

# **NOTE: THE RIGHT THING FOR THE WRONG REASONS? THE INCORPORATION OF THE SECOND AMENDMENT IN MCDONALD V. CHICAGO**

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## **Reporter**

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+ Ave Maria School of Law, J.D. 2011. I would like to thank Prof. Patrick Gillen, who kept me abreast of developments in the McDonald case as it made its way to the Supreme Court. Without his guidance in reviewing the current events this would be a very different Note. I would also like to thank Sarah Murphy and Stephen Foland, who gave me constructive criticism throughout the writing process. Most of all, I would like to thank my parents, whose attention to my education is only outmatched by their love and support, the depths of which I am only beginning to fathom.

## **Text**

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**[\*335]**

In 2008, the U.S. Supreme Court decided *District of Columbia v. Heller*,<sup>1</sup> holding that the "Second Amendment conferred an individual right to keep and bear arms."<sup>2</sup> However, several questions regarding the scope of the [Second Amendment of the U.S. Constitution](#) remain unanswered. Some of these questions concern the precise limits on the federal government's power to restrict firearm ownership and use, as well as what other requirements the government can place on firearm owners and users.<sup>3</sup> The Court has now answered, in the affirmative, the separate question of whether the Second Amendment applies to the states as well as the federal government in the case of *McDonald v. Chicago*,<sup>4</sup> which involves a gun control law very similar to the District of Columbia's.<sup>5</sup> In light of *McDonald*, this Note will address three questions: First, did the framers of the Fourteenth Amendment intend it to apply the Second Amendment against the states? The Petitioner in *McDonald* argues that *The Slaughter-House Cases*,<sup>6</sup> which construed the Privileges and [\*336] Immunities Clause of the Fourteenth Amendment narrowly,<sup>7</sup>

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<sup>1</sup> [554 U.S. 570 \(2008\)](#).

<sup>2</sup> [Id. at 595](#).

<sup>3</sup> [Id. at 625-28](#).

<sup>4</sup> [130 S. Ct. 3020 \(2010\)](#).

<sup>5</sup> Compare [McDonald, 130 S. Ct. at 3026](#) (describing city ordinance prohibiting possession of any firearm without registration while prohibiting registration of most handguns), with [Heller, 554 U.S. at 576-77](#) (prohibiting possession of an unregistered firearm while prohibiting the registration of handguns).

<sup>6</sup> [83 U.S. \(16 Wall.\) 36 \(1872\)](#).

wrongly decided the issue and that the framers of the Fourteenth Amendment intended to enforce the Second Amendment against the states through that provision.<sup>8</sup> In light of this argument, the intent of the framers of the Fourteenth Amendment becomes particularly relevant, and this Note will examine their intent in detail and will argue that the framers of the Fourteenth Amendment did not intend to incorporate the Second Amendment. Second, this Note will address the Supreme Court's recent decision in *McDonald v. Chicago*,<sup>9</sup> analyzing the rationales of both the plurality and Justice Thomas' concurring opinion. The opinion of the Court incorporates the Second Amendment through the Due Process Clause, which this Note will show has no historical basis in the intent of the framers of the Fourteenth Amendment. Justice Thomas, on the other hand, bases his argument on the Privileges and Immunities Clause, which has a stronger basis in history, but still fails to counter numerous statements to the effect that no incorporation was intended. Third, this Note addresses some of the non-legal reasons why the Court should not have incorporated the Second Amendment, such as the value of a federalism-based approach and the problem of using incorrect rationales.

To answer the first question, Part I of this Note will begin with some preliminary background study of the original understanding of "due process" and "privileges and immunities," the two key terms in the argument over incorporation, as understood prior to their use in the Fourteenth Amendment. A strong case for well-established meanings of these phrases requires a correspondingly strong argument to prove a contrary meaning in the Fourteenth Amendment. If the original meanings do not encompass the protection of the Second Amendment, the framers of the Fourteenth Amendment must have clearly indicated a different meaning for those terms for incorporation to follow.<sup>10</sup>

With this background in mind, Part II will look to the history of the ratification of the Fourteenth Amendment to determine whether **[\*337]** the framers intended any incorporation, and specifically incorporation of the Second Amendment. This discussion will show that they did not intend incorporation under any of the provisions of the Fourteenth Amendment. Part III will then analyze the opinions of the plurality and of Justice Thomas in light of the original intent of the framers. Part IV will discuss the negative effects and implications of the Court's decision to incorporate the Second Amendment, followed by a brief conclusion in Part V.

I.

#### "Due Process" and "Privileges and Immunities"

The terms "due process" and "privileges" and "immunities"<sup>11</sup> both appeared in the Constitution before the ratification of the Fourteenth Amendment.<sup>12</sup> Through the former, the Court has "incorporated" many of the Bill of Rights provisions against the states.<sup>13</sup> Before discussing the Fourteenth Amendment's use of these terms, some background on their meaning will provide a useful context in determining what the framers of the Fourteenth Amendment meant by them.

<sup>7</sup> [Id. at 78-80.](#)

<sup>8</sup> Petition for a Writ of Certiorari at 22-28, [McDonald v. Chicago, 130 S. Ct. 3020 \(2010\)](#) (No. 08-1521), 2009 WL 1640363.

<sup>9</sup> [130 S. Ct. 3020.](#)

<sup>10</sup> Cf. *United States v. Burr*, 25 F. Cas. 154, 165 (C.C.D. Ky. 1806) (No. 14,692) ("It would, however, be expected that an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms.").

<sup>11</sup> U.S. Const. amend. XIV, § 1.

<sup>12</sup> [U.S. Const. art. IV, § 2, cl. 1](#); [U.S. Const. amend. V.](#)

<sup>13</sup> See [Duncan v. Louisiana, 391 U.S. 145, 147-48 \(1968\)](#) (listing provisions of the Bill of Rights held to apply to the States through the Fourteenth Amendment).

## A. Due Process

Shortly before the Philadelphia Convention, Hamilton cited "Lord Coke, that great luminary of the law," for the proposition that the "law of the land [means] presentment and indictment, ... as contradistinguished from trial by jury." <sup>14</sup> Edward Coke equated "the law of the land" with "due process." <sup>15</sup> Therefore, due process meant "presentment and indictment." <sup>16</sup> Hamilton further stated that "the words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature." <sup>17</sup> In other words, Hamilton considered the phrase a term of art with a well-established [\*338] meaning. This apparently conflicts with Murray's Lessee v. Hoboken Land & Improvement Co., <sup>18</sup> where Justice Curtis stated for the Court that the Fifth Amendment Due Process Clause

is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. <sup>19</sup>

However, Justice Curtis still emphasizes the procedural aspect of the clause. While he seems to expand the meaning of due process to all provisions of the Constitution, he probably did not mean this. Given the context of the statement, he likely meant that a given process must not conflict with procedural provisions of the Constitution. If he meant otherwise, he conflicted with Hamilton, and by implication Coke, on the matter. Since "American lawyers relied heavily upon Coke's ... Institutes of the Laws of England to learn the principles of the common law," <sup>20</sup> Justice Curtis more likely meant to include only the procedural provisions of the Constitution, especially since he also cited Coke in his opinion. <sup>21</sup> Justice Story also cited to Coke for an understanding of the clause, noting that it "affirms the right of trial according to the process and proceedings of the common law." <sup>22</sup> However, this leaves unsettled the question of whether due process extends beyond presentment and indictment. Assuming Justice Curtis thought so, his opinion conflicts with Hamilton's. Since Hamilton not only lived during the founding generation but also attended the Philadelphia Convention and coauthored *The Federalist*, he carries great weight. Furthermore, nothing in the recorded debates on the Fifth Amendment in the First Congress reveals any discussion of what the phrase "due process" meant, <sup>23</sup> implying the Representatives had no questions on the matter. Combining this with Coke's [\*339] prominence in the colonies and early states and Hamilton's statement, it seems clear that "due process" had an accepted meaning, which almost certainly matched what Hamilton expressed rather than Justice Curtis' definition. Regardless, even under Justice Curtis' definitions it would not reach to include the Second Amendment.

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<sup>14</sup> Alexander Hamilton, Remarks on an Act for Regulating Elections, in 4 *The Papers of Alexander Hamilton: 1787-May 1788*, at 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

<sup>15</sup> 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 50 (William S. Hein Co., 1986) (1797).

<sup>16</sup> Hamilton, *supra* note 14.

<sup>17</sup> *Id.*

<sup>18</sup> [59 U.S. \(18 How.\) 272 \(1855\)](#).

<sup>19</sup> [Id. at 276-77](#) (emphasis added).

