UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

AUG 8 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL SAMUEL HUDSON, Jr.,

Petitioner-Appellant,

v.

MELISSA ANDREWJESKI, Superintendent, Coyote Ridge Corrections Center,

Respondent-Appellee.

No. 22-36063

D.C. No. 3:21-cv-05920-RSL
Western District of Washington, Tacoma

ORDER

Before: TALLMAN and IKUTA, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL SAMUEL HUDSON, JR.,

Petitioner,

v.

MELISSA ANDREWJESKI,

Respondent.

Case No. C21-5920-RSL-SKV

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court, having reviewed petitioner's petition for writ of habeas corpus (Dkt. # 4), respondent's answer to the petition (Dkt. # 7), petitioner's response to respondent's answer (Dkt. # 9), the Report and Recommendation of United States Magistrate Judge S. Kate Vaughan (Dkt. # 14), petitioner's objections to the Report and Recommendation (Dkt. # 15),[1] and the remaining record, hereby finds and ORDERS:

(1) The Report and Recommendation (Dkt. # 14) is approved and adopted.

(2) Petitioner's petition for writ of habeas corpus (Dkt. # 4) is DENIED, and this action is DISMISSED with prejudice.

[1] The Court has considered Magistrate Judge Vaughan's recommendations de novo in light of petitioner's objections. Fed. R. Civ. P. 72(b); United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). However, as petitioner's objections simply reargue issues raised in his initial petition and response, the Court finds they were adequately addressed by Judge Vaughan's Report and Recommendation. Moreover, the Court has thoroughly examined the record before it and finds Judge Vaughan's reasoning persuasive in light of that record.

(3) In accordance with Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, a certificate of appealability is DENIED.

(4) The Clerk is directed to send copies of this Order to Petitioner, to counsel for Respondent, and to the Honorable S. Kate Vaughan.

DATED this 30th day of November, 2022.

Robert S. Lasnik
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL SAMUEL HUDSON, JR.,

Petitioner,

v.

MELISSA ANDREWJESKI,

Respondent.

Case No. C21-5920-RSL-SKV

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Michael Hudson is a state prisoner who is currently confined at the Coyote Ridge Corrections Center in Connell, Washington. He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from his 2019 Clark County Superior Court judgment and sentence. *See* Dkts. 4, 4-1. Respondent has filed an answer addressing Petitioner's federal habeas claims and has submitted relevant portions of the state court record. *See* Dkts. 7, 8. Petitioner has filed a response to Respondent's answer. Dkt. 9. This Court, having reviewed Petitioner's petition, all briefing of the parties, and the balance of the record, concludes that the petition should be denied, and this action should be dismissed with prejudice.

APPENDIX A

II. FACTUAL BACKGROUND

The Washington Court of Appeals, on direct appeal, summarized the facts underlying Petitioner's convictions as follows:

> Between March 1, 2012 and August 5, 2017, Hudson raped his daughter who was less than 12 years old on four separate occasions, and he raped his son who was less than 12 years old on one occasion. During this time period, Hudson photographed his daughter engaging in sexually explicit conduct on four separate occasions. Hudson distributed the images of his daughter.
>
> Hudson was initially charged with seven counts of first degree child rape, two counts of first degree child molestation, five counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, and five counts of sexual exploitation of a minor. The State expressed its intent to seek exceptional sentences on all counts because if Hudson were convicted on all counts, the high offender score would mean certain counts would go unpunished. In exchange for reduced charges, Hudson ultimately pleaded guilty to ten counts, which included five counts of first degree child rape, four counts of sexual exploitation of a minor, and one count of first degree dealing in depictions of a minor engaged in sexually explicit conduct.
>
> In the statement of the defendant on plea of guilty, Hudson outlined the underlying facts supporting each count. The parties stipulated that Hudson would be subject to the indeterminate sentencing scheme for certain sex offenses under RCW 9.94A.507. Hudson acknowledged that the trial court could impose an exceptional sentence outside the standard range.
>
> The minimum sentence standard range for counts one through five was between 240 and 318 months. The statutory maximum term was life imprisonment. In a pretrial settlement agreement attached to the statement on plea of guilty, the parties stipulated that for counts one through five, the State would argue for 288 months for each count, a minimum sentence within the standard range, while Hudson would argue for 240 months for each count. For counts six through ten, the parties agreed to the top of the minimum sentence standard range. The parties stipulated that all counts should run concurrently.
>
> The parties also attached a list of "Stipulated Conditions of Sentence and of Community Custody" that included a condition that Hudson not possess or consume alcohol without prior approval and that he shall not possess or consume any controlled substances without a lawful prescription. Clerk's Papers (CP) at 24 (capitalization omitted). Hudson stipulated to these conditions "as well as any additional conditions suggested by the [Department of Corrections] Pre-Sentence

> Investigator as being conditions of community custody and conditions of the sentence." CP at 22 (emphasis omitted). Hudson also stipulated that all the conditions were "'crime-related'" under RCW 9.94A.703(3). *Id.*
>
> The pre-sentence investigation submitted by the Department recommended a prohibition on Hudson's possession or consumption of alcohol, marijuana, and any nonprescribed controlled substances. For sentencing, the Department recommended confinement within the standard range.
>
> At sentencing, on counts one through five for first degree rape of a child, the trial court imposed an exceptional upward sentence and ordered a minimum term of 365 months for each count, with a maximum of life. On counts six through nine, the trial court ordered a term of confinement of 120 months. On count ten, the trial court ordered a term of 116 months. All sentences were to be served concurrently. The trial court imposed lifetime community custody for counts one through five. One condition of community custody prohibited Hudson from possessing or consuming alcohol without prior approval from the Department and all treatment providers.
>
> The trial court adopted findings of fact and conclusions of law to justify the exceptional sentence. The trial court included eight aggravating circumstances in its findings of fact. The first five circumstances aligned with provisions under RCW 9.94A.535(3), while the last three were nonstatutory. The three nonstatutory aggravators were: (1) all of the crimes "had a lasting and severe negative impact on the mental health of the victims," (2) "[t]he breadth of sexual abuse toward[] the victims in [counts one through nine] was pervasive," and (3) Hudson "continued acts of criminal sexual behavior toward[] the victims in [counts one through nine] after [he] became aware of a police investigation . . . about whether he had committed sexual abuse against his children." CP at 61. The trial court noted that it "would impose the same sentence if only one of the grounds . . . [was] valid." *Id.*
>
> Defense counsel objected to the trial court's findings of fact, conclusions of law, and exceptional sentence, noting that "[n]one of the aggravating factors found by the [c]ourt were included in the information, that my client [pleaded] guilt only to the crime and without any aggravators and that he did not waive his right to a jury trial with regard to any of the aggravators." Verbatim Report of Proceedings (Mar. 18, 2019) at 69.

Dkt. 8, Ex. 3 at 2-4.

III. PROCEDURAL BACKGROUND

A. Direct Appeal/State Collateral Review

Petitioner appealed his judgment and sentence to the Washington Court of Appeals. Dkt. 8, Exs. 4-6. On April 6, 2021, the Court of Appeals issued an unpublished opinion in which it affirmed Petitioner's convictions, but remanded the case for resentencing upon concluding that the exceptional sentence imposed on counts one through five was improper. *Id.*, Ex. 3. Petitioner thereafter filed a motion for reconsideration which was denied by the Court of Appeals on May 18, 2021. *Id.*, Exs. 7-8. Petitioner next filed a *pro se* petition for review with the Washington Supreme Court. *Id.*, Ex. 9. The Supreme Court denied the petition for review without comment on October 6, 2021. *Id.*, Ex. 10. The Washington Court of Appeals issued its mandate terminating direct review on October 12, 2021. *Id.*, Ex. 11.

On November 30, 2020, while his direct appeal was pending, Petitioner filed a *pro se* personal restraint petition in the Washington Court of Appeals. *See id.*, Exs. 12-14. The Court of Appeals issued an order dismissing the petition on June 22, 2021. *Id.*, Ex. 15. Petitioner filed a motion for reconsideration in the Court of Appeals, which was transferred to the Washington Supreme Court for treatment as a motion for discretionary review. *See id.*, Exs. 16, 18. Petitioner subsequently moved to amend his motion for reconsideration to replace it with an actual motion for discretionary review, and that motion was granted. *See id.*, Exs. 17-18. The Supreme Court Commissioner denied Petitioner's motion for discretionary review on August 19, 2021. *Id.*, Ex. 18.

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B. Federal Habeas Proceedings

On May 13, 2019, less than two months after Petitioner's judgement and sentence was entered in the Clark County Superior Court, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Washington, which was subsequently transferred to this District. *See Hudson v. Uttecht*, No. 3:19-cv-5422-RJB, Dkts. 1, 3. That petition was later dismissed without prejudice based on Petitioner's failure to exhaust his state court remedies. *Id.*, Dkts. 19, 21. Petitioner appealed the dismissal of his petition to the Ninth Circuit Court of Appeals, but his request for a certificate of appealability was denied. *Id.*, Dkts. 23, 27.

Petitioner submitted the instant petition for writ of habeas corpus to this Court for filing in December 2021. *See* Dkt. 1. The briefing is now complete, and this matter is ripe for review.

IV. GROUNDS FOR RELIEF

Petitioner identifies the following five grounds for relief in his petition:

> GROUND ONE: The State of WA denied my 5th Amendment right to a Grand Jury, as proscribed by the Supreme Law of the Land, for an infamous crime before charging.
>
> GROUND TWO: Denied equal protections of the law & of due process because of constitutionally vague state law.
>
> GROUND THREE: Denied access to the courts when DOC refused to allow access to the law library to complete & file a timely writ of certiorari to the U.S. Supreme Court.
>
> GROUND FOUR: Prosecution used intimidation, threats & coercion to force Petitioner into plea of guilt.
>
> GROUND FIVE: The State of Washington, by & through State actors, failed to uphold its end of the plea agreement at sentencing.

See Dkt. 4 at 5, 7, 8, 10, 12.

V. DISCUSSION

Respondent concedes that Petitioner fairly presented his claims to the Washington Supreme Court either on direct appeal or collateral review. Dkt. 7 at 4. Respondent argues, however, that Petitioner is not entitled to relief with respect to any of the claims asserted in his federal habeas petition. *See id.* at 13-25.

A. Standard of Review

Federal habeas corpus relief is available only to a person "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or if the decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *See id.* at 407-09.

The Supreme Court has made clear that a state court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

The Supreme Court has also explained that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Clearly established federal law means "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *Lockyer*, 538 U.S. at 71-72. "If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law." *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) (citing *Dows v. Wood*, 211 F.3d 480, 485-86 (9th Cir. 2000)).

In considering a habeas petition, this Court's review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). If a habeas petitioner challenges the determination of a factual issue by a state court, such determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. Analysis

1. Right to a Grand Jury

Petitioner asserts in his first ground for relief that his Fifth Amendment rights were violated when the State of Washington failed to present his case to a grand jury before charging him. Dkt. 4 at 5. Petitioner asserts in his second ground for relief that the denial of a grand jury violated his rights to equal protection and due process. *Id.* at 7. Petitioner raised his claims

relating to his right to a grand jury in his personal restraint proceedings (*see* Dkt. 8, Exs. 12, 17), and both the Washington Court of Appeals and the Washington Supreme Court summarily rejected the claims on the grounds that Petitioner did not have a federal constitutional right to be charged by grand jury indictment (*id.*, Exs. 15, 18). The state courts reasonably rejected Petitioner's claims.

It has long been settled that state criminal defendants, such as Petitioner, do not have a federal constitutional right to be indicted by a grand jury. *Hurtado v. People of State of California*, 110 U.S. 516 (1884) (Rejecting claim that grand jury indictment is essential to due process and it is a violation of the Fourteenth Amendment for a state to prosecute a defendant by criminal information). This rule has been specifically applied to the State of Washington's practice of prosecution by information. *Gaines v. Washington,* 277 U.S. 81, 86 (1928); *Jeffries v. Blodgett*, 5 F.3d 1180, 1188 (9th Cir. 1993). The decision of the state courts was entirely consistent with United States Supreme Court precedent and, thus, Petitioner's federal habeas petition should be denied with respect to his first and second grounds for relief.

2. Access to Courts

Petitioner asserts in his third ground for relief that he was denied access to the courts when the Department of Corrections refused to allow him access to the prison law library to prepare and file a timely petition for writ of certiorari with the United States Supreme Court in his prior federal habeas action. Dkt. 4 at 8. This claim is, in essence, a challenge to the conditions of Petitioner's confinement.

The Supreme Court has explained that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is

to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Habeas corpus proceedings are therefore the proper mechanism for a prisoner to challenge the "legality or duration" of his confinement. *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (citing *Preiser*, 411 U.S. at 484). A civil rights action, in contrast, is the proper mechanism for challenging "conditions of ... confinement." *Badea*, 931 F.2d at 574 (citing *Preiser*, 411 U.S. at 498–99).

This federal habeas action constitutes an attack by Petitioner on the validity of his Clark County Superior Court convictions. Petitioner's complaints about the conditions of his confinement, and how those conditions affected his ability to litigate a *prior* habeas action, are beyond the scope of this Court's review in the instant action. Petitioner's federal habeas petition should therefore be denied with respect to his third ground for relief.

3. Voluntariness of Guilty Plea

Petitioner asserts in his fourth ground for relief that the prosecution used intimidation, threats, and coercion to force Petitioner into entering a guilty plea. Dkt. 4 at 10. In particular, Petitioner claims the prosecutor coerced his guilty plea by threatening to seek an exceptional sentence if Petitioner chose to go to trial, and by amending the charging document multiple times to add charges. *Id.* Petitioner also appears to claim that the conditions of his lengthy pre-trial confinement at the Clark County Jail had a coercive effect on his decision to plead guilty. Dkt. 4-1 at 16.

Due process requires that a guilty plea be both knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the

alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *Alford v. North Carolina*, 400 U.S. 25, 31 (1970)).

A guilty plea is voluntary only if the defendant was made fully aware of the direct consequences of the plea and the plea was not the result of threats, misrepresentations, or improper promises. *Brady v. United States*, 397 U.S. 742, 755 (1970). A guilty plea is intelligently made if the defendant was advised by competent counsel, was made aware of the true nature of the charges against him, and nothing in the record indicates that he was incompetent. *Id.* at 756. When considering the voluntariness of a plea, a reviewing court must examine all of the relevant circumstances surrounding the plea. *Id.* at 749.

Statements made by a criminal defendant contemporaneously with his plea are to be accorded great weight. *Chizen v. Hunter*, 809 F.2d 560, 562 (9th Cir. 1986) (citing *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977)). The Supreme Court has made clear that "the representations of the defendant, his lawyer, and the prosecutor at . . . a [plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge*, 431 U.S. at 73–74.

The state courts, on direct appeal, rejected Petitioner's challenge to the validity of his guilty plea:

> Hudson claims that his guilty plea is invalid because his plea agreement was obtained via threats, intimidation, and coercion. Hudson specifically asserts that the prosecutor threatened to add more charges if the plea deal was not accepted and intimidated Hudson because he was being held in the Clark County Jail. Hudson requests withdrawal of his guilty plea.
>
> A prosecutor's discretion in plea bargaining is not "'unfettered,'" and prosecutors may not exercise their discretion in a manner that violates due process. *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003) (quoting *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)).

> But otherwise, prosecutors are vested with broad discretion when determining whether to charge a crime or enter into a plea bargain. *Moen*, 150 Wn.2d at 227.
>
> Hudson does not cite to any case that concludes that either a prosecutor's threat to bring more charges or the general jail environment coerces a defendant to such a degree that due process is violated. We hold that this claim is meritless because the prosecutor was within their discretion to indicate that Hudson could face additional charges should he decline the plea deal. Moreover, Hudson noted in his signed statement on plea of guilty that he made the plea freely and voluntarily, and that no one threatened him in order for him to plead guilty. When the trial court asked at Hudson's plea hearing whether he made the plea freely and voluntarily, Hudson responded that he did and that no one had threatened to harm him. Hudson may not withdraw his guilty plea on this basis.

Dkt. 8, Ex. 3 at 10.

The record confirms that Petitioner acknowledged at the time he entered his pleas that he had reviewed the plea documents with counsel and that he understood the contents of those documents. *Id.*, Ex. 20 at 5. Petitioner also acknowledged that he understood the rights he was giving up by pleading guilty, that he was making his plea freely and voluntarily, and that no one had made any threats or promises to cause him to make his plea. *Id.*, Ex. 20 at 6-7, 17. Finally, Petitioner affirmed that the written statement contained in the plea documents which provided the factual basis for the charges was true. *Id.*, Ex. 20 at 7-19. These acknowledgements, made in open court, carry a strong presumption of verity.[1] *Blackledge*, 431 U.S. at 74. And, indeed, the trial judge, after engaging in the plea colloquy with Petitioner, found that Petitioner's plea was "knowingly, intelligently and voluntarily made." *Id.*, Ex. 20 at 22.

Petitioner fails to overcome the presumption that his pleas, consistent with his own statements at the plea hearing, were knowingly and voluntarily made. It is notable that after

[1] These acknowledgements are also consistent with those contained in the Statement of Defendant on Plea of Guilty that Petitioner executed prior to entering his pleas. *See* Dkt. 8, Ex. 2.

entering his pleas, but prior to sentencing, Petitioner sought to withdraw his guilty pleas, apparently based upon the representation provided by his attorney. *Id.*, Ex. 20 at 26-28. New counsel was appointed for Petitioner for purposes of preparing a formal motion to withdraw the pleas. *See id.* However, Petitioner thereafter changed his mind and decided he did not want to withdraw his pleas. *Id.*, Ex. 20 at 42-43. While Petitioner is apparently conflicted as to whether he should have entered the pleas in the first instance, nothing in the record suggests that he was coerced into doing so. Petitioner's federal habeas petition should therefore be denied with respect to his fourth ground for relief.

4. Breach of Plea Agreement

Petitioner asserts in his fifth ground for relief that the State of Washington failed to uphold its end of the plea agreement at sentencing. Dkt. 4 at 12. More specifically, Petitioner complains that though the prosecutor explained to the sentencing judge that there was an agreement between the parties that allowed the state to argue for a twenty-four-year sentence and Petitioner to argue for a twenty-year sentence, the sentencing judge refused to abide by that agreement and imposed an exceptional sentence. *Id.* Petitioner presented his argument regarding the state's alleged breach of the plea agreement to the Washington appellate courts on direct appeal (*see* Dkt. 8, Ex. 6 at 2-3, Ex. 9 at 1-6), but the appellate courts did not specifically address the issue, perhaps because they had already invalidated the exceptional sentence. In any event, the record makes clear that this claim is without merit.

In general, considerations of fundamental fairness require that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York,* 404

U.S. 257, 262 (1971); *accord Gunn v. Ignacio,* 263 F.3d 965, 969 (9th Cir. 2001); *United States v. Mondragon,* 228 F.3d 978, 980 (9th Cir. 2000). To determine whether a plea agreement has been breached, courts consider what was "reasonably understood" by a defendant "when he entered his plea of guilty." *Gunn,* 263 F.3d at 970; *United States v. Serrano,* 938 F.2d 1058, 1061 (9th Cir. 1991).

Petitioner acknowledges in his petition that the sentence imposed by the trial court, which he claims violated the plea agreement, has been overturned and the matter has been returned to the trial court for resentencing. Dkt. 4 at 12. Petitioner asserts, however, that the breach of the agreement rendered the contract between the parties void, and he should therefore have "received a new trial." *Id.* The record before this Court is devoid of any evidence that the prosecutor breached the plea agreement. Indeed, the record demonstrates that the prosecutor, at Petitioner's sentencing hearing, specifically described the agreement to the sentencing court and, consistent with that agreement, argued that the court should impose a sentence of 288 months. Dkt. 8, Ex. 20 at 51-53, 55-56. Petitioner acknowledged at the time he entered his plea his understanding that the sentencing judge was not obligated to follow the sentencing recommendation agreed to by the parties. *Id.*, Ex. 20 at 12. The fact that the sentencing judge disregarded the sentencing recommendation therefore provides no basis for relief.

