, sometimes pretending to act under orders from United States authorities.”); *id.*, pt. 2, at 21 (testimony that Alexandria, Virginia sought “to enforce the old law against [blacks] in respect to whipping and carrying firearms, nearly or quite up to the time of the establishment of the Freedmen’s Bureau in that city.”); *id.*, pt. 4, at 49-50 (testimony that armed patrols in Texas, acting under supposed authority of the governor, “passed about through the settlements here negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed

them” of other valuables); *id.*, pt. 2, at 272 (testimony that “[s]ome of the local police [in North Carolina] have been guilty of great abuses by pretending to have authority to disarm the colored people.”).

This testimony had an understandably powerful effect. Time and again, members of Congress—including key architects of the Fourteenth Amendment and related Reconstruction legislation—decried these acts as an evil in need of a federal remedy. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 914 (Feb. 19, 1866) (statement of Sen. Wilson) (citing reports that Southern Militias “were engaged in disarming the negroes” as reasons to disband these militias); *id.* at 941 (statement of Sen. Trumbull) (discussing reports of oppression of freedmen and the “abusive conduct of [a Mississippi] militia” that would “hang some freedman or search negro houses for arms”); *see also id.* at 39, 40 (Dec. 13, 1865) (statement of Sen. Wilson) (citing, as justification for a proposed bill that, in Mississippi, “rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are being done in other sections of the country.”). *See generally* Hardy, *Original Popular Understanding*, at 8-12 (collecting other contemporaneous news accounts).

Members of Congress and other federal officials did not merely regard this systematic disarmament of citizens as an outrage—they considered it a violation of citizens’ constitutional rights, and specifically as a violation of the right to keep and bear arms described by the Second Amendment. The Commissioner of the Freedmen’s Bureau reported to Congress that “the right of the people to keep and

bear arms as provided in the Constitution is infringed” because “the civil law [in Kentucky] prohibits the colored man from bearing arms.” House Exec. Doc. No. 70, at 233, 236; *see also Report of the Joint Comm.*, pt. 2, at 229 (discussing circular issued by General Saxton, which noted that “[i]t is reported that, in some parts of [South Carolina], armed parties are, without proper authority, engaged in seizing all firearms found in the hands of the freedmen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that ‘the right of the people to keep and bear arms shall not be infringed.’”).

These findings were well-publicized, and both the fact that states in the South were disarming innocent citizens and the fact that the federal government intended to put a stop to it were widely reported. *See* Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998) (hereinafter, Halbrook, *Freedmen*) at 7, 19, 31, 37 (discussing press coverage). There was widespread recognition that disarming civilians constituted a violation of individual rights, and widespread support for federal action preventing such violations. *Harper’s Weekly*, for example, excoriated the State of Mississippi for “infringing upon [freedmen’s] liberties by refusing to recognize “the negro as having any right to carry arms.” *Harper’s Weekly*, Jan 13, 1866, at 3 col. 2. An Augusta, Georgia newspaper cheered efforts by the U.S. military to protect the right to bear arms through General Order Number 1, trumpeting that “All men, without distinction of color, have the right to keep and bear arms to defend their homes,

families or themselves.” Editorial, *The Loyal Georgian (Augusta)*, Feb. 3, 1866, at 3, col. 4.

The overwhelming evidence demonstrates that Congress (along with much of the public) considered the deliberate, systematic disarmament of innocent citizens in the Reconstruction South to be an evil and that Congress specifically sought to remedy this evil. And that is exactly what Congress did—and what the ratifying public understood Congress to have done—by including the Privileges or Immunities Clause in the Fourteenth Amendment and through the direct legislation passed around the same time.

**B. Legislation Passed Contemporaneously with the Fourteenth Amendment Reinforces Congress’s Concern with the Right to Armed Self-Defense.**

As mentioned above, besides passing the Fourteenth Amendment, the 39th Congress generated two major pieces of Reconstruction legislation. Both of these bills further evidence the specific, avowed, and well-publicized attempts of the 39th Congress to protect the substantive rights of freedmen and others, including specifically the right to possess firearms.

**1. The Freedmen’s Bureau Bill**

The Freedmen’s Bureau Bill (S. 60) enhanced and extended the authorization of the Freedmen’s Bureau, allowing the federal military to protect the rights of individuals living in states that did not yet have a functioning reconstructed government.

Congress clearly intended the Freedmen’s Bureau Bill to prevent the widespread disarmament that was then occurring in the South. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 512, 517 (Jan. 29, 1866) (statement of Rep. Eliot) (noting that the bill would nullify the Black Codes in places like Louisiana, which barred freedmen from carrying weapons). But the most telling aspect of the Freedmen’s Bureau Bill actually lies in an amendment inserted by the House of Representatives.