<sup>20</sup> James McClellan, *Liberty, Order, and Justice* 33 (3d ed., Liberty Fund 2000) (1989).

<sup>21</sup> [Murray's Lessee, 59 U.S. at 276](#) (citing Coke, *supra* note 15).

<sup>22</sup> 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1789, at 565-67 (William S. Hein & Co. 1994) (Melville M. Bigelow ed., 5th ed. 1891) (1833) (emphasis added).

<sup>23</sup> 1 *Annals of Cong.* 781-82 (1789) (Joseph Gales ed., 1834).

## B. Privileges and Immunities

The phrase "privileges and immunities" has less history to clarify its meaning. Certainly the framers included it in the original Constitution <sup>24</sup> in order to prevent the states from discriminating in favor of their own citizens. <sup>25</sup> However, this does not answer the question of what the phrase "privileges and immunities" includes. It may correspond to every right held by a state citizen, or only a subset of them. If a subset, this begs the question of which rights fit into that category. The history of the term in America provides few clear answers, but the documents do give some guidance.

The term first appears in the Articles of Confederation, in language similar to the Constitution's use of the phrase:

The free inhabitants of each of these States ... shall be intitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively. <sup>26</sup>

Publius' argument regarding the General Welfare clause would lead the reader to believe that "privileges and immunities" meant simply the "privileges of trade and commerce." <sup>27</sup> Raoul Berger argues that in light of this argument, the lack of debate on the clause **[\*340]** in the Convention of 1787, <sup>28</sup> and the fact that many of the delegates had served in the Continental Congress, the framers must have accepted this as the meaning of the phrase, and the truncated version found in the Constitution merely eliminated the redundancy. <sup>29</sup>

Publius himself only addresses the clause twice. In the first instance, he notes that the Constitution improves on the language by changing "free inhabitants" to "citizens," thereby eliminating the possibility that an alien in one state could claim the rights of citizens in another. <sup>30</sup> In the midst of this discussion, he notes that it "cannot easily be determined" why the phrase "privileges of trade and commerce" accompanied the language in the Articles of Confederation. <sup>31</sup> Publius again mentions the phrase in his discussion of the national judiciary, where he calls the clause "the basis of the union," but otherwise gives no hint as to what the phrase means. <sup>32</sup> Justice Story says little

<sup>24</sup> [U.S. Const. art. IV, § 2.](#)

<sup>25</sup> See 1 The Records of the Federal Convention of 1787, at 317 (Max Farrand ed., rev. ed. 1966) (1911) (Madison's comments point out that some states discriminated against citizens of other states despite those citizens' "entitlement to equality of privileges [under] the Articles of Confederation.").

<sup>26</sup> The Articles of Confederation and Perpetual Union art. IV (1777); cf. [U.S. Const. art. IV, § 2, cl. 1](#) ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

<sup>27</sup> James Madison had argued that the power to tax for the "common defence and general welfare" was not as undefined as critics of the Constitution alleged because it was limited by the subsequent list of specific, enumerated powers. The Federalist No. 41, at 213-14 (James Madison) (George W. Carey & James McClellan eds., 2001).

<sup>28</sup> The Convention in fact left no record of any discussion of the meaning of the phrase. Most of the occurrences simply refer to the committee of style or that committee's reports back to the general convention. See Supplement to Max Farrand's The Records of the Federal Convention of 1787, at 436 (James H. Hutson ed., Supp. 1987) (index entry "Privileges and Immunities").

<sup>29</sup> Raoul Berger, The Fourteenth Amendment and the Bill of Rights 32 (1989); [U.S. Const. art. IV, § 2.](#)

<sup>30</sup> The Federalist No. 42, *supra note 27*, at 220.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* No. 80 (Alexander Hamilton) at 413-14; cf. The Articles of Confederation and Perpetual Union art. IV (1777) ("The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants ...").

more than Publius about the meaning of the clause, but confirms that it at least includes the right to "take or hold real estate."<sup>33</sup>

This indicates that Berger may have reached the wrong conclusion, and that in fact the "privileges of trade and commerce" describe a subset of the full meaning of the "privileges and immunities" or even an addition thereto. However, Berger does not limit the protected rights solely to those of trade and commerce, but rather extends them to include the Lockean concepts of life, liberty, and property.<sup>34</sup> This view finds some support in the early case law. Both before and after Justice Bushrod Washington's famous explication of the phrase in *Corfield v. Coryell*,<sup>35</sup> other cases established some [\*341] common understanding of the phrase.<sup>36</sup> Before he became a Supreme Court Justice, Samuel Chase rendered a decision in which he stated:

The court are of opinion it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected.<sup>37</sup>

Similarly, a Massachusetts court held that the rights comprehended the ability to sue and be sued as citizens and acquire and hold real property, but not to vote or be eligible for office before the term of years specified by the state constitution.<sup>38</sup> Justice Washington's classification and limited enumeration of the "fundamental" rights protected by the clause follows these cases.<sup>39</sup> Read together, these cases indicate that "privileges and immunities" describe the rights of life, liberty, and property in the abstract. States may differ on exactly what rights they protect and how they protect them, but these rights form the foundation of the purpose of government, and so all states in some form protect some subset of them. A foundation is "fundamental," and thus Justice Washington could justly use that word to describe the nature of those rights protected by the Privileges and Immunities Clause, since without such rights the foundation for civilization itself would not exist.

These sources, though they do not provide the clarity that common law gave due process, do share a common theme: privileges and immunities include the abstract rights of life, liberty, and property. [\*342] We cannot define them much more specifically, however, because the very nature of the original clause tacitly recognized that these rights may have differed from state to state, and protect out-of-state citizens from discrimination only.<sup>40</sup> However,

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<sup>33</sup> Story, *supra* note 22, § 1806, at 582.

<sup>34</sup> Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 31 (2d ed. 1997).

<sup>35</sup> [6 F. Cas. 546, 551-52 \(C.C.E.D. Pa. 1823\)](#) (No. 3,230) ("What are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental ... . They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agricultural, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens ... .").

<sup>36</sup> E.g., [Campbell v. Morris, 3 H. & Mch. 535, 554 \(Md. 1797\)](#); [Abbott v. Bayley, 23 Mass. \(6 Pick.\) 89, 92 \(1827\)](#).

<sup>37</sup> [Campbell, 3 H. & Mch. at 554](#).

<sup>38</sup> [Abbott, 23 Mass. \(6 Pick.\) at 92](#).

<sup>39</sup> [Corfield, 6 F. Cas. at 551-52](#).

the clause clearly protected people in their basic rights, those rights so fundamental that the Constitution required their protection regardless of the citizenship of the one claiming them. This may provide some basis for incorporation, since firearms are definitely property. A study of the debates about the Fourteenth Amendment will determine whether its framers in fact intended incorporation.

## II. The Intent of the Framers of the Fourteenth Amendment

With this background on due process and privileges and immunities, we now turn to the framing of the Fourteenth Amendment, keeping in mind the appellant's argument that the framers intended to enforce the Second Amendment against the states through the Privileges and Immunities Clause.<sup>41</sup> Three major views exist as to whether that amendment incorporates the Bill of Rights: 1) the "total incorporation" theory of Justice Hugo Black,<sup>42</sup> 2) the "selective incorporation" theory that has reigned on the Supreme Court,<sup>43</sup> and 3) the theory that the amendment incorporated nothing at all.<sup>44</sup> In considering the evidence, the scholar must remember that the presumption, as stated above, favors continuation of the old rule absent some clear evidence to the contrary.<sup>45</sup> Publius calmed the fears of an anxious public with the assurance that the powers given to the [\*343] federal government by the Constitution were "few and defined. Those which are to remain in the state governments, are numerous and indefinite... . [The latter] will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."<sup>46</sup> Any theory of incorporation must present a strong case, therefore, to overcome the presumption that the states still have the right to legislate regarding firearms.

### A. Total Incorporation

Justice Hugo Black first made a case for the total incorporation of the Bill of Rights through the Fourteenth Amendment in his dissent in *Adamson*.<sup>47</sup> He attached to his opinion a large appendix of the historical data that he believed proved his contention.<sup>48</sup> Justice Black relied heavily on statements by Congressman Bingham,<sup>49</sup> who on February 26, 1866, presented a proposed amendment to the House, which essentially copied the language of the Privileges and Immunities and Due Process Clauses.<sup>50</sup> The House eventually rejected the proposed

<sup>40</sup> Otherwise, the clause would not require states to grant noncitizens the privileges of citizenship in "the several States." [U.S. Const. art. IV, § 2](#). Instead, it would have used language more like that in the Fourteenth Amendment, which forbids states to "abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1 (emphasis added).