Petitioner suggests in his petition that the prosecutor somehow influenced the sentencing judge and offered support for the exceptional sentence. Dkt. 4-1 at 18. Petitioner maintains that as the judge was "making up his reasons to support his sentence," the prosecutor began handing the judge unspecified paperwork "trying to coax him into specific scenarios for support." *Id.* This allegation is both extremely vague and speculative. In his response to Respondent's

answer, Petitioner explains that what he was attempting to convey in his petition was that "the prosecutor, in a flurry of uncoordinated speed, began thrusting documents up to the judge which were irrelevant to the matter at hand." Dkt. 9 at 18. According to Petitioner, when the judge inquired about what he was being handed, the prosecutor "said something about correcting criminal points." *Id.* Petitioner infers from this interaction that this was not common practice, and was therefore suspicious, and he complains that the defense did not get to see what was presented to the judge. *Id.*

The transcript of Petitioner's sentencing hearing reveals no such interaction between the prosecutor and the judge. At a subsequent hearing, set for purposes of presentation of the judgment and sentence and entry of findings and conclusions with respect to the exceptional sentence, the prosecutor handed the judge a memorandum regarding the correction of Petitioner's offender score, a document the sentencing judge had specifically requested at a prior hearing. *See* Dkt. 8, Ex. 20 at 50, 74-75. Petitioner's suggestion that this interaction was related to, or in any way influenced, the exceptional sentence is completely unfounded.

Petitioner also suggests that the fact that the prosecutor drafted the formal findings and conclusions in support of the exceptional sentence renders the plea agreement void. *See* Dkt. 4-1 at 18-19. However, the record makes clear that the prosecutor, in drafting the findings and conclusions, was merely performing the ministerial task of committing the sentencing court's oral findings to paper. Indeed, at the hearing where the findings and conclusions were presented, the prosecutor made clear that he was not advocating for the exceptional sentence and that it was "up to the Court what it wants to include in those findings." Dkt. 8, Ex. 20 at 70. Petitioner's suggestion that the prosecutor's participation in drafting written findings and conclusions for the

sentencing court somehow constitutes a breach of the plea agreement is completely without merit. For the foregoing reasons, Petitioner's federal habeas petition should be denied with respect to his fifth ground for relief.

C. Evidentiary Hearing

Petitioner, in his response to Respondent's answer, asks that the Court hold an evidentiary hearing in this matter. Dkt. 9 at 2-3. The decision to grant an evidentiary hearing lies within the discretion of the Court. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). The Court "must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474 (citation omitted). "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* As explained in detail above, this Court concludes that the record in this matter precludes habeas relief. Accordingly, an evidentiary hearing is not warranted.

D. Certificate of Appealability

A petitioner seeking post-conviction relief under § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability from a district or circuit judge. A certificate of appealability may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537

U.S. 322, 327 (2003). Under this standard, this Court concludes that Petitioner is not entitled to a certificate of appealability with respect to any of the claims asserted in his petition.

VI. CONCLUSION

For the reasons set forth above, this Court recommends that Petitioner's petition for writ of habeas corpus be denied, and that this action be dismissed with prejudice. This Court further recommends that a certificate of appealability be denied. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **June 10, 2022**.

DATED this 18th day of May, 2022.

S. KATE VAUGHAN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL SAMUEL HUDSON, JR.,

Petitioner,

v.

MELISSA ANDREWJESKI,

Respondent.

Case No. C21-5920-RSL-SKV

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court, having reviewed petitioner's petition for writ of habeas corpus (Dkt. # 4), respondent's answer to the petition (Dkt. # 7), petitioner's response to respondent's answer (Dkt. # 9), the Report and Recommendation of United States Magistrate Judge S. Kate Vaughan (Dkt. # 14), petitioner's objections to the Report and Recommendation (Dkt. # 15),[1] and the remaining record, hereby finds and ORDERS:

(1) The Report and Recommendation (Dkt. # 14) is approved and adopted.

(2) Petitioner's petition for writ of habeas corpus (Dkt. # 4) is DENIED, and this action is DISMISSED with prejudice.

[1] The Court has considered Magistrate Judge Vaughan's recommendations de novo in light of petitioner's objections. Fed. R. Civ. P. 72(b); United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). However, as petitioner's objections simply reargue issues raised in his initial petition and response, the Court finds they were adequately addressed by Judge Vaughan's Report and Recommendation. Moreover, the Court has thoroughly examined the record before it and finds Judge Vaughan's reasoning persuasive in light of that record.

United States District Court

WESTERN DISTRICT OF WASHINGTON

MICHAEL SAMUEL HUDSON, JR.,

Petitioner,

v.

MELISSA ANDREWJESKI,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 3:21-cv-05920-RSL

___ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is approved and adopted. Petitioner's petition for writ of habeas corpus is denied and this action is dismissed with prejudice. A certificate of appealability is DENIED.

DATED this 6th day of February, 2023.

RAVI SUBRAMANIAN,
Clerk of the Court

By: */s/ Victoria Ericksen*
Deputy Clerk

Filed
Washington State
Court of Appeals
Division Two

June 22, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of MICHAEL SAMUEL HUDSON, JR., AKA MICHEAL SAMUEL HUDSON, JR., Petitioner.	No. 55580-8-II ORDER DISMISSING PETITION

Michael Samuel Hudson Jr., seeks relief from personal restraint imposed following his 2019 plea of guilty to five counts of first degree rape of a child, four counts of sexual exploitation of a minor, and one count of first degree dealing in depictions of a minor engaged in sexually explicit conduct. His direct appeal, No. 53280-8-II, is not yet final. First, he argues that he was denied the right to indictment by grand jury and was denied due process when he was not indicted by a grand jury. He is incorrect. *State v. Ng*, 104 Wn.2d 763, 775 n.2, 713 P.2d 63 (1985) (refusing to hold that the federal constitution's grand jury provision is binding on the states).

Second, he argues that the Department of Corrections denied him access to the courts when it did not give him access to a law library in time to timely file a petition for a writ of certiorari in the United States Supreme Court regarding his habeas corpus petition. To have standing to bring a claim of denial of access to the courts, an inmate must show that he was denied access to legal materials and the denial harmed his ability to pursue a

nonfrivolous legal action. *Lewis v. Casey*, 518 U.S. 343, 356, 360, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). The federal district court dismissed Hudson's habeas corpus petition without prejudice because he has not exhausted his state court remedies. The federal district court and federal court of appeals denied his requests for certificates of appealability because Hudson has not shown that "'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Department of Corrections' Resp., Ex. 8 (Order, *Hudson v. Uttecht*, No. 19-35882 (9th Cir. May 7, 2020) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)), Ex. 6 at 81 (Order, *Hudson v. Uttecht*, No. 19-5422 RJB JRC (U.S.D.C. W.D. Wash. Oct. 1, 2019). Therefore, any petition for a writ of certiorari would be frivolous. Hudson therefore lacks standing to bring a claim of denial of access to the courts.

The chief judge or acting chief judge of the Court of Appeals may dismiss a petition if it is frivolous. RAP 16.11(b). "'[A] personal restraint petition is frivolous where it fails to present an arguable basis for collateral relief either in law or in fact, given the constraints of the personal restraint petition vehicle.'" *In re Pers. Restraint of Caldellis,* 187 Wn.2d 127, 135, 385 P.3d 135 (2016) (quoting *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015)). Hudson's petition is frivolous. Accordingly, it is hereby

A-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: MICHAEL SAMUEL HUDSON, JR. Petitioner.	No. 99924-4 Court of Appeals No. 55580-8-II RULING DENYING REVIEW

Michael Hudson pleaded guilty in 2019 to first degree rape of a child, sexual exploitation of a minor, and first degree dealing in depictions of minors engaged in sexually explicit conduct. He timely filed a personal restraint petition in Division One of the Court of Appeals, but finding the petition frivolous, the acting chief judge dismissed it. Mr. Hudson now seeks this court's discretionary review. RAP 16.14(c).[1]

To obtain this court's review, Mr. Hudson must show that the acting chief judge's decision conflicts with a decision of this court or with a published Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). Mr. Hudson does not show that any of these criteria applies. He continues to urge that he had a federal constitutional right to be charged by grand jury indictment, but he did not. *State v. Ng*, 104 Wn.2d 763, 775 n.2, 713 P.2d 63 (1985). He also repeats his argument that the

[1] Mr. Hudson initially filed a motion for reconsideration in the Court of Appeals, which that court transferred to this court for treatment as a motion for discretionary review. Mr. Hudson subsequently moved to amend his motion for reconsideration to replace it with a proper motion for discretionary review. The motion to amend is granted.

Department of Corrections denied him access to the courts by limiting his law library access in relation to a petition for writ of certiorari in the United States Supreme Court, in which he sought review of a federal district court decision denying his petition for a writ of habeas corpus. But the acting chief judge correctly cited the rule that access is unconstitutionally denied only if an inmate is prevented from pursuing a nonfrivolous action. *Lewis v. Casey*, 518 U.S. 343, 356, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). The federal district court dismissed Mr. Hudson's habeas petition without prejudice because he had not exhausted state remedies. And the district court and the federal court of appeals denied certificates of appealability because Mr. Hudson failed to show that a reasonable jurist would find the district court's decision debatable. *See* Order, *Hudson v. Uttecht*, No. 19-35882 (9th Cir. May 7, 2020). Mr. Hudson does not show that the acting chief judge's decision merits this court's review.

The motion for discretionary review is denied.

Walter M Burta
DEPUTY COMMISSIONER

August 19, 2021

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Michael Samuel Hudson Jr,

Petitioner,

v.

Jeffrey A. Uttecht

Respondent.

CASE NO. 3:19-cv-05422-RJB-JRC

REPORT AND RECOMMENDATION

NOTED FOR: September 20, 2019

The District Court has referred this petition for a writ of habeas corpus to United States Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4.

Petitioner Michael Samuel Hudson Jr. filed his federal habeas petition on May 13, 2019 pursuant to 28 U.S.C. § 2254, seeking relief from his state court convictions and sentence. *See* Dkt. 1. The Court concludes that petitioner failed to properly exhaust his state court remedies as to all grounds raised in the petition; however, a state remedy remains available to petitioner. Therefore, the Court recommends that the petition be dismissed without prejudice. The Court

also recommends denying petitioner's motion to request that the Court rule on the petition (Dkt. 9) and motion to compel and response to state court record (Dkt. 17) as moot without prejudice.

BACKGROUND

Petitioner is in custody under a state court judgment and sentence imposed for his conviction by guilty plea for several counts of rape in the first degree, several counts of sexual exploitation of a minor, and one count of dealing with depictions of a minor engaged in sexually explicit conduct. Dkt. 13, Exhibit 1. Petitioner was sentenced on March 18, 2019. *Id.* Although in the petition, petitioner states he did not file a direct appeal, *see* Dkt. 8, the state court record filed by respondent reflects that petitioner's direct appeal is still pending in the Washington Court of Appeals under Cause No. 53280-8-II. *See* Dkt. 8; Dkt. 13, Exhibit 2. Petitioner filed this petition on May 13, 2019. Dkts. 1, 8.

Petitioner raises four grounds for relief all based on his claim he is unlawfully detained, and the State of Washington does not have jurisdictional authority to decide federal matters. Dkt. 8. On July 22, 2019, respondent filed an answer, wherein he asserts that petitioner has not properly exhausted his available state court remedies. Dkt. 12. Respondent maintains that the petition should be dismissed without prejudice for failure to exhaust state remedies. Dkt. 12. In the alternative, respondent argues the petition should be dismissed on the merits. Dkt. 12. Respondent does not address whether federal intervention with petitioner's pending state criminal proceedings would be inappropriate under the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). And the Court sees no reason to make a determination on the *Younger* abstention issue at this time, since the matter can be resolved without reaching that issue. On July 24 and 29, 2019, Petitioner filed a traverse and supplemental traverse, respectively. Dkts. 14, 15.

The Court notes that on August 13, 2019, petitioner filed a notice stating that he had not yet received a paper copy of the state court record filed by respondent. Dkt. 16. *See also* Dkt. 13 (state court record). However, on August 19, 2019, petitioner filed a response and motion to compel wherein he acknowledges he did receive a paper copy of the state court record. Dkt. 17.

DISCUSSION

I. Exhaustion

"[A] state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus." *Picard v. Connor*, 404 U.S. 270, 275 (1971). Petitioner's claims will be considered exhausted only after "the state courts [have been afforded] a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Here, petitioner challenges his 2019 judgment and sentence, which is still pending in his direct appeal in state court. Dkt. 13, Exhibit 2. Because petitioner's direct appeal is still pending, the state courts have not had a full opportunity to resolve any constitutional issues. Moreover, , the time for filing a state court collateral challenge has not expired. *See* RCW § 10.73.090. The Court also notes that the state court may resolve petitioner's direct appeal in his favor, which could moot this petition. Therefore, the Court finds that petitioner's claims should be dismissed without prejudice because he has not exhausted the state court remedies.

In the traverse, petitioner contends that the federal court has original jurisdiction and thus, exhaustion is not "appropriate." Dkts. 14, 15. The Court may consider an unexhausted federal habeas petition if it appears "there is an absence of available State corrective process . . . or

circumstances exist which render such process ineffective to protect the rights of the applicant." 28 U.S.C. 2254(b)(1)(B). However, petitioner has not shown that there is an absence of available state corrective processes or that circumstances exist rendering any state process ineffective.

Because the state courts have not yet had a full and fair opportunity to consider the merits of petitioner's claims, the claims are unexhausted and therefore ineligible for federal habeas review. *See Schwartzmiller v. Gardner*, 752 F.2d 1341, 1349 (9th Cir. 1984) ("The exhaustion of state remedies doctrine limits the issues a habeas corpus petitioner may raise in federal court to the 'same claims' that are 'fairly' presented to the highest state court."). Accordingly, the undersigned recommends that the petition be dismissed without prejudice. *See Watson v. Lampert*, 27 Fed. Appx. 824 (9th Cir. 2001) (affirming the district court's decision to dismiss the petition without prejudice for failure to exhaust when the petitioner's direct appeal was pending at the time he filed his § 2254 petition).

Based on the foregoing, the Court declines to address respondent's alternative argument that the petition should be dismissed on the merits. *See* Dkt. 12.

EVIDENTIARY HEARING

The decision to hold an evidentiary hearing is committed to the Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474. In determining whether relief is available under 28 U.S.C. § 2254(d)(1), the Court's review is limited to the record before the state court. *Cullen*, 563 U.S. at 181-82. A hearing is not required if the allegations would not entitle petitioner to relief under §2254(d). *Landrigan*, 550 U.S. at 474. "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district

court is not required to hold an evidentiary hearing." *Id.* The Court finds it is not necessary to hold an evidentiary hearing in this case because, as discussed in this report and recommendation, the petition may be resolved on the existing state court record.

CERTIFICATE OF APPEALABILITY

A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court's dismissal of the federal habeas petition only after obtaining a certificate of appealability from a district or circuit judge. *See* 28 U.S.C. § 2253(c). "A certificate of appealability may issue . . . only if the [petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

No jurist of reason could disagree with this Court's evaluation of petitioner's claims or would conclude that the issues presented in the petition should proceed further. Therefore, the Court concludes that petitioner is not entitled to a certificate of appealability with respect to this petition.

OTHER PENDING MOTIONS

Petitioner also filed a motion to request the Court rule on the petition, Dkt. 9, and a motion to compel, Dkt. 17. Petitioner argues that respondent has failed to provide legal cause for petitioner's arrest and detainment. Dkts. 9, 17. As discussed above, the Court concludes that the petition is unexhausted and recommends that it be dismissed without prejudice. Accordingly, the Court recommends that all pending motions (Dkts. 9, 17) be denied without prejudice as moot.

CONCLUSION

The Court recommends that the petition be dismissed without prejudice. No evidentiary hearing is necessary, and a certificate of appealability should be denied. Petitioner's remaining pending motions (Dkts. 9, 17) should be denied as moot without prejudice. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on September 20, 2019 as noted in the caption.

Dated this 29th day of August, 2019.

J. Richard Creatura
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL SAMUEL HUDSON, JR.,

Petitioner,

v.

JEFFREY A. UTTECHT,

Respondent.

CASE NO. 19-5422 RJB-JRC

ORDER ON REPORT AND RECOMMENDATION

THIS MATTER comes before the Court on the Report and Recommendation of U.S. Magistrate Judge J. Richard Creatura. Dkt. 19. The Court has considered the Report and Recommendation, objections, and the remaining file.

In this 28 U.S.C. § 2254 habeas corpus petition, the Petitioner challenges a state court conviction, by guilty plea, of several counts of rape in the first degree, exploitation of a minor and one count of dealing with depictions of a minor engaged in sexually explicit conduct and the resulting March 18, 2019 sentence. Dkt. 1. His direct appeal is pending in the Washington Court of Appeals Div. II. *Washington v. Hudson,* Washington Court of Appeals Div. II case number 532808. On August 29, 2019, the Report and Recommendation was filed,

recommending that this petition be denied without prejudice for failing to exhaust state court remedies on any of the claims. Dkt. 19.

"State prisoners seeking a writ of habeas corpus from a federal court must first exhaust their remedies in state court. A petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts." *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014)(*citing* 28 U.S.C. § 2254(b)(1)(A) and *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45, 119 S.Ct. 1728 (1999)).

The Report and Recommendation (Dkt. 19) should be adopted. The Petitioner has not fully presented any of his claims to the state courts. His first direct appeal is pending. The Petitioner has failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b)(1)(A). This federal habeas action is premature.

Under *Rhines v. Weber*, 544 U.S. 269, 276 (2005), a district court has discretion to stay a petition with both exhausted and unexhausted claims to allow the petitioner time to present his unexhausted claims to state courts. In the Ninth Circuit, a "district court has the discretion to stay and hold in abeyance fully unexhausted petitions under the circumstances set forth in *Rhines*." *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016). A stay and abeyance under *Rhines* is available when: (1) "the petitioner had good cause for his failure to exhaust," (2) the petitioner's "unexhausted claims are potentially meritorious," and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines*, at 278.

Petitioner does not request a stay here. In his objections, the Petitioner maintains that the state courts do not have jurisdiction to decide his claims. Dkt. 20. The Petitioner fails to cite any authority that supports his position. His remaining assertions are without merit and do not provide a basis to reject the Report and Recommendation. Further, there is no showing that a

stay, rather than dismissal, is appropriate. There is no showing that the petitioner had good cause for his failure to exhaust. *Rhines*, at 278. This case was filed on May 13, 2019 - a few months after the Petitioner was sentenced. Further, it is unclear whether the "unexhausted claims are potentially meritorious." *Rhines*, at 278. While "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics" *Rhines*, at 278, there are no other grounds to stay the case and hold it in abeyance rather than dismissing it without prejudice.

Further, a certificate of appealability should not issue. The Petitioner also objects to the Report and Recommendation's recommendation that a certificate of appealability should not issue in this case. Dkt. 20. As stated in the Report and Recommendation, reasonable jurists could not debate whether, or agree that, the petition should have been resolved in a different manner; the issues raised are not adequate to deserve encouragement to proceed further; and jurists of reason would not find it debatable whether the court was correct in its rulings. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A Certificate of Appealability should be denied.

It is **ORDERED** that:

- The Report and Recommendation (Dkt. 19) **IS ADOPTED**;
- This case **IS DISMISSED WITHOUT PREJUDICE**; and
- The certificate of appealability **IS DENIED.**

The Clerk is directed to send uncertified copies of this Order to Judge Creatura, all counsel of record, and to any party appearing *pro se* at said party's last known address.

Dated this 1st day of October, 2019.

ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL SAMUEL HUDSON, JR.,

Petitioner,

v.

JEFFREY A. UTTECHT,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NO. 3:19-cv-05422-RJB-JRC

— **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT DOES HEREBY **ORDER:**

(1) The R&R is **ADOPTED.**

(2) This case **IS DISMISSED WITHOUT PREJUDICE.**

(3) The certificate of appealability **IS DENIED.**

Dated October 2, 2019.

William M. McCool
Clerk of Court

s/Stefan Prater
Deputy Clerk

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAY 7 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL SAMUEL HUDSON, Jr.,

Petitioner-Appellant,

v.

JEFFREY A. UTTECHT, Warden,

Respondent-Appellee,

and

STATE OF WASHINGTON,

Respondent.

No. 19-35882

D.C. No. 3:19-cv-05422-RJB
Western District of Washington,
Tacoma

ORDER

Before: M. SMITH and LEE, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JUN 11 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL SAMUEL HUDSON, Jr.,

Petitioner-Appellant,

v.

JEFFREY A. UTTECHT, Warden,

Respondent-Appellee,

and

STATE OF WASHINGTON,

Respondent.

No. 19-35882

D.C. No. 3:19-cv-05422-RJB
Western District of Washington,
Tacoma

ORDER

Before: TROTT and N.R. SMITH, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

Filed
Washington State
Court of Appeals
Division Two

April 6, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent. v. MICHAEL SAMUEL HUDSON, JR., aka MICHEAL SAMUEL HUDSON, JR., Appellant.	No. 53280-8-II UNPUBLISHED OPINION

GLASGOW, J.—Michael Samuel Hudson Jr. pleaded guilty to five counts of first degree child rape, four counts of sexual exploitation of a minor, and one count of first degree dealing in depictions of a minor engaged in sexually explicit conduct. He committed all of these crimes against his daughter and son. Hudson appeals the exceptional sentence that the trial court imposed for counts one through five for first degree child rape. Hudson also appeals a condition of community custody that prohibits him from possessing alcohol. Hudson raises additional arguments in a statement of additional grounds for review (SAG).

