No. 08-1521

In The
# Supreme Court of the United States

OTIS MCDONALD, ET AL.,
*Petitioners*,

v.

CITY OF CHICAGO, ET AL.,
*Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## BRIEF FOR THE CALGUNS FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## CORPORATE DISCLOSURE STATEMENT

The Calguns Foundation, Inc. is a not-for-profit corporation that has no corporate parents and no publicly held company owns 10% or more of the corporation's stock.

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus Curiae* The Calguns Foundation, Inc. is a non-profit organization incorporated under the laws of California with its principal place of business in Redwood City, California. The purposes of Calguns include supporting the California firearms community by promoting education for all stakeholders about firearm laws, rights and privileges, and securing the civil and constitutional rights of California gun owners, who are among its members and supporters.

## STATEMENT

As Petitioners have, and other *amici* will, set forth in considerable and persuasive historical detail, the Framers of the Fourteenth Amendment publicly and clearly expressed their intent to include the Bill of Rights, and the Second Amendment in particular, among the privileges or immunities enforceable against the States via the Fourteenth Amendment. Pet. Br. at 10-42. This Court, of course, has not previously adopted that view and has taken a considerably narrower view of the Privileges or Immunities Clause. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Instead, this Court has opted for selective incorporation of portions of the Bill of Rights via the Due Process Clause of the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968).

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[1] This brief is filed pursuant to the written blanket consents on file with this Court. Per the terms of such consents, written notice was provided to the parties more than ten days prior to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

*Amicus* agrees with Petitioners that incorporation of the Bill of Rights generally, and the Second Amendment specifically, via the Privileges or Immunities Clause rather than the Due Process Clause is a more coherent and historically accurate reading of the original public meaning of the Fourteenth Amendment and that this Court should rule accordingly. It is not the purpose of this brief, however, to set forth the primary evidence for such incorporation, but rather to address a limited set of arguments that have frequently been raised against incorporation by two prominent opponents of incorporating the Bill of Rights: Charles Fairman and Raoul Berger.

Following the debate regarding incorporation between Justices Black and Frankfurter in *Adamson* v. *California*, 332 U.S. 46 (1947), Professor Charles Fairman – a protégé of Justice Frankfurter – set out to defend his mentor's position supporting selective and limited incorporation and to respond to the historical case for full incorporation of the Bill of Rights set forth by Justice Black in his *Adamson* dissent. The result of that effort was Fairman's seminal work on incorporation: *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949), in which he purported to rebut the historical evidence cited by Justice Black.[2] Fairman's work on the subject became the accepted orthodoxy regarding

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[2] Decades later Fairman revisited the subject and reached the same conclusions in Charles Fairman, *Reconstruction and Reunion, 1864-1888, Part II* (1971), in 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund ed., 1971) and Charles Fairman, *Reconstruction and Reunion, 1864-1888, Part II* (1987), in 7 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund & Stanley N. Katz eds., 1987).

the meaning of the Fourteenth Amendment, has "'shaped much of the constitutional field,'" and is "one of the most cited law review articles written since World War II." Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 58-59 (1993) (citation omitted).

Decades later, Professor Raoul Berger took up the role of leading critic of incorporation of the Bill of Rights and went Fairman one better, arguing that the Bill of Rights was not incorporated at all, not even selectively. *Id.* at 60 (describing Berger's views).[3]

Unfortunately, the work of these two opponents of incorporation suffers from numerous factual and logical flaws and has seriously distorted the analysis of generations of lawyers and jurists. The purpose of this brief, therefore, is to highlight some of the more recent scholarship that discusses those flaws and demonstrates that the work of Fairman and Berger should not be relied upon by this Court. Rather, this Court should look to the work of scholars such as Richard Aynes, Michael Kent Curtis, and Akhil Amar for a more accurate rendition of the history of the Fourteenth Amendment and the publicly expressed intent if its Framers.

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[3] Berger's critiques of incorporation can be found in his books GOVERNMENT BY JUDICIARY 134-56 (1978) and THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989), as well as in a series of articles in which he debated the subject with Michael Kent Curtis. *See* Stephen J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 WM. & MARY BILL OF RTS. J. 121, 128 (1992) (describing the dueling law review articles of Berger and Curtis).

## SUMMARY OF ARGUMENT

1. Fairman's and Berger's attempts to demean John Bingham, the principal Framer of the Fourteenth Amendment, and thus to discredit his expressed intent that the Fourteenth Amendment incorporate the Bill of Rights, are historically inaccurate and unjustifiable. Bingham was a well-regarded Congressman and lawyer with a clear and well-developed constitutional theory supporting incorporation. His statements that the Fourteenth Amendment was written to include the Bill of Rights among the privileges or immunities enforceable against the States were numerous, clear, and understood by his colleagues and the public. There is no reasonable basis for disregarding Bingham's statements, which are direct and reliable evidence of original intent and public understanding.