<sup>41</sup> Brief and Required Short Appendix For Plaintiffs-Appellants at 19-24, [Nat'l Rifle Ass'n of Am. v. Chicago](#), 567 F.3d 856 (7th Cir. 2009) (Nos. 08-4241, 08-4243, 08-4244).

<sup>42</sup> He first made the argument in [Adamson v. California](#), 332 U.S. 46, 68, 71-72 (1946) (Black, J., dissenting).

<sup>43</sup> [Duncan v. Louisiana](#), 391 U.S. 145, 147 (1968). I use this term to refer to any theory or methodology that applies some, but not necessarily all, of the first eight amendments, no matter what the reasoning, though in practice the Court has always used the Due Process Clause due to the Court's own narrow interpretation of the Privileges and Immunities Clause. See *supra* notes 6-7 and accompanying text.

<sup>44</sup> See, e.g., Berger, *supra* note 29; Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 78, 134 (1949).

<sup>45</sup> See *supra* note 10 and accompanying text.

<sup>46</sup> The Federalist No. 45, *supra* note 27, at 241 (emphasis added).

<sup>47</sup> [Adamson](#), 332 U.S. at 68, 71-72 (Black, J., dissenting).

<sup>48</sup> [Id. at 92-123](#).

<sup>49</sup> See *id.*

<sup>50</sup> Cong. Globe, 39th Cong., 1st Sess. 1033-34 (1866).

amendment,<sup>51</sup> but the language approximated what became the Fourteenth Amendment closely enough that this history has some relevance.<sup>52</sup> Bingham stated that "it is equally clear by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive, and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the states."<sup>53</sup> In context, "this bill of rights" apparently refers, not to the first eight amendments to the U.S. Constitution, but to the "privileges and immunities" and "due process" clauses, since Bingham makes no intervening reference to the Bill of Rights and he stated that "the proposed amendment does not impose upon any State of the Union, ... any obligation which is not now enjoined upon them by **[\*344]** the very letter of the Constitution."<sup>54</sup> In the same context, he noted that enforcement of "these provisions ... are absolutely essential to American nationality," strikingly reminiscent of Publius' "basis of the union."<sup>55</sup> For Bingham, it was the "want of the Republic" that Congress did not have power to enforce these two clauses,<sup>56</sup> so nothing in his opening statement suggests that the proposed amendment would make the actual Bill of Rights enforceable against the states. Indeed, the fact that he chose the "due process" clause for singular treatment implies the opposite. If he did mean the Bill of Rights, he certainly chose a poor method of expressing this, since the "letter of the Constitution" emphatically did not require the states to observe the Bill of Rights.

On the other hand, Bingham later stated that the amendment was a "proposition to arm the Congress of the United States, ... with the power to enforce the bill of rights as it stands in the Constitution today."<sup>57</sup> Again, however, he links the concept with the two clauses, this time referencing President Andrew Johnson's message to Congress discussing the right to "life, liberty, and the pursuit of happiness."<sup>58</sup> He also pointed out that one Congressman apparently believed that the federal courts would hear cases on violations of life, liberty, and property, and pointed out that *Barron v. Baltimore*<sup>59</sup> held to the contrary.<sup>60</sup> He said this in answer to a question as to whether federal courts could enforce the "bill of rights under the articles of amendment to the Constitution ... ." <sup>61</sup> Again, he noted that the **[\*345]** amendment would allow Congress to "punish officials of States for violation of the oaths enjoined upon them by their Constitution," and forbid them from denying the "equal protection to life, liberty, or property," just before asking whether the "bill of rights" would stand, "as in the past five years within eleven States," as "a mere dead letter."<sup>62</sup> Finally, he asked "what more could have been added to [the Constitution] to secure the

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<sup>51</sup> [Adamson, 332 U.S. at 98-100.](#)

<sup>52</sup> Compare U.S. Const. amend. XIV, § 1, with Cong. Globe, supra note 50, at 1034.

<sup>53</sup> Cong. Globe, supra note 50, at 1034 (emphasis added).

<sup>54</sup> Id. If Bingham meant the Bill of Rights, then he must have understood it to apply to the states, or else his statement makes no sense.

<sup>55</sup> Id.; The Federalist No. 80 (Alexander Hamilton), supra note 27, at 413-14. The enforcement of the Bill of Rights clearly had not proved "essential to American nationality," since the United States lasted nearly 80 years under the Constitution before the outbreak of the Civil War without such enforcement at the state level. Bingham's use of the plural "these provisions" indicates he in fact meant the Bill of Rights, but he may have meant the "provisions" of his proposed amendment, since he claimed that "every word" of it, except the grant of authority to Congress, was already in the Constitution, thus indicating he thought the Constitution already guaranteed "equal protection" when, in fact, it did not. Cong. Globe, supra note 50, at 1034.

<sup>56</sup> Cong. Globe, supra note 50, at 1034.

<sup>57</sup> Id. at 1088.

<sup>58</sup> Id. at 1088-89.

<sup>59</sup> [32 U.S. \(7 Pet.\) 243 \(1833\).](#)

<sup>60</sup> Cong. Globe, supra note 50, at 1089-90 (quoting [Barron, 32 U.S. \(7 Pet.\) at 247](#)).

<sup>61</sup> Id. at 1089 (emphasis added). The specification of which "bill of rights" lends credence to the view that Bingham used the phrase by itself to refer loosely to the "privileges and immunities" and the rights of life, liberty, and property under due process.

enforcement of these provisions of the bill of rights ... ?" and again the context shows he had "privileges and immunities" and "equal protection" of life, liberty, and property in mind. <sup>63</sup> At best, then, the evidence so far adduced is ambiguous. While Bingham often referred to the "bill of rights," he always couched it in language linking it to the two clauses already in the Constitution.

This evinces what Berger noted, that Bingham often used passionate rhetoric at the expense of precision of language. <sup>64</sup> Thus, even if Bingham really did mean to refer to the Bill of Rights, he does not serve well as a barometer of the intent of the 39th Congress. In short, either he used the term "bill of rights" as shorthand for the Privileges and Immunities and Due Process Clauses, or he simply had an insupportable understanding of the Bill of Rights in relation to the states. He apparently knew *Barron v. Baltimore* <sup>65</sup> held the Bill of Rights inapplicable to the states, <sup>66</sup> so he either believed that the Bill of Rights really did apply to the states but that Congress simply lacked the ability to enforce it, or that the Court decided *Barron* incorrectly. The former makes no sense in light of the fact that Congress also lacked specific authority to enforce the limitations on state powers in Article I, Section 10, yet he did nothing to remedy this. It also implies that he had a hopelessly flawed reading of *Barron*, since it held that the Bill of Rights does not apply to the states at all. It did not hold that the Bill of Rights applied to the states, but that Congress simply lacked the power to enforce it. <sup>67</sup> The latter interpretation implies that [\*346] Bingham simply intended to provide for congressional enforcement of the Bill of Rights against the states, but he surely chose a strange way of accomplishing this with the Fourteenth Amendment as he presented it, <sup>68</sup> since on its face it provides for congressional enforcement of the existing Privileges and Immunities Clause in Article IV, Section 2. The limited construction of "privileges and immunities" further complicates matters, since it did not extend to the protections of the Bill of Rights. <sup>69</sup> Given the two possible interpretations, it is fairer to Bingham to presume that his use of "bill of rights" was mere shorthand. Either way, his statements certainly do not constitute a solid case for total incorporation since the alternative makes him a poor constitutional scholar at best.

Michael Kent Curtis attempts to defend Bingham from similar comments by Raoul Berger, who Curtis says "set out to prove that Bingham was a legal moron." <sup>70</sup> Curtis argues that Bingham believed the Bill of Rights applied to the states through the Privileges and Immunities Clause of Article IV, but that the only enforcement mechanism was through the oath required of state officers. This line of reasoning, however, while it may save Bingham from the ignominious characterization of "legal moron," does not save him from being labeled a simple "moron." It implies he could not read the plain language of Article IV, which only prevents discrimination. Curtis seeks to save Bingham by quoting his own language:

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<sup>62</sup> *Id.* at 1090. If he meant the Bill of Rights, his reference to the time period of the Civil War is strange at best, since the Bill of Rights had never been enforced at the state level at all, and thus those five years were not an aberration.

<sup>63</sup> *Id.* (emphasis added). In fact, Congressman Price said the "privileges and immunities" language of the proposed amendment meant that a noncitizen of a state would have protection of that state's laws equal to that of a citizen of the state, though he admitted he was no "constitutional lawyer." However, no one seems to have contradicted him, and Bingham's statements tend to confirm this opinion. *Id.* at 1066.

