No. 08-1521

In the Supreme Court of the United States

OTIS MCDONALD, et al., PETITIONERS

v.

CITY OF CHICAGO, et al., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF HISTORIANS AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT CITY OF CHICAGO, *ET AL.*

CHRISTOPHER J. PAOLELLA
Winston & Strawn LLP
200 Park Avenue
New York, NY 10016
(212) 294-6700

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Amici Curiae

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici submit this brief to address a narrow but critically important question of constitutional law and legal and historical scholarship: whether the Privileges or Immunities Clause of the Fourteenth Amendment incorporates the whole of the Bill of Rights against the States. For more than 135 years, an unbroken line of precedent has squarely rejected the "total incorporation" doctrine. Indeed, this Court has rejected the notion that the Privileges or Immunities Clause incorporated *any* part of the Bill of Rights. The historical record does not support the Petitioners' efforts to upset more than a century of this Court's settled precedent.

Amici are historians and legal scholars who have each studied, taught courses about, and/or published scholarship on the Fourteenth Amendment and its framing. Our names, institutional affiliations, and examples of our relevant scholarship are set forth in the Appendix to this brief.

We submit this brief to respond to Petitioners' claim that the Privileges or Immunities Clause provides an independent historical basis for applying the Second Amendment against the States by virtue of

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. *Amici* are filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

the total incorporation theory.[2] Nothing in the language of the Clause makes it obvious that that provision would incorporate the Bill of Rights; indeed, the text is singularly opaque if that was the framers' intention. Further, we have studied the ratification of the Fourteenth Amendment, and the historical record does not reveal that the Privileges or Immunities Clause was broadly understood to incorporate the Bill of Rights as a whole and thus to work a dramatic change in the structure of our federal system. Treatises, state ratification debates, and judicial opinions from the period demonstrate no clear understanding by the legal profession or the public at large that the Clause had applied the Bill of Rights to the States.

In light of that evidence, the isolated statements Petitioners cite from a handful of congressional proponents cannot establish a general legislative intent to incorporate the Bill of Rights, much less an original public understanding of total incorporation. We share an interest as academics, as citizens, and as proponents of the appropriate use of the historical record in opposing the arguments and approach advanced by Petitioners and their *amici*.

---

[2] The question whether the Second Amendment should be incorporated under the Due Process Clause of the Fourteenth Amendment is outside the scope of this brief.

SUMMARY OF ARGUMENT

I. This Court should reject Petitioners' argument that the Privileges or Immunities Clause incorporates the whole of the Bill of Rights against the States. The total incorporation theory is radical in two respects. First, particularly when viewed from the perspective of the framing-era public, it would have worked a massive realignment of power between the States and the federal government. Second, embracing total incorporation would require the Court to overrule more than 135 years of unbroken—indeed, repeatedly reaffirmed—precedent. Both of these concerns militate against accepting the total incorporation theory absent convincing evidence about what the Clause actually meant to the States that ratified it.

II. Petitioners' evidence fails to meet this standard. First, nothing in the plain language of the Clause suggests that an observer from the framing era would read it to incorporate the Bill of Rights. To the contrary, prevailing legal opinion at the time did not recognize the rights granted by the first eight amendments as "privileges or immunities" guaranteed against States by virtue of national citizenship. And the Clause's closest textual analog, the Privileges and Immunities Clause of Article IV—which predated the Bill of Rights—has never been read to encompass the first eight amendments.

Petitioners' arguments based on legislative intent fare no better. Although a handful of congressional proponents seem to have envisioned some form of incorporation, the great majority of Congress either viewed the Clause simply as an anti-discrimination

provision or gave little thought to its scope. The legislative record is characterized by confusion and ambiguity.

In any case, the important question is not what the *framers* of the Fourteenth Amendment intended, but rather what the *public that ratified the Amendment* understood it to mean. There is no evidence of any widespread public understanding that the language of the Privileges or Immunities Clause required total incorporation. To the contrary, during the ratification debates, even proponents of the Amendment characterized it as an anti-discrimination provision, not as a source of new substantive rights against the States. Newspapers did not report the total incorporation theory, and politicians did not discuss it.

Post-ratification sources also fail to reveal any public understanding that the Clause had applied the whole of the Bill of Rights against the States. After ratification, States enacted new laws—including provisions abolishing the grand jury—that would have been inconsistent with incorporation. They also enacted comprehensive firearms regulations without objection based on the new Amendment. Moreover, neither the leading legal scholars nor the judges of the Reconstruction period made reference to incorporation; they continued to assume that the Bill of Rights applied only to the federal government. This Court—then composed of Justices who witnessed the ratification debates firsthand—decisively rejected total incorporation when presented with the question just years after the enactment of the Fourteenth Amendment.

Absent any persuasive textual basis, legislative intent, or original public understanding favoring total incorporation, there is no basis for holding that the Privileges or Immunities Clause applies the Bill of Rights *in toto*—or the Second Amendment in particular—against the States.

III. If this Court, against the historical evidence, were to adopt the total incorporation theory, its decision would have effects reaching far beyond incorporation of the Second Amendment. It would logically require the overruling of precedent holding that the Fifth Amendment's grand jury requirement and the Seventh Amendment's right to a jury in civil cases do not apply to the States. Many States, in addition to having to modify their gun control regimes, would also have to revamp large portions of their criminal and civil justice systems to bring them into conformity with these constitutional strictures.

And there is no guarantee that, after total incorporation, the rights emanating from the Privileges or Immunities Clause would be limited to those enumerated in the Bill of Rights. To the contrary, the same legislative history sources on which Petitioners rely for incorporation also suggest that the Clause protects other unenumerated "natural rights"—including the right to contract, the right to a profession, and the right to acquire and possess property without government interference. If the Court finds these sources convincing, then it must also be prepared to accept their embrace of these and other highly indeterminate, ultimately judge-divined rights. Petitioners' constitutional theory is an invitation to resurrect *Lochner* and its progeny. This Court should decline that invitation.