2. The absence of discussion or objection regarding potential conflicts between the Bill of Rights and some state procedural laws foregoing grand or civil juries does not negate direct and public statements of intent to incorporate. The Framers and others were either unaware of, or insufficiently disturbed by, such potential conflicts and there was a similar absence of discussion of the same conflicts posed by the Fourteenth Amendment's Due Process Clause.

3. Early post-ratification cases in this Court ignoring or rejecting incorporation under the Fourteenth Amendment are not reliable indicia of the original understanding of that Amendment. Still earlier cases in the lower courts correctly reflected the intent to incorporate the Bill of Rights and other Blackstonian and constitutional rights, and this

Court's subsequent decisions were widely understood as having abandoned that original intent.

4. The suggestion by Berger that the Fourteenth Amendment was precisely equivalent to the Civil Rights Act, and thus limited to prohibiting discrimination rather than enforcing concrete rights, is contrary to the text and history of both the Amendment and the Act establishing a broader purpose for both. In addition, the unambiguous guarantee of the Dues Process Clause either disproves the claimed equivalence or is paralleled by language in the Civil Rights Act that would also have been understood to protect the Bill of Rights generally.

5. Both Fairman and Berger are unreliable sources in the debate over incorporation in that they approached their work from a now-repudiated historical perspective that was hostile toward the Reconstruction and contemptuous of the Framers of the Fourteenth Amendment. That perspective created systemic flaws and biases in their treatment of the historical evidence and their inferences therefrom. Such flaws and biases render their work unreliable.

## ARGUMENT

### CHARLES FAIRMAN'S AND RAOUL BERGER'S WORK ON FOURTEENTH AMENDMENT INCORPORATION OF THE BILL OF RIGHTS IS DEEPLY FLAWED, INACCURATE, AND SHOULD NOT BE RELIED UPON BY THIS COURT.

### I. Misleading and Unjustified Attacks on John Bingham, the Principal Framer of the Fourteenth Amendment.

As Petitioners and others set forth in detail, Representative John Bingham, the principal author of the Fourteenth Amendment and its leading proponent in the House, frequently expressed his intent that the Fourteenth Amendment's Privileges or Immunities Clause make the Bill of Rights (and other Blackstonian and constitutional rights) enforceable against the States. *See, e.g.*, Pet. Br. at 29-31 (discussing statements by Bingham). Senator Jacob Howard, the manager of the proposed amendment in the Senate, likewise expressly stated his view that the purpose of the Fourteenth Amendment included making the Bill of Rights enforceable against the States. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866). Such explicit and public explanations of the meaning and purpose of the Fourteenth Amendment ordinarily would and should be extremely compelling evidence for the interpretation of the Fourteenth Amendment.[4]

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[4] As a simple exercise, imagine that such explicit statements regarding the meaning of the Constitution were present in the Federalist Papers or in other statements by Madison. Few would seriously dispute the great weight of such statements.

To overcome such compelling historical evidence, Fairman and Berger attempted to discredit Bingham as befuddled, confused, idiosyncratic in his legal theories, and unclear, thus arguing that his statements should be discounted as offering little indicia of intent or public understanding. Fairman, 2 STAN. L. REV. at 26 (describing Bingham's views as "novel" and "beffuddled"); Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 58 (Fairman dismissed "as unreliable numerous statements by" Bingham, arguing that "Bingham's position was muddled, inconsistent and idiosyncratic.[]") (footnotes omitted); *id.* at 66 (describing Fairman's efforts to discount Bingham).[5] Berger likewise argued that Bingham was a "'muddled' thinker[] whose views should be discounted." *Id.* at 60 (footnote omitted) (quoting Berger, GOVERNMENT BY JUDICIARY 145).

Fairman even suggested that when Bingham expressly referred to the "Bill of Rights" he did not actually mean what he said, but instead was referring only "to two specific provisions of the Constitution." Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 68; Fairman, 2 STAN. L. REV. at 26 (the phrase "'the immortal bill of rights'" used in Bingham's February 26, 1866 speech in Congress "is to Bingham a fine literary phrase not referring precisely to the first

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[5] Fairman continued his ad hominem attacks on Bingham in his 1971 work. Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 65-66 ("Relying on his earlier reading of Bingham's speeches, Fairman wrote that Bingham was 'confused'[] and held 'peculiar conceptions.'[] According to Fairman, Bingham was 'not a man of exact knowledge or clear conceptions or accurate language,' but rather was 'distinguished for elocution but not for hard thinking.'") (footnotes omitted).

eight Amendments"). "It was this unconventional usage of the term 'Bill of Rights' which, in part, led Fairman to conclude Bingham's beliefs were idiosyncratic.[]" Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 68 (footnote omitted).

