IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 07 – 15763
DC# CV 99-4389-MJJ

RUSSELL ALLEN NORDYKE, *et al.*,
Appellants

v.

MARY V. KING, *et al.*,
Appellees

AMICUS CURIAE BRIEF OF PROFESSORS OF LAW IN SUPPORT OF THE APPELLANTS AND IN SUPPORT OF REVERSAL

Appeal from the U.S. District Court
for the Northern District of California
D.C. No. CV 99-04389 MJJ

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AMICI

All parties have consented to the filing of this brief.

Each of the amici is a law professor who has published a book or law review article on the 14th Amendment and the Bill of Rights. Their various publications are cited in the brief and in its Table of Contents.

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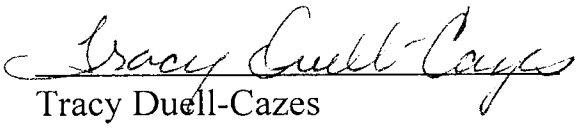
AMICIS' INTEREST

Amici are professors of law who have written books or law review articles on the Fourteenth Amendment and the Bill of Rights. This Amicus brief summarizes the historic case for applying the Bill of Rights guarantees, including the right to bear arms in the Second Amendment, to state and local governments. History supports application by way of the Privileges or Immunities Clause of the Fourteenth Amendment.

Amici do not address gun control generally, the validity of the local government act involved in this case, or the scrutiny that should be applied to gun regulation.

Date: September 26, 2008



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THE PRIVILEGES OR IMMUNITIES CLAUSE WAS DESIGNED TO REQUIRE STATE AND LOCAL GOVERNMENTS TO RESPECT THE LIBERTIES SET OUT IN THE BILL OF RIGHTS

I. Historical Background

A. From the 1830s to 1866

From the 1830s through the framing of the Fourteenth Amendment, the United States was wracked by interconnected controversies over slavery, civil liberties, the status of Americans of African descent, secession, and civil war. The Fourteenth Amendment was shaped by these battles–battles about free speech and civil liberties for opponents of slavery, about civil liberty for free blacks before the Civil War, and battles over rights of newly freed slaves (including their right to have arms) and the rights of white Unionists. As the framers of the Thirteenth and Fourteenth Amendments knew, for more than thirty years the nation had suffered a conflict between a slave system where semi-sovereign states were free to deny fundamental rights and a system of liberty where they were not.

Of course, slavery denied basic constitutional rights to slaves–rights to learn to read, to speak, preach, assemble, and bear arms. Free blacks in the slave states were also denied rights such as the right to bear arms. Nor were denials of civil liberty limited to blacks. Laws and mobs punished opponents of slavery for anti-slavery speech, press, religious expression, and assembly. Slave states punished

distributors of anti-slavery literature, searched for, seized, and destroyed anti-slavery pamphlets, and imposed cruel punishments. Abolitionists were the first targets, but after the Republican Party was formed, Republicans were targeted as well. Republicans could not speak or assemble in the South. As Lincoln and Douglas agreed in their famous debates, Republicans could not campaign for their candidates in the South. *See generally* Clement Eaton, *The Freedom of Thought Struggle in the Old South* (1964); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 27-56, 31(Lincoln-Douglas) (1986) [hereinafter, *No State Shall Abridge*]; Michael Kent Curtis, *Free Speech: The People's Darling Privilege*, 199-271(2000) [hereinafter, *Free Speech*].

Some states curtailed basic liberties for free blacks–and not exclusively in the South. In the South, free blacks (and of course slaves) were denied all sorts of basic rights, including the right to possess firearms. Akhil Reed Amar, *The Bill of Rights: Creation and Destruction*, 160-161 (1998) [hereinafter, Amar, *Bill of Rights*]. Oregon's 1859 Constitution, opposed by most Republicans, denied to blacks the right to enter the state, to sue, or to testify against whites. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 Rutgers L. J. 415, 437 (1986); *No State Shall Abridge* at 59-60.