We hold that the trial court erred by relying on some statutory aggravating factors that must be found by a jury and some nonstatutory aggravating factors when it imposed exceptional upward sentences for counts one through five. In addition, we hold that the alcohol-related community custody condition was proper because Hudson initially stipulated to the condition and the condition is permitted by statute. None of the arguments in Hudson's SAG undermines the validity of his

guilty plea. We remand for resentencing because the exceptional sentence on counts one through five was improper, but we affirm in all other respects.

FACTS

Between March 1, 2012 and August 5, 2017, Hudson raped his daughter who was less than 12 years old on four separate occasions, and he raped his son who was less than 12 years old on one occasion. During this time period, Hudson photographed his daughter engaging in sexually explicit conduct on four separate occasions. Hudson distributed the images of his daughter.

Hudson was initially charged with seven counts of first degree child rape, two counts of first degree child molestation, five counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, and five counts of sexual exploitation of a minor. The State expressed its intent to seek exceptional sentences on all counts because if Hudson were convicted on all counts, the high offender score would mean certain counts would go unpunished. In exchange for reduced charges, Hudson ultimately pleaded guilty to ten counts, which included five counts of first degree child rape, four counts of sexual exploitation of a minor, and one count of first degree dealing in depictions of a minor engaged in sexually explicit conduct.

In the statement of the defendant on plea of guilty, Hudson outlined the underlying facts supporting each count. The parties stipulated that Hudson would be subject to the indeterminate sentencing scheme for certain sex offenses under RCW 9.94A.507. Hudson acknowledged that the trial court could impose an exceptional sentence outside the standard range.

The minimum sentence standard range for counts one through five was between 240 and 318 months. The statutory maximum term was life imprisonment. In a pretrial settlement agreement attached to the statement on plea of guilty, the parties stipulated that for counts one

through five, the State would argue for 288 months for each count, a minimum sentence within the standard range, while Hudson would argue for 240 months for each count. For counts six through ten, the parties agreed to the top of the minimum sentence standard range. The parties stipulated that all counts should run concurrently.

The parties also attached a list of "Stipulated Conditions of Sentence and of Community Custody" that included a condition that Hudson not possess or consume alcohol without prior approval and that he shall not possess or consume any controlled substances without a lawful prescription. Clerk's Papers (CP) at 24 (capitalization omitted). Hudson stipulated to these conditions "as well as any additional conditions suggested by the [Department of Corrections] Pre-Sentence Investigator as being conditions of community custody and conditions of the sentence." CP at 22 (emphasis omitted). Hudson also stipulated that all the conditions were "'crime-related'" under RCW 9.94A.703(3). *Id.*

The pre-sentence investigation submitted by the Department recommended a prohibition on Hudson's possession or consumption of alcohol, marijuana, and any nonprescribed controlled substances. For sentencing, the Department recommended confinement within the standard range.

At sentencing, on counts one through five for first degree rape of a child, the trial court imposed an exceptional upward sentence and ordered a minimum term of 365 months for each count, with a maximum of life. On counts six through nine, the trial court ordered a term of confinement of 120 months. On count ten, the trial court ordered a term of 116 months. All sentences were to be served concurrently. The trial court imposed lifetime community custody for counts one through five. One condition of community custody prohibited Hudson from possessing or consuming alcohol without prior approval from the Department and all treatment providers.

The trial court adopted findings of fact and conclusions of law to justify the exceptional sentence. The trial court included eight aggravating circumstances in its findings of fact. The first five circumstances aligned with provisions under RCW 9.94A.535(3), while the last three were nonstatutory. The three nonstatutory aggravators were: (1) all of the crimes "had a lasting and severe negative impact on the mental health of the victims." (2) "[t]he breadth of sexual abuse toward[] the victims in [counts one through nine] was pervasive," and (3) Hudson "continued acts of criminal sexual behavior toward[] the victims in [counts one through nine] after [he] became aware of a police investigation . . . about whether he had committed sexual abuse against his children." CP at 61. The trial court noted that it "would impose the same sentence if only one of the grounds . . . [was] valid." *Id.*

Defense counsel objected to the trial court's findings of fact, conclusions of law, and exceptional sentence, noting that "[n]one of the aggravating factors found by the [c]ourt were included in the information, that my client [pleaded] guilty only to the crime and without any aggravators and that he did not waive his right to a jury trial with regard to any of the aggravators." Verbatim Report of Proceedings (Mar. 18, 2019) at 69.

Hudson appeals his sentence and the alcohol-related community custody condition. Hudson also filed a SAG.

ANALYSIS

I. SENTENCING

Hudson argues, and the State concedes, that the trial court erred when it relied on five aggravating factors in imposing an exceptional sentence because those factors require jury findings

under RCW 9.94A.535(3). We accept the State's concession. Next, Hudson asserts that the trial court cannot use nonstatutory factors to impose an exceptional sentence. We agree.

A. Statutory Background on Exceptional Sentences

RCW 9.94A.535 provides that the trial court can impose "a sentence outside the standard sentence range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537." In turn, RCW 9.94A.537(3) provides that "[t]he facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt." unless the defendant stipulates to the existence of the aggravating factor or waives the jury right and allows a court to make the finding necessary to support the factor.

In addition, the legislature distinguished between mitigating and aggravating factors. RCW 9.94A.535(1) provides that the court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." The legislature included a list of mitigating circumstances for the court's consideration, noting that the list is "illustrative only" and "not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535(1). For aggravating circumstances, the legislature further differentiated between those that can be found by a judge and those that must be found by a jury. There are only four instances where a trial court judge can independently impose an aggravated exceptional sentence without a jury, all of which rely on stipulation, the defendant's criminal history, or the defendant's offender score. RCW 9.94A.535(2). RCW 9.94A.535(3) provides. "Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors

that can support a sentence above the standard range," and all of those factors must be considered by a jury.

On appeal we review de novo the trial court's reason to depart from the standard sentence range. *State v. Cham*, 165 Wn. App. 438, 449-50, 267 P.3d 528 (2011). RCW 9.94A.535 provides that "[i]f the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4)." To reverse a sentence outside the standard range, this court must conclude that "the reasons supplied by the sentencing court are not supported by the record which was before the judge[,] that those reasons do not justify a sentence outside the standard sentence range for that offense," or that "the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4). Here, Hudson argues that the reasons given are not valid bases for an exceptional sentence absent jury findings.

B. The Trial Court Erred in Imposing an Exceptional Sentence

The trial court relied on five factors listed in RCW 9.94A.535(3), a section that expressly requires jury findings. At Hudson's sentencing hearing, no jury played a part in the trial court's findings of fact. We accept the State's concession that reliance on these factors was improper.

For the last three aggravating factors, Hudson argues that the trial court cannot rely on factors that do not appear in RCW 9.94A.535 to impose an exceptional sentence. Hudson is correct. While the list of mitigating factors to be considered by a trial court in imposing an exceptional sentence downward is merely "illustrative" and not exclusive, RCW 9.94A.535(1), the list of aggravating factors is exclusive, RCW 9.94A.535(2), (3). There is an expressly exclusive list of aggravating factors for a jury to determine and there is a list of only four aggravating factors that

a trial court may impose without jury findings, none of which was the basis for Hudson's exceptional sentence. The plain statutory language precludes a trial court from making up additional, nonstatutory aggravating factors.

The State relies on *State v. Fowler*, 145 Wn.2d 400, 38 P.3d 335 (2002), for the proposition that a judge may use nonstatutory factors to impose an exceptional sentence above the standard range. But Fowler sought an exceptional sentence *below* the standard range based on the presence of three statutory mitigating factors. *Fowler*, 145 Wn.2d at 403. The trial court imposed a sentence below the standard range, but relied upon mitigating factors that were not listed in the statute. *Id.* at 404-05. While the Washington Supreme Court reversed the exceptional sentence in *Fowler*, the court noted that the list of statutory mitigating factors is not exclusive. *Id.* at 405. Here, the trial court imposed a sentence above the standard range, not below.

Next, the State relies on *In re Postsentence Petition of Smith*, 139 Wn. App. 600, 603; 161 P.3d 483 (2007), to suggest that the legislative intent of Washington's Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, was for judges to have broad discretion to impose exceptional sentences tailored to individual cases. But the *Smith* court also imposed an exceptional sentence of confinement *below* the standard range, citing a mitigating factor. *Id.* at 601.[1]

Neither *Fowler* nor *Smith* establishes that nonstatutory aggravating, rather than mitigating, factors may be used to impose an exceptional sentence above the standard range.

We hold that the last three factors the trial court relied on were invalid because they were outside of the exclusive list of aggravators that the legislature allowed a judge to find. Because all

[1] *Smith* also addressed the length of the community custody term, but that is not an issue in this case. 139 Wn. App. at 602-04.

of the eight factors the trial court relied on were invalid, Hudson's exceptional sentence is also invalid.

II. COMMUNITY CUSTODY CONDITION

Hudson argues that because there was no evidence that alcohol was a factor for his charged offenses, the condition of community custody prohibiting him from possessing alcohol is improper as it is not a "[c]rime-related prohibition" under RCW 9.94A.030(10). We disagree.

The prohibition on the possession or consumption of alcohol was one of the conditions that Hudson agreed to comply with under the stipulated conditions of sentence and of community custody attached to Hudson's pretrial settlement agreement. Hudson also stipulated that all imposed community custody conditions were crime-related under RCW 9.94A.703(3). Thus, Hudson may not challenge the alcohol-related community custody condition on appeal because he stipulated to the condition as part of his plea.

But even if Hudson had not stipulated to the condition, the alcohol-related community custody condition is valid. A trial court may only impose community custody conditions authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008). Appellate courts in Washington review a trial court's decision to impose community custody conditions for an abuse of discretion. *State v. Johnson*, 12 Wn. App. 2d 201, 213, 460 P.3d 1091, *review granted*, 196 Wn.2d 1001 (2020). An abuse of discretion occurs when the imposition of a condition is manifestly unreasonable. *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018).

The trial court's discretionary community custody conditions include ordering an offender to "[r]efrain from possessing or consuming alcohol." RCW 9.94A.703(3)(e). A separate provision allows a court to order a defendant to "[c]omply with any crime-related prohibitions." RCW

9.94A.703(3)(f). A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The plain language of the statute does not require the restriction on alcohol possession or consumption to be crime-related.

In *State v. Jones*, this court held that a trial court "may order an offender not to consume alcohol regardless of whether alcohol contributed to the crime." 118 Wn. App. 199, 202, 76 P.3d 258 (2003). Jones argued that the trial court erred in imposing a community custody condition prohibiting him from consuming alcohol because there was no evidence that alcohol contributed to his offense. *Id.* at 204. This court noted that because the legislature's 1988 amendments to the SRA separated community custody conditions involving crime-related prohibitions from those prohibiting the offender from consuming alcohol, the legislature "manifested its intent that a trial court be permitted to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." *Id.* at 206.

Under the plain language of the statute, there is no requirement that the restriction on alcohol use and possession be crime-related. RCW 9.94A.703(3)(e). The trial court did not abuse its discretion in imposing the challenged community custody condition.

III. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Hudson's SAG raises three additional claims that he argues require withdrawal of his guilty plea and remand for a corrected sentence. None of his claims merits relief.

A. Plea Bargaining

1. Threats, intimidation, and coercion

Hudson claims that his guilty plea is invalid because his plea agreement was obtained via threats, intimidation, and coercion. Hudson specifically asserts that the prosecutor threatened to add more charges if the plea deal was not accepted and intimidated Hudson because he was being held in the Clark County Jail. Hudson requests withdrawal of his guilty plea.

A prosecutor's discretion in plea bargaining is not "'unfettered,'" and prosecutors may not exercise their discretion in a manner that violates due process. *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003) (quoting *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)). But otherwise, prosecutors are vested with broad discretion when determining whether to charge a crime or enter into a plea bargain. *Moen*, 150 Wn.2d at 227.

Hudson does not cite to any case that concludes that either a prosecutor's threat to bring more charges or the general jail environment coerces a defendant to such a degree that due process is violated. We hold that this claim is meritless because the prosecutor was within their discretion to indicate that Hudson could face additional charges should he decline the plea deal. Moreover, Hudson noted in his signed statement on plea of guilty that he made the plea freely and voluntarily, and that no one threatened him in order for him to plead guilty. When the trial court asked at Hudson's plea hearing whether he made the plea freely and voluntarily, Hudson responded that he did and that no one had threatened to harm him. Hudson may not withdraw his guilty plea on this basis.

2. Ineffective assistance of counsel

Next, Hudson argues that his counsel provided ineffective assistance in facilitating his signing of the plea agreement despite the coercive prosecutor. Hudson claims that, but for his counsel's errors, he would not have signed the plea agreement, rendering a different outcome for his case.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Ineffective assistance of counsel is a two-pronged inquiry. *Grier*, 171 Wn.2d at 32. To prevail, Hudson must show that his counsel's performance was deficient and that counsel's deficient performance prejudiced him. *Id.* at 32-33. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Hudson has not demonstrated that his counsel's performance was deficient. Hudson initially faced 19 counts, including 7 counts of first degree child rape. The plea reduced the number of counts to 10. Defense counsel's role in Hudson's plea agreement, whatever it may have been, can be viewed as a legitimate strategy to get Hudson fewer charges and a reduced sentence.

B. Same Criminal Conduct

Hudson argues that counts one through four and ten amount to the same criminal conduct. From his understanding, the above counts stem from one incident when he forced his son and daughter to have sexual intercourse in order to get permission to go swimming at the local pool. In addition, Hudson argues that counts six through nine represent the same criminal conduct. Hudson raises these arguments for the first time on appeal.

Under RCW 9.94A.589(1)(a), "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct[,] then those current offenses shall be counted as one crime." "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The defendant bears the burden to establish each element to determine whether the offenses stemmed from the same criminal conduct. *State v. Hall*, 11 Wn. App. 2d 113, 142, 452 P.3d 577 (2019), *review denied*, 195 Wn.2d 1011, *cert. denied*, 141 S. Ct. 345 (2020).

We hold that Hudson's same criminal conduct claim is meritless. Counts one through four explicitly detail first degree rape of a child, each on an occasion separate and distinct from the other counts, with the date range for the sexual abuse occurring between March 1, 2012 and August 5, 2017. In Hudson's signed statement on plea of guilty, he indicated that counts one through four represented "separate and distinct" offenses committed against his daughter. CP at 16. Similarly, Hudson indicated in his statement that counts six through nine represented "separate and distinct" offenses committed against his daughter. CP at 17.

At Hudson's plea hearing, the trial court questioned whether counts one through five involved separate and distinct occasions, to which Hudson responded that they did. At the same hearing, Hudson admitted that counts six through nine involved four separate occasions where Hudson permitted his daughter to engage in sexually explicit conduct that would be photographed. While Hudson may have possessed the same criminal intent for the counts committed against his daughter, he admitted that the counts he pleaded guilty to were based on separate and distinct occasions. Thus, he has failed to show any of his convictions involve the same criminal conduct.

CONCLUSION

We remand for resentencing because the exceptional sentence on counts one through five was improper, but we affirm in all other respects.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

Glasgow, J.

We concur:

Sutton, A.C.J.

Sutton, A.C.J.

Maxa, J.

Maxa, J.

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL SAMUEL HUDSON JR., Petitioner.	)	No. 99869-8 **ORDER** Court of Appeals No. 53280-8-II

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu, and Whitener (Justice Johnson sat for Justice Madsen), considered at its October 5, 2021, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 6th day of October, 2021.

For the Court

González C.J.
CHIEF JUSTICE

Cases in the State of Washington the held a grand jury:

Deskins v Waldt, 81 Wn2d 1, 499 P2d 206 (1972 WA)

State ex rel Zempel v Twitchell, 59 Wn2d 419, 367 P2d 985 (1962 WA)

State v Beck, 56 Wn2d 474, 349 P2d 387 (1960 WA)

State v Bell, 59 Wn2d 338, 368 P2d 177 (1962 WA)

State v Burnham, 185 Wash 556, 56 P2d 170 (1936 WA)

State v Carrol, 81 Wn2d 95, 500 P2d 115 (1972 WA)

State v Clancy, 99 Wash 47, 168 P 894 (1917 WA)

State v Comer, 171 Wash 25, 17 P2d 643 (1932 WA)

State v Fenter, 89 Wn2d 57, 569 P2d 67 (1977 WA)

State v Ingels, 4 Wn2d 676, 104 P2d 944 (1940 WA)

State v Krug, 12 Wash 288, 41 P 126 (1895 WA)

State v London, 194 Wash 458, 78 P2d 548 (1938 WA)

State v Nick, 66 Wash 134, 119 P 15 (1911 WA)

State v Robinson, 9 WnApp 644, 513 P2d 837 (1973 WA)

State v Sponburgh, 84 Wn2d 203, 525 P2d 238 (1974 WA)

State v Whetstone, 30 Wn2d 301, 191 P2d 818 (1948 WA)

Cases where the judge(s) was being stopped from trying to draw a grand jury:

Gibson v Gillian, 56 Wash 29, 104 P 1131 (1909 WA)

Hanna v Main, 62 Wash 242, 113 P 632 (1911 WA)

EXTENDED CASE LAW ANNOTATION

McDonald v Chicago, 130 S.Ct. 3020, 177 L.Ed.2d at 938

Justice Thomas, concurring in part and concurring in the judgement.

Thomas Justice, concurring in part and concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment "fully applicable to the States." *Ante*, at 3026, 177 L.Ed.2d, at 903. I write separately because I believe there is a more straightforward path to this conclusion, one that is [130 S.Ct. 3059] more

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faithful to the Fourteenth Amendment's text and history. I therefore do not join in Parts II-C, IV, and V of the principal opinion.

Applying what is now a well-settled test, the Court concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "fundamental" to the American "scheme of ordered liberty, " *ante*, at 3036, 177 L.Ed.2d, at 914 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)), and "'deeply rooted in this Nation's history and tradition, '" *ante*, at 3036, 177 L.Ed.2d, at 914 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997)). I agree with that description of the right. But I cannot agree that it is enforceable against the States through a Clause that [177 L.Ed.2d 939] speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.

I

In *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), this Court held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense, striking down a District of Columbia ordinance that banned the possession of handguns in the home. *Id.*, at 635 128 S.Ct., at 2821-2822, 171 L.Ed.2d 637, 659.. The question in this case is whether the Constitution protects that right against abridgment by the States.

As the Court explains, if this case were litigated before the Fourteenth Amendment's adoption in 1868, the answer to that question would be simple. In *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. 243, 7 Pet. 243, 8 L.Ed. 672 (1833), this Court held that the Bill of Rights applied only to the Federal Government. Writing for the Court, Chief Justice Marshall recalled that the founding generation added the first eight Amendments to the Constitution in response to Antifederalist concerns regarding the extent of federal—not state— power, and held that if "the framers of these amendments [had] intended them to be limitations on the powers of the state

governments, "
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"they would have declared this purpose in plain and intelligible language." *Id.*, at 250, 7 Pet. 243, 8 L.Ed. 672. Finding no such language in the Bill of Rights, Chief Justice Marshall held that it did not in any way restrict state authority. *Id.*, at 248-250, 7 Pet. 243, 8 L.Ed. 672; see *Lessee of Livingston v. Moore*, 32 U.S. 469, 7 Pet. 469, 551-552, 8 L.Ed. 751 (1833) (reaffirming *Barron*'s holding); *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. 589, 3 How. 589, 609-610, 11 L.Ed. 739 (1845) (same).

Nearly three decades after *Barron*, the Nation was splintered by a civil war fought principally over the question of slavery. As was evident to many throughout our Nation's early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure. See, *e.g.*, 3 Records of the Federal Convention of 1787, p. 212 (M. Farrand ed. 1911) (remarks of Luther Martin) ("[S]lavery is inconsistent with the genius of republicanism, and has a tendency to destroy those principles on which it is supported, as it lessens the sense of the equal rights of mankind" (emphasis deleted)); A. Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), reprinted in 2 The Collected Works of Abraham Lincoln 266 (R. Basler ed. 1953) ("[N]o man is good enough to govern another man, *without that other's consent*. I say this is the leading principle-the sheet anchor of American republicanism. . . . Now the relation [130 S.Ct. 3060] of masters and slaves is, *pro tanto*, a total violation of this principle").