ARGUMENT

I. In construing the Privileges or Immunities Clause, this Court is not writing on a blank slate.

Proponents of total incorporation face two heavy burdens. *First*, they must show that when the Fourteenth Amendment was ratified, the public understood that it would work a radical realignment of the constitutional balance of power between the Federal Government and the States. *Second*, they must demonstrate that their evidence of this original understanding is so persuasive that it should override the *stare decisis* effect of over a century of unbroken, post-ratification precedent holding that the Clause does *not* incorporate the Bill of Rights. Petitioners have done neither.

A. For the total incorporation theory to be correct, the ratifying public must have understood that the Privileges or Immunities Clause would radically alter the federal system as then understood.

Petitioners' reading of the Clause would undoubtedly work a fundamental change in federal-state relations today. See § III, *infra*. But it would have represented an even more radical redistribution of power between the Federal Government and the States at the time the Fourteenth Amendment was adopted.

The Constitution, as originally designed, imposed only a handful of enumerated limits on the powers of the States. See, *e.g.*, U.S. Const. art. I, § 10. In *Barron* v. *Baltimore*, 32 U.S. 243 (1833), Chief Justice Marshall confirmed that the limitations on government action set forth in the Bill of Rights did not apply to the States. *Id.* at 247. As the unanimous *Barron* Court explained, "[h]ad congress engaged in the

extraordinary occupation of improving the constitutions of the several States, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." *Id.* at 250.[3]

That basic principle is not disputed here; no party claims that the Bill of Rights would apply to the States absent adoption of the Fourteenth Amendment, and even advocates of incorporation acknowledge that *Barron* was "almost certainly" correctly decided. Bryan J. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 Ohio St. L.J. 1509 (2007).

Viewed in light of *Barron*, the wholesale incorporation of the Bill of Rights against the States would have radically altered the existing constitutional structure: it would have been "a seismic shift in the tectonic plates that underlie our government." George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L.J. 1627, 1629 (2007) (hereinafter Thomas, *Riddle*).

That is why the Court in *The Slaughter-House Cases* echoed Chief Justice Marshall's basic point when it concluded that it could not read the Privileges or Immunities Clause as subjecting the States

---

[3] Indeed, the Bill of Rights as originally proposed by James Madison included an amendment that would have expressly constrained the States: "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." 1 Annals of Cong. 434–435 (Joseph Gales ed., 1834). That provision was never adopted.

"to the control of Congress, in the exercise of powers heretofore universally conceded to them," in the absence of "language which expresses such a purpose *too clearly to admit of doubt*." 83 U.S. 36, 78 (1873) (emphasis added); cf. *Minor* v. *Happersett*, 88 U.S. 162, 173 (1874) (noting, with respect to claim that the Fourteenth Amendment enfranchised all citizens, that "[s]o important a change * * * if intended, would have been expressly declared").

Petitioners' reading of the Privileges or Immunities Clause must be evaluated in light of the huge transformation in federal-state power that total incorporation would have worked. It is reasonable to expect that such far-reaching effects would be "expressly declared" in "plain and intelligible language" that was "too clear[] to admit of doubt." As we will demonstrate below, this was not the case.

B. The total incorporation theory has been rejected in more than a century's worth of unbroken precedent.

Petitioners also face an unbroken line of post-ratification precedent contradicting their position. For over 135 years, this Court has followed *Slaughter-House* and repeatedly rejected the notion that the Privileges or Immunities Clause incorporates the Bill of Rights.

In *Slaughter-House*, this Court concluded that the Clause encompassed only those privileges and immunities that "owe their existence to the Federal government, its National character, its Constitution, or its laws." 83 U.S. at 79. As *Barron* recognized, these privileges and immunities of national citizenship did not include rights against *state* abridgements of the Bill of Rights. See *ibid*.

Other cases decided during the post-ratification era reaffirmed the *Slaughter-House* principle.[4] In *Edwards* v. *Elliot*, 88 U.S. 532 (1874), and *Walker* v. *Sauvinet*, 92 U.S. 90 (1876), the Court held that the Seventh Amendment right to a civil jury trial was not incorporated against the States. In *Kelly* v. *City of Pittsburgh*, 104 U.S. 78 (1881), the Court ruled that the Fifth Amendment's Just Compensation Clause did not apply to state takings. In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court rejected incorporation of the First Amendment's right to assemble and the Second Amendment's right to bear arms. The Court reaffirmed the non-incorporation of the Second Amendment in *Presser* v. *Illinois*, 116 U.S. 252 (1886).[5]

In *Adamson v. California*, 332 U.S. 46 (1947), overruled in part on other grounds by *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the Court revisited and again rejected the total incorporation theory—this time over a lengthy dissent by Justice Black (complete with a 30-page appendix of historical sources), in which he concluded, based on his "study of the his-

---

[4] *Slaughter-House* and these other Reconstruction-era cases are relevant not only as precedent, but because they are themselves important historical evidence of what lawyers and judges—and, by implication, the ratifying public—understood the Clause to mean during the framing period. See ___, *infra*.

[5] See also *In re Kemmler*, 136 U.S. 436 (1890) (Eighth Amendment prohibition against cruel and unusual punishment); *McElvaine* v. *Brush*, 142 U.S. 155, 159 (1891) (same); *Miller v. Texas*, 153 U.S. 535 (1894) (Second Amendment); *Maxwell* v. *Dow*, 176 U.S. 581 (1900) (Fifth Amendment right to grand jury and Sixth Amendment right to criminal jury trial); *Twining* v. *New Jersey*, 211 U.S. 78 (1908) (Fifth Amendment right against self-incrimination); *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530 (1922) (First Amendment right to freedom of speech).

torical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage," that the Amendment was intended "to make the Bill of Rights[] applicable to the states." *Id.* at 71–72 (Black, J., dissenting). Justice Black's rejected position was the same total incorporation theory pressed here, and his historical sources (which failed to persuade a majority of the *Adamson* Court) included many of the statements on which Petitioners here principally rely.