In *Barron v. Baltimore*, 32 U.S. 243, 247 (1833) and following cases, the Supreme Court ruled that the guarantees of the Bill of Rights did not limit the states. This left Southern states free to make felons of those who circulated anti-slavery literature and to punish free blacks for possessing firearms. In addition *Dred Scott v. Sandford*, 60 U.S. 393, 427 (1857), stripped blacks, free or slave, of all constitutional rights. In North Carolina, a minister was convicted for circulating a Republican campaign document, Hinton Helper's anti-slavery book, *The Impending Crisis*. In 1860, the North Carolina legislature amended the law punishing expression tending to cause slaves or free blacks to be discontent, by providing the death penalty for the first offense. *Free Speech* at 295-296.

In reaction to the suppression of civil liberties for whites as well as blacks that accompanied slavery, abolitionists and later leading Republicans espoused an understanding of the Constitution that nationalized civil liberty. By a widely held anti-slavery and Republican view, rights in the Bill of Rights were rights of American citizens that states should respect. This was a matter of constitutional obligation, though, prior to the Fourteenth Amendment, leading Republicans differed on whether the obligation was legally enforceable. Amar, *The Bill of Rights* at 181-215; *No State Shall Abridge* at 26-56. John A. Bingham (the primary author of section 1 of the Fourteenth Amendment) read Article IV, section

2 as saying "the citizens of each state shall be entitled to all privileges and immunities of citizens [*of the United States*] in the several states." For Bingham, the privileges or immunities of citizens of the United States included those in the Bill of Rights. *No State Shall Abridge* at 58-62.

The view that the liberties in the Bill of Rights limited the states was (in spite of *Barron*) expressed by several state supreme courts. For example, in *Nunn v. State*, 1 Ga. 243, 250 (1846), Chief Justice Lumpkin said that though the power to deny the privilege of bearing arms had been withheld from Congress, it was never "intended to confer it on local legislatures. This right is too dear to be confided to a republican legislature." *See*, generally, Amar, *The Bill of Rights* at 145-62; *No State Shall Abridge* at 24-25.

B. 1864-1866

As the framers of the Fourteenth Amendment understood, slavery was incompatible with liberty, not only for blacks, but for whites as well. Republicans, in the 38th Congress that abolished slavery and in the 39th that submitted the Fourteenth Amendment to the states, believed that the rights of American citizens included the liberties (or privileges or immunities as they were often described) in the Bill of Rights. As Republicans saw it, states had been violating the Constitution by abridging the liberties in the Bill of Rights before the Civil War;

after the war they were continuing to do so. In addition, slavery, though abolished by the Thirteenth Amendment, was being revived under another name.

Republicans expressed a national view of civil liberties in their discussions of the amendment to abolish slavery in 1864, of Reconstruction, and of the Fourteenth Amendment. Congressman James Wilson was the chairman of the House Judiciary Committee in 1864. Wilson insisted the slavery had defied the Supremacy Clause and nullified the constitutional privileges and immunities of citizens of the United States.

> Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together. ... [Still in the South] the press has been padlocked, and men's lips have been sealed. Constitutional defense of free discussion by speech or press has been a rope of sand south of the line which marked the limit of dignified free labor in the country.

Wilson said he might enumerate many other constitutional rights slavery had "practically destroyed" but he had done enough to show that slavery "denied to the

citizens of each State the privileges and immunities of citizens in the several States." *Cong. Globe*, 38th Cong., 1st Sess. 1202 (1864) [hereinafter, *Globe* 38(1)]. Southern laws about which Wilson complained denied free speech rights to all critics of slavery–in state citizens and out of state citizens and blacks and whites.

In the 38th Congress that abolished slavery and in the 39th Congress that framed the Fourteenth Amendment, congressmen and senators demanded protection of Bill of Rights liberties. Like Congressman Wilson, they often cited specific infringements as examples of a pattern of state misconduct. *See, e.g.*, Amar, *The Bill of Rights*, 181-197; *No State Shall Abridge* at 36-56. *See specifically e.g.*, *Globe* 39(1) at 1013 (1866) (Rep. Plants) (suppression of free speech and press); *id.* at 1183 (Sen. Pomeroy) (throwing around the newly free slaves the "essential safeguards of the Constitution," including specifically the constitutional right of bearing arms);[1] *id.* at 1837-38 (Rep. Sidney Clarke) (right to keep and bear arms which had been denied to blacks in Alabama); *id.* at 38(1)114 (1864) (Rep. Arnold) (liberty of speech, press, and trial by jury); *id.* at 38(2) 193 (1865) (Rep. Kasson) (denial of constitutional rights in the states including speech

[1] Before the Congressional adoption of the Fourteenth Amendment Pomeroy said that constitutional liberties could be enforced under the Thirteenth Amendment. *Id.*

and press); *id.* at 38(1) 2979 (1864) (Rep. Farnsworth); *cf. id.* at 39(1) 340 (1866) (Sen. Cowan) (due process); *id.* at 67 app. (Rep. Garfield) (liberty and personal rights, including due process together with Article IV privileges and immunities); and *id.* at 1072 (Sen. Nye) (rights enumerated in the Constitution).