After the war, a series of constitutional amendments were adopted to repair the Nation from the damage slavery had caused. The provision at issue here, §1 of the Fourteenth Amendment, significantly altered our system of government. The first sentence of that section provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State [177 L.Ed.2d 940] wherein they reside." This unambiguously overruled this Court's contrary holding in *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691, 60 U.S. 393 (1857),
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that the Constitution did not recognize black Americans as citizens of the United States or their own State. *Id.*, at 405-406, 19 How. 393, 15 L.Ed. 691.

The meaning of §1's next sentence has divided this Court for many years. That sentence begins with the command that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." On its face, this appears to grant the persons just made United States citizens a certain collection of rights-*i.e.*, privileges or immunities-attributable to that status.

This Court's precedents accept that point, but define the relevant collection of rights quite narrowly. In the *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873), decided just five years after the Fourteenth Amendment's adoption, the Court interpreted this text, now known as the Privileges or Immunities Clause, for the first time. In a closely divided decision, the Court drew a sharp distinction between the privileges and immunities of state citizenship and those of federal citizenship, and held that the Privileges or Immunities Clause protected only the

latter category of rights from state abridgment. *Id.*, at 78, 16 Wall. 36, 21 L.Ed. 394. The Court defined that category to include only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, at 79, 16 Wall. 36, 21 L.Ed. 394. This arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship. See *ibid.* (listing "[t]he right to peaceably assemble" and "the privilege of the writ of *habeas corpus*" as rights potentially protected by the Privileges or Immunities Clause). But the Court soon rejected that proposition, interpreting the Privileges or Immunities Clause even more narrowly in its later cases.

Chief among those cases is *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876). There, the Court held that members of a white militia who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had

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not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms. *Ibid.;* see L. Keith, The Colfax Massacre 109 (2008). According to the Court, the right to peaceably assemble codified in the First Amendment was not a privilege of United States citizenship because "[t]he right . . . existed long *before* the adoption of the Constitution." 92 U.S., at 551, 23 L.Ed. 588 (emphasis added). Similarly, the Court held that the right to keep and bear arms was not a privilege of United States citizenship because it was not "in any manner dependent upon that instrument for its existence." *Id.*, at 553, 23 L.Ed. 588. In other words, the reason the Framers codified the right to bear arms in the Second Amendment-its nature as an inalienable right that pre-existed the Constitution's adoption-was the very reason citizens could not enforce it against States through the Fourteenth.

That circular reasoning effectively has been the Court's last word on the [177 L.Ed.2d 941] Privileges or Immunities Clause. [1] [130 S.Ct. 3061] In the intervening years, the Court has held that the Clause prevents state abridgment of only a handful of rights, such as the right to travel, see *Saenz v. Roe*, 526 U.S. 489, 503, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999), that are not readily described as essential to liberty.

As a consequence of this Court's marginalization of the Clause, litigants seeking federal protection of fundamental rights turned to the remainder of §1 in search of an alternative fount of such rights. They found one in a most curious place-that section's command that every State guarantee "due process" to any person before depriving him of "life, liberty, or property." At first, litigants argued that this Due Process Clause "incorporated" certain procedural rights codified in the Bill of Rights against the States. The Court

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generally rejected those claims, however, on the theory that the rights in question were not sufficiently "fundamental" to warrant such treatment. See, *e.g.*, *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884) (grand jury indictment requirement); *Maxwell v. Dow*, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900) (12-person jury requirement); *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908) (privilege against self-incrimination).

That changed with time. The Court came to conclude that certain Bill of Rights guarantees *were* sufficiently fundamental to fall within §1's guarantee of "due process." These included not

only procedural protections listed in the first eight Amendments, see, *e.g.*, *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (protection against double jeopardy), but substantive rights as well, see, *e.g.*, *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) (right to free speech); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) (same). In the process of incorporating these rights against the States, the Court often applied them differently against the States than against the Federal Government on the theory that only those "fundamental" aspects of the right required Due Process Clause protection. See, *e.g.*, *Betts v. Brady*, 316 U.S. 455, 473, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942) (holding that the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, but that the Due Process Clause required appointment of counsel in state criminal cases only where "want of counsel . . . result[ed] in a conviction lacking in . . . fundamental fairness"). In more recent years, this Court has "abandoned the notion" that the guarantees in the Bill of Rights apply differently when incorporated against the States than they do when applied to the Federal Government. *Ante*, at 765, 177 L.Ed.2d, at 926 (opinion of the Court) (internal quotation marks omitted). But our cases continue to adhere to the view that a right is incorporated through the Due Process Clause only if it is sufficiently "fundamental, " [177 L.Ed.2d 942] *ante*, at 3046, 3048-3050, 177 L.Ed.2d, at 925, 928 (plurality opinion)-a term the Court has long struggled to define.

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While this Court has at times concluded that a right gains "fundamental" status only if it is essential to the American "scheme of ordered liberty" or "'deeply rooted in this Nation's history and tradition, [130 S.Ct. 3062] '" *ante*, at 3036, 767, 177 L.Ed.2d, at 914 (plurality opinion of the Court) (quoting *Glucksberg*, 521 U.S., at 721, 117 S.Ct. 2302, 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772), the Court has just as often held that a right warrants Due Process Clause protection if it satisfies a far less measurable range of criteria, see *Lawrence v. Texas*, 539 U.S. 558, 562, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (concluding that the Due Process Clause protects "liberty of the person both in its spatial and in its more transcendent dimensions"). Using the latter approach, the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights. See, *e.g.*, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Lawrence*, *supra*.

All of this is a legal fiction. The notion that a constitutional provision that guarantees only "process" before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish "fundamental" rights that warrant protection from nonfundamental rights that do not. Today's decision illustrates the point. Replaying a debate that has endured from the inception of the Court's substantive due process jurisprudence, the dissents laud the "flexibility" in this Court's substantive due process doctrine, *post*, at 14, 871, 177 L.Ed.2d, at 978 (opinion of (Stevens, J.); see *post*, at 3122-3123, 177

L.Ed.2d, at 1007-1008 (opinion of Breyer, J.), while the plurality makes yet another effort to impose principled restraints on its exercise, see *ante*, at 3044 – 3048, 177 L.Ed.2d, at 922-927. But neither side argues that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification.

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To be sure, the plurality's effort to cabin the exercise of judicial discretion under the Due Process Clause by focusing its inquiry on those rights deeply rooted in American history and tradition invites less opportunity for abuse than the alternatives. See post, at 918, 177 L.Ed.2d, at 3123 (Breyer, J., dissenting) (arguing that rights should be incorporated against the States through the Due Process Clause if they are "well-suited to the carrying out of . . . constitutional promises"); *post*, at 3100, 177 L.Ed.2d, at 982 (Stevens, J., (STEVENS, J., dissenting) (warning that there is no "all-purpose, top-down, totalizing theory of 'liberty'" protected by the Due Process Clause). But any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does.

I cannot accept a theory of constitutional interpretation that rests on such tenuous footing. This Court's [177 L.Ed.2d 943] substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the Fourteenth Amendment offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.

I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system [130 S.Ct. 3063] But *stare decisis* is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 963, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part). It is not "an inexorable command." *Lawrence*, *supra*, at 577, 123 S.Ct. 2472, 156 L.Ed.2d 508. Moreover, as judges, we interpret the Constitution

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one case or controversy at a time. The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here. With the inquiry appropriately narrowed, I believe this case presents an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.

II

"It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 174, 2 L.Ed. 60 (1803) (opinion for the Court by Marshall, C. J.). Because the Court's Privileges or Immunities Clause precedents have presumed

just that, I set them aside for the moment and begin with the text.

The Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States." In interpreting this language, it is important to recall that constitutional provisions are "'written to be understood by the voters.'" *Heller*, 554 U.S., at 576, 128 S.Ct. 2783, 171 L.Ed.2d at 2788 (quoting *United States v. Sprague*, 282 U.S. 716, 731, 51 S.Ct. 220, 75 L.Ed. 640 (1931)). Thus, the objective of this inquiry is to discern what "ordinary citizens" at the time of ratification would have understood the Privileges or Immunities Clause to mean. 554 U.S., at 577, 128 S.Ct., at 2788, 2783, 171 L.Ed.2d 637.

A

1

At the time of Reconstruction, the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." The two words, standing alone or paired together, were used interchangeably with the words "rights, " "liberties, " and "freedoms, " and had been since the time of Blackstone. See 1 W. Blackstone, Commentaries *129 (describing

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the "rights and liberties" of Englishmen as "private immunities" and "civil privileges"). A number of antebellum judicial decisions used the terms in this manner. See, *e.g.*, *Magill v. Brown*, [177 L.Ed.2d 944] 16 F. Cas. 408, 428, F. Cas. No. 8952 (No. 8,952) (CC ED Pa. 1833) (Baldwin, J.) ("The words 'privileges and immunities' relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places"). In addition, dictionary definitions confirm that the public shared this understanding. See, *e.g.*, 2 N. Webster, An American Dictionary of the English Language 1039 (C. Goodrich & N. Porter rev. 1865) (defining "privilege" as "a right or immunity not enjoyed by others or by all" and listing among its synonyms the words "immunity, " "franchise, " "right, " and "liberty"); 1 *id.*, at 661 (defining "immunity" as "[f]reedom from an obligation" or "particular privilege"); 2 *id.*, at 1140 (defining "right" as "[p]rivilege or immunity granted by authority"). [2]

The fact that a particular interest was designated as a "privilege" or "immunity, " [130 S.Ct. 3064] rather than a "right, " "liberty, " or "freedom, " revealed little about its substance. Blackstone, for example, used the terms "privileges" and "immunities" to describe both the inalienable rights of individuals and the positive-law rights of corporations. See 1 Commentaries, at *129 (describing "private immunities" as a "*residuum* of natural liberty, " and "civil privileges" as those "which society has engaged to provide, in lieu of the natural liberties so given up by individuals" (footnote omitted)); *id.*, at *468 (stating that a corporate charter enables a corporation to "establish

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rules and orders" that serve as "the privileges and immunities . . . of the corporation"). Writers in this country at the time of Reconstruction followed a similar practice. See, *e.g.*, *Racine & Mississippi R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331, 334 (1868) (describing agreement between two railroad companies in which they agreed "'to fully merge and consolidate the[ir] capital stock, powers, privileges, immunities and franchises'"); *Hathorn v. Calef*, 53 Me. 471, 483–484 (1866) (concluding that a statute did not "modify any power, privileges, or immunity,

pertaining to the franchise of any corporation"). The nature of a privilege or immunity thus varied depending on the person, group, or entity to whom those rights were assigned. See Lash, The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art, 98 Geo. L. J. 1241, 1256–1257 (2010) (surveying antebellum usages of these terms).

2

The group of rights-bearers to whom the Privileges or Immunities Clause applies is, of course, "citizens." By the time of Reconstruction, it had long been established that both the States and the Federal Government existed to preserve their citizens' inalienable rights, and that these rights were considered "privileges" or "immunities" of citizenship.

This tradition begins with our country's English roots. Parliament declared the basic liberties of English citizens in a series of documents ranging from the Magna Carta to the Petition [177 L.Ed.2d 945] of Right and the English Bill of Rights. See 1 B. Schwartz, The Bill of Rights: A Documentary History 8-16, 19-21, 41-46 (1971) (hereinafter Schwartz). These fundamental rights, according to the English tradition, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. See B. Bailyn, The Ideological Origins of the American Revolution 77-79 (1967). These rights included many that later would be set forth in our

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Federal Bill of Rights, such as the right to petition for redress of grievances, the right to a jury trial, and the right of "Protestants" to "have arms for their defence." English Bill of Rights (1689), reprinted in 1 Schwartz 41, 43.

As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen. They consistently claimed the rights of English citizenship in their founding documents, repeatedly referring to these rights as "privileges" and "immunities." For example, a Maryland law provided that

[130 S.Ct. 3065] "[A]ll the Inhabitants of this Province being Christians (Slaves excepted) Shall have and enjoy all such *rights liberties immunities priviledges and free customs* within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England . . . ." Md. Act for the Liberties of the People (1639), in *id.*, at 68 (emphasis added). [3]

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As tensions between England and the Colonies increased, the colonists adopted protest resolutions reasserting their claim to the inalienable rights of Englishmen. Again, they used the terms "privileges" and "immunities" to describe these rights. As the Massachusetts Resolves declared:

"*Resolved*, That there are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the common Rights of Mankind-Therefore ..... "*Resolved*, That no Man can [177 L.Ed.2d 946] justly take the Property of another without his Consent: And that upon this *original* Principle the Right of Representation . . . is evidently founded. . . . *Resolved*, That this *inherent* Right, together with all other, essential *Rights, Liberties, Privileges and Immunities* of the People of *Great Britain*, have been fully confirmed to them by

Magna Charta." The Massachusetts Resolves (Oct. 29, 1765), reprinted in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766, p. 56 (E. Morgan ed. 1959) (some emphasis added). [4]

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[130 S.Ct. 3066]In keeping with this practice, the First Continental Congress declared in 1774 that the King had wrongfully denied the colonists "the rights, liberties, and immunities of free and natural-born subjects . . . within the realm of England." 1 Journals of the Continental Congress 1774-1789, p. 68 (W. Ford. ed. 1904). In an address delivered to the inhabitants of Quebec that same year, the Congress described those rights as including the "great" "right[s]" of "trial by jury, " "Habeas Corpus, " and "freedom of the press." Address of the Continental Congress to the Inhabitants of Quebec (1774), reprinted in 1 Schwartz 221–223.

After declaring their independence, the newly formed States replaced their colonial charters with constitutions and state bills of rights, almost all of which guaranteed the same fundamental rights that the former colonists previously had claimed by virtue of their English heritage. See, *e.g.* , Pa. Declaration of Rights (1776), reprinted in 5 Thorpe 3081–3084 (declaring that "all men are born equally free and independent, and have certain natural, inherent and inalienable rights, " including the "right to worship Almighty God according to the dictates of their own consciences" and the "right to bear arms for the defence of themselves and the state"). [5]

Several years later, the Founders amended the Constitution to expressly protect many of the same fundamental rights against interference by the Federal Government. Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text. See, *e.g.*, 1 Annals of Cong. 431-432, 436–437, 440–442 (1834) (statement of Rep. Madison)

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(proposing Bill of Rights in the first Congress); The Federalist No. 84, pp. 531-533 (B. Wright ed. 1961) (A. Hamilton); see also *Heller*, 554 U.S., at 592, 128 S.Ct. 2783, 171 L.Ed.2d at 2797 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a [177 L.Ed.2d 947] *pre-existing* right"). The Court's subsequent decision in *Barron*, however, made plain that the codification of these rights in the Bill of Rights made them legally enforceable only against the Federal Government, not the States. See 7 Pet., at 247, 32 U.S. 469, 8 L.Ed. 751.

3

Even though the Bill of Rights did not apply to the States, other provisions of the Constitution did limit state interference with individual rights. Article IV, §2, cl. 1 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The text of this provision resembles the Privileges or Immunities Clause, and it can be assumed that the public's understanding of the latter was informed by its understanding of the former.

Article IV, §2 was derived from a similar clause in the Articles of Confederation, and reflects the dual citizenship the Constitution provided to all Americans after replacing that "league" of separate sovereign States. *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 187, 6 L.Ed. 23 (1824); see

3 J. Story, Commentaries on the Constitution of the United States §1800, p. 675 (1833). By virtue of a person's citizenship in a particular State, he was guaranteed whatever rights and liberties that State's constitution [130 S.Ct. 3067] and laws made available. Article IV, §2 vested citizens of each State with an additional right: the assurance that they would be afforded the "privileges and immunities" of citizenship in any of the several States in the Union to which they might travel.

What were the "Privileges and Immunities of Citizens in the several States"? That question was answered perhaps most famously by Justice Bushrod Washington sitting as Circuit
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Justice in *Corfield v. Coryell*, 6 F. Cas. 546, 551-552, F. Cas. No. 3230 (No. 3, 230) (CC ED Pa. 1825). In that case, a Pennsylvania citizen claimed that a New Jersey law prohibiting nonresidents from harvesting oysters from the State's waters violated Article IV, §2 because it deprived him, as an out-of-state citizen, of a right New Jersey availed to its own citizens. *Id.*, at 550. Justice Washington rejected that argument, refusing to "accede to the proposition" that Article IV, §2 entitled "citizens of the several states . . . to participate in *all* the rights which belong exclusively to the citizens of any other particular state." *Id.*, at 552 (emphasis added). In his view, Article IV, §2 did not guarantee equal access to all public benefits a State might choose to make available to its citizens. See *id.*, at 552. Instead, it applied only to those rights "which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments." *Id.*, at 551 (emphasis added). Other courts generally agreed with this principle. See, *e.g.*, *Abbott v. Bayley*, 23 Mass. 89, 92–93 (1827) (noting that the "privileges and immunities" of citizens in the several States protected by Article IV, §2 are "qualified and not absolute" because they do not grant a traveling citizen the right of "suffrage or of eligibility to office" in the State to which he travels).

When describing those "fundamental" rights, Justice Washington thought it "would perhaps be more tedious than difficult to enumerate" them all, but suggested that they could "be all comprehended under" a broad list of "general heads, " such as "[p]rotection by the government, " "the enjoyment of life and liberty, with the [177 L.Ed.2d 948] right to acquire and possess property of every kind, " "the benefit of the writ of habeas corpus, " and the right of access to "the courts of the state, " among others. [6] *Corfield*, *supra*, at 551-552.
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Notably, Justice Washington did not indicate whether Article IV, §2 *required* States to recognize these fundamental rights in their own citizens and thus in sojourning citizens alike, or whether the Clause simply prohibited the States from discriminating against sojourning citizens with respect to whatever fundamental rights state law happened to recognize. On this question, the weight of legal authorities at the time of Reconstruction indicated [130 S.Ct. 3068] that Article IV, §2 prohibited States from discriminating against sojourning citizens when recognizing fundamental rights, but did not require States to recognize those rights and did not prescribe their content. The highest courts of several States adopted this view, see, *e.g.*, *Livingston v. Van Ingen* , 9 Johns. 507, 561 (N.Y.Sup.Ct. 1812) (Yates, J.); *id.*, at 577 (Kent, J.); *Campbell v. Morris*, 3 H. & McH. 535, 553-554 (Md. Gen. Ct. 1797) (Chase, J.), as did several influential treatise-writers, see T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union 15–16, and n. 3 (1868) (reprint 1972) (describing Article IV, §2 as

designed "to prevent discrimination by the several States against the citizens and public proceedings of other States"); 2 J. Kent, Commentaries on American Law 35 (11th ed. 1867) (stating that Article IV, §2 entitles sojourning citizens "to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other"). This Court adopted the same conclusion in a unanimous opinion

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just one year after the Fourteenth Amendment was ratified. See *Paul v. Virginia*, 75 U.S. 168, 8 Wall. 168, 180, 19 L.Ed. 357 (1869).

The text examined so far demonstrates three points about the meaning of the Privileges or Immunities Clause in §1. First, "privileges" and "immunities" were synonyms for "rights." Second, both the States and the Federal Government had long recognized the inalienable rights of their citizens. Third, Article IV, §2 of the Constitution protected traveling citizens against state discrimination with respect to the fundamental rights of state citizenship.

Two questions still remain, both provoked by the textual similarity between §1's Privileges or Immunities Clause and Article IV, §2. The first involves the nature of the rights at stake: Are the privileges or immunities [177 L.Ed.2d 949] of "citizens of the United States" recognized by §1 the same as the privileges and immunities of "citizens in the several States" to which Article IV, §2 refers? The second involves the restriction imposed on the States: Does §1, like Article IV, §2, prohibit only discrimination with respect to certain rights *if* the State chooses to recognize them, or does it require States to recognize those rights? I address each question in turn.

B

I start with the nature of the rights that §1's Privileges or Immunities Clause protects. Section 1 overruled *Dred Scott's* holding that blacks were not citizens of either the United States or their own State and, thus, did not enjoy "the privileges and immunities of citizens" embodied in the Constitution. 60 U.S. 393, 19 How., at 417, 15 L.Ed. 691. The Court in *Dred Scott* did not distinguish between privileges and immunities of citizens of the United States and citizens in the several States, instead referring to the rights of citizens generally. It did, however, give examples of what the rights of citizens were-

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the constitutionally enumerated rights of "the full liberty of speech" and the right "to keep and carry arms." *Ibid.*

Section 1 protects the rights of citizens "of the United States" specifically. The evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution, including the right to keep and bear arms.