This Court has implicitly reaffirmed its rejection of total incorporation many times since *Adamson* by confirming that certain protections of the Bill of Rights have no application against the States. See, *e.g.*, *Campbell* v. *Louisiana*, 523 U.S. 392, 399 (1998) (noting that the "Fifth Amendment's grand jury requirement is not binding on the States"); *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) ("[t]he Seventh Amendment * * * governs proceedings in federal court, but not in state court"); *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972) ("the Court has never held that federal concepts of a 'grand jury,' binding on the federal courts under the Fifth Amendment, are obligatory for the States"). In short, it has treated *Slaughter-House* and its progeny as settled law.

Any departure from this long and unbroken line of precedent "demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). "*Stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Pearson* v. *Callahan*, 129 S. Ct. 808, 816 (2009) (quot-

ing *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)). And while obedience to precedent is not an "inexorable command," this Court "approach[es] the reconsideration of [its] decisions * * * with the utmost caution." *Ibid.* (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997)).

These concerns are at their height where, as here, the Court faces "the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 233 (1995).[6] The Court's rejection of total incorporation has more than just lengthy pedigree; it also has engendered important reliance by the States. Although many of the guarantees of the Bill of Rights have been selectively incorporated through the Fourteenth Amendment's Due Process Clause, certain important rights have not: the right to a grand jury indictment, see *Campbell*, 523 U.S. at 399; the right to a civil jury trial, see *Gasperini*, 518 U.S. at 432; and of course, the right to

---

[6] See also *United States* v. *Lopez*, 514 U.S. 549, 601 n.8 (1995) (THOMAS, J., concurring) ("Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean."); *South Carolina* v. *Gathers,* 490 U.S. 805, 824 (1989) (SCALIA, J., dissenting) ("[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised on their validity."), overruled by *Payne*, *supra*; *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 209 (1994) (SCALIA, J., concurring in the judgment) (deciding on *stare decisis* grounds to enforce "negative Commerce Clause" in certain situations where the Court "adopted the doctrine * * * 121 years ago,* * * engendering considerable reliance interests") (citation omitted).

bear arms. Many States have relied on these decisions in structuring their criminal and civil justice systems, as well as in adopting firearm regulations and law enforcement strategies designed to prevent violent crime. These vital state interests would be seriously disrupted if this Court were to repudiate its current approach to incorporation. *See* § III.1, *infra*.

Finally, the historical arguments now raised in support of incorporation are nothing new. The *Slaughter-House* Court—composed of Justices who witnessed firsthand the debates surrounding the ratification of the Fourteenth Amendment—rejected precisely the same understanding that Petitioners now advance. And the same arguments for incorporation—including the same quotations from the same speeches and congressional statements that are at the core of Petitioners' pro-incorporation case—were again thoroughly debated, analyzed and rejected by this Court decades later in *Adamson*. The proponents of total incorporation have had more than one bite at the constitutional apple, and each time their position has been rejected.

Given the force of *stare decisis*, Petitioners must do more than show that their reading of the Privileges or Immunities Clause is historically plausible (though they fail to do even that). They must convincingly demonstrate that more than 135 years of unbroken precedent was "wrongly decided" and is "unworkable." *Payne*, 501 U.S. at 843–844 (SCALIA, J., concurring). This Court has cautioned against overruling "major decisions of the Court" on the basis of "ambiguous historical evidence." *Welch* v. *Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 479 (1987). As we will show below, ambiguous historical evidence is, at most, what Petitioners present.

II. The historical record does not support Petitioners' argument about total incorporation under the Privileges or Immunities Clause.

A. The plain language of the Clause does not support total incorporation.

As discussed above, total incorporation of the Bill of Rights against the States would have worked a radical constitutional transformation. If the text of the Privileges or Immunities Clause clearly effectuated the "seismic shift" of incorporating the Bill of Rights *in toto*, then there would be no need for detailed review of the historical record. But it does not.

The Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. xiv, § 1. This is a strange formulation if its purpose was incorporation: the Clause does not refer to the Bill of Rights, and nothing in its text suggests that it applies those provisions to the States. Incorporation would have been "crystal clear" if the drafters

> "had added a simple clause, as follows: 'No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, *including those defined in the first eight amendments to the Constitution.*'"

Thomas, *Riddle*, at 1629–1630 (emphasis in original). But they did not. If the Fourteenth Amendment's drafters "really did intend to incorporate the Bill of Rights, it is obvious that they chose language which was designed to conceal their purpose, not to express it." Stanley Morrison, *Does the Fourteenth Amend-*

ment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 140, 159 (1949).

Petitioners spill much ink arguing that during the framing, the terms "privileges" and "immunities" were widely used as synonyms for "rights," including constitutional rights. McDonald Br. 15–22. That is true, but it dodges the important question: *which* rights? As an examination of framing-era newspaper records discovered, the term "privileges and/or immunities" regularly appeared "in several different contexts—created by treaties, rights of railroads, rights of corporations, even the benefits of peace and of our republican form of government." George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. Contemp. Leg. Issues (forthcoming) (hereinafter Thomas, *Newspapers*). Section One of the Fourteenth Amendment "simply fails to specify at all the particular rights to which it applies." William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 60 (1988).