In 1866, Senator Nye denied that "any State has the power to subvert or impair" the rights enumerated in the Constitution. *Id.* Rep. McClurg referred to the need or protection of the "natural and personal rights enumerated in the Constitution." *Id.* at 1032, 2724.

After the Civil War, Republican congressmen had serious reasons for concern about the resurgence of a new form of slavery. Southern governments established by Andrew Johnson were adapting the slave codes to regulate free blacks. In his report to Congress on the Freedman's Bureau Bill, Representative Eliot set out the ordinance of Opelousas, Louisiana. It provided that no free black could come within the town limits without permission of his employer; blacks could not rent or keep a house in the town; blacks were not allowed to assemble for public meetings without permission of town officials; and no blacks could preach without permission of town officials. Finally no freedman not in the military was allowed firearms or weapons within the limits of the town without special written permission from his employer. *Cong. Globe*, Cong. 39th 1st Sess.

517 (1866) [hereinafter, *Globe* 39(1)]; Stephen P. Halbrook, *Freedmen, The Fourteenth Amendment and the Right to Bear Arms*, *1868-1876,* 10 (1998) [hereinafter, *Freedmen*]; *see also* Walter L. Fleming, *Documentary History of Reconstruction: Political, Military, Social, Religious, Educational & Industrial 1865 to the Present Time*, 279-81 (1906) (citing the ordinance of St. Landry Parish, Louisiana which had similar provisions. It also provided that, "No Negro who is not in the military service shall be allowed to carry firearms or any kind of weapons within the parish without permission of his employer endorsed by the nearest chief of patrol." Violators were to be put in a barrel, but not for longer than twelve hours).

For Republicans who believed that blacks were now citizens after the Thirteenth Amendment and that citizens were entitled to the protection of the Bill of Rights against their state, the codes not only discriminated, they also violated constitutional rights–including rights of free speech, free assembly, free exercise of religion, due process, and the right to bear arms.

Congress responded to the Black Codes with the Civil Rights Act of 1866. The Act provided (contrary to *Dred Scott*) that "all persons born in the United States and not subject to any foreign power...are hereby declared to be citizens of the United States." Such citizens "shall have the same right, in every State and

Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and *to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens...*" An Act to Protect All Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication, 14 Stat. 27 (1866) (emphasis added).

The phrase "laws and proceedings for the security of person and property" was widely understood to encompass liberties of the sort set out in the Bill of Rights. *E.g.*, *No State Shall Abridge* at 71-72; *see, e.g.*, *Dred Scott*, 60 U.S. 393 at 449-50; *Boyd v. United States*, 116 U.S. 616, 635 (1886); James Kent, *Commentaries on American Law*, 9-11 (1827) (citing grand jury indictment, the protection against double jeopardy, guarantees of a speedy and public trial, confrontation, compulsory process for witnesses, right to counsel and prohibition against ex post facto laws as provisions for the security of person).

The clearest evidence that "laws for the security of person and property" included rights in the Bill of Rights, *such as the right to bear arms*, comes from the legislation passed by the 39th Congress. The Freedman's Bureau Bill provided that blacks should have, among other things, "the full and equal benefit of all laws and proceedings for the security of person and property, *including the*

constitutional right of bearing arms." *Globe* 39(1) at 654, 743, 1292. (Bingham's speech sets out the pertinent provisions of the bill.) The phrase "including the constitutional right of bearing arms" had been added as an amendment by the House. Senator Trumbull who was managing the bill in the Senate said the amendment did not change the meaning of the bill. *No State Shall Abridge* at 104.