Fairman's and Berger's efforts to discredit Bingham, however, are both inaccurate and unjustifiable and cannot diminish the compelling evidence Bingham provides for an original and publicly understood intent to incorporate the Bill of Rights.

First, Bingham's constitutional views were neither confused nor unclear. In making such a charge, "Fairman inaccurately portrayed Bingham and distorted his constitutional theory. [¶] Fairman derived the theory he ascribed to Bingham by ignoring the bulk of Bingham's speeches and the context these provide." *Id.* 66-67.

The crux of Bingham's views turns on the idea that the Constitution, including the Bill of Rights, declared various rights of national citizenship, that state officers were obligated by their oaths to respect the Bill of Rights, but that because of this Court's decision in *Barron* v. *Baltimore*, 32 U.S. (7 Pet) 243 (1833), such an obligation could not be enforced by Congress or the federal courts. Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 68-74. The Fourteenth Amendment, therefore, was needed to, among other things, make the previously unenforceable obligation to respect the Bill of Rights enforceable against the States. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088 (Feb. 28, 1866) (Bingham: the Fourteenth Amendment would "arm the Congress * * * with the power to enforce the bill of rights as it

stands in the Constitution today"); *id.* at 1089 (Bingham explaining that *Barron* v. *Baltimore* "makes plain the necessity of adopting this amendment").

After reviewing numerous speeches by Bingham, Professor Aynes persuasively concluded that

> this textual and contextual review shows that Bingham held a clear constitutional theory and that he intended to use the Privileges or Immunities Clause of the Fourteenth Amendment to enforce the Bill of Rights against the states. Fairman reached the opposite conclusion only by narrowly focusing on and misreading Bingham's February 26, 1866, speech and ignoring the context provided by Bingham's other relevant speeches.

Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 74; *see also* Akhil Reed Amar, THE BILL OF RIGHTS 181-83 (1998) (reviewing numerous references by Bingham to the need and purpose of the Fourteenth Amendment to enforce the Bill of Rights and concluding that "[i]n light of all this, it is astonishing that some scholars, most notably Charles Fairman and Raoul Berger, have suggested that when Bingham invoked 'the bill of rights,' he didn't mean what he said.").

Second, not only did Bingham have a coherent theory behind his intent to incorporate the Bill of Rights, his contemporaries apparently had little difficulty understanding that intent. *See* Amar, THE BILL OF RIGHTS 184 n. * (following Bingham's speech introducing the Fourteenth Amendment, "everyone else in the Thirty-ninth Congress understood Bingham's references to 'the bill of rights' as meaning just

that."). Even the particular speech in which Fairman found Bingham's references to the Bill of Rights so confusing and peculiar was not viewed with any such difficulty at the time. The separately published pamphlet version of that speech left no doubt about Bingham's intent to enforce the Bill of Rights, and the New York Times readily grasped and reported Bingham's intent to the public. Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 72 & n. 84 (the pamphlet version of Bingham's speech was subtitled a speech "in support of the proposed amendment to enforce the bill of rights" and the New York Times' report of that speech described Bingham's view of the proposed amendment as "simply a proposition to arm the Congress of the United States * * * with the power to enforce the Bill of Rights as it stood in the Constitution").

Third, Bingham's views were not especially "novel," "singular," or "peculiar." Fairman, 2 STAN. L. REV. at 26. Such claims stem, in part, from Fairman's (and Berger's) misreading of Bingham's references to the "bill of rights" as meaning something other than their natural import. They also stem, however, from Fairman's seeming incredulity over Bingham's disagreement with *Barron* v. *Baltimore* and the failure to recognize or credit the fact that such disagreement was not at all uncommon among anti-slavery legal theorists. As noted by Michael Kent Curtis, the "major fault with Professor Fairman's effort to understand the Fourteenth Amendment is that it overlooked the antislavery origins of the amendment. * * * Read in light of antislavery legal thought, Bingham's remarks are fairly clear." Michael Kent

Curtis, NO STATE SHALL ABRIDGE 100 (1986). Because Fairman overlooked, or perhaps merely looked down upon, *see infra* at 24-25, antislavery legal theory, he not surprisingly found Bingham's ideas peculiar. But, while Bingham's disagreement with *Barron* and his view that the Bill of Rights should already be binding on the States (though unenforceable absent an amendment) were "contrarian," the "leading scholarly work counts no fewer than thirty Republican Statements in the Thirty-eighth and Thirty-ninth Congresses voicing contrarian sentiments, and not one supporting *Barron*.[]" Amar, THE BILL OF RIGHTS 185-86.