<sup>64</sup> Berger, *supra* note 29, at 128-29.

<sup>65</sup> [32 U.S. \(7 Pet.\) 243 \(1833\)](#).

<sup>66</sup> See *supra* notes 59-60.

<sup>67</sup> [Barron, 32 U.S. \(7 Pet.\) at 248](#).

<sup>68</sup> Cong. Globe, *supra* note 50, at 1033-34.

<sup>69</sup> See *infra* Part II.B.

<sup>70</sup> Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 120 (1986).

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty or property without due process of the law.<sup>71</sup>

Curtis then argues that Berger objected to Bingham's apparent confusion of the rights of citizens of a state with the rights of a citizen of the United States.<sup>72</sup> He then states that the change in wording in **[\*347]** the final version of the Fourteenth Amendment solved this problem.<sup>73</sup> However, Curtis cannot have it both ways. Either Bingham believed his wording, and by implication the wording of Article IV, referred to rights of national citizenship, or he did not. If he did, it does him no credit to say that the wording of the final version of the Fourteenth Amendment resolves the issue, because Curtis would have believed that unnecessary; thus he is still a "moron," though he may not be a "legal moron." If he did not, then the case for incorporation fails again. No matter how one takes this evidence, Congress never passed this proposed amendment on to the states, so statements regarding this version have far less weight than those regarding the finally-adopted version.

Congressman Thaddeus Stevens presented a newly drafted amendment on May 8, 1866, this time with the language we know as the Fourteenth Amendment.<sup>74</sup> In doing so, he stated that it "supplied the defect" that the "Constitution limits only the action of Congress, and is not a limitation on the States."<sup>75</sup> Justice Black argues that Stevens "evidently had reference to the Bill of Rights, for it is in it that most of the privileges are enumerated, and besides it was not applicable to the States."<sup>76</sup> However, this argument fails to rise above the level of bald assertion. In fact, Stevens said that the amendment remedied the "defect" by allowing "Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all."<sup>77</sup> Once again a proponent of the Amendment emphasizes the equality of protection of the laws as they stand, not a sweeping application of new restrictions on the states.

Justice Black's strongest argument, however, rests on Senator Jacob Howard, who claimed to speak for the "joint committee of fifteen" when he introduced the amendment to the Senate.<sup>78</sup> After quoting the explanation of "privileges and immunities" in *Corfield v. Coryell*,<sup>79</sup> he proceeded to state "to these should be added the personal rights guarantied and secured by the first eight amendments **[\*348]** of the Constitution."<sup>80</sup> After noting that Congress had no authority to enforce either the Privileges and Immunities Clause or the Bill of Rights against the states, he concluded that "the great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."<sup>81</sup> Unlike Bingham's and Stevens', Howard's statement cannot be interpreted as merely arguing for equality under the law; he clearly meant that the Bill of Rights would apply to the states.

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<sup>71</sup> [Id. at 121](#) (quoting Cong. Globe, supra note 50, at 1089) (footnote omitted).

<sup>72</sup> [Id. at 122](#) (citing Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 Ohio St. L.J. 435, 450 (1981)).

<sup>73</sup> *Id.*

<sup>74</sup> Cong. Globe, supra note 50, at 2459.

<sup>75</sup> *Id.*

<sup>76</sup> [Adamson v. California, 332 U.S. 46, 104, n.2 \(1946\)](#) (quoting Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* 75 (1908)).

<sup>77</sup> Cong. Globe, supra note 50, at 2459.

<sup>78</sup> *Id.* at 2764-65.

<sup>79</sup> [6 F. Cas. 546, 551-52 \(C.C.E.D. Pa. 1823\)](#) (No. 3,230).

<sup>80</sup> Cong. Globe, supra note 50, at 2765.

<sup>81</sup> *Id.* at 2765-66.

However, Howard was an extreme radical Republican<sup>82</sup> and did not speak for the joint committee (chaired by Senator Fessenden of Maine) that produced the amendment.<sup>83</sup> Furthermore, Senator Poland contradicted this idea of including the Bill of Rights with the privileges and immunities when he said the first clause of the Fourteenth Amendment "secures nothing beyond what was intended by the original [Privileges and Immunities Clause] in the Constitution."<sup>84</sup> The evidence could point in either direction as to the full Senate; they could have followed either interpretation. Even assuming Howard represented the Senate's view, however, that does not apply to the House, or to anything said in later ratification debates. Justice Black's argument, then, ultimately does not muster sufficient evidence to overcome the presumption in favor of state authority.<sup>85</sup>

Justice Black's appendix, however, does not accumulate all the evidence in favor of his position. The briefs filed in McDonald add further statements made in the 39th Congress to support incorporation. One of the briefs points out that Bingham stated in the debates that the Eighth Amendment's protection against cruel and unusual punishments counted as one of the "guarantied privileges" protected by the Fourteenth Amendment.<sup>86</sup> This supports the view that Bingham considered the Bill of Rights as included in the meaning of "privileges and immunities," but it also creates problems. In the same context as this statement, he also said that the Fourteenth Amendment **[\*349]** would not deprive the states of any rights they already had.<sup>87</sup> Again, this implies he had a fundamental misunderstanding of the meaning of *Barron v. Baltimore*.<sup>88</sup> It also creates a serious logical problem in that the Petitioners in McDonald also cite Bingham for the proposition that the 39th Congress passed the Fourteenth Amendment to enforce the original Privileges and Immunities Clause of Article IV.<sup>89</sup> Bingham and the Petitioners cannot have it both ways. Article IV preexisted the Bill of Rights, so to read the Bill of Rights into Article IV requires proof beyond the mere ipse dixit of one Congressman in the 39th Congress - proof no one has yet furnished.<sup>90</sup>

The final substantive point derives from comments Bingham made about the Civil Rights Bill and the Freedmen's Bureau Bill. Bingham stated that the two bills enumerated the same rights, and the National Rifle Association's brief relies on the fact that the Freedmen's Bureau Bill listed "the constitutional right of bearing arms" among its provisions.<sup>91</sup> This does not advance the Petitioners' cause, however, because regardless of which rights the two bills "enumerate," the Civil Rights Act only protects against unequal treatment as to those rights.<sup>92</sup> Furthermore, the Freedmen's Bureau Bill itself only provides for punishment of different treatment as to those rights.<sup>93</sup> The various Petitioners advance other evidence, but these constitute their strongest points. At best, it reveals that

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<sup>82</sup> Berger, *supra* note 29, at 135-36.

<sup>83</sup> Cong. Globe, *supra* note 50, at 2764-65.

<sup>84</sup> *Id.* at 2961. He also implied that it was the want of congressional authority to enforce Article IV, Section 2 that necessitated the Fourteenth Amendment. *Id.*

<sup>85</sup> See *supra* note 10 and accompanying text.

<sup>86</sup> Petitioner's Brief at 24, [McDonald v. Chicago, 130 S. Ct. 3020 \(2010\)](#) (No. 08-1521), 2009 WL 4378912 (quoting Cong. Globe, *supra* note 50, at 2542).

<sup>87</sup> Cong. Globe, *supra* note 50, at 2542.

<sup>88</sup> [32 U.S. \(7 Pet.\) 243 \(1833\)](#).

<sup>89</sup> Petitioner's Brief, *supra* note 86, at 30 (quoting Cong. Globe, *supra* note 50, at 1089).

<sup>90</sup> See also *supra* notes 71-73 and accompanying text.

<sup>91</sup> Brief for Respondents at 12, [McDonald, 130 S. Ct. 3020 \(2010\)](#) (No. 08-1521), 2009 WL 3844394 (quoting Cong. Globe, *supra* note 50, at 1292) (emphasis omitted).

<sup>92</sup> See *infra* Part II.C.

<sup>93</sup> Cong. Globe, *supra* note 50, at 1292.