The reference to the "full and equal benefit of all laws and provisions for the security of person and property" shows that the Civil Rights Act, (which some take to be equivalent to section 1 of the Fourteenth Amendment) could be and was understood by leading Republicans as protecting liberties in the Bill of Rights. For example, Senator Dixon said the Civil Rights Act contained a guarantee of free speech throughout the nation. *Globe* 39(1) at 2332. One purpose of the final version of the Fourteenth Amendment was to secure its privileges "by a constitutional amendment that legislation cannot override." *Globe* 39(1) at 1095 (Rep. Hotchkiss); *see* Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 28 Mich. L. Rev. 203, 254 (1983).

The power to pass the Civil Rights Act was contested. In response, Republicans cited the Thirteenth Amendment, Article IV, section 2, and congressional power to enforce the Bill of Rights. Republicans who believed the Civil Rights Act could be justified as enforcing the Bill of Rights *or* was an

attempt to enforce the Bill of Rights included Representative James Wilson, chairman of the Judiciary Committee, *Globe* 39(1) at 1294, John A. Bingham, primary author of section 1, *id.* at 1291, Representative Thayer, *id.* at 1153, and Representative Lawrence, *id.* at 1833 (citing the Due Process Clause of the Fifth Amendment). Bingham said a constitutional amendment was needed so Congress could enforce the Bill of Rights in that way.

II. The Fourteenth Amendment: Interpreting Section 1

The final version of the Fourteenth Amendment made persons born in the nation and subject to its jurisdiction "citizens of the United States and of the state wherein they reside." The citizenship clause overruled *Dred Scott*. The framers also sought to overrule *Barron v. Baltimore*: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

To understand the meaning of constitutional provisions, one can look at the text of the Constitution itself and the text in context (seeking to understand the text in light of related constitutional provisions); one can look at the historical circumstances giving rise to the amendment and the purposes expressed by those

who proposed or ratified it; one can look at relevant precedent; and one can look at the constitutional structure–how the Constitution needs to be interpreted to achieve its overall objectives. *See, e.g.*, Phillip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1984); Charles Black, *Structure and Relationship in Constitutional Law* (2000); Amar, *The Bill of Rights* at 163-214.

In the case of the Fourteenth Amendment these methods of interpretation point in the same direction: the amendment and specifically its privileges or immunities clause were designed to forbid states from abridging fundamental rights of citizens, including those rights in the Bill of Rights. Section 1 was also designed to see that all persons (even those who were not citizens) would be guaranteed due process of law, including those criminal procedures protected by the Bill of Rights, and be guaranteed equal protection of the laws.

A. Text: privileges or immunities

Reading the privileges or immunities clause to protect Bill of Rights liberties from state abridgment fits historical usage. *See* Amar, *The Bill of Rights* at 163-174. For a discussion of the use of the word "privilege" as equivalent to "right" or "liberty" *see, e.g.*, *No State Shall Abridge* at 64-65; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges and Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1072, 1094-1143

(2000) (citing examples covering almost 50 pages) [hereinafter, *Historical Linguistics*].

The words, "privilege" and "immunity" have been used to describe rights like those in the Bill of Rights throughout American history. The usage was common in the years leading up to the adoption of the Fourteenth Amendment. *See, e.g.*, *Historical Linguistics* at 1089-1143 (setting out nearly 50 pages of examples, including 44 pages from the English and colonial background, the debate over the new Constitution, Madison proposing the Bill of Rights, the debate over the Sedition Act of 1798, debates over the suppression of anti-slavery speech, debates during the Civil War, debates over the Fourteenth Amendment, and finally use of the words in the 1870s). Senator Howard, who presented the Fourteenth Amendment to the Senate on behalf of the Joint Committee, and John A. Bingham, who wrote section 1 less the citizenship clause, used the words in this way. That is strong additional evidence of the original meaning of the words. Howard's speech was reported in a number of leading newspapers. *E.g.*, *Freedmen* at 36.

The words "right" and "privilege" were often used interchangeably. For example, in proposing the Bill of Rights, James Madison referred to the rights of free press, jury trial, and conscience as "invaluable privileges" and as the "choicest

privileges of the [American] people." Bernard Schwartz, 2 *The Bill of Rights, A Documentary History* 1028, 1033 (B. Schwartz ed., 1971); *Historical Linguistics* at 1103. Madison presciently warned that "State Governments are as liable to attack the invaluable privileges and the General Government is." *Id.*

As the Civil War approached, rights in the Bill of Rights such as free speech, press, assembly, and the right to bear arms were often described as privileges *of citizens of the United States*. *Historical Linguists* at 1110-21. During the Civil War Democrats used the words in the same way. *Id.* at 1121-23. Opponents of slavery and others often used the word "privilege" to describe constitutional rights in the Bill of Rights. *Id.* at 1110-1124.