Among Republicans who supported the Fourteenth Amendment, Bingham's ideas were not particularly novel or peculiar at all. But despite the Republican origins of the amendment, "Fairman regularly found the Democrats to be the people who had a clear understanding of the Bill of Rights question[]," and it was the Republicans who were "confused." Curtis, NO STATE SHALL ABRIDGE 100. "In fact, of course, the Republicans and Democrats adhered to different legal philosophies." *Id.*

Having reviewed extensive materials from the relevant time period, Professor Aynes summarized the situation thus:

> [T]he historical evidence reveals that Bingham's views of the Constitution and the Fourteenth Amendment were not idiosyncratic. Elements of his national citizenship, Bill of Rights, compact, and enforcement theories can be found in traditional antislavery theory,[] and in the opinions of well-known lawyers,

> judges, and political leaders. During speeches on the floor of the House and Senate, several congressional leaders espoused positions consistent with Bingham's theories. The authors of three contemporary legal treatises each shared Bingham's view concerning the purpose of the Fourteenth Amendment.

Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 74 (footnote omitted).

Ultimately, the attempt to discredit Bingham's views as unclear or misguided statements of original intent and understanding is not supported by a fair and accurate reading of the evidence. Rather, in his attacks on Bingham, Fairman "misread critical sources, relied on information taken out of context, ignored important contemporary materials, and buttressed his argument with a flawed legal theory. As a result * * * Fairman's portrait of John Bingham is distorted and unfaithful to the historical evidence." *Id.* at 61. And once such efforts to discredit Bingham are themselves discredited, it is exceedingly difficult to overcome such direct evidence that the Fourteenth Amendment was intended and understood to incorporate the Bill of Rights, necessarily including the Second Amendment.

## II. Unwarranted Inferences from Potential Conflict with State Statutes and Constitutions and the Lack of Discussion During Ratification Debates.

A further argument used by Fairman to discount the expressed intent of the Framers to incorporate the Bill of Rights is the suggestion such incorporation

would have conflicted with certain state laws and constitutions, some of which did not provide for indictment by grand jury or the use of civil juries in certain cases, as required by the Fifth and Seventh Amendments. *See* Fairman, 2 STAN. L. REV. at 137-38. Fairman expressed incredulity that Congress could have intended to impose such constitutional procedures upon the States, marveled at the lack of discussion regarding incorporation and such potential conflicts during the ratification period, and thus concluded that the Fourteenth Amendment could not have been intended or understood as fully incorporating the Bill of Rights. *Id.*

There are several flaws with this argument, the first and not the least of which is that the record from the ratification period is not so silent on incorporation as Fairman suggests. Amar, THE BILL OF RIGHTS, at 197 ("Fairman argues that virtually no one during the ratification debates explicitly reaffirmed incorporation, but Michael Kent Curtis has shown that here, too, Fairman overlooks a great deal of affirmative evidence for incorporation."); Curtis, NO STATE SHALL ABRIDGE 131-53 (describing discussions of the Amendment in the States); Pet. Br. at 35-40 (noting discussions of incorporation during the ratification period). Acknowledgement of incorporation as a general matter would seem to be a more meaningful indication of public understanding than the absence of a detailed parsing of the varying consequences of each individual right so incorporated.[6]

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[6] And merely because there was little discussion of certain potential objections does not mean there was not concern that may have prevented some votes for ratification. California, for ex-

And, of course, Fairman offered no evidence of any person *denying* the explicit views of Bingham and Howard on incorporation as expressed in Congress and reported in the press. Any lack of comment or objection thus as easily supports acquiescence in Bingham's and Howard's views as it does non-incorporation based on potential conflicts with existing state procedure.

Second, contrary to Fairman's assertions, there is little reason to believe that the Framers or Congress would have recoiled from overriding unconstitutional state procedures. Bingham unambiguously told Congress in 1866 "'that many of the States – I might say, in some sense, all the States of the Union – have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens.[]'" Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 95 (footnote omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 158 (Jan. 9, 1866)). Bingham thus made no secret of the fact that his intent to incorporate the Bill of Rights would, in "many" or "all" States override such violations. And in welcoming the passage of the Fifteenth Amendment, Bingham showed no concern that it would overcome Ohio's denial of voting rights to blacks. *Id.* (citing CONG. GLOBE, 41st Cong., 2d Sess. 3503 (May 10, 1870)). "No evidence suggests that Bingham was less willing [than he was with the Fifteenth Amendment] for the Fourteenth

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ample, did not ratify the Fourteenth Amendment until 1959, http://www.gpoaccess.gov/constitution/html/conamt.html, based on any number of objections all of which may not have been comprehensively expressed.