As a matter of original meaning, there is little lexical support for an incorporationist understanding of "privileges or immunities." Framing-era legal norms simply did not recognize any constitutional "privilege or immunity" of national citizenship against state legislation restricting free speech, abrogating jury rights, or otherwise abridging any of the provisions of the first eight amendments. "Under *Barron*, citizens had no right to be free from state legislation inconsistent with the Bill of Rights—the privileges and immunities described in the first eight amendments only applied to federal legislation." Lawrence Rosenthal, *Second Amendment Plumbing*

After Heller: *Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. L. 1, 55 (2009) (hereinafter Rosenthal, *Second Amendment*). As Professor Rosenthal has explained:

> "Even though the drafters utilized the 'No State shall abridge' formulation, the rest of the Privileges or Immunities clause did not purport to alter any of the preexisting privileges and immunities of citizenship, or to create new ones. And, since the first eight amendments, under *Barron*, were not understood to afford privileges and immunities against state laws inconsistent with the Bill of Rights, nothing in the text of the Fourteenth Amendment could change the meaning of the 'privileges and immunities' of citizenship, which went unaltered by the Fourteenth Amendment."

Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. Contemp. Leg. Issues (forthcoming).

Moreover, the phrase's closest analog in the antebellum Constitution was never understood to embrace the Bill of Rights. The Privileges and Immunities Clause of Article IV, § 2[7]—which itself pre-dated the Bill of Rights—has never been read to include the

---

[7] "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." U.S. Const., art. IV, § 2. The framers of the Fourteenth Amendment specifically referenced the Article IV provision as providing insight into the "privileges or immunities" covered by the proposed Amendment. See Cong. Globe, 39th Cong., 1st Sess. 1089, 2542 (1866) (Rep. Bingham), 2765 (Sen. Howard); see also *id.* at 1054 (Rep. Higby), 1057 (Rep. Kelley).

guarantees set forth in the first eight amendments. The leading nineteenth-century opinion interpreting that provision, *Corfield* v. *Coryell*, 6 F. Cas. 546, 551–552 (C.C.E.D. Pa. 1823), set forth a list of "fundamental" rights implicated by the Clause (including, for example, the right to "pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise"), but made no reference to the Bill of Rights.

Throughout the framing period, this understanding of "privileges and immunities" never expanded to include the first eight amendments. Only months after the Fourteenth Amendment's ratification, this Court construed the Article IV clause as forbidding discrimination with respect to state law rights like the "right of free ingress into other States" and "the acquisition and enjoyment of property." *Paul* v. *Virginia*, 75 U.S. 168, 180 (1868), overruled in part on other grounds, *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Again, there was no mention of the Bill of Rights.

In short, there is little evidence that the term "privileges or immunities," when viewed in the legal environment of the framing era, would have been widely understood as shorthand for the guarantees set forth in the Bill of Rights.

B. Legislative intent, to the extent that it is relevant, does not support total incorporation through the Clause.

Petitioners' historical argument (which largely recycles Justice Black's rejected argument in *Adamson*) relies heavily on congressional floor statements by proponents of the Fourteenth Amendment—in particular, Senator Howard and Represen-

tative Bingham—to the effect that the Privileges or Immunities Clause was intended to incorporate the Bill of Rights against the States. See, *e.g.*, McDonald Br. 26–32; Academics for the Second Amendent Br. 24–26; Calguns Br. 6–12. But this "evidence" of congressional intent is at best ambiguous and at worst irrelevant.

1. Petitioners' evidence is insufficient to establish even Congress's intent, much less any public understanding. The Congress that debated the Fourteenth Amendment comprised 52 Senators and 192 Representatives. Benjamin Vincent, *Haydn's Dictionary of Dates* 18 (American ed. 1867). Only a handful—by a generous count, one Senator and five Representatives—spoke in favor of total incorporation. See Thomas, *Riddle*, at 1640–1647 (citing statements of Senator Howard and Representatives Bingham, Price, Wilson, Hale and Thayer).[8] The remaining members of Congress "'simply did not speak to the point, either one way or another, and neither did they say anything from which their views on the subject can be inferred.'" *Id.* (quoting William Winslow Crosskey, *Charles Fairman, "Legislative History,"*

[8] There are doubts about even these members' views. Representative Price spoke only of incorporating the freedom of speech, and his concern might have been equal treatment rather than substantive protection. See Thomas, *Riddle*, at 1643. And Representative Thayer said only that the Amendment would "bring[] into the Constitution what is found in the bill of rights *of every State of the Union*." Cong. Globe, 39th Cong., 1st Sess. 2465 (1866) (emphasis added). At the time of that comment, the States were not bound by the federal Bill of Rights, and not all state constitutions provided protections coterminous with the first eight amendments. See Thomas, *Riddle*, at 1644.

and Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1, 71 (1951)).[9]

Indeed, "[u]ncertainty about what the new provision meant, as well as its application and scope, characterized both congressional debates and contemporary commentary." Ronald Labbe & Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* 2 (2003). Even after Senator Howard's speech, Senators Hendricks and Johnson each complained that the meaning of "privileges or immunities" was unclear; no proponent of the Amendment responded by expounding the incorporation theory. Cong. Globe, 39th Cong., 1st Sess. 3040 (1866) (Sen. Hendricks), 3041 (Sen. Johnson); see also *id.* at 2467 (statement of Rep.

---

[9] Many of the statements relied on by Petitioners make no mention at all of the Bill of Rights—much less of its total incorporation. Representative Rogers defined "privileges and immunities" to include rights such as "[t]he right to marry" and "[t]he right to contract." McDonald Br. 25. Representative Raymond also viewed it as protecting unenumerated rights like "the right of free passage." *Id.* at 27. Representative Broomall cited the *Corfield* definition, which, as discussed above, did not reference the Bill of Rights. *Ibid.* Representatives Donnelly and Woodbridge vaguely suggested that the Fourteenth Amendment would protect against some state interference with "natural rights" or "guarantees of the Constitution," but did not address whether it incorporated the full protections of the Bill of Rights. *Id.* at 32. Finally, Senator Stevens' statement about the Amendment remedying the fact that "the Constitution limits only the action of Congress," *ibid.*, was followed by explication painting the Fourteenth Amendment simply as an anti-discrimination measure: "This amendment * * * allows Congress to correct the unjust legislation of the states, *so far that the law which operates upon one man shall operate equally upon all*." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (emphasis added).