B. Text: of citizens of the United States

The orthodox understanding of the Privileges and Immunities Clause of Article IV, section 2 is that it protects certain privileges or immunities that come from state law. A state may not deprive out-of-staters of these interests (such as the right to pursue the common occupations of life) unless it also denies them to its own citizens. In contrast, the Fourteenth Amendment protects privileges and immunities of [belonging to] citizens of the United States. An obvious place to look for privileges or immunities [rights] of citizens of the United States is in the rights set out in the Constitution. Foremost among these are the rights in the Bill

of Rights. *See*, *Random House Webster's College Dictionary* 1074 (privilege, 1 & 5) (1991).

C. Contextual Analysis: no state shall

James Madison, in his proposal to apply some of the "invaluable privileges" in the Bill of Rights to the states, inserted them in Article I, section 10 and prefaced them with the words used in that section–"No state shall." When the original Constitution imposed limits on the states in the interest of liberty in Article I, section 10, it also prefaced the limits with the words "no state shall." *No State Shall Abridge* at 21. The Fourteenth Amendment used this approach.

D. Precedent: *Barron v. Baltimore*.

In the 1833 case of *Barron v. Baltimore*, the Supreme Court held the guarantees of the Bill of Rights did not limit the states. Even after the Fourteenth Amendment, the Court cited *Barron* for this proposition. *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). In fact, however, *Barron* supports application of the Bill of Rights to the states. In *Barron*, Chief Justice Marshall said that had the framers of the original Bill of Rights intended any of them to limit the states, they would have prefaced them with "no state shall" as had been done in Article I, section 10. 32 U.S. at 249. In 1871, John A. Bingham explained that in drafting section 1, he had followed the *Barron* recipe to the letter. *Cong.*

Globe, 42nd Cong. 1st Sess. app. 84 (1871) [hereinafter, *Globe* 42(1)]; *No State Shall Abridge* at 161.

E. History:

Concern about denial of Bill of Rights liberties and concern for equality for Americans of African descent shaped the Fourteenth Amendment. Securing basic constitutional rights such as free speech and the right to bear arms for *all* citizens promotes equality as well as liberty because all citizens have these liberties equally.

Leading Republicans thought free blacks were citizens even before the Fourteenth Amendment. From this perspective, the Black Codes not only subjected Americans of African descent to racial discrimination. The Codes also deprived Americans of African descent of liberties that, as leading Republicans saw it, should belong to all citizens.

Framers of the Amendment described it as requiring states to obey the Bill of Rights. These statements are relevant to the purposes of the drafters and to the popular understanding of the words of the Amendment. Senator Howard presented the Fourteenth Amendment on behalf of the Joint Committee that drafted it. He explained that the privileges or immunities included "the personal rights guaranteed and secured by the first eight amendments of the constitution..."

He specifically listed most of them and made clear he referred to all, describing them as rights "*such as* the freedom of speech and of the press..." and "... the right to keep and bear arms...." *Globe* 39(1) at 2765 (emphasis added).

Similarly, John A. Bingham, the author of section 1 (less the citizenship clause) said the amendment allowed Congress to "protect" by national law the privileges or immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." *Id.* at 2542. The amendment was needed because "many instances of State injustice and oppression have already occurred in the State legislation of this union, of flagrant violation of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens..." *Id.* In 1871 Bingham reiterated the view that the privileges or immunities of citizens of the United States were *chiefly* set out in the Bill of Rights, which read word for word. *Globe* 42(1) at 84.

A common description of the Fourteenth Amendment was that it would protect all citizens in all their constitutional rights. *E.g.*, *No State Shall Abridge* at

89-91, 131-145. In the 39th Congress, leading Republicans described the rights in the Bill of Rights as fundamental rights. For example, Congressman James Wilson, referred to "the great fundamental rights embraced in the Bill of Rights." *Globe* 39(1) at 1294. Senator Howard described the rights in the Bill of Rights as "these great fundamental guarantees." *Id.* at 2766.