Amendment to overrule state practices contrary to the Bill of Rights." *Id.*

Third, Fairman's argument from silence regarding conflicts with state procedures depends on the doubtful assumptions that Congress and others *would have been aware* of such potential conflicts and *would have objected* to overriding any conflicting state procedural law. Neither assumption withstands scrutiny. Indeed, Fairman's acknowledgement that Senator Howard understood the Bill of Rights to be incorporated, and his recognition that Howard had been Attorney General of Michigan when the Michigan legislature enacted a statute dispensing with indictment by grand jury as required by the Fifth Amendment, readily disproves Fairman's assumptions:

> If Howard knew of this conflict, then he likely believed that, if ratified, the Fourteenth Amendment would render the Michigan statute unconstitutional. If, however, he was unaware of the conflict, then its existence cannot have affected his understanding of the Amendment's purpose."

Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 95-96. That a Congressman and former state Attorney General was unaware of or did not object to the potential conflict with state procedures makes it difficult to accept Fairman's assumptions regarding the silence of others. As Professor Amar has summarized, "Fairman builds his argument on the assumption that the implications of section I's key sentence were carefully considered during the ratification period. * * * Yet as Fairman's own evidence shows, his assumption is false. Amar, THE BILL OF RIGHTS 198.

It is far more likely that Bingham and his contemporaries, while aware of the contents of the Bill of Rights, and desiring its enforcement, "did not know the contents of every state statute and constitution. Indeed, Judge Paschal evidenced no knowledge of state constitutional provisions that conflicted with the Bill of Rights.[]" Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 94-95 (footnote omitted).

Fourth, even assuming Fairman's claimed conflicts, they tell us nothing regarding the intent or meaning of the Privileges or Immunities Clause given the additional presence of the Due Process Clause. The silence Fairman identifies would only have been relevant had his hypothesis been that section I was meaningless and that no incorporation whatsoever was intended (and hence there would be no possible conflicts to discuss). But Fairman "wisely avoided this outlandish claim" and instead argued for selective incorporation. Amar, THE BILL OF RIGHTS 199. In attempting to decide between selective and full incorporation, however, "the silence that Fairman trumpets becomes background noise with no resolving power whatsoever" because there was similarly silence regarding the same potential conflicts between existing state laws and the imposition of due process requirements which quite naturally would have been understood at the time to encompass many of the procedural guarantees in the Bill of Rights. *Id.* at 199-201.

The conclusion to be drawn from silence regarding potential conflicts with state procedures, if known, is that the Framers were at worst indifferent to such results or in fact saw nothing objectionable about im-

posing the Bill of Rights' uniform procedural safeguards on the States. And in the ratification debates, Republicans certainly had little interest in discussing such matters while Democrats either may not have wanted to be seen arguing against the content of the Bill of Rights or had bigger fish to fry in the other provisions of the Fourteenth Amendment. *Id.* at 203 ("Although twentieth-century readers rarely look past the key sentence of section I, politicians of the day who did the proposing and ratifying saw other provisions as more important."); *id.* at 204 ("during the ratification debates, many Republicans again kept silent in public deliberations, content that they had the votes to pass the amendment and fearful that any statement might give the Democrats political ammunition"); *id.* at 205 ("Democratic critics of the amendment also had much easier targets than section I. Who wants to campaign against the Bill of Rights?").[7]

Whatever the cause for the limited discussion of incorporation and potential conflicts arising therefrom, however, it says virtually nothing about the scope of the Privileges or Immunities Clause and hardly rebuts the direct and public expressions by the

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[7] That States could ratify the Fourteenth Amendment despite potential conflicts with state law is demonstrated by the example of Oregon, whose constitution discriminated against blacks until 1926, but which voted to ratify the Fourteenth Amendment. Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 96. "The Republican majority [in Oregon] did so even though the state constitution violated the Equal Protection Clause – a portion of the Fourteenth Amendment that explicitly applied against the state regardless whether Section One also incorporated the Bill of Rights." *Id.*

Framers of an intent to enforce the Bill of Rights against the States.

## III. Inaccurate Description of and Inferences from Early Treatment of the Fourteenth Amendment in the Courts.

A further line of argument used by Fairman to avoid the publicly expressed intent of the Framers of the Fourteenth Amendment is the suggestion that early post-ratification interpretations of the Fourteenth Amendment did not adopt or apply Bingham's incorporation views, and hence such views could not have been part of the original understanding of that Amendment. Fairman, 2 STAN. L. REV. at 132-33, 139. Post-ratification arguments and cases regarding the scope of the Fourteenth Amendment are questionable bases for rejecting more direct evidence from the Framers themselves and the public reports of their views prior to passage and ratification. Indeed, Fairman himself suggests as much in rejecting Bingham's unambiguous 1871 statements regarding incorporation of the Bill of Rights, which were entirely consistent with his earlier statements on incorporation. *Id.* at 136-37. It is especially odd, therefore, for Fairman to rely on after-the-fact decisions or inferences from the absence of arguments by litigants that were *inconsistent* with the Framers' earlier public expressions of intent.