1

Nineteenth-century treaties through which the United States acquired territory from other sovereigns routinely promised inhabitants of the newly acquired territories [130 S.Ct. 3069] that they would enjoy all of the "rights, " "privileges, " and "immunities" of United States citizens. See, *e.g.*, Treaty of Amity, Settlement, and Limits, Art. 6, Feb. 22, 1819, 8 Stat. 256-258, T. S. No. 327 (entered into force Feb. 19, 1821) (cession of Florida) ("The inhabitants of the territories which his Catholic Majesty cedes to the United States, by this Treaty, shall be incorporated in the Union of

the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of *all the privileges, rights, and immunities, of the citizens of the United States*" (emphasis added)). [7]

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Commentators of the time explained that the rights and immunities of "citizens of the United States" recognized in these treaties "undoubtedly mean[t] those privileges that are common to all the citizens of this republic." Marcus, An Examination of the Expediency and Constitutionality of Prohibiting Slavery in the State of Missouri 17 (1819). It is therefore altogether unsurprising that several of these treaties [177 L.Ed.2d 950] identify liberties enumerated in the Constitution as privileges and immunities common to all United States citizens.

For example, the Louisiana Cession Act of 1803, which codified a treaty between the United States and France culminating in the Louisiana Purchase, provided that

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyments of *all the rights, advantages and immunities of citizens of the United States;* and in the mean time they shall be maintained and protected in *the free enjoyment of their liberty, property and the religion which they profess.*" Treaty Between the United States of America and the French Republic, Art. III, Apr. 30, 1803, 8 Stat. 202, T. S. No. 86 (emphasis added). [8]

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[130 S.Ct. 3070] The Louisiana Cession Act reveals even more about the privileges and immunities of United States citizenship because it provoked an extensive public debate on the meaning of that term. In 1820, when the Missouri Territory (which the United States acquired through the Cession Act) sought to enter the Union as a new State, a debate ensued over whether to prohibit slavery within Missouri as a condition of its admission. Some congressmen argued that prohibiting slavery in Missouri would deprive its inhabitants of the "privileges and immunities" they had been promised by the Cession Act. See, *e.g.*, 35 Annals of Cong. 1083 (1855) (remarks of Kentucky Rep. Hardin). But those who opposed slavery in Missouri argued that the right to hold slaves was merely a matter of state property law, not one of the privileges and immunities of United States citizenship guaranteed by the Act. [9]

Daniel Webster was among the leading proponents of the antislavery position. In his "Memorial to Congress, " Webster argued that "[t]he rights, advantages and immunities here spoken of [in the Cession Act] [177 L.Ed.2d 951] must . . . be such as are recognized or communicated by the Constitution of the United States, " not the "rights, advantages and immunities, derived exclusively from the *State* governments . . . ." D.

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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 (Dec. 15, 1819) (emphasis added). "The obvious meaning" of the Act, in Webster's view, was that "*the rights derived under the federal Constitution* shall be enjoyed by the inhabitants of [the territory]." *Id.*, at 15–16 (emphasis added). In other words, Webster articulated a distinction between the rights of United States citizenship and the rights of state citizenship, and argued that the former included those

rights "recognized or communicated by the Constitution." Since the right to hold slaves was not mentioned in the Constitution, it was not a right of federal citizenship.

Webster and his allies ultimately lost the debate over slavery in Missouri and the territory was admitted as a slave State as part of the now-famous Missouri Compromise. Missouri Enabling Act of March 6, 1820, ch. 22, §8, 3 Stat. 548. But their arguments continued to inform public understanding of the privileges and immunities of United States citizenship. In 1854, Webster's Memorial was republished in a pamphlet discussing the Nation's next major debate on slavery-the proposed repeal of the Missouri Compromise through the Kansas-Nebraska Act, see The Nebraska Question: Comprising Speeches in the United States Senate: Together with the History of the Missouri Compromise 9–12 (1854). It was published again in 1857 in a collection of famous American speeches. See Political Text-Book, or Encyclopedia: Containing Everything Necessary for the Reference of the Politicians and Statesmen of the United States 601–604 (M. Cluskey ed. 1857); see also Lash, 98 Geo. L. J., at 1294–1296 (describing Webster's arguments and their influence).

[130 S.Ct. 3071] 2

Evidence from the political branches in the years leading to the Fourteenth Amendment's adoption demonstrates broad public understanding that the privileges and immunities

of United States citizenship included rights set forth in the Constitution, just as Webster and his allies had argued. In 1868, President Andrew Johnson issued a proclamation granting amnesty to former Confederates, guaranteeing "to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason . . . with restoration of *all rights, privileges, and immunities under the Constitution* and the laws which have been made in pursuance thereof." 15 Stat. 712 (emphasis added).

Records from the 39th Congress further support this understanding.

a

After the Civil War, Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union. See Cong. Globe, 39th Cong., 1st Sess., 6, 30 (1865) (hereinafter 39th Cong. Globe); M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 57 (1986) (hereinafter Curtis). That Committee would ultimately [177 L.Ed.2d 952] recommend the adoption of the Fourteenth Amendment, justifying its recommendation by submitting a report to Congress that extensively catalogued the abuses of civil rights in the former slave States and argued that "adequate security for future peace and safety . . . can 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." See Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 15 (1866); H. R. Rep. No. 30, 39th Cong., 1st Sess., p. XXI (1866).

As the Court notes, the Committee's Report "was widely reprinted in the press and distributed by members of the 39th Congress to their constituents." *Ante*, at 3039, 177 L.Ed.2d, at 917 B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 264–265 (1914)

(noting that 150, 000 copies of the
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Report were printed and that it was widely distributed as a campaign document in the election of 1866). In addition, newspaper coverage suggests that the wider public was aware of the Committee's work even before the Report was issued. For example, the Fort Wayne Daily Democrat (which appears to have been unsupportive of the Committee's work) paraphrased a motion instructing the Committee to
"enquire into [the] expediency of amending the Constitution of the United States so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in *that instrument*." The Nigger Congress!, Fort Wayne Daily Democrat, Feb. 1, 1866, p. 4 (emphasis added).

b

Statements made by Members of Congress leading up to, and during, the debates on the Fourteenth Amendment point in the same direction. The record of these debates has been combed before. See *Adamson v. California*, 332 U.S. 46, 92-110, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) (Appendix to dissenting opinion of Black, J.) (concluding that the debates support the conclusion that §1 was understood to incorporate the Bill of Rights against the States); *ante*, at 3033, n. 9, 3040, n. 23, 177 L.Ed.2d, at 911, 918-919 (opinion of the Court) (counting the debates among other evidence that §1 applies the Second Amendment against the States). Before considering that record [130 S.Ct. 3072] here, it is important to clarify its relevance. When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted. Statements by legislators can assist in this process to the extent they demonstrate the manner in which the public used or understood a particular word or phrase. They can further assist to the extent there is evidence that these statements were disseminated to the public. In other words, this evidence is useful not because
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it demonstrates what the draftsmen of the text may have been thinking, but only insofar as it illuminates what the public understood the words chosen by the draftsmen to mean.

(1)

Three speeches stand out as particularly significant. Representative John Bingham, the principal draftsman of §1, delivered a speech on the floor of the House in February 1866 introducing his first draft of the provision. [177 L.Ed.2d 953] Bingham began by discussing *Barron* and its holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide "an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person." 39th Cong. Globe 1089–1090 (1866). Bingham emphasized that §1 was designed "to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It 'hath that extent-no more.'" *Id.*, at 1088.

Bingham's speech was printed in pamphlet form and broadly distributed in 1866 under the

title, "One Country, One Constitution, and One People, " and the subtitle, "In Support of the Proposed Amendment to Enforce the Bill of Rights." [10] Newspapers also reported his proposal, with the New York Times providing particularly extensive coverage,

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including a full reproduction of Bingham's first draft of §1 and his remarks that a constitutional amendment to "enforc[e]" the "immortal bill of rights" was "absolutely essential to American nationality." N.Y.Times, Feb. 27, 1866, p. 8.

Bingham's first draft of §1 was different from the version ultimately adopted. Of particular importance, the first draft granted Congress the "power to make all laws . . . necessary and proper to secure" the "citizens of each State all privileges and immunities of citizens in the several States, " rather than restricting state power to "abridge" the privileges or immunities of citizens of the United States. [11] 39th Cong. Globe 1088.

That draft was met with objections, which the Times covered extensively. A [130 S.Ct. 3073] front-page article hailed the "Clear and Forcible Speech" by Representative Robert Hale against the draft, explaining-and endorsing-Hale's view that Bingham's proposal would "confer upon Congress all the rights and power of legislation now reserved to the States" and would "in effect utterly obliterate State rights and State authority over their own internal affairs." [12] N.Y.Times, Feb. 28, 1866, p. 1.

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Critically, Hale did *not* object to the draft insofar as it purported to protect [177 L.Ed.2d 954] constitutional liberties against state interference. Indeed, Hale stated that he believed (incorrectly in light of *Barron*) that individual rights enumerated in the Constitution were already enforceable against the States. See 39th Cong. Globe 1064 ("I have, somehow or other, gone along with the impression that there is that sort of protection thrown over us in some way, whether with or without the sanction of a judicial decision that we are so protected"); see N.Y.Times, Feb. 28, 1866, at 1. Hale's misperception was not uncommon among members of the Reconstruction generation. See *infra*, at 3047-3048, 177 L.Ed.2d, at 960-961. But that is secondary to the point that the Times' coverage of this debate over §1's meaning suggests public awareness of its main contours-*i.e.*, that §1 would, at a minimum, enforce constitutionally enumerated rights of United States citizens against the States.

Bingham's draft was tabled for several months. In the interim, he delivered a second well-publicized speech, again arguing that a constitutional amendment was required to give Congress the power to enforce the Bill of Rights against the States. That speech was printed in pamphlet form, see Speech of Hon. John A. Bingham, of Ohio, on the Civil Rights Bill, Mar. 9, 1866 (Cong. Globe); see 39th Cong. Globe 1837 (remarks of Rep. Lawrence) (noting that the speech was "extensively published"), and the New York Times covered the speech on its front page. Thirty-Ninth Congress, N.Y.Times, Mar. 10, 1866, p. 1.

By the time the debates on the Fourteenth Amendment resumed, Bingham had amended his draft of §1 to include the text of the Privileges or Immunities Clause that was ultimately adopted. Senator Jacob Howard introduced the new draft on the floor of the Senate in the third speech relevant here. Howard explained that the Constitution recognized "a mass of privileges,

immunities, and rights, some of them secured by the second section of the fourth article of the
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Constitution, . . . some by the first eight amendments of the Constitution, " and that "there is no power given in the Constitution to enforce and to carry out any of these guarantees" against the States. 39th Cong. Globe 2765. Howard then stated that "the great object" of §1 was to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.*, at 2766. Section 1, he indicated, imposed "a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States." *Id.*, at 2765.

In describing these rights, Howard explained that they included "the privileges [130 S.Ct. 3074] and immunities spoken of" in Article IV, §2. *Id.*, at 2765. Although he did not catalogue the precise "nature" or "extent" of those rights, he thought "*Corfield v. Coryell*" provided a useful description. Howard then submitted that

"[t]o these privileges and immunities, whatever they may be- . . . should be added *the personal rights guarantied and secured by the first eight amendments of the Constitution*; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress [177 L.Ed.2d 955] of grievances, [and] . . . *the right to keep and to bear arms.*" *Ibid.* (emphasis added).

News of Howard's speech was carried in major newspapers across the country, including the New York Herald, see N.Y.Herald, May 24, 1866, p. 1, which was the best-selling paper in the Nation at that time, see A. Amar, The Bill of Rights: Creation and Reconstruction 187 (1998) (hereinafter Amar). [13] The New York Times carried the speech as well,
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reprinting a lengthy excerpt of Howard's remarks, including the statements quoted above. N.Y.Times, May 24, 1866, p. 1. The following day's Times editorialized on Howard's speech, predicting that "[t]o this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer no justifiable resistance, " suggesting that Bingham's narrower second draft had not been met with the same objections that Hale had raised against the first. N.Y.Times, May 25, 1866, p. 4.

As a whole, these well-circulated speeches indicate that §1 was understood to enforce constitutionally declared rights against the States, and they provide no suggestion that any language in the section other than the Privileges or Immunities Clause would accomplish that task.

(2)

When read against this backdrop, the civil rights legislation adopted by the 39th Congress in 1866 further supports this view. Between passing the Thirteenth Amendment-which outlawed slavery alone-and the Fourteenth Amendment, Congress passed two significant pieces of legislation. The first was the Civil Rights Act of 1866, which provided that "all persons born in the United States" were "citizens of the United States" and that "such citizens, of every race and color, . . . shall have the same right" to, among other things, "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." §1, 14 Stat. 27.

Both proponents and opponents of this Act described it as providing the "privileges" of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms. See 39th Cong. Globe 474 (remarks of Sen. Trumbull) (stating that "the late slaveholding

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States" had enacted laws "depriving persons of African descent of privileges which are essential to freemen, " including "prohibit[ing] any negro or mulatto from having fire-arms" and stating that "[t]he purpose of the bill under consideration is to destroy all these discriminations"); *id.*, at 1266–1267 (remarks[130 S.Ct. 3075] of Rep. Raymond) (opposing the Act, but recognizing that to "[m]ake a colored man a citizen of the United States" would guarantee to him, *inter alia*, "a defined *status* . . . a right to defend himself and his wife and children; a right to bear arms").

Three months later, Congress passed the Freedmen's Bureau Act, which also entitled all citizens to the "full and equal benefit of all laws and [177 L.Ed.2d 956] proceedings concerning personal liberty" and "personal security." Act of July 16, 1866, §14, 14 Stat. 176. The Act stated expressly that the rights of personal liberty and security protected by the Act "includ[ed] the constitutional right to bear arms." *Ibid.*

(3)

There is much else in the legislative record. Many statements by Members of Congress corroborate the view that the Privileges or Immunities Clause enforced constitutionally enumerated rights against the States. See Curtis 112 (collecting examples). I am not aware of any statement that directly refutes that proposition. That said, the record of the debates-like most legislative history-is less than crystal clear. In particular, much ambiguity derives from the fact that at least several Members described §1 as protecting the privileges and immunities of citizens "in the several States, " harkening back to Article IV, §2. See *supra*, at 3041, 832-833, 177 L.Ed.2d, at 954-955 (describing Sen. Howard's speech). These statements can be read to support the view that the Privileges or Immunities Clause protects some or all the fundamental rights of "citizens" described in *Corfield*. They can also be read to support the view that the Privileges or Immunities Clause, like Article IV, §2, prohibits only state discrimination with

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respect to those rights it covers, but does not deprive States of the power to deny those rights to all citizens equally.

I examine the rest of the historical record with this understanding. But for purposes of discerning what the public most likely thought the Privileges or Immunities Clause to mean, it is significant that the most widely publicized statements by the legislators who voted on §1—Bingham, Howard, and even Hale—point unambiguously toward the conclusion that the Privileges or Immunities Clause enforces at least those fundamental rights enumerated in the Constitution against the States, including the Second Amendment right to keep and bear arms.

3

Interpretations of the Fourteenth Amendment in the period immediately following its ratification help to establish the public understanding of the text at the time of its adoption.

Some of these interpretations come from Members of Congress. During an 1871 debate on

a bill to enforce the Fourteenth Amendment, Representative Henry Dawes listed the Constitution's first eight Amendments, including "the right to keep and bear arms, " before explaining that after the Civil War, the country "gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens" who formerly were slaves. Cong. Globe, 42d Cong., 1st Sess., 475-476 (1871). "It is all these, " Dawes explained, "which are comprehended in the words 'American citizen.'" *Id.*, at 476; *see also id.*, at 334 (remarks of Rep. Hoar) (stating that the Privileges or Immunities Clause referred to those rights "declared to belong to the citizen by the Constitution itself"). Even opponents of Fourteenth Amendment enforcement legislation acknowledged that the Privileges or Immunities Clause [130 S.Ct. 3076] protected constitutionally enumerated individual rights. See 2 Cong. Rec. 384-385 (1874) (remarks

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of Rep. Mills) (opposing enforcement law, but acknowledging, in referring to the Bill of Rights, [177 L.Ed.2d 957] that "[t]hese first amendments and some provisions of the Constitution of like import embrace the 'privileges and immunities' of citizenship as set forth in article 4, section 2 of the Constitution *and in the fourteenth amendment*" (emphasis added)); see Curtis 166-170 (collecting examples).

Legislation passed in furtherance of the Fourteenth Amendment demonstrates even more clearly this understanding. For example, Congress enacted the Civil Rights Act of 1871, 17 Stat. 13, which was titled in pertinent part "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, " and which is codified in the still-existing 42 U.S.C. §1983. That statute prohibits state officials from depriving citizens of "any rights, privileges, or immunities *secured by the Constitution.*" Rev. Stat. 1979, 42 U.S.C. §1983 (emphasis added). Although the Judiciary ignored this provision for decades after its enactment, this Court has come to interpret the statute, unremarkably in light of its text, as protecting constitutionally enumerated rights. *Monroe v. Pape*, 365 U.S. 167, 171, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

A Federal Court of Appeals decision written by a future Justice of this Court adopted the same understanding of the Privileges or Immunities Clause. See, *e.g.*, *United States v. Hall*, 26 F. Cas. 79, 82, F. Cas. No. 15282 (No. 15,282) (CC S.D. Ala. 1871) (Woods, J.) ("We think, therefore, that the . . . rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States"). In addition, two of the era's major constitutional treatises reflected the understanding that §1 would protect constitutionally enumerated rights from state abridgment. [14] A third such treatise unambiguously

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indicates that the Privileges or Immunities Clause accomplished this task. G. Paschal, The Constitution of the United States 290 (1868) (explaining that the rights listed in §1 had "already been guarantied" by Article IV and the Bill of Rights, but that "[t]he new feature declared" by §1 was that these rights, "which had been construed to apply only to the national government, are thus imposed upon the States").

Another example of public understanding comes from United States Attorney Daniel Corbin's

statement in an 1871 Ku Klux Klan prosecution. Corbin cited *Barron* and declared:

"[T]he fourteenth amendment changes all that theory, and lays the same restriction upon the States that before lay upon the Congress of the United States—that, as Congress heretofore could not interfere with the right of the citizen to keep and bear arms, now, after the adoption of the fourteenth amendment, the State cannot interfere with the right of the citizen to keep and bear arms. The right to keep [177 L.Ed.2d 958] and bear arms is included in the fourteenth amendment [130 S.Ct. 3077], under 'privileges and immunities.'" Proceedings in the Ku Klux Trials at Columbia, S. C., in the United States Circuit Court, November Term, 1871, p. 147 (1872).

This evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep

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and bear arms. As the Court demonstrates, there can be no doubt that §1 was understood to enforce the Second Amendment against the States. See *ante*, at 3038 – 3044, 177 L.Ed.2d, at 916-922. In my view, this is because the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.

C

The next question is whether the Privileges or Immunities Clause merely prohibits States from discriminating among citizens if they recognize the Second Amendment's right to keep and bear arms, or whether the Clause requires States to recognize the right. The municipal respondents, Chicago and Oak Park, argue for the former interpretation. They contend that the Second Amendment, as applied to the States through the Fourteenth, authorizes a State to impose an outright ban on handgun possession such as the ones at issue here so long as a State applies it to all citizens equally. [15] The Court explains why this antidiscrimination-only reading of §1 as a whole is "implausible." *Ante*, at 3042 – 3043, 177 L.Ed.2d, at 921 (citing Brief for Municipal Respondents 64). I agree, but because I think it is the Privileges or Immunities Clause that applies this right to the States, I must explain why this Clause in particular protects against more than just state discrimination, and in fact establishes a minimum baseline of rights for all American citizens.

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1

I begin, again, with the text. The Privileges or Immunities Clause opens with the command that "*No State shall*" abridge the privileges or immunities of citizens of the United States. Amdt. 14, §1 (emphasis added). The very same phrase opens Article I, §10 of the Constitution, which prohibits the States from "pass[ing] any Bill of Attainder" or "ex post facto Law, " among other things. Article I, §10 is one of the few constitutional provisions that limits state authority. In *Barron*, when Chief Justice Marshall interpreted the Bill of Rights as lacking "plain and intelligible language" restricting state power to infringe upon individual liberties, he pointed to Article I, §10 as an example of text that would have accomplished that task. 7 Pet., at 250, 32 U.S. 243, 8 L.Ed. 672. Indeed, Chief Justice Marshall would later describe Article I, § 10, [177 L.Ed.2d 959] as "a bill of rights for the people of each state." *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 138, 3 L.Ed. 162 (1810). Thus, the fact that the Privileges or Immunities Clause uses the command "[n]o State shall"-which Article IV, § 2, [130 S.Ct. 3078] does not—strongly suggests that the former imposes

a greater restriction on state power than the latter.