Boyer that section one was "open to ambiguity and admitting of conflicting constructions"); Thomas, *Riddle*, at 1633, 1646.

In short, as William Crosskey—an early academic proponent of incorporation—conceded, "it would be idle to pretend that the debate on the amendment, standing by itself, was very informative as to what the House thought the Privileges and Immunities Clause of the amendment meant." Crosskey, *supra*, at 70.

2. The incorporation theory was not the only—or even the most prominent—view of the Amendment's scope that was expressed in Congress. During the debates, several Republican members of Congress argued that "the amendment did not protect specific fundamental rights or give Congress and the federal courts power to interfere with state lawmaking that either created or denied rights," but rather was intended only to "prevent the states from discriminating arbitrarily between different classes of citizens." Nelson, *supra*, at 115.

"On this account, states were required to give everyone the same set of substantive privileges and immunities and to enforce those privileges and immunities in an even-handed way." Thomas, *Riddle*, at 1640. As one scholar put it, "in 1866, when people discussed abridgements of the privileges or immunities of citizens, they mainly were talking about laws that deprived certain classes of citizens of the civil rights accorded to everyone else." John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1388 (1992). See also David P. Currie, *The Constitution in the Supreme Court: The*

First Hundred Years, 1789–1888 at 342–351 (1985) (detailing anti-discrimination view).

Representative Thaddeus Stevens, a leading proponent of the Fourteenth Amendment, described its purpose as "allow[ing] Congress to correct the unjust legislation of the States, so far that the law which operates on one man shall operate *equally* on all." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). Representative Hotchkiss understood the "object" of the proposed amendment to be that "no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another." *Id.* at 1095. Representative Wilson explained that the word "immunities" would "merely secure to citizens of the United States equality in the exemptions of the law." *Id.* at 1117. Senator Morrill emphasized that the "principle of equality before the law * * * does not prevent the State from qualifying the rights of the citizen according to the public necessities." Cong. Globe, 39th Cong., 2d Sess. 40 (1866). Even Representative Bingham at one point defined "immunity" as "[e]xemption from unequal burdens." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

Other members of Congress characterized the Amendment as simply constitutionalizing the Civil Rights Act of 1866.[10] That statute was an anti-discrimination measure that neither mentioned the

---

[10] *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess., at 2462 (1866) (Rep. Garfield), 2465 (Rep. Thayer), 2501 (Rep. Raymond), 2549 (Rep. Stevens), 2462 (Rep. Garfield), 2467 (Rep. Boyer), 2468 (Rep. Kelley), 2498 (Rep. Broomall), 2501 (Rep. Raymond), 2509 (Rep. Spaulding), 2511 (Rep. Eliot), 2534 (Rep. Eckley), 2538 (Rep. Rogers), 2539 (Rep. Farnsworth), 2883 (Rep. Latham), 2961 (Sen. Poland), 3031 (Sen. Henderson), 3069 (Rep. Van Aernam).

Bill of Rights nor created any new substantive rights.[11] See Rosenthal, *Second Amendment*, at 58–59.

Still other legislators defined the scope of the Clause with reference to its Article IV counterpart, which—as this Court was shortly to confirm in *Paul* v. *Virginia*—was widely viewed as a non-discrimination measure. See p. 16, *supra*. Senator Poland, for example, opined that the proposal "secures nothing beyond what was intended" by Article IV's Privileges and Immunities Clause. 39th Cong., 1st Sess. 2961 (1866); see also *id.* at App. 240 (statement of Sen. Davis). Even after the Amendment's ratification—and this Court's decision in *Paul*—Senator Trumbull mused that the Privileges or Immunities Clause "amounts to the same thing" as Article IV and that "[i]t is a repetition of a provision in the Constitution as it before existed," though "stat[ing] it in a little different language." Cong. Globe, 42d Cong., 1st Sess. 576–77 (1871). By that time, the *Paul* Court had already definitely interpreted Article IV as an antidiscrimination rule. If the Fourteenth Amendment was widely known to have *substantively* incorporated the Bill of Rights, the dif-

---

[11] The Act provided that:

> "[C]itizens, of every race and color, without regard to previous condition of slavery or involuntary servitude * * * shall have *the same right* * * * to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to *full and equal benefit* of all laws and proceedings for security of person and property, as is enjoyed by white citizens."

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphasis added).

ference between the provisions would have been obvious.

Many members of Congress stressed the antidiscrimination aspects of the Fourteenth Amendment, while relatively few suggested that it was intended to incorporate the substantive guarantees of the Bill of Rights. The handful of floor statements cited by Petitioners does not establish a critical legislative mass in favor of incorporation. The most generous conclusion that can be drawn is that legislative intent was ambiguous: that Congress "never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well." Nelson, *supra*, at 123. In light of both the sea change in the constitutional framework that total incorporation would work, and this Court's unbroken line of precedent rejecting the total incorporation theory, Petitioners need more than ambiguity to prevail.

3. In many ways, however, the search for congressional intent is a red herring. Even if Petitioners' handful of sponsors' statements could establish that Congress intended incorporation, that would not end the inquiry. As this Court made clear in *District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008), the important question is not the intention of the drafters, but the meaning of the text as it would have been originally understood by the ratifying public. An enactment's "[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to *ordinary citizens in the founding generation*." *Id.* at 2788 (emphasis added). The Court further rejected the use of "statements of those who drafted or voted for the law that are made after its enactment" in favor of "examination of a variety of legal and other sources to

determine the *public understanding* of a legal text." *Id.* at 2805 (emphasis in original).[12]

When Petitioners' case for total incorporation is considered in terms of the original *public understanding* of the Privileges or Immunities Clause, it becomes even weaker. Regardless of whether a handful of congressional sponsors had the subjective intent to incorporate the Bill of Rights, there is no persuasive evidence that the framing-era public shared that understanding. In the following section, we examine the framing-era public's understanding of the Clause's meaning in light of the same types of historical sources that the Court relied upon in *Heller*.