In 1866-68 (and before) the privileges and immunities of free speech, free press, free exercise of religion, assembly, and the right to bear arms were seen as fundamental to freedom. *See Free Speech* 216-299, 357-383 (2000), *No State Shall Abridge* at 131-138 (every right set out in the constitution including the right to have arms), 139-140 (constitutional rights including the right to bear arms were rights of citizens of the United States), 141 (denials of right to bear arms and other rights basic to freedom), 142 (broad reading of guarantees of the Civil Rights Act), 143 (treating the privileges or immunities clause as protecting the rights of American citizens and the Due Process Clause as "rather more than the Bill of Rights"), 144-145.

At least three constitutional treatises published after the amendment was proposed but before ratification expressed the view that the rights in the Bill of Rights were now protected by the Fourteenth Amendment from state action. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*,

03 Yale L. J. 57, 83-94 (1993); Amar, *The Bill of Rights* at 210 (citing John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 147, 151 (1868); Timothy Farrar, *Manual of the Constitution of the United States*, 53–59, 145, 396-397 (1872); George W. Paschal, *The Constitution of the United States* 290 (1868)). Thomas Cooley's *Constitutional Limitations* (1868) did not discuss the Fourteenth Amendment.

After the ratification of the Fourteenth Amendment, congressmen said that the privileges or immunities clause protected rights in the Bill of Rights. *E.g.*, *No State Shall Abridge* at 161-168; *see also*, *Freedmen* at 64-68. For a detailed historical discussion focusing on the right to bear arms as protected by the Fourteenth Amendment and supplying substantial additional evidence of protection of the right to bear arms as a personal right under the Fourteenth Amendment, see, e.g., *Freedmen* at 1-44 (1998); Amar, *The Bill of Rights* at 257-268. In *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2810 (2008), the Court recognized congressional concern from 1866 to 1871 that the personal constitutional right to bear arms was being abridged in the Southern states.

The Fourteenth Amendment was designed to make the privileges or immunities in the Bill of Rights, including the right to bear arms, applicable to state and local governments by way of the Privileges or Immunities Clause. This

conclusion is supported by the text of the Constitution, by the history leading up to the adoption of the Amendment, by discussions in the Congress that proposed the Amendment, by discussions of it in the congressional campaign of 1866 which was a referendum on the Amendment, by historic usage of the words "privileges" and "immunities" of citizens of the United States as including liberties in the Bill of Rights, by the discussion in *Barron v. Baltimore* as to how a provision would have been crafted to make Bill of Rights liberties a limit on the states, by the aspirations of the framers of the Amendment, and by the understanding of congressmen shortly after it was adopted. In light of the history of suppression of civil liberty before the Civil War, it is also supported by a structural understanding of how the Constitution needs to be interpreted to fulfill its objective of "secur[ing] the blessings of liberty" *(U.S. Const.* pmbl.) and providing representative government.

That the Fourteenth Amendment was designed to apply the Bill of Rights to the states is now supported by a wealth of scholarly commentary. For early substantial support among those who had seriously studied the issue, see, e.g., *No State Shall Abridge* at 222, n. 19 (citing sources prior to 1986). For later commentary, see e.g., *No State Shall Abridge*; Amar, *The Bill of Rights*; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 03 Yale L.

J. 57, 83-94 (1993); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revising the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L. J. 1509 (2007) [hereinafter, *Nationalizing*]; *Freedmen*; Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1 (2007). Indeed, the more scholars have looked, the more evidence for application they have discovered. This is not to say all scholars agree or that there are not some bits of evidence that have been read (and often misread) to support an opposite conclusion. See, e.g., Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 155-190 (1977); David Currie, *The Constitution and the Supreme Court: The First Hundred Years*, 342-51(1985); William Nelson, *The Fourteenth Amendment: From Political Principle To Judicial Doctrine* 114-118 (1988). For a criticism of arguments against application of the Bill of Rights to the states see, e.g., Amar, *The Bill of Rights* at 181-206; *No State Shall Abridge* at 92-130; Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause, and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 Bost. College L. Rev. 1, 44-67 (1996). For a comprehensive discussion of the issue and of scholarship, see *Nationalizing*. For an agnostic view, see George C.

Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal,* 68 Ohio St. L. J. 1627 (2007).