This interpretation is strengthened when one considers that the Privileges or Immunities Clause uses the verb "abridge, " rather than "discriminate, " to describe the limit it imposes on state authority. The Webster's dictionary in use at the time of Reconstruction defines the word "abridge" to mean "[t]o deprive; to cut off; . . . as, to *abridge* one of his rights." Webster, An American Dictionary of the English Language, at 6. The Clause is thus best understood to impose a limitation on state power to infringe upon pre-existing substantive rights. It raises no indication that the Framers of the Clause used the word "abridge" to prohibit only discrimination.

This most natural textual reading is underscored by a well-publicized revision to the Fourteenth Amendment that the Reconstruction Congress rejected. After several

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Southern States refused to ratify the Amendment, President Johnson met with their Governors to draft a compromise. N.Y.Times, Feb. 5, 1867, p. 5. Their proposal eliminated Congress' power to enforce the Amendment (granted in §5), and replaced the Privileges or Immunities Clause in §1 with the following:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States in which they reside, and the Citizens of each State shall be entitled to all *the privileges and immunities of citizens in the several States.*" Draft reprinted in 1 Documentary History of Reconstruction 240 (W. Fleming ed. 1950) (hereinafter Fleming).

Significantly, this proposal removed the "[n]o State shall" directive and the verb "abridge" from §1, and also changed the class of rights to be protected from those belonging to "citizens of the United States" to those of the "citizens in the several States." This phrasing is materially indistinguishable from Article IV, §2, which generally was understood as an antidiscrimination provision alone. See *supra*, at 3066 – 3068, 177 L.Ed.2d, at 947-948. The proposal thus strongly indicates that at least the President of the United States and several southern Governors thought that the Privileges or Immunities Clause, which they unsuccessfully tried to revise, prohibited more than just state-sponsored discrimination.

2

The argument that the Privileges or Immunities Clause prohibits no more than discrimination often is followed by a claim that public discussion of the Clause, and of §1 generally, was not extensive. Because of this, the argument goes, §1 must not have been understood to accomplish such a significant task as subjecting States to federal enforcement of a minimum baseline of rights. That argument overlooks

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critical aspects of the Nation's history that underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States, including the right to keep and bear arms.

[177 L.Ed.2d 960] a

I turn first to public debate at the time of ratification. It is true that the congressional debates over §1 were relatively brief. It is also true that there is little evidence of extensive debate in the

States. Many state legislatures did not keep records of their debates, and the few records that do exist reveal only modest discussion. See Curtis 145. These facts are not surprising.

First, however consequential we consider the question today, the nationalization of constitutional rights was not the most [130 S.Ct. 3079] controversial aspect of the Fourteenth Amendment at the time of its ratification. The Nation had just endured a tumultuous civil war, and §§2, 3, and 4—which reduced the representation of States that denied voting rights to blacks, deprived most former Confederate officers of the power to hold elective office, and required States to disavow Confederate war debts— were far more polarizing and consumed far more political attention. See Wildenthal 1600; Hardy, Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868, 30 Whittier L. Rev. 695, 699 (2009).

Second, the congressional debates on the Fourteenth Amendment reveal that many representatives, and probably many citizens, believed that the Thirteenth Amendment, the 1866 Civil Rights legislation, or some combination of the two, had already enforced constitutional rights against the States. Justice Black's dissent in *Adamson* chronicles this point in detail. 332 U.S., at 107-108, 67 S.Ct. 1672, 91 L.Ed. 1903 (Appendix to dissenting opinion). Regardless of whether that understanding was accurate as a matter of constitutional law, it helps to explain why

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Congressmen had little to say during the debates about §1. See *ibid.*

Third, while *Barron* made plain that the Bill of Rights was not legally enforceable against the States, see *supra*, at 3059, 177 L.Ed.2d, at 939, the significance of that holding should not be overstated. Like the Framers, see *supra*, at 3066, 177 L.Ed.2d, at 946-947, many 19th-century Americans understood the Bill of Rights to declare inalienable rights that pre-existed all government. Thus, even though the Bill of Rights technically applied only to the Federal Government, many believed that it declared rights that no legitimate government could abridge.

Chief Justice Henry Lumpkin's decision for the Georgia Supreme Court in *Nunn v. State*, 1 Ga. 243 (1846), illustrates this view. In assessing state power to regulate firearm possession, Lumpkin wrote that he was "aware that it has been decided, that [the Second Amendment], like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual States." *Id.*, at 250. But he still considered the right to keep and bear arms as "an unalienable right, which lies at the bottom of every free government, " and thus found the States bound to honor it. *Ibid.* Other state courts adopted similar positions with respect to the right to keep and bear arms and other enumerated rights. [16] Some courts even suggested that the protections in the Bill of Rights were legally enforceable [177 L.Ed.2d 961] against the States, *Barron* notwithstanding. [17] A prominent treatise of the era took the same position. W. Rawle, A View of the Constitution of the

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United States of America 124–125 (2d ed. 1829) (arguing that certain of the first eight Amendments "appl[y] to the state legislatures" because those Amendments "form parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them"); *id.*, at 125-126 (describing the Second Amendment "right of the people to keep and bear arms" as "a restraint on both" Congress and the States); see also *Heller*, 554 U.S., at

607, [130 S.Ct. 3080] 128 S.Ct, at 2805-2806, 171 L.Ed.2d 637, 666 (describing Rawle's treatise as "influential"). Certain abolitionist leaders adhered to this view as well. Lysander Spooner championed the popular abolitionist argument that slavery was inconsistent with constitutional principles, citing as evidence the fact that it deprived black Americans of the "natural right of all men 'to keep and bear arms' for their personal defence, " which he believed the Constitution "prohibit[ed] both Congress and the State governments from infringing." L. Spooner, The Unconstitutionality of Slavery 98 (1860).

In sum, some appear to have believed that the Bill of Rights *did* apply to the States, even though this Court had squarely rejected that theory. See, *e.g.*, *supra*, at 3072-3073, 177 L.Ed.2d, at 953-954 (recounting Rep. Hale's argument to this effect). Many others believed that the liberties codified in the Bill of Rights were ones that no State *should* abridge, even though they understood that the Bill technically did not apply to States. These beliefs, combined with the fact that most state constitutions recognized many, if not all, of the individual rights enumerated in the Bill of Rights, made the need for federal enforcement of constitutional liberties against the States an afterthought. See *ante*, at 777, 177 L.Ed.2d, at 920 (opinion of the Court) (noting that, "[i]n 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms"). That changed with the national conflict over slavery.

b

In the contentious years leading up to the Civil War, those who sought to retain the institution of slavery found that to

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do so, it was necessary to eliminate more and more of the basic liberties of slaves, free blacks, and white abolitionists. Congressman Tobias Plants explained that slaveholders "could not hold [slaves] safely where dissent was permitted, " so they decided that "all dissent must be suppressed by the strong hand of power." 39th Cong. Globe 1013. The measures they used were ruthless, repressed virtually every right recognized in the Constitution, and demonstrated that preventing only discriminatory state firearms restrictions would have been a hollow assurance for liberty. Public reaction indicates that the American people understood this point.

The overarching goal of pro-slavery forces was to repress the spread of [177 L.Ed.2d 962] abolitionist thought and the concomitant risk of a slave rebellion. Indeed, it is difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures. Slaves and free blacks represented a substantial percentage of the population and posed a severe threat to Southern order if they were not kept in their place. According to the 1860 Census, slaves represented one quarter or more of the population in 11 of the 15 slave States, nearly half the population in Alabama, Florida, Georgia, and Louisiana, and *more* than 50% of the population in Mississippi and South Carolina. Statistics of the United States (Including Mortality, Property, &c.,) in 1860, The Eighth Census 336-350 (1866).

The Southern fear of slave rebellion was not unfounded. Although there were others, two particularly notable slave uprisings heavily influenced slaveholders in the South. In 1822, a group of free blacks and slaves led by Denmark Vesey planned a rebellion in which they would slay their masters and flee to Haiti. H. Aptheker, American Negro Slave Revolts 268–270 (1983). The plan

was foiled, leading to the swift arrest of 130 blacks, and the execution of 37, including Vesey. *Id.*, at 271. Still, slaveowners took notice-it was reportedly feared that as many as 6, 600 to 9, 000 slaves and

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free blacks were involved in the plot. *Id.*, at 272. A few years later, [130 S.Ct. 3081] the fear of rebellion was realized. An uprising led by Nat Turner took the lives of at least 57 whites before it was suppressed. *Id.*, at 300-302.

The fear generated by these and other rebellions led Southern legislatures to take particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense. Teaching slaves to read (even the Bible) was a criminal offense punished severely in some States. See K. Stampp, The Peculiar Institution: Slavery in the Ante-bellum South 208, 211 (1956). Virginia made it a crime for a member of an "abolition" society to enter the State and argue "that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery." 1835-1836 Va. Acts ch. 66, p. 44. Other States prohibited the circulation of literature denying a master's right to property in his slaves and passed laws requiring postmasters to inspect the mails in search of such material. C. Eaton, The Freedom-of-Thought Struggle in the Old South 118-143,199-200 (1964).

Many legislatures amended their laws prohibiting slaves from carrying firearms [18] to apply the prohibition to free blacks as well. See, *e.g.*, Act of Dec. 23, 1833, §7, 1833 Ga. Acts pp. 226, 228 (declaring that "it shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever"); H. Aptheker, Nat Turner's Slave Rebellion 74-76, 83-94 (1966) (discussing similar Maryland and Virginia statutes); see also Act of Mar. 15,

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1852, ch. 206, 1852 Miss. Laws p. 328 (repealing laws allowing free blacks to obtain firearms licenses); Act of Jan. 31, 1831, 1831 Fla. Acts p. 30 (same). Florida made it the "duty" of white citizen "patrol[s] to search negro houses or other suspected [177 L.Ed.2d 963] places, for fire arms." Act of Feb. 17, 1833, ch. 671, 1833 Fla. Acts pp. 26, 30. If they found any firearms, the patrols were to take the offending slave or free black "to the nearest justice of the peace, " whereupon he would be " sever[ely] punished" by "whipping on the bare back, not exceeding thirty-nine lashes, " unless he could give a "plain and satisfactory" explanation of how he came to possess the gun. *Ibid.*

Southern blacks were not alone in facing threats to their personal liberty and security during the antebellum era. Mob violence in many Northern cities presented dangers as well. Cottrol & Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L. J. 309, 340 (1991) (hereinafter Cottrol) (recounting a July 1834 mob attack against "churches, homes, and businesses of white abolitionists and blacks" in New York that involved "upwards of twenty thousand people and required the intervention of the militia to suppress"); *ibid.* (noting an uprising in Boston nine years later in which a confrontation between a group of white sailors and four blacks led "a mob of several hundred whites" to "attac[k] and severely beat every black they could find").

c

After the Civil War, Southern anxiety about an uprising among the newly freed slaves peaked. As Representative Thaddeus Stevens is reported to have said, "[w]hen it was first proposed to free the slaves, and arm the blacks, did not half the nation tremble? The prim conservatives, [130 S.Ct. 3082] the snobs, and the male waiting-maids in Congress, were in hysterics." K. Stampp, The Era of Reconstruction, 1865– 1877, p. 104 (1965) (hereinafter Era of Reconstruction).

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As the Court explains, this fear led to "systematic efforts" in the "old Confederacy" to disarm the more than 180,000 freedmen who had served in the Union Army, as well as other free blacks. See *ante*, at 3038, 177 L.Ed.2d, at 917. Some States formally prohibited blacks from possessing firearms. *Ante,* at 3038-3039 (quoting 1865 Miss. Laws p. 165, §1, reprinted in 1 Fleming 289). Others enacted legislation prohibiting blacks from carrying firearms without a license, a restriction not imposed on whites. See, *e.g.*, La. Statute of 1865, reprinted in *id.,* at 280. Additionally, "[t]hroughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves." *Ante*, at 3039, 177 L.Ed.2d, at 917.

As the Court makes crystal clear, if the Fourteenth Amendment "had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African-Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers." *Ante,* at 3043, 177 L.Ed.2d, at 921.. In the years following the Civil War, a law banning firearm possession outright "would have been nondiscriminatory only in the formal sense, " for it would have "left firearms in the hands of the militia and local peace officers." *Ibid.*

Evidence suggests that the public understood this at the time the Fourteenth Amendment was ratified. The publicly circulated Report of the Joint Committee on Reconstruction extensively detailed these abuses, see *ante,* at 3038 - 3039, 177 L.Ed.2d, at 917 (collecting examples), and statements by citizens indicate that they looked [177 L.Ed.2d 964] to the Committee to provide a federal solution to this problem, see, *e.g.*, 39th Cong. Globe 337 (remarks of Rep. Sumner) (introducing "a memorial from the colored citizens of the State of South Carolina" asking for, *inter alia*, "constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press").

One way in which the Federal Government responded was to issue military orders countermanding Southern arms legislation.

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See, *e.g.*, Jan. 17, 1866, order from Major General D. E. Sickles, reprinted in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 37 (1871) ("The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed"). The significance of these steps was not lost on those they were designed to protect. After one such order was issued, The Christian Recorder, published by the African Methodist Episcopal Church, published the following editorial:

"'We have several times alluded to the fact that the Constitution of the United States, guaranties to every citizen the right to keep and bear arms. . . . All men, without the distinction of color, have the

right to keep arms to defend their homes, families, or themselves.'

"We are glad to learn that [the] Commissioner for this State . . . has given freedmen to understand that they have as good a right to keep fire arms as any other citizens. The Constitution of the United States is the supreme law of the land, and we will be governed by that at present." Right to Bear Arms, Phila., Pa., Christian Recorder, Feb. 24, 1866, pp. 29–30.

The same month, The Loyal Georgian carried a letter to the editor asking "Have colored persons a right to own and carry [130 S.Ct. 3083] fire arms?-A Colored Citizen." The editors responded as follows:

"Almost every day, we are asked questions similar to the above. We answer *certainly* you have the *same* right to own and carry fire arms that *other* citizens have. You are not only free but citizens of the United States and, as such, entitled to the same privileges granted to other citizens by the Constitution of the United States.

.... .

". . . Article II, of the amendments to the Constitution of the United States, gives the people the right to bear

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arms and states that this right shall not be infringed. . . . All men, without distinction of color, have the right to keep arms to defend their homes, families or themselves." Letter to the Editor, Augusta, Ga., Loyal Georgian, Feb. 3, 1866, p. 3.

These statements are consistent with the arguments of abolitionists during the antebellum era that slavery, and the slave States' efforts to retain it, violated the constitutional rights of individuals-rights the abolitionists described as among the privileges and immunities of citizenship. See, *e.g.*, J. Tiffany, Treatise on the Unconstitutionality of American Slavery 56 (1849) ("pledg[ing] . . . to see that all the rights, privileges, and immunities, granted by the constitution of the United States, are extended to all"); *id.*, at 99 (describing the "right to keep and bear arms" as one of those rights secured by "the constitution of the United States"). The problem abolitionists [177 L.Ed.2d 965] sought to remedy was that, under *Dred Scott*, blacks were not entitled to the privileges and immunities of citizens under the Federal Constitution and that, in many States, whatever inalienable rights state law recognized did not apply to blacks. See, *e.g.*, *Cooper v. Savannah*, 4 Ga. 68, 72 (1848) (deciding, just two years after Chief Justice Lumpkin's opinion in *Nunn* recognizing the right to keep and bear arms, see *supra*, at 3079 - 3080, 177 L.Ed.2d, at 960, that "[f]ree persons of color have never been recognized here as citizens; they are not entitled to bear arms").

Section 1 guaranteed the rights of citizenship in the United States and in the several States without regard to race. But it was understood that liberty would be assured little protection if §1 left each State to decide which privileges or immunities of United States citizenship it would protect. As Frederick Douglass explained before §1's adoption, "the Legislatures of the South can take from him the right to keep and bear arms, as they can-they would not allow a negro to walk with a cane where I came from, they would not allow five of them to assemble together." In

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What New Skin Will the Old Snake Come Forth? An Address Delivered in New York, New York,

on May 10, 1865, reprinted in 4 The Frederick Douglass Papers 79, 83–84 (J. Blassingame & J. McKivigan eds., 1991) (footnote omitted). "Notwithstanding the provision in the Constitution of the United States, that the right to keep and bear arms shall not be abridged, " Douglass explained that "the black man has never had the right either to keep or bear arms." *Id.*, at 84. Absent a constitutional amendment to enforce that right against the States, he insisted that "the work of the Abolitionists [wa]s not finished." *Ibid.*

This history confirms what the text of the Privileges or Immunities Clause most naturally suggests: Consistent with its command that "[n]o State shall . . . abridge" the rights of United States citizens, the Clause establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them. [19]

[130 S.Ct. 3084] III

My conclusion is contrary to this Court's precedents, which hold that the Second Amendment right to keep and bear arms is not a privilege of United States citizenship. See *Cruikshank*, 92 U.S., at 548–549, 551-553, 23 L.Ed. 588. I must, therefore, consider whether *stare decisis requires* retention of those precedents. As mentioned at the outset, my inquiry is limited to the right at issue here. Thus, I do not endeavor to decide in this case whether, or to what extent, the Privileges or Immunities Clause applies any other rights enumerated

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in the Constitution against the States. [20] Nor do I suggest that the *stare decisis* considerations surrounding [177 L.Ed.2d 966] the application of the right to keep and bear arms against the States would be the same as those surrounding another right protected by the Privileges or Immunities Clause. I consider *stare decisis* only as it applies to the question presented here.

A

This inquiry begins with the *Slaughter-House Cases*. There, this Court upheld a Louisiana statute granting a monopoly on livestock butchering in and around the city of New Orleans to a newly incorporated company. 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394. Butchers excluded by the monopoly sued, claiming that the statute violated the Privileges or Immunities Clause because it interfered with their right to pursue and "exercise their trade." *Id.*, at 60, 16 Wall. 36, 21 L.Ed. 394. This Court rejected the butchers' claim, holding that their asserted right was not a privilege or immunity of American citizenship, but one governed by the States alone. The Court held that the Privileges or Immunities Clause protected only rights of *federal* citizenship—those "which owe their existence to the Federal government, its National character, its Constitution, or its laws, " *id.*, at 79, 16 Wall. 36, 21 L.Ed. 394 --and did not protect *any* of the rights of state citizenship,

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id., at 74, 16 Wall. 36, 21 L.Ed. 394. In other words, the Court defined the two sets of rights as mutually exclusive.

After separating these two sets of rights, the Court defined the rights of state citizenship as "embrac[ing] nearly every civil right for the establishment and protection of which organized government is instituted"—that is, all those rights listed in *Corfield*. 83 U.S. 36, 16 Wall., at 76, 21 L.Ed. 394 (referring to "those rights" that "Judge Washington" described). That left very few rights of [130 S.Ct. 3085] federal citizenship for the Privileges or Immunities Clause to protect. The Court

suggested a handful of possibilities, such as the "right of free access to [federal] seaports, " protection of the Federal Government while traveling "on the high seas, " and even two rights listed in the Constitution. *Id.*, at 79, 16 Wall. 36, 21 L.Ed. 394 (noting "[t]he right to peaceably assemble" and "the privilege of the writ of *habeas corpus*"); see *supra*, at 3060, 177 L.Ed.2d, at 940. But its decision to interpret the rights of state and federal citizenship as mutually exclusive led the Court in future cases to conclude that constitutionally enumerated rights were excluded from the Privileges or Immunities Clause's scope. See *Cruikshank*, *supra*.

I reject that understanding. There was no reason to interpret the Privileges or Immunities Clause as putting the Court to the extreme choice of interpreting the "privileges and immunities" of federal citizenship to mean either all those rights listed in *Corfield*, or almost no rights at all. 83 U.S. 36, 16 Wall., at 76, 21 L.Ed. 394. The record is scant that the public understood the Clause to make the Federal Government "a perpetual censor upon all legislation of the States" as the [177 L.Ed.2d 967] *Slaughter-House* majority feared. *Id.*, at 78, 16 Wall. 36, 21 L.Ed. 394. For one thing, *Corfield* listed the "elective franchise" as one of the privileges and immunities of "citizens of the several states, " 6 F. Cas., at 552, yet Congress and the States still found it necessary to adopt the Fifteenth Amendment—which protects "[t]he right of citizens of the United States to vote"-two years after the Fourteenth Amendment's passage. If the Privileges or Immunities Clause were understood to protect every

conceivable civil right from state abridgment, the Fifteenth Amendment would have been redundant.