In any event, even assuming the relevance of close-in-time but subsequent interpretations, there is much evidence that respected jurists, including Justice Bradley, understood the Fourteenth Amendment to incorporate the Bill of Rights. Aynes, *On Misreading*

*John Bingham*, 103 Yale L.J. at 96-103 (discussing early cases supporting Bingham's original intent, including *Live-Stock Dealers' & Butchers' Ass'n* v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870) (opinion of Bradley and Woods, JJ.) and *United States* v. *Hall*, 26 F. Cas. 79 (S.D.Ala.1871) (Woods, J.)). While Fairman's later work mentioned Justice Bradley's opinion in the lower court in the *Slaughter-House Cases*, he did not "acknowledge that it supported Bingham's theory of the Fourteenth Amendment." Aynes, *On Misreading John Bingham*, 103 Yale L.J. at 97 n. 255 (citations omitted).

As for subsequent decisions of this Court rejecting incorporation, the "decisions in the *Slaughter-House Cases* and *Cruikshank* reflected the changed political climate and the retreat from Reconstruction idealism." *Id.* at 102. Indeed, at the time such decisions were widely recognized (with praise or regret) to have abandoned the original intent of the Framers. *Id.* at 99-102. Furthermore, given the universally acknowledged weaknesses of Justice Miller's decision in the *Slaughter-House Cases*, it is difficult to imagine relying upon it for its supposed insight into intent, regardless whether it remains extant precedent. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) ("'everyone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause"); Thomas B. McAffee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986) ("this is

one of the few important constitutional issues about which virtually every modern commentator is in agreement.").[8] "The obvious inadequacy of Miller's opinion – on virtually any reading of the Fourteenth Amendment – powerfully reminds us that interpretations offered in 1873 can be highly unreliable evidence of what was in fact agreed to in 1866-68. * * * By 1873 some of the justices were ignoring some of the core commitments of the Fourteenth Amendment ratified only five years earlier." Amar, THE BILL OF RIGHTS 213 n. *.

In contrast to the early decisions from this Court, "it was *Hall* and the lower court decision in the *Slaughter-House Cases* which best illustrate the judiciary's initial view of the true purpose of the Fourteenth Amendment. And that purpose was the one John Bingham had repeatedly espoused: to enforce the Bill of Rights against the states." Aynes, *On Misreading John Bingham*, 103 Yale L.J. at 102-03; *see also id.* at 96 ("An analysis of the initial judicial interpretations concerning the Fourteenth Amendment reveals that several judges also believed that the Fourteenth Amendment applied the Bill of Rights against the states.").

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[8] *See also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1121, 1297 n. 247 (1995) ("[T]he *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause"); Amar, THE BILL OF RIGHTS, at 212-13 ("If read conventionally, the majority opinion [in *Slaughter-House*] rejects not just Black's incorporation but Frankfurter's and Fairman's ordered liberty, Berger's terms of art, and indeed every theory of section I that gives Bingham's key clause any independent bite.[]") (footnote omitted).

In a related vein, both Fairman and Berger cite to the lack of even a mention of the Fourteenth Amendment in *Twitchell* v. *Pennsylvania*, 74 U.S. (7 Wall.) 321 (1869), as demonstrating that nobody understood the Bill of Rights to be incorporated into the Fourteenth Amendment. *See* Fairman, 2 STAN. L. REV. at 132-33; Berger, GOVERNMENT BY JUDICIARY 153. In *Twitchell*, this Court rejected claims that the State had violated the Fifth and Sixth Amendments. Neither counsel nor this Court cited the Fourteenth Amendment. Amar, THE BILL OF RIGHTS 206-07.

But, as with the ratification debates, the silence proves too much and hence tells us nothing about incorporation. As Amar notes, counsel in *Twitchell* specifically argued that the state had violated "due process of law" but cited only to the Fifth Amendment, which this Court disposed of by citing to *Barron*. *Id.* at 207.

> If *Twitchell*'s silence is evidence that the Fourteenth Amendment does not incorporate earlier amendments, it is equally strong evidence that the Fourteenth Amendment does not require state due process. But in light of the plain words of the Fourteenth Amendment, this latter claim is absurd. *Twitchell*'s silence thus proves too much – and therefore nothing at all. Or more precisely, it proves that, contrary to Berger and Fairman's glib assumptions, only "oversight will [] account for the ommission[.]"

*Id.*

## IV. False Theory of Perfect Congruence between the Fourteenth Amendment and the Civil Rights Act, and Erroneously Narrow Readings of Both.