C. The framing-era public did not understand the Clause to incorporate the full Bill of Rights.

1. *State ratification debates.* If the public had understood the proposed Privileges or Immunities Clause to incorporate the Bill or Rights wholesale, the issue would presumably been widely aired during the ratification debates. But the historical record is silent.

The ratification debates took place amidst the heated elections of 1866; yet despite the popularity "of the notion that the federal government was intervening too much in local matters," there "was no vigorous discussion of the idea that * * * state judiciaries were going to be subservient to Congress and the fed-

---

[12] Accord Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 38 (Amy Gutmann ed., 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

eral courts." Thomas, *Newspapers*; see also Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5, 84-126 (1949). As one academic proponent of incorporation has acknowledged, "the evidence from the ratification process seems vague and scattered when it comes to any strong public awareness of nationalizing the entire Bill of Rights." Wildenthal, *supra*, at 1601.

A study of the ratification debates in Illinois, Ohio, and Pennsylvania concluded that there is "no record" in those States "of any advocate of the 14th Amendment explaining that the privileges and immunities clause guaranteed those rights enshrined in the Bill of Rights." James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 450 (1985). Rather, the evidence suggests that in those States, the Amendment was generally understood to constitutionalize the non-discrimination provisions of the Civil Rights Act. See *id.* at 445–454. Professor Bond's study of the ratification process in the southern States similarly uncovered no evidence of an incorporationist understanding, but considerable evidence that the Amendment was understood as a non-discrimination provision. James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* (1997); see also James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 Wake Forest L. Rev. 89, 112–16 (1984). Had Democratic candidates in the former Confederate States been aware of the incorporation thesis, they would likely have "campaigned ferociously against turning control over their

rights to the Radical Republicans and federal judges." Thomas, *Riddle*, at 1648–1649. But they did not.

Republican Congressmen who campaigned in favor of ratification "argu[ed] that the Fourteenth Amendment did nothing more than require the states to treat their citizens equally." Saul Cornell, *A Well-Regulated Militia* 174 (2006). For example, Representative Bingham emphasized "that the amendment simply forced the States to abide by the principle of equality before the law." *Ibid.*

One *amicus* searched ratification-period newspaper and magazine archives for mentions of the Privileges or Immunities Clause. Of 102 articles referencing the provision, only four "put the reader on notice that Section 1 incorporated the Bill of Rights." Thomas, *Newspapers*. In contrast, he found "a large number of accounts of 'privileges and immunities' as including equality of rights and natural law rights such as the right to contract or to sue." *Ibid*. With respect to incorporation, the loudest noise from the state ratification process is the sound of silence. See Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863–1869*, at 117 (1990) (characterizing Republican silence as a "puzzling anomaly" that means incorporation is "not proven beyond a reasonable doubt").

Against this compelling evidence of public indifference to incorporation, Petitioners throw up a handful of isolated statements—an pseudonymous column in the *New York Times*; a book review in *The Nation*; ambiguous statements by a state legislative committee and two other officeholders; and a statement by the Secretary of the Interior. McDonald Br. 35–40. But *none* of the sources quoted by Petitioners even

mentions the Bill of Rights—much less advocates its total incorporation. Rather, these snippets speak in generalities that, at the most, suggest an embrace of *Corfield*-style unenumerated rights. See McDonald Br. 35–36 ("Madison" column paraphrasing *Corfield's* list of "fundamental" rights), 36–37 (*The Nation* review arguing generally that amendment would "give to liberty of the individual inhabitant the will of the nation as its basis, instead of the will of a State"); 37 (Texas House Committee suggesting that "privileges and immunities" embody rights outside the Bill of Rights, including "suffrage at the polls" and "other matters which need not be here enumerated"), 38 (statements of Sec. Browning, Rep. Delano and Gov. Hawley failing to mention Bill of Rights).

Perhaps most strikingly, Petitioners cite Horace Flack's early twentieth-century study of the Fourteenth Amendment's framing. McDonald Br. 40. But they omit from their quotation the very next sentence, which acknowledges that "[t]here does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not. * * *" Horace E. Flack, *The Adoption of the Fourteenth Amendment* 154 (1908). That observation remains as true today as it was a hundred years ago.

2. *Post-ratification enactments.* Many of the States that ratified the Fourteenth Amendment had on their books—and did not repeal—constitutional and statutory provisions incompatible with the Bill of Rights. See Fairman, *supra*, at 84–132. This discrepancy is especially notable in the case of former Confederate States, which were required to "have formed a government in conformity with the Constitution of the United States in all respects" and whose

constitutions were submitted to Congress "for examination and approval" as conditions for re-admission to the Union. 14 Stat. 428 (1867). Several of those States had laws incompatible with the Bill of Rights, if it were indeed incorporated. For example, Louisiana permitted prosecution by information for certain non-capital felonies, and Georgia permitted non-jury trial in certain civil contract cases. Fairman, *supra*, at 127–128. Yet their laws were determined to be "in conformity with the Constitution" and they were re-admitted even *after* ratification of the Fourteenth Amendment. *Id.* at 130–131.

Moreover, five States took action to modify or eliminate their grand jury requirements in the years *after the Fourteenth Amendment was ratified*—inexplicable decisions if state legislators had understood the Privileges or Immunities Clause to incorporate the Fifth Amendment and other provisions of the Bill of Rights.[13] Indeed, in the years after ratification, many States changed their criminal laws in ways "incompatible with the Fifth Amendment's indictment and self-incrimination clauses," and contemporary jurists did not argue that such changes were prohibited by the Fourteenth Amendment. Donald J. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure*

---

[13] See Calif. Const. art. I, § 8 (1879) (requiring abolition of grand jury); Colo. Const. art. II, § 23 (1876) (permitting legislature to abolish grand jury requirement); Ga. Const. of 1868 (not mentioning grand juries); Wis. Const. § 8 (1870) (replacing requirement of grand juries with general due process requirement); Kan. Stat. Ann. § 82 (1868) (permitting prosecutors to proceed by information). See generally Thomas, *Riddle*, at 1654 & n.131.