The better view, in light of the States and Federal Government's shared history of recognizing certain inalienable rights in their citizens, is that the privileges and immunities of state and federal citizenship overlap. This is not to say that the privileges and immunities of state and federal citizenship are the same. At the time of the Fourteenth Amendment's ratification, States performed many more functions than the Federal Government, and it is unlikely that, simply by referring to "privileges or immunities, " the Framers of §1 meant to transfer every right mentioned in *Corfield* to congressional oversight. As discussed, "privileges" and "immunities" were understood only as synonyms for "rights." See *supra*, at 3063-3064, 177 L.Ed.2d, at 943-944. It was their attachment to a particular group that gave them content, and the text and history recounted here indicate that the rights of United States citizens were not perfectly identical to the rights of citizens "in the several States." Justice Swayne, one of the dissenters in *Slaughter-House* , made the point clear:

"The citizen of a State has the *same* fundamental rights as a citizen of the United States, *and also certain others*, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection.83 U.S. 36, 16 Wall., at 126, 21 L.Ed. 394 (emphasis added).

Because the privileges and immunities of American citizenship include rights enumerated in the Constitution, they overlap to at least some extent with the privileges and immunities

traditionally recognized in citizens in the several States.

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A separate question is whether the privileges and immunities of American citizenship include any rights besides those enumerated in the Constitution. The four [130 S.Ct. 3086] dissenting Justices in *Slaughter-House* would have held that the Privileges or Immunities Clause protected the unenumerated right that the butchers in that case asserted. See *id.*, at 83, 16 Wall. 36, 21 L.Ed. 394 (opinion of Field, J.); *id.*, at 111, 16 Wall. 36, 21 L.Ed. 394 (opinion of Bradley, J.); *id.*, at 124, 16 Wall. 36, 21 L.Ed. 394 (opinion of Swayne, J.). Because this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights, or whether the Court's judgment in *Slaughter-House* was correct.

Still, it is argued that the mere possibility that the Privileges or Immunities Clause may enforce unenumerated rights against the States creates "'special hazards'" that should prevent this Court from returning to [177 L.Ed.2d 968] the original meaning of the Clause. [21] *Post*, at 3089-3090, 177 L.Ed.2d, at 971 (Stevens, J., dissenting). Ironically, the same objection applies to the Court's substantive due process jurisprudence, which illustrates the risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts. But I see no reason to assume that such hazards apply to the Privileges or Immunities Clause. The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited. See, *e.g.*, Art. I, §8, cl. 18 (Necessary and Proper Clause); Amdt. 8 (Cruel and Unusual Punishments Clause).

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When the inquiry focuses on what the ratifying era understood the Privileges or Immunities Clause to mean, interpreting it should be no more "hazardous" than interpreting these other constitutional provisions by using the same approach. To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer. I believe those questions are more worthy of this Court's attention—and far more likely to yield discernable answers-than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support.

Finding these impediments to returning to the original meaning overstated, I reject *Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship. I next proceed to the *stare decisis* considerations surrounding the precedent that expressly controls the question presented here.

B

Three years after *Slaughter-House*, the Court in *Cruik-shank* squarely held that the right to keep and bear arms was not a privilege of American citizenship, thereby over- turning the convictions of militia members responsible for the brutal Colfax Massacre. See *supra*, at 3027 - 3028, 177 L.Ed.2d, at 940. Cruikshank is not a precedent entitled to any respect. The flaws in its interpretation of the Privileges or Immunities Clause are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone. But, the consequences

of *Cruikshank* warrant mention as well.

[130 S.Ct. 3087] *Cruikshank*'s holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them

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into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were [177 L.Ed.2d 969] tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens.

Take, for example, the Hamburg Massacre of 1876. There, a white citizen militia sought out and murdered a troop of black militiamen for no other reason than that they had dared to conduct a celebratory Fourth of July parade through their mostly black town. The white militia commander, "Pitchfork" Ben Tillman, later described this massacre with pride: "[T]he leading white men of Edgefield" had decided "to seize the first opportunity that the negroes might offer them to provoke a riot and teach the negroes a lesson by having the whites demonstrate their superiority by killing as many of them as was justifiable." S. Kantrowitz, Ben Tillman & the Reconstruction of White Supremacy 67 (2000) (ellipsis, brackets, and internal quotation marks omitted). None of the perpetrators of the Hamburg murders was ever brought to justice. [22]

Organized terrorism like that perpetuated by Tillman and his cohorts proliferated in the absence of federal enforcement of constitutional rights. Militias such as the Ku Klux Klan, the Knights of the White Camellia, the White Brotherhood, the Pale Faces, and the '76 Association spread terror among blacks and white Republicans by breaking up Republican meetings, threatening political leaders, and whipping black militiamen. Era of Reconstruction, 199-200; Curtis

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156. These groups raped, murdered, lynched, and robbed as a means of intimidating, and instilling pervasive fear in, those whom they despised. A. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction 28–46 (1995).

Although Congress enacted legislation to suppress these activities, [23] Klan tactics remained a constant presence in the lives of Southern blacks for decades. Between 1882 and 1968, there were at least 3, 446 reported lynchings of blacks in the South. Cottrol 351–352. They were tortured and killed for a wide array of alleged crimes, without even the slightest hint of due process. Emmit Till, for example, was killed in 1955 for allegedly whistling at a white woman. S. Whitfield, A Death in the Delta: The Story of Emmett Till 15–31 (1988). The fates of other targets of mob violence were equally depraved. See, *e.g.*, Lynched Negro and Wife Were First Mutilated, Vicksburg (Miss.) Evening Post, Feb. 8, 1904, reprinted in R. Ginzburg, 100 Years [130 S.Ct. 3088] of Lynchings 63 (1988); Negro Shot Dead for Kissing His White Girlfriend, Chi. Defender, Feb. 31, 1915, in *id.*, at 95 (reporting incident in Florida); La. Negro Is Burned Alive Screaming "I Didn't Do It, " Cleveland Gazette, Dec. 13, 1914, in *id.*, at 93 (reporting incident in Louisiana).

The use of firearms for self-defense was often the only way black citizens [177 L.Ed.2d 970] could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to

have explained, "'[t]he Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.'" Church Burnings Follow Negro Agitator's Lynching, Chicago Defender, Sept. 6, 1919, in *id.*, at 124. Sometimes, as in Cooper's case, self-defense did not succeed. He was dragged from his home by a mob and

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killed as his wife looked on. *Ibid.* But at other times, the use of firearms allowed targets of mob violence to survive. One man recalled the night during his childhood when his father stood armed at a jail until morning to ward off lynchers. See Cottrol, 354. The experience left him with a sense, "not 'of powerlessness, but of the "possibilities of salvation"'" that came from standing up to intimidation. *Ibid.*

In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the war over slavery. There is nothing about *Cruikshank*'s contrary holding that warrants its retention.

* * *

Timbs v Indiana, 139 S.Ct. 682

Justice Gorsuch concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendments Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendments Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. See, *e.g.*, *post*, at 691 - 692 (THOMAS, J., concurring in judgment); *McDonald v. Chicago,* 561 U.S. 742, 805-858, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment) (documenting evidence that the "privileges or immunities of citizens of the United States" include, at minimum, the individual rights enumerated in the Bill of Rights); Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509 (2007); A. Amar, The Bill of Rights: Creation and Reconstruction 163-214 (1998); M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986). But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

Timbs v Indiana, 139 S.Ct. 682
Justice Thomas concurring in the judgement.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendments prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendments Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." "On its face, this appears to grant ... United States citizens a certain collection of rights— *i.e.*, privileges or immunities— attributable to that status." *McDonald v. Chicago,* 561 U.S. 742, 808, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment). But as I have previously explained, this Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause "quite narrowly." *Id.,* at 808-809, 130 S.Ct. 3020. Litigants seeking federal protection of substantive rights against the States thus needed "an alternative fount of such rights," and this Court "found one in a [139 S.Ct. 692] most curious place," *id.,* at 809, 130 S.Ct. 3020— the Fourteenth Amendments Due Process Clause, which prohibits "any State" from "depriv[ing] any person of life, liberty, or property, without due process of law."

Because this Clause speaks only to "process," the Court has "long struggled to define" what substantive rights it protects. *McDonald, supra,* at 810, 130 S.Ct. 3020 (opinion of THOMAS, J.). The Court ordinarily says, as it does today, that the Clause protects rights that are "fundamental." *Ante,* at 686 - 687, 687 - 688, 689 - 690, 690 - 691. Sometimes that means rights that are " deeply rooted in this Nations history and tradition. " *Ante,* at 687 - 688, 690 - 691 (quoting *McDonald, supra,* at 767, 130 S.Ct. 3020 (majority opinion)). Other times, when that formulation proves too restrictive, the Court defines the universe of "fundamental" rights so broadly as to border on meaningless. See, *e.g., Obergefell v. Hodges,* 576 U.S. __, __ - __, 135 S.Ct. 2584, 2593, 192 L.Ed.2d 609 (2015) ("rights that allow persons, within a lawful realm, to define and express their identity"); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) ("At the heart of liberty is the right to define ones own concept of existence, of meaning, of the universe, and of the mystery of human life"). Because the oxymoronic "substantive" "due process" doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any "guiding principle to distinguish fundamental rights that warrant protection from nonfundamental rights that do not." *McDonald, supra, at 811,* 130 S.Ct. 3020 (opinion of THOMAS, J.). And because the Courts substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Courts most notoriously incorrect decisions. *E.g., Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Dred Scott v. Sandford,* 19 How. 393, 450, 15 L.Ed. 691 (1857).

I

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." "On its face, this appears to grant ... United States citizens a certain collection of rights— *i.e.*, privileges or immunities— attributable to that status." *McDonald v. Chicago,* 561 U.S. 742, 808, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment). But as I have previously explained, this Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause "quite narrowly." *Id.,* at 808-809, 130 S.Ct. 3020. Litigants seeking federal protection of substantive rights against the States thus needed "an alternative fount of such rights," and this Court "found one in a [139 S.Ct. 692] most curious place," *id.,* at 809, 130 S.Ct. 3020— the Fourteenth Amendments Due Process Clause, which prohibits "any State" from "depriv[ing] any person of life, liberty, or property, without due process of law."

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The present case illustrates the incongruity of the Courts due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to " proceed according to the "law of the land"— that is, according to written constitutional and statutory provisions, " or that the State failed to provide "some baseline procedures." *Nelson v. Colorado,* 581 U.S. __, __, n. 1, 137 S.Ct. 1249, 1264, n. 1, 197 L.Ed.2d 611 (2017) (THOMAS, J., dissenting). His claim has nothing to do with any "process" "due" him. I therefore decline to apply the "legal fiction" of substantive due process. *McDonald,* 561 U.S., at 811, 130 S.Ct. 3020 (opinion

of THOMAS, J.).

II

When the Fourteenth Amendment was ratified, "the terms privileges and immunities had an established meaning as synonyms for rights. " *Id.,* at 813, 130 S.Ct. 3020. Those "rights" were the "inalienable rights" of citizens that had been "long recognized," and "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights" against interference by the States. *Id.,* at 822, 837, 130 S.Ct. 3020. Many of these rights had been adopted from English law into colonial charters, then state constitutions and bills of rights, and finally the Constitution. "Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in [the Bill of Rights] as new entitlements, but as inalienable rights of all men, given legal [139 S.Ct. 693] effect by their codification in the Constitutions text." *Id.,* at 818, 130 S.Ct. 3020.

The question here is whether the Eighth Amendments prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

The present case illustrates the incongruity of the Courts due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to " proceed according to the "law of the land"— that is, according to written constitutional and statutory provisions, " or that the State failed to provide "some baseline procedures." *Nelson v. Colorado,* 581 U.S. __, __, n. 1, 137 S.Ct. 1249, 1264, n. 1, 197 L.Ed.2d 611 (2017) (THOMAS, J., dissenting). His claim has nothing to do with any "process" "due" him. I therefore decline to apply the "legal fiction" of substantive due process. *McDonald,* 561 U.S., at 811, 130 S.Ct. 3020 (opinion

Ramos v Louisiana, 140 S.Ct. 1390

Justice Gorsuch delivering opinion of the Court, regarding stare decisis.

If Louisiana's path to an affirmance is a difficult one, the dissent's is trickier still. The dissent doesn't dispute that the Sixth Amendment protects the right to a unanimous jury verdict, or that the Fourteenth Amendment extends this right to state-court trials. But, it insists, we must affirm Mr. Ramos's conviction anyway. Why? Because the doctrine of *stare decisis* supposedly commands it. There are two independent reasons why that answer falls short.

In the first place and as we've seen, not even Louisiana tries to suggest that *Apodaca* supplies a governing precedent. Remember, Justice Powell agreed that the Sixth Amendment requires a unanimous verdict to convict, so he would have no objection to that aspect of our holding today. Justice Powell reached a different result only by relying on a dual-track theory of incorporation that a majority of the Court had already rejected (and continues to reject). And to accept *that* reasoning as precedential, we would have to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected.

This is not the rule, and for good reason — it would do more to destabilize than honor precedent. To see how, consider a [140 S.Ct. 1403] hypothetical. Suppose we face a question of first impression under the Fourth Amendment: whether a State must obtain a warrant before reading a citizen's email in the hands of an Internet provider and using that email as evidence in a criminal trial. Imagine this question splits the Court, with four Justices finding the Fourth Amendment requires a warrant and four Justices finding no such requirement. The ninth Justice agrees that the Fourth Amendment requires a warrant, but takes an idiosyncratic view of the consequences of violating that right. In her view, the exclusionary rule has gone too far, and should only apply when the defendant is prosecuted for a felony. Because the case before her happens to involve only a misdemeanor, she provides the ninth vote to affirm a conviction based on evidence secured by a warrantless search. Of course, this Court has longstanding precedent requiring the suppression of all evidence obtained in unconstitutional searches and seizures. *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). But like Justice Powell, our hypothetical ninth Justice sticks to her view and expressly rejects this Court's precedent. Like Justice Powell, this Justice's vote would be essential to the judgment. So if, as the dissent suggests, *that* is enough to displace precedent, would *Mapp* 's exclusionary rule now be limited to felony prosecutions?

Admittedly, this example comes from our imagination. It has to, because no case has before

suggested that a single Justice may overrule precedent. But if the Court were to embrace the dissent's view of *stare decisis,* it would not stay imaginary for long. Every occasion on which the Court is evenly split would present an opportunity for single Justices to overturn precedent to bind future majorities. Rather than advancing the goals of predictability and reliance lying behind the doctrine of *stare decisis,* such an approach would impair them.

The dissent contends that, in saying this much, we risk defying *Marks* v. *United States.* [48] According to *Marks,* when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, `the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[49] But notice that the dissent never actually gets around to telling us which opinion in *Apodaca* it considers to be the narrowest and controlling one under *Marks* — or why. So while the dissent worries that we defy a *Marks* precedent, it is oddly coy about where exactly that precedent might be found.

The parties recognize what the dissent does not: *Marks* has nothing to do with this case. Unlike a *Marks* dispute where the litigants duel over which opinion represents the narrowest and controlling one, the parties before us accept that *Apodaca* yielded no controlling opinion at all. In particular, both sides admit that Justice Powell's opinion cannot bind us— precisely because he relied on a dual-track rule of incorporation that an unbroken line of majority opinions before and after *Apodaca* has rejected. Still, the dissent presses the issue, suggesting that a single Justice's opinion *can* overrule prior precedents under "the logic" of *Marks.* [50] But, as the dissent itself implicitly acknowledges, *Marks* never sought to offer or defend such a rule. And, as we have seen, too, a [140 S.Ct. 1404] rule like that would do more to harm than advance *stare decisis.*

The dissent's backup argument fares no better. In the end, even the dissent is forced to concede that Justice Powell's *reasoning* in *Apodaca* lacks controlling force.[51] So far, so good. But then the dissent suggests *Apodaca* somehow still manages to supply a controlling precedent as to its *result.* [52] Look closely, though. The dissent's account of *Apodaca* 's *result* looks suspiciously like the *reasoning* of Justice Powell's opinion: "In *Apodaca,* this means that when (1) a defendant is convicted in state court, (2) at least 10 of the 12 jurors vote to convict, and (3) the defendant argues that the conviction violates the Constitution because the vote was not unanimous, the challenge fails."[53] Where does the convenient "state court" qualification come from? Neither the *Apodaca* plurality nor the dissent included any limitation like that— their opinions turned on the meaning of the Sixth Amendment. What the dissent characterizes as *Apodaca* 's result turns out to be nothing more than Justice Powell's reasoning about dual-track incorporation dressed up to look like a logical proof.

All of this does no more than highlight an old truth. It is usually a judicial decision's reasoning— its *ratio decidendi* — that allows it to have life and effect in the disposition of future cases.[54] As this Court has repeatedly explained in the context of summary affirmances, "`unexplicated'" decisions may "`settl[e] the issues for the parties, [but they are] not to be read as a renunciation by this Court of doctrines previously announced in our opinions.'"[55] Much the same may be said here. *Apodaca* 's judgment line resolved that case for the parties in that case. It is binding in that sense. But stripped from any reasoning, its judgment alone cannot be read to

repudiate this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments. [56]

B

1

There's another obstacle the dissent must overcome. Even if we accepted [140 S.Ct. 1405] the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true.[57] Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as "an inexorable command."[58] And the doctrine is "at its weakest when we interpret the Constitution"[59] because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means.[60] To balance these considerations, when it revisits a precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[61] In this case, each factor points in the same direction.

Start with the quality of the reasoning. Whether we look to the plurality opinion or Justice Powell's separate concurrence, *Apodaca* was gravely mistaken; again, no Member of the Court today defends either as rightly decided. Without repeating what we've already explained in detail, it's just an implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws. Instead, the plurality subjected the Constitution's jury trial right to an incomplete functionalist analysis of its own creation for which it spared one paragraph. And, of course, five Justices expressly rejected the plurality's conclusion that the Sixth Amendment does not require unanimity. Meanwhile, Justice Powell refused to follow this Court's incorporation precedents. Nine Justices (including Justice Powell) recognized this for what it was; eight called it an error.

Looking to *Apodaca* 's consistency with related decisions and recent legal developments compounds the reasons for concern. *Apodaca* sits uneasily with 120 years of preceding case law. Given how unmoored it was from the start, it might seem unlikely that later developments could have done more to undermine the decision. Yet they have. While Justice Powell's dual-track theory of incorporation was already foreclosed in 1972, some at that time still argued that it might have a role to play outside the realm of criminal procedure. Since then, the Court has held otherwise.[62] Until recently, dual-track incorporation attracted at least a measure of support in dissent. But this Court has now roundly rejected it.[63] Nor has the plurality's rejection [140 S.Ct. 1406] of the Sixth Amendment's historical unanimity requirement aged more gracefully. As we've seen, in the years since *Apodaca,* this Court has spoken inconsistently about its meaning— but nonetheless referred to the traditional unanimity requirement on at least eight occasions.[64] In light of all this, calling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company.

When it comes to reliance interests, it's notable that neither Louisiana nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to

preserve precedent usually invoke. No one, it seems, has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that, should a crime occur, at least the accused may be sent away by a 10-to-2 verdict.[65] Nor does anyone suggest that nonunanimous verdicts have "become part of our national culture."[66] It would be quite surprising if they had, given that nonunanimous verdicts are insufficient to convict in 48 States and federal court.

Instead, the only reliance interests that might be asserted here fall into two categories. The first concerns the fact Louisiana and Oregon may need to retry defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal. The dissent claims that this fact supplies the winning argument for retaining *Apodaca* because it has generated "enormous reliance interests" and overturning the case would provoke a "crushing" "tsunami" of follow-on litigation.[67]

The overstatement may be forgiven as intended for dramatic effect, but prior convictions in only two States are potentially affected by our judgment. Those States credibly claim that the number of nonunanimous felony convictions still on direct appeal are somewhere in the hundreds, [68] and retrying or plea bargaining these cases will surely impose a cost. But new rules of criminal procedures usually do, often affecting significant numbers of pending cases across the whole country. For example, after *Booker* v. *United States* held that the Federal Sentencing Guidelines must be advisory rather than mandatory, this Court vacated and remanded nearly 800 decisions to the courts of appeals. Similar consequences likely followed when *Crawford* v. *Washington* overturned prior interpretations of the Confrontation Clause[69] or *Arizona* v. *Gant* changed the law for searches incident to arrests.[70] Our decision here promises to cause less, and certainly nothing before us supports the dissent's surmise that it will [140 S.Ct. 1407] cause wildly more, disruption than these other decisions.

2

The second and related reliance interest the dissent seizes upon involves the interest Louisiana and Oregon have in the security of their final criminal judgments. In light of our decision today, the dissent worries that defendants whose appeals are already complete might seek to challenge their nonunanimous convictions through collateral (*i.e.,* habeas) review.