Bingham completely misunderstood precedent, and at any rate he only counted for one vote. It takes more than one man to establish a general intent.<sup>94</sup>

## B. Selective Incorporation

The argument for selective incorporation, in brief, runs thus: While the Fourteenth Amendment does not technically "incorporate" Bill of Rights provisions, it does protect an array of rights that do in **[\*350]** fact overlap with the Bill of Rights.<sup>95</sup> Two possible approaches reach this result. The first construes the privileges and immunities protected by the Fourteenth Amendment to include some, but not all, of the provisions of the Bill of Rights. The second rests on the same basic premise but operates through the Fourteenth Amendment's Due Process protections of life, liberty, and property rather than the Privileges and Immunities Clause. The Supreme Court rejected the first approach in *The Slaughter-House Cases*,<sup>96</sup> which, while not defining exhaustively the privileges and immunities of United States citizenship, made clear that they had a narrow scope. They consisted only of those, which related specifically to one's relationship to the federal, rather than state, government.<sup>97</sup> Because the Court rejected this approach, it has used the second.<sup>98</sup>

The Court, when using a due-process-incorporation theory, commonly uses language to the effect that those elements of the Bill of Rights which are "implicit in the concept of ordered liberty" are protected by the Due Process Clause of the Fourteenth Amendment.<sup>99</sup> Try as one might, a search of the case law will bring no light on the origins of the theory other than more judicial opinions.<sup>100</sup> In the words of Paul Bator, "the way we arrived at incorporation was intellectually shoddy. It was just announced, as though it were a coup d'etat; suddenly we had incorporation."<sup>101</sup> With so little in favor of the approach from an original intent perspective, it cannot withstand much contrary evidence. However, such evidence abounds.

**[\*351]** Some strictly textual arguments provide some of the strongest evidence against selective incorporation. For example, if the right to due process protected other rights explicitly listed in the Bill of Rights, the framers of the Bill of Rights added needless redundancy to it; they could have simply left out from the enumeration any rights included within "due process." Furthermore, it makes no sense to use the word "process" to protect a substantive right. As discussed in Part I.A., due process had a "precise technical import" limited to "presentment and indictment," and

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<sup>94</sup> Further evidence directly contradicts Bingham, showing he did not speak for the whole Congress. I discuss this evidence, which applies to both total and selective incorporation, *infra* Part II.C.

<sup>95</sup> [Adamson v. California, 332 U.S. 46, 53-54 \(1947\)](#).

<sup>96</sup> [83 U.S. \(16 Wall.\) 36 \(1872\)](#).

<sup>97</sup> [Id. at 79-80](#). This section deals solely with the due process element since the Court adopted that approach. I discuss the meaning of "privileges and immunities" as found in the Fourteenth Amendment; see *infra* Part II.C.

<sup>98</sup> [Palko v. Connecticut, 302 U.S. 319, 326 & n.4 \(1937\)](#) (quoting [Twining v. New Jersey, 211 U.S. 78, 99 \(1908\)](#)).

<sup>99</sup> [Adamson, 332 U.S. at 54](#) (quoting [Palko, 302 U.S. at 325](#)).

<sup>100</sup> Beginning with *Adamson*, see [id. at 80-81](#), one may trace the notion that liberty includes more than freedom from restraint back to [Allgeyer v. Louisiana, 165 U.S. 578, 589-90 \(1897\)](#), which cites to only one majority opinion for its holding: [Powell v. Pennsylvania, 127 U.S. 678, 684 \(1888\)](#), which cited nothing for the proposition. [Allgeyer, 165 U.S. at 589](#), also cites Justice Bradley's concurrence in [Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 762, 764 \(1884\)](#), which relies on the privileges and immunities of the Fourteenth Amendment rather than due process, and in any case only goes so far as to include Judge Washington's definition from [Corfield v. Coryell, 6 F. Cas. 546, 551-52 \(C.C.E.D. Pa. 1823\)](#) (No. 3,230).

<sup>101</sup> Paul M. Bator, *Some Thoughts on Applied Federalism*, 6 Harv. J.L. & Pub. Pol'y 51, 58 (1982).

could not "be referred to an act of legislature." <sup>102</sup> Absent an express intent to use the term in a different sense, we must presume the 39th Congress used its established meaning.

The documentary evidence speaks against the due process method of incorporation on this very point. Bingham, when asked what "due process" meant, replied that "the courts have settled that long ago." <sup>103</sup> As noted in Part I.A., the discussion in *Murray's Lessee v. Hoboken Land & Improvement Co.* <sup>104</sup> probably refers only to the procedural guarantees of the Bill of Rights, if any, <sup>105</sup> so Bingham's reliance on prior cases would certainly not lead to the conclusion that the Due Process provision of the Fourteenth Amendment incorporated any of the substantive elements of the Bill of Rights. Moreover, neither Berger nor John Hart Ely found any evidence that the 39th Congress gave the Due Process provision a substantive meaning. <sup>106</sup> In short, nothing indicates that the guarantee of due process carried with it any substantive rights, whether or not listed in the Bill of Rights. Even if "due process" includes protection of other procedural rights, it has no bearing on the topic of the substantive right of gun ownership. Even if selective incorporation has some validity under this theory, then, it would not implicate the Second Amendment.

### C. No Incorporation

Finally, some argue that the Fourteenth Amendment did not incorporate any of the rights of the first eight amendments. Raoul Berger, who argues that the Fourteenth Amendment merely [\*352] "incorporated" into the Constitution the Civil Rights Act of 1866, <sup>107</sup> provides the strongest argument for this position. The Act's relevant language states

that all persons born in the United States and not subject to any foreign power ... shall have the same right ... 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 full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. <sup>108</sup>

This provides no overlap with the Bill of Rights, save perhaps the Due Process Clause itself. Here also we see repeated the idea that the goal was equality for blacks and whites, not an outright grant of substantive rights. <sup>109</sup> This means that if the Fourteenth Amendment simply incorporates the Civil Rights Act, it does not incorporate the Bill of Rights. Several members of the 39th Congress said or implied the Fourteenth Amendment did just that, confirming Berger's thesis. Representative Garfield seemed to think that the purpose of the Fourteenth Amendment was simply to put the Civil Rights Act "above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in ... the eternal firmament of the Constitution." <sup>110</sup> Representative Thayer

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<sup>102</sup> Supra notes 14-17 and accompanying text.

<sup>103</sup> Cong. Globe, supra note 50, at 1089.

<sup>104</sup> [59 U.S. \(18 How.\) 272 \(1855\)](#).

<sup>105</sup> Supra text accompanying notes 18-21.

<sup>106</sup> Berger, supra note 29, at 11; John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *Ind. L.J.* 399, 416 (1978).

<sup>107</sup> Berger, supra note 29, at 20. Justice Alito, writing for the majority in *McDonald*, notes that it is now "generally accepted" that the framers intended the Fourteenth Amendment to "provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866." [McDonald v. Chicago, 130 S. Ct. 3020, 3041 \(2010\)](#) (citing [Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389 \(1982\)](#)).

<sup>108</sup> Civil Rights Act of 1866, Ch. 31, § 1, [14 Stat. 27](#) (1866) (emphasis added).

<sup>109</sup> The act does not say that "all persons shall have the right to ...," but rather they shall have the "same right ... as is enjoyed by white citizens." *Id.* (emphasis added).

more explicitly stated that the "second section" of the Fourteenth Amendment simply "incorporated in the Constitution of the United States the ... civil rights bill which has lately become a law." <sup>111</sup> Representative Broomall noted:

It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress? The gentleman **[\*353]** from Ohio [Mr. Bingham] may answer this question. He says the act is unconstitutional... . While I differ from him upon the law ... . I wish to make assurance doubly sure. <sup>112</sup>

Just before this statement, he noted that the members had already "voted for this proposition in another shape, in the civil rights bill." <sup>113</sup> Representative Raymond, likewise, after noting that the first section "secures an equality of rights among all the citizens of the United States," equated it with Bingham's original proposed amendment and "a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer." <sup>114</sup> Representative Stevens, who introduced the amendment, said that one objection to the amendment was that "'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority." <sup>115</sup> He never indicated another difference, so by saying "partly true" he apparently referred only to the difference between a statute and a constitutional amendment - the inability of a mere Congressional majority to repeal it.

This attitude extended beyond the House. Senator Doolittle said the "celebrated civil rights bill ... was the forerunner of this constitutional amendment, and to give validity to which this constitutional amendment is brought forward." <sup>116</sup> Senator Latham, after Senator Howard's speech, stated that the "civil rights bill ... covers exactly the same ground as this amendment." <sup>117</sup> In addition, Joseph B. James noted that "statements of congressmen before their constituents definitely identify the provisions of the first section of the amendment with those of the Civil Rights Bill." <sup>118</sup> Likewise, James Bond found that in ratification debates in Illinois, Ohio, and Pennsylvania, the Fourteenth Amendment was considered a restatement of the Civil Rights Bill. <sup>119</sup>

**[\*354]** Joseph James also collected information on the ratification of the Fourteenth Amendment. <sup>120</sup> Governor Oliver Morton of Indiana spoke of the Amendment's grant of "equal protection of the law around every person who may be within the jurisdiction of any state, whether citizen or alien, and without regard to condition or residence," and noted that southern states had previously "discriminated against the citizens of other States" in terms of such protection, as well as in recourse to the courts. <sup>121</sup> Senator Lyman Trumbull stated the first section of the

<sup>110</sup> Cong. Globe, supra note 50, at 2462.