Revolution, 18 J. Contemp. Leg. Issues (forthcoming).

States also adopted post-ratification laws regulating firearms that were arguably inconsistent with the understanding that they were bound by the Second Amendment. Spurred by racial violence after the Civil War, several southern States amended their constitutions to grant their legislatures the power to regulate firearms in terms broader than the Second Amendment's.[14] Others enacted post-ratification laws banning the carrying of handguns or other categories of arms.[15] There is no evidence of opposition based on the argument that the Fourteenth Amendment precluded such laws.

3. *Legal treatises.* Leading treatise writers during Reconstruction also failed to contemplate total incorporation. Judge Thomas Cooley, who published a "massively popular" treatise the year the Fourteenth Amendment was ratified, *Heller*, 128 S. Ct. at 2811, was silent about total incorporation. Thomas M. Cooley, *Constitutional Limitations* 19 (1868) (Da Capo Press 1972). Rather, Cooley favorably cited *Barron*, which held that the Bill of Rights did not constrain the States, as good law. *Ibid.*

---

[14] See, *e.g.*, Fla. Const. of 1885, art. I, § 20; Ga. Const. of 1877, art. I, § 22. Tex. Const. of 1876, art. I, § 3; Tenn. Const. of 1870, art. I, § 26.

[15] See, *e.g.*, 1879 Tenn. Pub. Acts ch. 186 (criminalizing carrying any "belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol"); 1876 Wyo. Comp. Laws ch. 52, § 1 (criminalizing carrying "any fire-arm or deadly weapon within the limits of any city, town or village"); Ark. Act of Apr. 1, 1881 (same); Tex. Act of Apr. 12, 1871 (same).

John Dillon, another influential legal scholar of the period, also showed no awareness of total incorporation. In his 1874 survey on the right to bear arms, he concluded that "none of the first amendments apply to the States, but that all of them are merely restrictive on the federal power." *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cent. L.J. 259, 295 (1874).

Bishop and Wharton, authors of leading treatises on criminal law, also failed to discuss total incorporation. See 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* (2d ed. rev. 1872); 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* (7th ed. 1874). And while Pomeroy and Bateman touched on the Fourteenth Amendment's impact on the States, both authors suggested anti-discrimination interpretations of the Privileges or Immunities Clause. See John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 150–151 (1868) (then-pending Fourteenth Amendment would "remedy" the situation where a "certain state contains clauses securing to the people the right of keeping and bearing arms" but "the legislature of the same state passes statutes by which certain classes of inhabitants—say negroes—are required to surrender their arms"); William O. Bateman, *Political and Constitutional Law of the United States of America* 259 (1876) (Fourteenth Amendment "*prohibits* the denial or abridgement of such right as was *previously vested*, 'on account of race, color, or previous condition of servitude.'").

In short, most prominent commentators (including Cooley) expressed no awareness of total incorporation. Others (including Pomeroy, on whom Petitioners attempt to rely) appear to have embraced an

anti-discrimination interpretation of the Clause. Though Petitioners point to a few other commentators who proponed incorporation, the most that can be said is that the evidence is—in the words of one modern incorporation advocate—a "mixed bag." Wildenthal, *supra*. That is a thin reed on which to rest any conclusion about general public understanding.

4. *Judicial opinions.* Leaders of the bar and bench also demonstrated no awareness of the total incorporation doctrine. In a series of cases following ratification of the Fourteenth Amendment, courts repeatedly reiterated that the Bill of Rights did not restrict the States. Attorneys did not argue for incorporation, and courts did not contemplate it.[16] This silence among judges and practitioners rebuts petitoners' claim that the public understood the Amendment to effect total incorporation.

Moreover, when this Court squarely addressed the question in *Slaughter-House*, *Edwards*, *Cruikshank*, and their progeny, it decisively rejected the total incorporation theory. The Court's judgment in these cases is important not only for its precedential effect; it is also historical evidence of how the Clause was understood by Justices who witnessed the ratification debates firsthand. In *United States* v. *Morrison*, this Court accorded special weight to the con-

---

[16] See, *e.g.*, *Justices* v. *Murray*, 76 U.S. 274, 278 (1870); *Twitchell* v. *Commonwealth*, 74 U.S. 321, 325–326 (1869); *N.M.R. Co.* v. *Maguire*, 49 Mo. 490, 495 (1872); *Clark* v. *Dick*, 5 F. Cas. 865, 867 (C.C.D. Mo. 1870); *Greenwood* v. *State*, 65 Tenn. 567, 568 (1873); *Commonwealth* v. *Byrne*, 61 Va. 165, 186 (1871); *Andrews* v. *State*, 50 Tenn. 165, 174–175 (1871); *State* v. *Jackson*, 21 La. Ann. 574, 575 (1869); *State* v. *Shumpert*, 1 S.C. 85, 86 (1869).

temporaneous interpretation of the Fourteenth Amendment by the framing-era Court:

> The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

529 U.S. 598, 621–622 (2000); see also *Adamson*, 332 U.S. at 53.

Morrison's observation is even more true here. *Cruikshank*, for example, was decided by "a Court on which eight of the nine Justices had been appointed by Presidents Lincoln or Grant, and which, within only a few years, held that the exclusion of African-Americans from state juries violated the Fourteenth Amendment." Rosenthal, *Second Amendment*, at 72. If those Justices did not understand the Amendment to incorporate the Bill of Rights, that is good evidence that the ratifying public did not either.