The hypothesis that the Privileges or Immunities Clause was designed to require states to respect the Bill of Rights liberties of citizens and most of the guarantees for all persons (the criminal procedure guarantees of the Bill of Rights) is significantly stronger than competing claims.

The history recounted in the *Heller* decision strongly supports the understanding that the right to bear arms was understood in the 19th Century as a fundamental, individual privilege and immunity of citizens. The *Heller* majority cited Joel Tiffany's influential *Treatise on the Unconstitutionality of American Slavery* 117-118 (1849). Tiffany believed that the federal Constitution protected American citizens "from the despotism of states at home" and that any state law that deprived citizens of the "rights, privileges, and immunities secured by the Constitution" was "void." The "privileges and immunities" of citizens of the United States were "all the guarantys of the Federal Constitution for personal security, personal liberty and private property." To further define these Tiffany listed rights in the Bill of Rights (including the "right to keep and bear arms)" and habeas corpus see *Id.* at 56-58, 97, 99; *No State Shall Abridge* at 43-44.

III. History, Incorporation, and the Role of the Courts

The key *historical* question as to free speech, arms, or any other right protected by the Fourteenth Amendment, would be how the right was understood by those who proposed, supported, and adopted the Amendment. From an original understanding or original meaning perspective, we would look at the understanding of the right by people of 1866-1868.

Even if the dubious claim that free speech in 1789-1791 meant only protection against prior restraint were true, that would not determine the meaning and understanding of 1866-1868. The thirty years of protests against suppression of anti-slavery speech were not about prior restraint. Similarly, even if the right to bear arms in the Second Amendment had been limited to active members of the militia, by 1866 the right was understood to be a personal one not connected to the militia. Amar, *The Bill of Rights* at 262-266.

The *Heller* opinion expressly recognizes that 19th Century Americans believed the right to arms to be a fundamental, basic personal right. *Heller*, 128 S. Ct. at 2811. Significantly, the Court in *Heller* cited and relied on anti-slavery constitutional theory such as Joel Tiffany's *Treatise on the Unconstitutionality of Slavery*. *Id.* at 2789. The evidence cited by the *Heller* opinion from the period after the framing of the Bill of Rights and prior to the ratification of the Fourteenth

Amendment shows that the Fourteenth Amendment privilege or immunity of possessing arms was regarded as a fundamental personal right.

Some see the Second Amendment as protecting the power of the states to have a militia. Whatever the strength of this view as to the Second Amendment, it makes no sense as to the privilege of bearing arms secured by the Fourteenth. By that reading the Fourteenth Amendment would be saying no state shall make or enforce any law which shall abridge the right of the state to organize a militia. Obviously, the state does not need to be protected against itself. The sensible reading of the incorporated privilege of bearing arms is that it protects the individual right of the citizen.

Application to the states under the Privileges or Immunities Clause would allow, but not require, denial of the right to aliens. It would not protect the right of corporations to bear arms. It makes no logical sense for these artificial corporate "persons" have an individual right to defend themselves with arms.

The traditional standard for application of a specific right has been whether the right is essential to the American scheme of ordered liberty or fundamental in our traditions. The view of the framers of the Fourteenth Amendment was that Bill of Rights liberties were fundamental and essential to liberty. As the *Heller* opinion shows, as to the right of bearing arms, that view was pervasive in the

Nineteenth Century prior to and shortly after the framing of the Fourteenth Amendment.

IV. The Destruction and Resurrection of Application of the Bill of Rights to the States

In the *Slaughter-House Cases,* 83 U.S. 36, 77 (1873), and subsequent cases, the Court largely eviscerated the Privileges or Immunities Clause. For nearly fifty years, cases following *Slaughter-House* rejected application of any of the rights in the Bill of Rights to the states. This mistake was gradually and partially corrected by selective incorporation of Bill of Rights liberties as a limit on the states.

The *Slaughter-House* majority provided a radically incomplete historical background for the Fourteenth Amendment. It ignored Southern state suppression of civil liberty–including speech, press, assembly, arms, and free exercise of religion–in the interest of protecting slavery. It ignored the denial of these basic liberties including the right to bear arms that characterized the quasi-slavery of the Black Codes. *Slaughter-House* did discuss the Black Codes, but failed to mention how they limited the rights of blacks to free speech, assembly, exercise of religion, and the right to bear arms. *Id.* at 70. It totally ignored statements of leading supporters of the Amendment. It failed to note that the words "privileges" and "immunities" had a long history as description of liberties such as those in the Bill

of Rights. The Court suggested, incorrectly, that the Fourteenth Amendment was motivated simply by the need to protect blacks. *Id.* at 72.