<sup>111</sup> Id. at 2465. Doubtless he meant the second sentence of the first section, since the second section clearly has no relation to the Civil Rights Act. It provides merely that a state would lose representation in the House in proportion to the degree it limited the right of males 21 or older to vote.

<sup>112</sup> Id. at 2498 (emphasis added) (first alteration in original).

<sup>113</sup> Id.

<sup>114</sup> Id. at 2502 (emphasis added).

<sup>115</sup> Id. at 2459 (emphasis added).

<sup>116</sup> Id. at 2896.

<sup>117</sup> Id. at 2883 (emphasis added) (internal quotation marks omitted).

<sup>118</sup> Joseph B. James, *The Framing of the Fourteenth Amendment* 179 (1965).

<sup>119</sup> James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania*, 18 *Akron L. Rev.* 435, 443, 448 (1985).

<sup>120</sup> See generally Joseph B. James, *The Ratification of the Fourteenth Amendment* (1984) (tracing the steps taken by each state on the proposed 14th Amendment).

Amendment was "a reiteration of the rights set forth in the Civil Rights Bill," and that "it had been thought proper to put in the fundamental law the declaration that all good citizens were entitled to equal rights." <sup>122</sup> Speaking in Philadelphia in support of the Amendment, Carl Schurz "summarized" it by saying it "provides that ... citizens shall be protected in the enjoyment of equal rights in whatever State they may reside." <sup>123</sup> One might argue that Trumbull and Schurz meant all citizens would have the same rights regardless of which state they were in, but their choice of words poorly expresses this idea, and the fact that their language parallels the Equal Protection Clause <sup>124</sup> indicates that they meant equal rights within each state. Senator James Lane and Congressman Robert Schenck likewise equated the Fourteenth Amendment's protections with those of the Civil Rights Bill. <sup>125</sup> Bingham himself stated that it was "a simple, strong, plain, declaration that equal laws and equal and exact justice shall hereafter be secured within every state," and again stated it took from the states no right they already had. <sup>126</sup> In an address to his state's legislature, Governor Jacob Cox of Ohio seemed to indicate the opposite when he stated that the amendment "was necessary long before the war" because "freedom of discussion ... was not tolerated in the Southern States; and the State laws gave no real protection to immunities of this kind." <sup>127</sup> However, there was no real debate in the legislature on the issue because the Republicans were assured of **[\*355]** victory; they simply allowed the Democrats to speak against it and then voted to ratify. <sup>128</sup> In Missouri, Governor Thomas Fletcher told his legislature that the first section of the Amendment "would prevent a state "from depriving any citizen of the United States of any rights conferred on him by the laws of Congress." <sup>129</sup> His failure to reference the Bill of Rights indicates he did not understand the Amendment to incorporate those guarantees. He instead seemed to focus attention on the power of Congress to enforce the Amendment. <sup>130</sup> Foreign journalist Georges Clemenceau wrote that the Fourteenth Amendment would "establish[] absolute equality in civil rights between the blacks and the whites." <sup>131</sup> His explanation is uniquely useful in that it portrays the understanding of an outsider with no reason to favor one side or the other. Outside the halls of Congress, then, spokesmen for the Fourteenth Amendment, both members of Congress and others, almost unanimously spoke of it in terms of providing equal, non-discriminatory application of laws and rights. Only one voice, that of Governor Cox, tends to prove incorporation.

One might make the counter-argument that these references only applied to the Privileges and Immunities Clause, not to the Due Process Clause. However, the evidence on the latter clause, though scarce, <sup>132</sup> reveals that the framers of the Fourteenth Amendment did not intend it as a mechanism of incorporation either. Congressman

<sup>121</sup> [Id. at 42](#) (quoting the Cincinnati Commercial, July 19, 1866). James notes that this "widely-quoted statement ... faithfully reflects the prevailing thought." [Id. at 43](#) (emphasis added).

<sup>122</sup> [Id. at 43](#) (quoting the Chi. Trib., Aug. 2, 1866) (emphasis added).

<sup>123</sup> [Id. at 61-63](#) (emphasis added).

<sup>124</sup> U.S. Const. amend. XIV, § 1.

<sup>125</sup> James, supra note 120, at 44.

<sup>126</sup> [Id. at 46](#) (quoting the Cincinnati Commercial, Aug. 27, 1866).

<sup>127</sup> [Id. at 161-62](#) (internal quotation marks omitted).

<sup>128</sup> [Id. at 162-63](#).

<sup>129</sup> [Id. at 166](#).

<sup>130</sup> Cf. U.S. Const. amend. XIV, § 5 (granting Congress the power to enforce the provisions of the Fourteenth Amendment through "appropriate legislation").

<sup>131</sup> James, supra note 120, at 292-93 (quoting Georges Clemenceau, *American Reconstruction 1865-1870*, 195 (Fernand Baldensperger ed., Margaret Mac Veagh trans., 1928)).

<sup>132</sup> Berger, supra note 34, at 228.

Wilson did not directly state its meaning, but spoke of it in connection with the need for a "remedy" for newly freed slaves when their rights were violated.<sup>133</sup> Furthermore, the evidence accumulated in Part II.B. reveals that the framers of the Fourteenth Amendment intended no radical shift in the meaning of the term "due process." In the face of such evidence, one can only conclude that the 39th Congress did not intend incorporation, especially in light of the original understanding of the terms "due process" and "privileges and immunities." Only solid evidence will permit a presumption of a different meaning, but **[\*356]** the evidence, such as it is, leads to the conclusion that they intended the same meanings. Thus, the appellant in *McDonald*<sup>134</sup> is right in one sense: the Slaughter-House Cases<sup>135</sup> were wrongly decided,<sup>136</sup> just not in the way that would win his case.

### III. The Supreme Court's Decision

Despite evidence that the framers of the Fourteenth Amendment did not intend incorporation of the Second Amendment, the Supreme Court recently decided that it does indeed apply to the states.<sup>137</sup> In so doing, it once again refused to reconsider its prior narrow interpretation of the Privileges and Immunities Clause, and used a substantive due process analysis.<sup>138</sup> As noted in Part II.B., this approach has no basis in the framing or ratification of the Fourteenth Amendment, and instead derives solely from judicial opinions. As such, this approach clearly achieves the end in the wrong way, regardless of whether the end itself is wrong. Part IV addresses the negative implications of this outcome. While this leaves very little to address in terms of original intent, the Court's opinion does make certain points that relate to issues besides due process. For example, in discussing the importance of the right to keep and bear arms throughout American history, the Court notes that during Reconstruction some of the occupying Union officials sought to guarantee to blacks the right to keep and bear arms, and even explicitly stated that all men have such a right.<sup>139</sup> While this seems to indicate that the Second Amendment was thought to apply to the states, the fact that this took place during Reconstruction highlights the problems with using these declarations to prove such a proposition. The presence of military commanders of course meant that the state governments, to the extent they existed at all, had nothing like the authority they had before and after Reconstruction. They effectively had the characteristics of territories. Applying this logic to the situation, it makes perfect sense to state that all men had the right to bear arms, because there was no authority other than the **[\*357]** federal government who could limit such a right, and it could not do so because of the Second Amendment.

The Court also cites Senator Trumbull for the proposition that Congress intended the Civil Rights Bill to "end the disarmament of African Americans in the South," and that "the [Civil Rights B]ill would 'destroy' ... laws" that disarmed them.<sup>140</sup> Their quotation of Senator Trumbull, however, is slightly misleading, because he actually said that the Civil Rights Bill's purpose "is to destroy all these discriminations," and then went on to quote the Bill, which begins with these words: "That there shall be no discrimination in civil rights or immunities ... ." <sup>141</sup> Again, the evidence points to discrimination as the focus. Yet the Court declares that the "unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect 'the constitutional right to bear arms' and not

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<sup>133</sup> Cong. Globe, supra note 50, at 1294.

<sup>134</sup> [130 S. Ct. 3020 \(2010\)](#).

<sup>135</sup> [83 U.S. \(16 Wall.\) 36 \(1873\)](#).

<sup>136</sup> Petition for a Writ of Certiorari, supra note 8, at 22-28.

<sup>137</sup> [McDonald, 130 S. Ct. at 3046](#).

<sup>138</sup> [Id. at 3031](#).

<sup>139</sup> [Id. at 3040 n.21](#).

<sup>140</sup> [Id. at 3041 n.23](#) (quoting Cong. Globe, supra note 50, at 474).