III. Adopting total incorporation would have effects that extend beyond the right to bear arms.

1. Petitioners urge more than just incorporation of the Second Amendment: they seek total incorporation of the Bill of Rights against the States. The total incorporation theory would require this Court to overrule its prior decisions holding that the grand jury requirement of the Fifth Amendment and the civil trial guaranty of the Seventh Amendment do not

bind the States. Consequently, not only would it call into question dozens of state firearm regulations, but it would also force many States to restructure their criminal and civil justice systems—effectively abolishing both prosecution by information and many States' small claims court systems.[17]

Only 18 States currently require a grand jury indictment to initiate criminal proceedings. Rosenthal, *Second Amendment*, at 78. As this Court recognized a half-century ago, "[e]ven the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of 12 for every case involving a claim above $20." *Adamson*, 332 U.S. at 64-65.

2. The same historical sources that Petitioners claim compel total incorporation also imbue the Privileges or Immunities Clause with other unenumerated rights. For example, Senator Howard's speech to Congress, which is at the center of Petitioners' pro-incorporation case, admitted that the terms "privileges" and "immunities" "cannot be fully defined in their entire extant and precise nature." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). He cited Justice

---

[17] See, *e.g.*, *Cheung* v. *Eighth Judicial Dist. Court*, 124 P.3d 550, 553–556 (Nev. 2005) (no right to jury trial in small claims court under Nevada constitution); *Crouchman* v. *Superior Court*, 755 P.2d 1075, 1076 (Cal. 1988) (same under California law); *Maddalone* v. *C.D.C., Inc.*, 765 P.2d 1047, 1049 (Colo. App. 1988) (same under Colorado law). Such a decision would also call into question myriad other state laws allocating authority between judges and civil juries. See, *e.g.*, *Smith* v. *Printup*, 866 P.2d 985 (Kan. 1993) (upholding Kansas statute granting power to determine amount of punitive damages to court rather than jury).

Washington's opinion in *Corfield*, which, as we have seen, includes among its listing of "fundamental" privileges and immunities unenumerated rights including "the right to acquire and possess property of any kind," the right "to pursue and obtain happiness and safety," and "an exemption from higher taxes or impositions than are paid by the other citizens of the state." 6 F. Cas. at 551–552. Representative Rogers, also relied on by Petitioners, opposed the Amendment because he read "privileges and immunities" to cover matters traditionally delegated to the States, including the rights to contract, to marry, and to serve as a juror. Cong. Globe, 39th Cong., 1st Sess. 2538 (1866)

Representative Woodbridge, whom Petitioners also cite, broadly interpreted privileges and immunities to embrace "the natural rights which necessarily pertain to citizenship." *Id.* at 1088. And the anonymous columnist "Madison," whom Petitioners rely on as a bellwether of public understanding of the Clause, similarly viewed it as encompassing other unenumerated rights such as the rights to "[p]rotection from the Government" and the "enjoyment of life and liberty." McDonald Br. 36.

Both Petitioners and their *amici* are upfront about what relying on these sources would entail. Petitioners acknowledge that the same sources that support total incorporation would also "constitutionalize the preexisting natural rights protected by the Civil Rights Act, including the rights of personal security." McDonald Br. 21; see also *id.* at 10, 46. *Amicus* Center for Constitutional Jurisprudence would extend the Amendment's protections to "fundamental, natural rights" including the right to contract and the "right to earn a living at a lawful occu-

pation, free from unreasonable governmental intrusion." Br. 8.[18]

The reading championed by Petitioners, and supported by the same sources they rely upon to argue for total incorporation, is radically indeterminate. At a minimum, it would encompass the type of substantive economic rights once embraced by *Lochner* v. *New York*, 198 U.S. 45 (1905) and its (for now) discredited progeny. And at its farthest reaches, who knows?

This reading "raises the specter that the * * * Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'" *Saenz* v. *Roe*, 526 U.S. 489, 528 (1998) (THOMAS, J., dissenting) (quoting *Moore* v. *East Cleveland*, 431 U.S. 494, 502 (1977)). This Court should decline Petitioners' invitation to empower the federal judiciary to strike down laws they view as inconsistent with unenumerated "fundamental" or "natural" rights under the mantle of the Privileges or Immunities Clause.

CONCLUSION

For the foregoing reasons, the Court should reject Petitioners' argument that the Bill of Rights is incorporated *in toto* against the States by virtue of the Privileges or Immunities Clause.

---

[18] See also Constitutional Law Professors Br. 9 (in addition to incorporation, "the Clause is 'the natural textual home for * * * unenumerated fundamental rights'") (citation omitted); Institute for Justice Br. 13 (Amendment protects "individual rights whose enjoyment is indispensible to personal security and autonomy").

Respectfully submitted.

CHRISTOPHER J. PAOLELLA
Winston & Strawn LLP
200 Park Avenue
New York, NY 10016
(212) 294-6700

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Amici Curiae

JANUARY 2010

APPENDIX

Bret Boyce, Associate Professor of Law at University of Detroit Mercy College of Law, author of *Originalism and the Fourteenth Amendment*, 33 Wake Forest L. Rev. 909 (1998).

Jonathan Lurie, Professor Emeritus of History at Rutgers University, co-author (with Ronald Labbe) of *The Slaughterhouse Cases: Regulation, Reconstruction and the Fourteenth Amendment* (2003).

William G. Merkel, Associate Professor of Law at Washburn University School of Law, author of *Mandatory Gun Ownership, The Militia Census of 1806, and Background Assumptions Concerning the Early American Right to Arms: A Cautious Response to Robert Churchill*, 25 L. & Hist. Rev. 188 (2007), and co-author (with Richard Uviller) of *The Militia and the Rights to Arms, or, How the Second Amendment Fell Silent* (2002).

William Nelson, Professor of Law at New York University School of Law, author of *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988).

Donna Schuele, Lecturer in Criminology, Law & Society at the University of California—Irvine.

George C. Thomas III, Professor of Law at Rutgers School of Law—Newark, author of *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. Contemp. Leg. Issues (forthcoming) and *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L.J. 1627, 1629 (2007).