Slaughter-House held the Fourteenth Amendment protected privileges or immunities of citizens of the United States, not those that came from state citizenship. Then it suggested that almost all civil liberties were privileges of state citizenship. Lest it should be said that there were no privileges or immunities of national citizenship, the *Slaughter-House* court suggested some: the right to visit the sub-treasuries, to travel back and forth to Washington, D.C., to use the navigable waters, to petition the [national as it turned out] government, and to protection on the high seas and in foreign lands. *Id.* at 77.

By this extraordinary view, the privileges or immunities clause protected the newly freed slaves both on their trans-Atlantic cruises and once they arrived in Paris. The crucial problem from the 1830s through the Civil War had not been the need to protect American citizens in Paris. The problem had been to protect their fundamental rights, particularly, but by no means exclusively, in the slave states.

The Court's excision of the Bill of Rights from the Fourteenth Amendment was made explicit in *United States v. Cruikshank*, 92 U.S. at 552. Citing *Barron v. Baltimore*, the Court said that the Bill of Rights was "not intended to limit the powers of the State governments in respect to their own citizens, but to operate on

the national government alone." *Id.* It was now (about eight years after the adoption of the Fourteenth Amendment) "too late to question the correctness of this construction." *Id.*

According to *Cruikshank*, the right to bear arms was not a "right granted by the Constitution." *Id.* at 553. The Second Amendment merely limited the national government. The continuance of this and other Bill of Rights liberties depended on the states. American citizens did not have the rights in the Bill of Rights. They merely had a protection against the national government abridging them. State protection of the rights was, as it had been before the Civil War, a matter of state option.

These claims were flatly inconsistent with those expressed by leading framers of the Fourteenth Amendment, with the text of the amendment, with a widespread original understanding of the words "privileges or immunities," and with the historical problems that led to the amendment.

An analysis more consistent with the purposes of the Fourteenth Amendment was set forth by Judge (later Justice) William Woods in 1871 in *United States v. Hall*: "What are the privileges and immunities of citizens of the United States [referred to in section 1 of the Fourteenth Amendment.] They are undoubtedly those which may be denominated fundamental; which belong of right

to the citizens of all free states... Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments... [T]he rights enumerated in the first eight articles of amendment to the constitution of the United States are the privileges and immunities of citizens of the United States." *United States v. Hall*, 26 F. Cas. 79, 81-82 (S.D. Ala 1871) (No. 15,282); *No State Shall Abridge* at 160, 171-172; Amar, *The Bill of Rights* at 209-210. Judge Woods' views were shared by Justice Bradley. *No State Shall Abridge* at 160.

Cruikshank stands for the proposition that none of the rights in the Bill of Rights limit the states. Subsequent cases, selectively applying almost all of the guarantees in the Bill of Rights against the states, have entirely undermined the fallacious basis for the *Cruikshank* opinion. Since the no-application justification for the opinion has been entirely undermined, it is hard to see why the decision should survive. If this court finds itself bound by the decision whose foundation has been utterly destroyed, it would be worthwhile to examine the history *Cruikshank* ignored for the benefit of the Supreme Court and other courts.

CONCLUSION

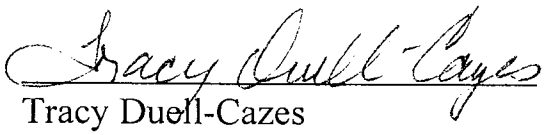
The historical case for applying the Second Amendment to the states through the Privileges or Immunities Clause is strong. It is never too late in the

day to provide a far more accurate account of that history than the Supreme Court provided in *Slaughter-House* and *Cruikshank*.

This brief was written by Professor Michael Kent Curtis with the help of Prof. William Van Alstyne and Professor Richard Aynes.

Date: September 26, 2008

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached *amici curiae* brief is proportionately spaced, has a typeface of 14 points and contains 6491 words.

Date: September 26, 2008

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