<sup>141</sup> Cong. Globe, supra note 50, at 474 (emphasis added).

simply to prohibit discrimination." <sup>142</sup> Such a conclusion is not only avoidable, but it flies in the face of the very language of the Act, which they quote. <sup>143</sup>

Worse still, the Court directly addresses the argument that the Fourteenth Amendment only prohibits discrimination in Part III.B.2., and makes further errors. First, the Court argues that by this interpretation, it would only prevent discriminatory limitations of speech or discriminatory police activity under the First and Fourth Amendments, but that this makes no sense, and concludes with the statement: "We assume that this is not municipal respondents' view." <sup>144</sup> This line of reasoning contains several errors. First, it assumes the rights listed in the First and Fourth Amendments are included in those protected by the Fourteenth Amendment. If, however, the Fourteenth Amendment only incorporates the Civil Rights Act, then it does not protect the rights listed in the First and Fourth Amendments. <sup>145</sup> Second, the Court quite literally assumes, without any basis for the assumption, that the respondents are not arguing that position. The only legitimate reason the Court could **[\*358]** have for this assumption is that the position either entails a logical contradiction, or that it leads to an unacceptable conclusion. The view certainly does not entail an inherent contradiction, since it is perfectly logical to prohibit merely the discriminatory application of law as opposed to prohibiting certain types of laws. The Court fails to state any unacceptable conclusion that must follow, but perhaps it has in mind the fact that such fundamental rights would thus be subject to complete abridgement. The first problem with this argument is that precisely this situation prevailed before the Civil War, when the Bill of Rights clearly only applied to the federal government. Thus, such a conclusion was certainly acceptable then. To assume that such an outcome is not acceptable to the respondents today is simply to sweep the argument under the rug. Even if the respondents are not willing to accept such a result, that fact does not give the Court license to ignore what the law actually says.

The Court also argues that the anti-discrimination theory ignores the language of the Freedmen's Bureau Act, <sup>146</sup> but in doing so the Court ignores the fact that the Fourteenth Amendment incorporated the Civil Rights Act, not the Freedmen's Bureau Act. <sup>147</sup> The Court then argues that prohibition of discrimination only would still have left blacks unprotected from state militias and peace officers, who accounted for much of the abuse of African Americans. <sup>148</sup> This argument has some force, but it falls short of proving that incorporation was intended, partly because of the Court's fifth point: Congress considered disarming the militias but decided instead to disband them because disarming them would violate their Second Amendment rights. <sup>149</sup> If Congress could not disarm all the oppressors, providing African Americans with at least equal rights to firearms would prove better than nothing. It might not achieve the goal as well as enforcing the Second Amendment at the state level, but that does not prove that was what they did. At best it provides an argument that they would have liked to, if they could. The Court's fourth argument is that anti-discrimination would not have protected **[\*359]** the whites who opposed the Black Codes. <sup>150</sup> This argument has no more force than the third. Furthermore, whites, whether ex-Confederate or Unionist,

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<sup>142</sup> [McDonald, 130 S. Ct. at 3040-41.](#)

<sup>143</sup> [Id. at 3040](#) ("Section 1 of the Civil Rights Act guaranteed the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." (emphasis added)).

<sup>144</sup> [Id. at 3043.](#)

<sup>145</sup> See Civil Rights Act of 1866, Ch. 31, § 1, [14 Stat. 27](#) (1866) (listing the rights protected under the Civil Rights Act, notably without any reference to a right of speech or protection from searches or seizures).

<sup>146</sup> [McDonald, 130 S. Ct. at 3043.](#)

<sup>147</sup> See supra Part II.C.; see also supra note 92 and accompanying text (showing why the equality of rights enumerated in the Freedmen's Bureau Act and the Civil Rights Act does not prove that either the Civil Rights Act or the Fourteenth Amendment did more than prohibit discrimination).

<sup>148</sup> [McDonald, 130 S. Ct. at 3043.](#)

<sup>149</sup> *Id.*

would not likely sit idly by and allow their state governments to disarm them. Indeed, the Court's own analysis of the importance of the right to bear arms <sup>151</sup> speaks to this, as does their citation of various states that protected that right with their own bills of rights. <sup>152</sup> Thus any fear that prohibition of discrimination only would allow whites and African Americans to be disarmed is at war with the Court's own factual basis for proving that the right should be incorporated.

In sum, the Court's opinion fails to support any theory of incorporation, let alone the theory espoused by the plurality. It simply assumes that the current jurisprudence of substantive due process is correct, or at least that the principle of stare decisis demands it be followed. Justice Thomas, however, disagrees with this approach and attempts to build a case for incorporation that is much more in line with history and original intent.

#### A. Justice Thomas' Concurring Opinion

Justice Thomas takes the long-abandoned approach that the Privileges and Immunities Clause, not the Due Process Clause, serves as the means of incorporating the Bill of Rights against the states. <sup>153</sup> He begins his analysis with a discussion of the meaning of "'privileges' and 'immunities,'" stating that they were "synonyms for 'rights.'" <sup>154</sup> He quotes various definitions to prove this contention, but they all show that "privilege" meant a right that was limited in terms of who had it and that immunity meant some freedom from obligation. <sup>155</sup> In short, it seems that these terms were considered subsets of the broader category of "rights."

Justice Thomas fails to address this point, but it is crucial. If privileges are rights that belong to some, but not all, then the Privileges and Immunities Clause of the Fourteenth Amendment apparently refers to rights held by citizens of the United States, but not any other resident. The problem is that the Bill of Rights gives no **[\*360]** indication that its protections are limited to citizens. In fact, history speaks against this. In arguing against the adoption of a Bill of Rights, Publius wrote that a bill of rights in the federal constitution would be "dangerous" in that it "would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do?" <sup>156</sup> Thus, in Hamilton's mind, the Congress had no power to limit speech, the press, possession of firearms, etc. If they had no power to do so, the distinction between citizen and non-citizen was meaningless. In debating the Bill of Rights in Congress, Roger Sherman argued the First Amendment was unnecessary because Congress possessed no power to "make religious establishments" as the Constitution stood. <sup>157</sup> No such comment was made regarding the Second Amendment, but Congress issued with the Bill of Rights a preamble, which stated, in part:

The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution. <sup>158</sup>

<sup>150</sup> *Id.*

<sup>151</sup> [Id. at 3036-38.](#)

<sup>152</sup> [Id. at 3042.](#)

<sup>153</sup> [Id. at 3058-59](#) (Thomas J., dissenting).

<sup>154</sup> [Id. at 3063.](#)

<sup>155</sup> [Id. at 3063 n.2.](#)

<sup>156</sup> The Federalist No. 84 (Alexander Hamilton), *supra* note 27, at 445 (emphasis added).

<sup>157</sup> 1 Annals of Congress 757 (Joseph Gales ed., 1789).

<sup>158</sup> George Anastaplo, *The Amendments to the Constitution* 326 (1995). (emphasis added).

This indicates that the Second Amendment, like the First, simply restated what the Constitution already made clear: The Congress has no power to infringe on the right to keep and bear arms. One might argue that the Second Amendment falls into the second category of "restrictive" clauses, but two facts make this implausible. First, there are certain portions of the Bill of Rights which very clearly restrict powers Congress was, in fact, given, such as the Seventh and Eighth Amendments.<sup>159</sup> Second, none of the powers of Congress entail a [\*361] power to regulate gun ownership and possession any more than they entail the authority to establish religion.<sup>160</sup> The weight of evidence, then, indicates the right to keep and bear arms was utterly out of Congress' reach, regardless of the citizenship of the party affected. If this is so, the term "privileges and immunities of citizens " makes no sense as a reference to the Bill of Rights.

Justice Thomas next states that the colonists referred to the various rights established by English documents such as the Magna Carta as "privileges" and "immunities," but his sources fail to make this clear, since they use various terms besides "privileges" and "immunities" such as "liberties," "freedoms," and "rights," without ever making a distinction as to what each category includes.<sup>161</sup> He then discusses Article IV, Section 2, and notes that it prevents discrimination against traveling citizens.<sup>162</sup> With this background, he turns to the two most important questions: 1) What are the rights protected? 2) Does the Privileges and Immunities Clause of the Fourteenth Amendment prevent only discrimination like that of Article IV?<sup>163</sup>

He begins by noting that the Court in *Dred Scott v. Sandford*<sup>164</sup> considered the right to bear arms one of the privileges and immunities of citizens, though it did not specify whether it referred to national or state citizenship.<sup>165</sup> He then discusses various treaties in which the terms were used, but again with no clear understanding of what they included.<sup>166</sup> He also cites Daniel Webster, who stated that the Louisiana Cession Act's grant of "rights, advantages and immunities" referred to those "derived under the federal Constitution."<sup>167</sup> Again, however, this fails to establish that the term [\*362] "privileges and immunities" includes all those rights, since the phrase used here includes "rights" and "advantages."