A final argument made most strenuously by Berger is that the Fourteenth Amendment was intended to have no greater scope than the Civil Rights Act, and that such Act merely forbade *discrimination* in the rights of citizens, but left it to the States to define what those rights would be for all citizens. Berger, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 22, 115-19; Amar, THE BILL OF RIGHTS 193-94 (describing Berger's argument). That far more extreme position – rejecting even the selective incorporation adopted by Fairman – ignores the text of the Fourteenth Amendment, reads both the Amendment and the Act too narrowly, and mischaracterizes the relationship between the two. *Id.* at 194-95 (no support for limiting the Fourteenth Amendment to what was contained in the Civil Rights Act, as opposed to an intent that the Amendment include, but go beyond, providing authority to Congress that would encompass the Civil Rights Act).

Additionally, even were one to accept Berger's claimed limitation of the Fourteenth Amendment to the scope of the Civil Rights Act, he reads the Act and its history too narrowly in order to disclaim the notion that the Civil Rights Act sought to prevent substantive violations of the Bill of Rights, not merely to require nondiscrimination in such violations. Thus, while Berger claims that there was no reference to the Bill of Rights in the history of the Civil Rights Bill and no provision for protection of the right to as-

semble or bear arms, Berger, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 24 n. 21, 73, Amar identifies numerous such references contradicting Berger's claims, which he describes as being in "gross error" and two of the "especially egregious" examples of the "legion" of Berger's "misstatements, distortions, and non-sequiturs." Amar, THE BILL OF RIGHTS 197 n. *.

Furthermore, the presence of the Due Process Clause in the Fourteenth Amendment turns Berger's argument on its head and supports a broader reading of the Civil Rights Act and hence the Fourteenth Amendment as well: "[I]f section I and the act were indeed intended identical in their substantive scope, as [Berger] insists, then the act must go beyond nondiscrimination to require states to provide all persons with due process." *Id.* at 195.

But the language in the Civil Rights Act that can be read to protect due process is likewise broad enough to protect the remainder of the Bill of Rights as well, and hence any argument of equivalence would then support, rather than refute, full incorporation. *Id.* at 195-96 & n. * (describing the Act's last clause protecting the "'full * * * benefit of all laws and proceedings for the security of person and property'" as being a phrase encompassing more than just nondiscrimination and historically used to describe the rights in the Bill of Rights); Curtis, NO STATE SHALL ABRIDGE 71-83, 119-20 (discussing scope of the Civil Rights Act).

> Berger's argument thus self-destructs. To save his first step, we must read the act to go beyond nondiscrimination (for due process has

> bite against even nondiscriminatory laws); but in so doing, we undermine Berger's second step, which tries to neuter the incorporationist language of the act."

Amar, THE BILL OF RIGHTS 196.

## V. Generally Flawed Approaches and Perspectives on History and the Fourteenth Amendment.

Having canvassed a number of the oft-cited arguments of Fairman and Berger against incorporation, it is hopefully apparent that they lack the weight to justify the reliance that has been placed upon them over the years, and are in fact deeply flawed. Fairman and Berger make other arguments as well, but the constraints of an *amicus* brief preclude any comprehensive rebuttal of each and every one. In general, however, it is worth observing that the scholarship of both Fairman and Berger suffers from systemic flaws in their approaches that counsel caution in relying upon their claims, whether in the arguments discussed herein, or in other of their arguments that might be cited to this Court.

For example, both Fairman and Berger approach what should be a genuine attempt to understand and fairly interpret the Framers and ratifiers of the Fourteenth Amendment instead from a perspective of seeming contempt for those actors and their goals. That perspective seems to derive from a once popular, but now questionable, view of the Reconstruction referred to as the "Dunning" School of history. Amar, THE BILL OF RIGHTS 302-03 ("Early in this century, the reigning historical narrative, exemplified by the

work of William Dunning and his disciples, viewed Reconstruction as a tragic era in American history.[] Republican Reconstructors on this account were knaves and fools.").

"The work of Charles Fairman and Raoul Berger was very much in the grip of this [Dunning School] view." *Id.* at 303; see also Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1204 (1995) (Coming from the perspective of the so-called "Dunning" school of history, Fairman "had a jaundiced view of Reconstruction and of the framers of the Fourteenth Amendment.").[9] Such a distorted perspective casts doubt on how Fairman and Berger select and read the historical evidence and many, if not all, of the inferences they draw from such evidence.[10]

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[9] Fairman's and Berger's hostile perspective is reflected in their sharp and ad hominem attacks on Bingham as well as in other of their writings. *See* Michael Kent Curtis, *The Bill of Rights After* Heller, 60 HASTINGS L.J. 1445, 1483 (2009) (quoting Fairman's earlier comments that because of the downfall of the Reconstruction-era " 'carpet bag government'[]" – the result of the Colfax Massacre in which hundreds of blacks were killed – " 'self government was restored in Louisiana'[] "; quoting Berger's attempt to discredit Sen. Howard by quoting a hostile historian who disdained Howard as " ' "consistently in the vanguard of extreme negrophiles" '[] ") (footnotes omitted).