The Senate’s initial draft of the bill (introduced by Senator Trumbull) called for all people to have “full and equal benefit of all laws and proceedings concerning personal liberty, personal security,” and personal property. That language, however, was amended by the addition of the phrase “including the constitutional right to bear arms.” *See* CONG. GLOBE, 39th Cong., 1st Sess. 654 (Feb. 5, 1866) (statement of Rep. Eliot) (describing Committee substitute adding this language). While the amendment shows how concerned Congress was with firearm rights, it is equally important to note that the addition was only intended to provide emphasis, based on an assumption that the right to bear arms was already encompassed in the idea of personal liberty or security. *See, e.g., id.* at 743 (statement of Sen. Trumbull) (explaining that the House had “inserted these words, ‘including the constitutional right of bearing arms.’ I think that does not alter [the section’s] meaning.”)

## 2. The Civil Rights Bill

On the same day Sen. Trumbull introduced the Freedman's Bill, he also introduced the Civil Rights Bill, intended to provide complementary protection for the "full and equal benefit of all laws and proceedings for the security of person and property." CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866), 211 (Jan. 12, 1866). Unlike the Freedmen's Bureau Bill, the Civil Rights Bill was intended to apply in every State, even after the former Confederate states had fully reconstructed governments.<sup>6</sup>

The Civil Rights Bill, like the Freedman's Bureau Bill, sought to protect "the security of person and property." While the Civil Rights Bill was not amended to particularly name a right to bear arms, no one suggested that the presence or absence of this language made the slightest difference. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1291-92 (Mar. 9, 1866) (statement of Rep. Bingham) (explaining that the relevant "sections of the Freedmen's Bureau bill enumerate the same rights and all the rights and privileges that are enumerated in the first section of [the Civil Rights] bill"). Debate over the bill made clear that it was intended to restrict the states' authority to violate individual rights, including the right to bear arms. *See, e.g., id.* at 1838 (Apr. 7, 1866) (statement of Rep. Clark) ("I find in the Constitution of the United States an article which declares that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall

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<sup>6</sup> One of the significant motivations for the Fourteenth Amendment was a concern that the Civil Rights Act might exceed the scope of Congress's congressional power. Congress actually passed the Act a second time after the adoption of the Fourteenth Amendment, just to be sure of its power. *See* Michael Kent Curtis, *No State Shall Abridge* 27 (1986).

insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws.”).

The debate over the Civil Rights Bill is also illuminating because of a proposed amendment by Rep. Raymond of New York. Representative Raymond, also a member of the Joint Committee considering the Fourteenth Amendment, proposed adding a clause to the bill declaring that all persons born in the United States are “citizens of the United States, and entitled to all rights and privileges as such.” CONG GLOBE, 39th Cong., 1st Sess. 1266 (Mar. 8, 1866). Representative Raymond’s proposed language was not incorporated into the Civil Rights Bill, but very similar language became the Privileges or Immunities Clause of the Fourteenth Amendment. For that reason, Rep. Raymond’s description of the meaning of his proposed addition to the Civil Rights Bill bears quoting at length:

[This language would] make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and constitution of the United States. . . . He has defined status; he has a country and a home; a right to defend himself and his wife and children; *a right to bear arms*.

*Id.* (emphasis added).

In short, in 1866, Congress was faced with state and local governments run amok and with local militia groups and others disarming and terrorizing disfavored members of the public. Congress responded by providing for increased federal protection for certain individual rights in order to ensure that people throughout the country, made nominally free after the Civil War, would be free in fact—free to defend themselves from aggressors, speak, travel, and pursue the calling of their

choice—free, in short to fully participate in the political, civic, and economic lives of their communities.

Congress made no secret of its intent to protect all of those rights, and did so by proposing an amendment that contained a provision—the Privileges or Immunities Clause—that was widely understood as protecting the very rights that were systematically denied to freedmen, white abolitionists, and others in the Reconstruction-era South. The pace at which modern courts may finally accept that reality remains to be seen, but the reality itself remains unchanged. The Supreme Court sent a strong signal in *Heller* that it does not expect lower courts to adhere to outdated decisions or discredited doctrines, and this Court should embrace the opportunity to apply the substantive protections of the Fourteenth Amendment in the manner intended by its Framers and understood by its ratifiers.

## CONCLUSION

Adopted in the wake of the bloodiest war in the country's history, the Fourteenth Amendment, and specifically the Privileges or Immunities Clause, represents a triumph of political courage and will, both on the part of the congressional leaders who introduced it and the members of the public who ratified it. Unfortunately, that courage has gone largely unrewarded by the federal courts. This case represents an opportunity to begin to honor that triumph.

Dated: February 5, 2009

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,  
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,145 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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Dated: February 5, 2009

## CERTIFICATE OF SERVICE

On this, the 5<sup>th</sup> day of February, 2009, I served two true and correct copies of the foregoing Brief of *Amicus Curiae* the Institute for Justice in Support of Appellants on the following by overnight mail carrier:

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I further certify that on this, the 5<sup>th</sup> day of February, 2009, pursuant to Circuit Rule 31(e), I served an electronic copy via CD-ROM of the foregoing Brief of *Amicus Curiae* the Institute for Justice in Support of Appellants on the following by overnight mail carrier.

The brief was also served this day to the Clerk of the U.S. Court of Appeals for the Seventh Circuit via overnight mail carrier.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 5<sup>th</sup> day of February, 2009.

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Clark M. Neily