Moving to the post-Civil War era, he points out that the Joint Committee on Reconstruction, whose work was followed by the public, issued a widely read report stating that "adequate security for future peace and safety ... can

<sup>159</sup> Compare [U.S. Const. amend. VII](#) ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.") and amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") with [U.S. Const. art. I, § 8, cl. 9](#) (the power to constitute inferior courts, presumably including the rules of procedure when conjoined with the "necessary and proper" clause 18) and [U.S. Const. art. I, § 8, cl. 6](#) (the power to provide punishments for counterfeiting).

<sup>160</sup> Both can be hampered through the taxing power or the power to regulate commerce, but these are indirect methods. [U.S. Const. art. I, § 8, cl. 1, 3](#). The power to provide for arming the militia obviously does not touch the general population, and the power to provide arms for a subset certainly does not logically entail the power to disarm the broader set. [U.S. Const. art. I, § 8, cl. 16](#).

<sup>161</sup> [McDonald v. Chicago, 130 S. Ct. 3020, 3064-65 & n.3 \(2010\)](#).

<sup>162</sup> [Id. at 3066-68](#).

<sup>163</sup> [Id. at 3068](#).

<sup>164</sup> **60 U.S. (19 How.) 393 (1856)**.

<sup>165</sup> [McDonald, 130 S. Ct. at 3068](#) (quoting *Dred Scott*, **60 U.S. (19 How.) at 417**).

<sup>166</sup> [Id. at 3068-69](#).

<sup>167</sup> [Id. at 3070](#) (quoting Daniel Webster, A Memorial to the Congress of the United States on the Subject of Restraining the Increase of Slavery in New States to Be Admitted into the Union 15 (Boston, Phelps 1819)).

only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic." <sup>168</sup> He then discusses statements by Congressman Bingham and Senator Howard already set forth in Part II.A. of this Note which need not be recapitulated here, but it is noteworthy that Justice Thomas places a great deal of emphasis on the fact that the speeches by these two men were widely published. <sup>169</sup> He also references a statement by Congressman Raymond, who noted that granting citizenship to African Americans would give them the right to bear arms, but this fails to aid Justice Thomas' argument because Raymond was speaking of the Constitution as it stood before the Fourteenth Amendment, and thus presumably referred only to the right to bear arms as against federal encroachment. <sup>170</sup> Finally, he states, "Many statements by Members of Congress corroborate the view that the Privileges or Immunities Clause enforced constitutionally enumerated rights against the States." <sup>171</sup> He admits, however, that the statements can be interpreted to refer only to discrimination. <sup>172</sup> The rest of his discussion of the nature of the rights protected by the Fourteenth Amendment refers to statements made after ratification. <sup>173</sup> However, these statements carry virtually no weight in terms of discerning the understanding of the Amendment at the time of its actual ratification.

Justice Thomas then addresses the question of whether the Fourteenth Amendment was merely an anti-discrimination tool, and begins with the textual argument that it makes little sense to say "no State shall ... abridge" if in fact what is meant is "no State shall discriminate." <sup>174</sup> This does not prove, however, that Congress did not intend to prohibit only discrimination, especially in light of the **[\*363]** evidence accumulated in Part II.C. He next argues that the idea of incorporation was not controversial at the time, thus accounting for the lack of debate. <sup>175</sup> This does not account, however, for the fact that various spokesmen very definitely stated that the Fourteenth Amendment merely incorporated the Civil Rights Act, apparently without contradiction. <sup>176</sup> He then points out that the rights of African Americans were very restricted in all parts of the country, both before and after the Civil War, as evidence for the fact that their rights needed protection. <sup>177</sup> However, this does not prove that a prohibition of discrimination would not also solve the problem. <sup>178</sup>

#### IV. The Policy Implications of the Court's Decision

The first reason the Supreme Court should not have incorporated the Second Amendment is that its decision contravened the original intent of the Fourteenth Amendment, or at least the original intent of the Constitution which was not clearly abrogated by the Fourteenth Amendment. If consent of the governed means anything, it means that only the governed can change the laws, and the Constitution provides for the manner in which they can change it. <sup>179</sup> If five Justices on the Supreme Court change, by "interpretation," the meaning of a provision essentially at

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<sup>168</sup> [Id. at 3071](#) (quoting Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., at 15 (1866); H.R. Rep. No. 30, 39th Cong., 1st Sess. at XXI (1866)).

<sup>169</sup> [Id. at 3072-74.](#)

<sup>170</sup> [Id. at 3074-75](#) (quoting Cong. Globe, *supra* note 50, at 1266-67).

<sup>171</sup> *Id.* (citing Curtis, *supra* note 70, at 112).

<sup>172</sup> *Id.*

<sup>173</sup> [Id. at 3075-77.](#)

<sup>174</sup> [Id. at 3077-78.](#)

<sup>175</sup> [Id. at 3078-79.](#)

<sup>176</sup> See Part II.C., *supra*.

<sup>177</sup> [Id. at 3080-83.](#)

<sup>178</sup> See *supra* notes 142-46 and accompanying text.

whim, they act as unelected, unaccountable legislators, with no constitutional limitations on their power. Indeed, this change by "interpretation" makes a mockery of the very concept of the rule of law, for if the law can change based on what five unelected non-legislators say tomorrow, it lacks an essential characteristic of law: that only legislators (lawmakers) can make it.<sup>180</sup> Thus, the decision both destroys consent by the governed and the rule of law.

The second reason relies on the policies behind the adoption of federalism as a governmental structure. In a nation as diverse as ours, from open country to dense inner cities, with virtually every race, ethnicity, nationality, and culture represented, one-size-fits-all solutions simply do not work, especially over the long term. Gun [\*364] control may serve useful purposes in an inner city where gangs roam the streets, while providing no extra protection whatsoever in the Great Plains farmlands. Gun control itself comes in a variety of forms, as well. Trigger locks, waiting periods, and outright bans may all have varying levels of effectiveness in different parts of the country. If residents of a particular part of the country dislike the gun laws there, they can simply move. If the same baseline rules apply to the whole country, however, many people will not have a meaningful means of escape. Moving always requires expenditures of time, effort, and money, but leaving the country usually requires far more than leaving one state for another.

As to the specific method used by the Court, substantive due process has no historical foundation in the intent of the framers or ratifiers of the Fourteenth Amendment. The particular method may not seem important, but when a judge or group of judges unmoors its decisions from a solid foundation, it no longer has any guidance. If yesterday's court could invent a standard of incorporation, why cannot tomorrow's court invent a new one? This does not only affect how the Court rules on this one issue; once it has allowed itself to make decisions based purely on its own say-so in one area, no logic can prevent it from doing so in every area. Thus, the Court has essentially rendered itself incapable of any kind of self-restraint. Impartial interpreters of law will become biased enforcers of their own prejudices and values. The value of stability, so well expressed in the doctrine of stare decisis, cannot resist a court that is willing to make up the rules of the game as it plays.

## Conclusion

Tracing the history of federalism, "due process" and "privileges and immunities," and the ratification of the Fourteenth Amendment reveals that its framers did not intend to incorporate the Second Amendment against the states. Due process meant just that: process. Privileges and immunities included only those rights deemed fundamental, regardless of citizenship. The evidence that the framers of the Fourteenth Amendment intended to apply the Second Amendment to the states, to the extent it exists, fails to counter the evidence to the contrary. The Court's decision to incorporate the Second Amendment violates the original intent of the Fourteenth Amendment both in terms of the end and the means. This can only cause more problems in the future. To solve these problems, the [\*365] Court should use the correct rationale and begin the process of reversing much of the precedent built on the wrong rationale by overturning previous cases incorporating other Bill of Rights provisions. It should do this for three reasons. First, it will revive the correct interpretation of the law, rather than a force-fitted version thereof. Second, it will take the Court out of its assumed role of law-giver, a role properly filled by the people through their elected representatives. Finally, it will permit the republic to continue on the path that has led to its current greatness by allowing local communities to make decisions that work best for them, rather than having one-size-fits-all solutions forced on them. In the free marketplace of governments, the best government will win, and the best governments uphold the rule of law.

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<sup>179</sup> [U.S. Const. art. V.](#)

<sup>180</sup> Cf. [U.S. Const. art. I, § 1](#) ("All legislative Powers herein granted shall be vested in a Congress ...").

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