[10] Such hostility to the views of the time may have caused Fairman to impute his own views to the various actors in the Reconstruction era, rather than genuinely searching for their contemporaneous views. *See, e.g.*, Amar, THE BILL OF RIGHTS 191 (because Fairman, "in 1949, deemed various parts of the Bill [of Rights] to be optional or outdated, he tended to attribute similar views to the 1866 Congress."). That approach is simply anachronism and undercuts the historical credibility of Fairman's arguments and inferences.

What is surprising, then, is that "Fairman's and Berger's "work continues to exert * * * influence in legal circles long after many of its intellectual foundations have been undermined by decades of serious and sustained scholarship of professional historians." Amar, THE BILL OF RIGHTS 303.

Another concern at play, at least with Fairman's work, is that he seems to have assumed the role of an advocate defending his mentor – Frankfurter – rather than the role of a scholar looking for an accurate understanding of the Fourteenth Amendment. After an extensive review of Fairman's writings and his relationship with Justice Frankfurter, Aynes concluded that

> Fairman's entry into the adversary process with his 1949 Stanford article causes considerable pause as to whether he was then the disinterested scholar or the self-appointed surrogate of Justice Frankfurter in combating the views of Justice Black. However one may resolve that question, the evolution of Fairman's position by 1954 of treating the question of the intent of the framer's of the Fourteenth Amendment not as a matter of history or of law, but a "public relations" effort to ensure that the view he wanted to prevail would prevail, is a sad chapter in the history of academia.

Aynes, *Fairman and Frankfurter*, 70 Chi.-Kent L. Rev. at 1272.

Ultimately one of the ways such biases played out was in unfair and misleading attacks on Justice Black and John Bingham. Amar, THE BILL OF RIGHTS

188 n. * ("in my view, Professor Fairman was unfair to Justice Black, and his unfair substance and tone put almost an entire generation of lawyers, judges, and law professors off track."); Aynes, *Fairman and Frankfurter*, 70 Chi.-Kent L. Rev. at 1231-32 ("One telling aspect of Fairman's approach was a lack of even-handedness toward the framers."). Indeed, many of both Fairman's and Berger's attempts to discount Bingham's views are best described as *ad hominem* attacks on Bingham himself rather than as meaningful attempts to interpret his statements or to discern how they were understood at the time.

Such biases may also account for their failure to thoroughly explore the historical record for evidence contradicting their claims or to fairly cite what evidence was available. *See* Aynes, *On Misreading John Bingham*, 103 YALE L.J. at 81 (while Fairman quoted portions of speeches by various other congressmen, he "failed to acknowledge that these statements coincided with Bingham's" legal theory); *id.* at 85 (Fairman "did not mention" Farrar [a respected contemporary writer of a widely used legal treatise] in his 1949 article, and in Fairman's later writings disparaged Farrar on other matters but "ignored entirely Farrar's view that the Fourteenth Amendment applied the bill of rights to the states, a view contrary to Fairman's own"); *id.* at 87 (discussing a respected legal treatise written by Judge Paschal and mirroring Bingham's views on incorporation, noting that Fairman was aware of, cited, and praised Paschal in other contexts, but made no reference to Paschal's treatise in his Fourteenth Amendment writings); *id.* at 90-91 (similar regarding a nationally known treatise by

Dean Pomeroy); Amar, THE BILL OF RIGHTS 197 n. * (noting that "Berger's misstatements, distortions, and non-sequiturs are legion").

## CONCLUSION

While the writings of Charles Fairman and Raoul Berger have long shaped the views of lawyers and jurists regarding the history and meaning of the Fourteenth Amendment and this Court's approach to incorporation, more recent scholarship has thoroughly exposed the historical and logical errors of those writings and thoroughly debunked the orthodox view that the Fourteenth Amendment was not intended or understood to incorporate the Bill of Rights.

The preceding discussion necessarily gives only a limited taste of such later scholarship, and the original works are far more comprehensive and compelling than can be expressed in an *amicus* brief. In considering the incorporation issue, and the scope of the Privileges or Immunities Clause in particular, this Court should eschew reliance on either Fairman or Berger – notwithstanding their past prominence – and instead look to the more accurate and compelling historical analyses by subsequent writers.

In particular, this Court's consideration of incorporation would be valuably informed by reviewing the incisive synthesis of Akhil Amar in THE BILL OF RIGHTS, the detailed rebuttals of Richard Aynes in *On Misreading John Bingham and the Fourteenth Amendment*, and the comprehensive historical review of Michael Kent Curtis in NO STATE SHALL ABRIDGE. While the list of meaningful scholarship is far longer, Professor Amar has aptly noted that "serious lawyers

should begin with the works of [Michael Kent Curtis and Richard Aynes] and not with the work of Fairman and Berger." Amar, THE BILL OF RIGHTS 303.

For the reasons above, this Court should reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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