But again the worries outstrip the facts. Under *Teague* v. *Lane,* newly recognized rules of criminal procedure do not normally apply in collateral review.[71] True, *Teague* left open the possibility of an exception for "watershed rules" "implicat[ing] the fundamental fairness [and accuracy] of the trial."[72] But, as this language suggests, *Teague* 's test is a demanding one, so much so that this Court has yet to announce a new rule of criminal procedure capable of meeting it.[73] And the test is demanding by design, expressly calibrated to address the reliance interests States have in the finality of their criminal judgments.[74]

Nor is the *Teague* question even before us. Whether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and we will benefit from their adversarial presentation. That litigation is sure to come, and will rightly take into account the States' interest in the finality of their criminal convictions. In this way, *Teague* frees us to say what we know to be true about the rights of the

accused under our Constitution today, while leaving questions about the reliance interest States possess in their final judgments for later proceedings crafted to account for them. It would hardly make sense to ignore that two-step process and count the State's reliance interests in final judgments both here and again there. Certainly the dissent cites no authority for such double counting.

Instead, the dissent suggests that the feeble reliance interests it identifies should get a boost because the right to a unanimous jury trial has "little practical importance going forward."[75] In the dissent's telling, Louisiana has "abolished" nonunanimous verdicts and Oregon "seemed on the verge of doing the same until the Court intervened."[76] But, as the dissent itself concedes, a ruling for Louisiana would invite other States to relax their own unanimity requirements.[77] In fact, 14 jurisdictions have already told us that they would value the right to "experiment" with nonunanimous juries.[78] Besides, Louisiana's law bears only prospective effect, so the State continues to allow nonunanimous verdicts for crimes committed before 2019.[79] And while the dissent speculates that our grant of certiorari contributed to the failure of legal reform efforts in Oregon, its citation does not support its surmise.

[140 S.Ct. 1408] No doubt, too, those who risk being subjected to nonunanimous juries in Louisiana and Oregon today, and elsewhere tomorrow, would dispute the dissent's suggestion that their Sixth Amendment rights are of "little practical importance."

That point suggests another. In its valiant search for reliance interests, the dissent somehow misses maybe the most important one: the reliance interests of the American people. Taken at its word, the dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. Whether that slice turns out to be large or small, it cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties. Indeed, the dissent can cite no case in which the one-time need to retry defendants has *ever* been sufficient to inter a constitutional right forever.

In the final accounting, the dissent's *stare decisis* arguments round to zero. We have an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time. In arguing otherwise, the dissent must elide the reliance the American people place in their constitutionally protected liberties, overplay the competing interests of two States, count some of those interests twice, and make no small amount of new precedent all its own.

V

On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. The judgment of the Court of

Ramos v Louisiana, 140 S.Ct. 1390

Justice Sotomayor, concurring as to all but Part IV-A. On stare decisis.

I agree with most of the Court's rationale, and so I join all but Part IV-A of its opinion. I write separately, however, to underscore three points. First, overruling precedent here is not only warranted, but compelled. Second, the interests at stake point far more clearly to that outcome than those in other recent cases. And finally, the racially biased origins of the Louisiana and Oregon laws uniquely matter here.

I

Both the majority and the dissent rightly emphasize that *stare decisis* "has been a fundamental part of our jurisprudence since the founding." *Post,* at 1432 (opinion of ALITO, J.); see *ante,* at 1404-1405. Indeed, "[w]e generally adhere to our prior decisions, even if we question their soundness, because doing so `promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Alleyne v. United States,* 570 U.S. 99, 118, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (SOTOMAYOR, J., concurring) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)).

[140 S.Ct. 1409] But put simply, this is not a case where we cast aside precedent "simply because a majority of this Court now disagrees with" it. *Alleyne,* 570 U.S. at 133, 133 S.Ct. 2151 (ALITO, J., dissenting). Rather, *Apodaca* v. *Oregon,* 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), was on shaky ground from the start. That was not because of the functionalist analysis of that Court's plurality: Reasonable minds have disagreed over time— and continue to disagree — about the best mode of constitutional interpretation. That the plurality in *Apodaca* used different interpretive tools from the majority here is not a reason on its own to discard precedent.

What matters instead is that, as the majority rightly stresses, *Apodaca* is a universe of one— an opinion uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision. The Court has long recognized that the Sixth Amendment requires unanimity. *Ante,* at 1399-1400, 1404-1406. Five Justices in *Apodaca* itself disagreed with that plurality's contrary view of the Sixth Amendment. Justice Powell's theory of dual-track incorporation also fared no better: He recognized that his argument on that score came "late in the day." *Johnson v. Louisiana,* 406 U.S. 356, 375, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (concurring opinion).

Moreover, "[t]he force of *stare decisis* is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections." *Alleyne,* 570 U.S. at 116, n. 5, 133 S.Ct. 2151. And the constitutional protection here ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment. See *Codispoti* v. *Pennsylvania,* 418 U.S. 506, 515-516, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974) ("The Sixth Amendment represents a deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement" (internal quotation marks omitted)). Where the State's power to imprison those like Ramos rests on an erroneous interpretation of the jury-trial right, the Court should not hesitate to reconsider its

precedents.

II

In contrast to the criminal-procedure context, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne,* 501 U.S. at 828, 111 S.Ct. 2597. Despite that fact, the Court has recently overruled precedent where the Court's shift threatened vast regulatory and economic consequences. *Janus* v. *State, County, and Municipal Employees,* 585 U.S. ___, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018); *id.,* at ___, 138 S.Ct., at 2499 (KAGAN, J., dissenting) (noting that the Court's opinion called into question "thousands of ... contracts covering millions of workers"); see *South Dakota* v. *Wayfair, Inc.,* 585 U.S. ___, ___, 138 S.Ct. 2080, 2098, 201 L.Ed.2d 403 (2018) (noting the "legitimate" burdens that the Court's overruling of precedent would place on vendors who had started businesses in reliance on a previous decision).

This case, by contrast, threatens no broad upheaval of private economic rights. Particularly when compared to the interests of private parties who have structured their affairs in reliance on our decisions, the States' interests here in avoiding a modest number of retrials— emphasized at such length by the dissent— are much less weighty. They are certainly not new: Opinions that force changes in a State's criminal procedure typically impose such costs. And were this Court to take the dissent's approach— defending criminal-procedure [140 S.Ct. 1410] opinions as wrong as *Apodaca* simply to avoid burdening criminal justice systems— it would never correct its criminal jurisprudence at all.

To pick up on the majority's point, *ante,* at 1406-1407, in that alternate universe, a trial judge alone could still decide the critical facts necessary to sentence a defendant to death. *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled by *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). An officer would still be able to search a car upon the arrest of any one of its recent occupants. *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), holding limited by *Arizona v. Gant,* 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). And States could still deprive a defendant of the right to confront her accuser so long as the incriminating statement was "reliable." *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), abrogated by *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Constitution demands more than the continued use of flawed criminal procedures— all because the Court fears the consequences of changing course.

III

Finally, the majority vividly describes the legacy of racism that generated Louisiana's and Oregon's laws. *Ante,* at 1393-1394, 1400-1401, and n. 44. Although Ramos does not bring an equal protection challenge, the history is worthy of this Court's attention. That is not simply because that legacy existed in the first place— unfortunately, many laws and policies in this country have had some history of racial animus— but also because the States' legislatures never truly grappled with the laws' sordid history in reenacting them. See generally *United States v. Fordice,* 505 U.S. 717, 729, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) (policies that are "traceable" to a State's *de jure* racial segregation and that still "have discriminatory effects" offend the Equal Protection Clause).

and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery,* 474 U.S. 254, 265-266, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

The doctrine of *stare decisis* does not mean, of course, that the Court should never overrule erroneous precedents. All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions. Indeed, in just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents. *See, e.g., Knick v. Township of Scott,* 588 U.S. ___, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019); *Franchise Tax Bd. of Cal.* v. *Hyatt,* 587 U.S. ___, 139 S.Ct. 1485, 203 L.Ed.2d 768 (2019); *Janus v. State, County, and Municipal Employees,* 585 U.S. ___, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018); *Hurst* v. *Florida,* 577 U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016); *Obergefell v. Hodges,* 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *Johnson* v. *United States,* 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); *Alleyne v. United States,* 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); see also Baude, Precedent and Discretion, 2020 S.Ct. Rev. 1, 4 (forthcoming) ("Nobody on the Court believes in absolute stare decisis").

Historically, moreover, some of the Court's most notable and consequential decisions have entailed overruling precedent. See, *e.g., Obergefell v. Hodges,* 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); *Montejo v. Louisiana,* 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009); *Crawford v. Washington,* 541 U.S. 36, [140 S.Ct. 1412] 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Agostini v. Felton,* 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); [1] *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *United States v. Scott,* 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978); *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*); *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 S.Ct. 873 (1954); *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 S.Ct. 987 (1944); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 S.Ct. 1628 (1943); *United States v. Darby,* 312 U.S. 100, 61 S.Ct. 451, 85 S.Ct. 609 (1941); *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 S.Ct. 1188 (1938); *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 S.Ct. 703

(1937).

The lengthy and extraordinary list of landmark cases that overruled precedent includes the single most important and greatest decision in this Court's history, *Brown* v. *Board of Education,* which repudiated the separate but equal doctrine of *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 S.Ct. 256 (1896).

As those many examples demonstrate, the doctrine of *stare decisis* does not dictate, and no one seriously maintains, that the Court should *never* overrule erroneous precedent. As the Court has often stated and repeats today, *stare decisis* is not an "inexorable command." *E.g., ante,* at 1405.

On the other hand, as Justice Jackson explained, just "because one should avoid Scylla is no reason for crashing into Charybdis." Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944). So no one advocates that the Court should *always* overrule erroneous precedent.

Rather, applying the doctrine of *stare decisis,* this Court ordinarily adheres to precedent, but *sometimes* overrules precedent. The difficult question, then, is when to overrule an erroneous precedent.

To begin with, the Court's precedents on precedent distinguish statutory cases from constitutional cases.

[140 S.Ct. 1413] In statutory cases, *stare decisis* is comparatively strict, as history shows and the Court has often stated. That is because Congress and the President can alter a statutory precedent by enacting new legislation. To be sure, enacting new legislation requires finding room in a crowded legislative docket and securing the agreement of the House, the Senate (in effect, 60 Senators), and the President. Both by design and as a matter of fact, enacting new legislation is difficult— and far more difficult than the Court's cases sometimes seem to assume. Nonetheless, the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process. *See, e.g., Kimble v. Marvel Entertainment, LLC,* 576 U.S. 446, 456-457, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015); *Patterson v. McLean Credit Union,* 491 U.S. 164, 172-173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); *Flood v. Kuhn,* 407 U.S. 258, 283-284, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972). The principle that "it is more important that the applicable rule of law be settled than that it be settled right" is "commonly true even where the error is a matter of serious concern, *provided correction can be had by legislation.* " *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 76 S.Ct. 815 (1932) (Brandeis, J., dissenting) (emphasis added).[2]

In constitutional cases, by contrast, the Court has repeatedly said— and says again today— that the doctrine of *stare decisis* is not as "inflexible." *Burnet,* 285 U.S. at 406, 52 S.Ct. 443 (Brandeis, J., dissenting); see also *ante,* at 1404-1405; *Payne,* 501 U.S. at 828, 111 S.Ct. 2597; *Scott,* 437 U.S. at 101, 98 S.Ct. 2187. The reason is straightforward: As Justice O'Connor once wrote for the Court, *stare decisis* is not as strict "when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini,* 521 U.S. at 235, 117 S.Ct. 1997. The Court therefore "must balance the importance of having constitutional questions *decided* against the importance of having them *decided right.* " *Citizens United,* 558 U.S. at 378, 130 S.Ct. 876 (ROBERTS, C. J., concurring). It follows "that in the unusual circumstance when fidelity to any particular precedent does more to

damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Ibid.* In his canonical opinion in *Burnet,* Justice Brandeis described the Court's practice with respect to *stare decisis* in constitutional cases in a way that was accurate then and remains accurate now: In "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." 285 U.S. at 406-407, 52 S.Ct. 443 (dissenting opinion).

That said, in constitutional as in statutory cases, to "overrule an important precedent is serious business." Jackson, 30 A. B. A. J., at 334. In constitutional as in statutory cases, adherence to precedent is the norm. To overrule a constitutional decision, the Court's precedents on precedent still require a "special justification," *Allen v. Cooper,* 589 U.S. ___, ___, 140 S.Ct. 994, 1003, ___ L.Ed.2d ___ (2020) (internal quotation marks omitted); *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, [140 S.Ct. 1414] 81 L.Ed.2d 164 (1984), or otherwise stated, "strong grounds," *Janus,* 585 U.S. at ___, 138 S.Ct., at 2478.

In particular, to overrule a constitutional precedent, the Court requires something "over and above the belief that the precedent was wrongly decided." *Allen,* 589 U.S. at ___, 140 S.Ct., at 1003 (internal quotation marks omitted). As Justice Scalia put it, the doctrine of *stare decisis* always requires "reasons that go beyond mere demonstration that the overruled opinion was wrong," for "otherwise the doctrine would be no doctrine at all." *Hubbard v. United States,* 514 U.S. 695, 716, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) (opinion concurring in part and concurring in judgment). To overrule, the Court demands a special justification or strong grounds.

But the "special justification" or "strong grounds" formulation elides a key question: What constitutes a special justification or strong grounds?[3] In other words, in deciding whether to overrule an erroneous constitutional decision, how does the Court know when to overrule and when to stand pat?

As the Court has exercised the "judicial Power" over time, the Court has identified various *stare decisis* factors. In articulating and applying those factors, the Court has, to borrow James Madison's words, sought to liquidate and ascertain the meaning of the Article III "judicial Power" with respect to precedent. The Federalist No. 37, at 236.

The *stare decisis* factors identified by the Court in its past cases include:

- the quality of the precedent's reasoning;
- the precedent's consistency and coherence with previous or subsequent decisions;
- changed law since the prior decision;
- changed facts since the prior decision;
- the workability of the precedent;
- the reliance interests of those who have relied on the precedent; and
- the age of the precedent.

But the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner.

As I read the Court's cases on precedent, those varied and somewhat elastic *stare decisis*

factors fold into three broad considerations that, in my view, can help guide the inquiry and help determine what constitutes a "special justification" or "strong grounds" to overrule a prior constitutional decision.

First, is the prior decision not just wrong, but grievously or egregiously wrong? A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it. In conducting that inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and [140 S.Ct. 1415] workability, among other factors. A case may be egregiously wrong when decided, see, *e.g., Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 S.Ct. 194 (1944); *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 S.Ct. 256 (1896), or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, *see, e.g., Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), or both, *ibid.*

Second, has the prior decision caused significant negative jurisprudential or real-world consequences? In conducting that inquiry, the Court may consider jurisprudential consequences (some of which are also relevant to the first inquiry), such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system. *See, e.g., Brown v. Board of Education,* 347 U.S. at 494-495, 74 S.Ct. 686; *Barnette,* 319 U.S. at 630-642, 63 S.Ct. 1178; *see also Payne,* 501 U.S. at 825-827, 111 S.Ct. 2597.

Third, would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors.

In short, the first consideration requires inquiry into how wrong the precedent is as a matter of law. The second and third considerations together demand, in Justice Jackson's words, a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." *Jackson*, 30 A. B. A. J., at 334.

Those three considerations together provide a structured methodology and roadmap for determining whether to overrule an erroneous constitutional precedent. The three considerations correspond to the Court's historical practice and encompass the various individual factors that the Court has applied over the years as part of the *stare decisis* calculus. And they are consistent with the Founding understanding and, for example, Blackstone's shorthand description that overruling is warranted when (and only when) a precedent is "manifestly absurd or unjust." 1 Blackstone, Commentaries on the Laws of England, at 70.

Taken together, those three considerations set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings and maintain stability in the law.[4] Those three considerations also constrain judicial discretion in deciding when to overrule an erroneous precedent. To be sure, applying those considerations is not a purely mechanical exercise, and I do not claim otherwise. I suggest only that those three considerations may better structure how to consider the many traditional *stare decisis* factors.

It is inevitable that judges of good faith applying the *stare decisis* considerations will sometimes disagree about when to overrule an erroneous constitutional precedent, as the Court does in this case. To begin with, judges may disagree about whether a prior decision is wrong in the first place— and importantly, that disagreement is sometimes the *real* dispute when judges joust over *stare decisis.* But even when judges agree that a prior decision [140 S.Ct. 1416] is wrong, they may disagree about whether the decision is so egregiously wrong as to justify an overruling. Judges may likewise disagree about the severity of the jurisprudential or real-world consequences caused by the erroneous decision and, therefore, whether the decision is worth overruling. In that regard, some judges may think that the negative consequences can be addressed by narrowing the precedent (or just living with it) rather than outright overruling it. Judges may also disagree about how to measure the relevant reliance interests that might be affected by an overruling. And on top of all of that, judges may also disagree about how to weigh and balance all of those competing considerations in a given case.[5]

This case illustrates that point. No Member of the Court contends that the result in *Apodaca* is correct. But the Members of the Court vehemently disagree about whether to overrule *Apodaca.*

II

Applying the three broad *stare decisis* considerations to this case, I agree with the Court's decision to overrule *Apodaca.*

First, Apodaca is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury. *Ante,* at 1396-1397; *see, e.g., Patton v. United States,* 281 U.S. 276, 288, 50 S.Ct. 253, 74 S.Ct. 854 (1930); *Thompson v. Utah,* 170 U.S. 343, 351, 18 S.Ct. 620, 42 S.Ct. 1061 (1898). And the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States. *See Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *id.,* at 166, 88 S.Ct. 1444 (Black, J., concurring); see also *Malloy,* 378 U.S. at 10-11, 84 S.Ct. 1489; *see generally Timbs v. Indiana,* 586 U.S. ___, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019); *McDonald v. Chicago,* 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). When *Apodaca* was decided, it was already an outlier in the Court's jurisprudence, and over time it has become even more of an outlier. As the Court today persuasively explains, the original meaning of the Sixth and Fourteenth Amendments and this Court's two lines of decisions— the Sixth Amendment jury cases and the Fourteenth Amendment incorporation cases— overwhelmingly demonstrate that *Apodaca* 's holding is egregiously wrong.[6]

[140 S.Ct. 1417] *Second, Apodaca* causes significant negative consequences. It is true that *Apodaca* is workable. But *Apodaca* sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule (although exactly how many is of course unknowable). That consequence has traditionally supplied some support for overruling an egregiously wrong criminal-procedure precedent. See generally *Malloy,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.

In addition, and significant to my analysis of this case, the origins and effects of the non-unanimous jury rule strongly support overruling *Apodaca.* Louisiana achieved statehood in 1812.

And throughout most of the 1800s, the State required unanimous juries in criminal cases. But at its 1898 state constitutional convention, Louisiana enshrined non-unanimous juries into the state constitution. Why the change? The State wanted to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875. *See Strauder v. West Virginia,* 100 U.S. 303, 308-310, 25 S.Ct. 664 (1880); T. Aiello, Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana 16, 19 (2015). Coming on the heels of the State's 1896 victory in *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 S.Ct. 256, the 1898 constitutional convention expressly sought to "establish the supremacy of the white race." Semmes, Chairman of the Committee on the Judiciary, Address at the Louisiana Constitutional Convention in 1898, in Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 375 (H. Hearsey ed. 1898). And the convention approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service. See Aiello, *supra,* at 16-26; Frampton, The Jim Crow Jury, 71 Vand. L. Rev. 1593, 1620 (2018).[7]

In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all, [140 S.Ct. 1418] that was the whole point of adopting the non-unanimous jury requirement in the first place. And the math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class." *Johnson v. Louisiana,* 406 U.S. 356, 397, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (Stewart, J., dissenting). That reality— and the resulting perception of unfairness and racial bias— can undermine confidence in and respect for the criminal justice system. The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors. In effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors.

In its 1986 decision in *Batson* v. *Kentucky,* the Court recognized the pervasive racial discrimination woven into the traditional system of unfettered peremptory challenges. See 476 U.S. at 85-89, 91, 106 S.Ct. 1712. The Court therefore overruled a prior decision, *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), that had allowed those challenges. See generally *Flowers* v. *Mississippi,* 588 U.S. ___, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019).

In my view, *Apodaca* warrants the same fate as *Swain.* After all, the "requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury." *Johnson,* 406 U.S. at 398, 92 S.Ct. 1650 (Stewart, J., dissenting). And as Justice Thurgood Marshall forcefully explained in dissent in *Apodaca,* to "fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests." *Johnson,* 406 U.S. at 402, 92 S.Ct. 1651 (Marshall, J., dissenting in both *Johnson* and *Apodaca*).

To be clear, one could advocate for and justify a non-unanimous jury rule by resort to neutral and legitimate principles. England has employed non-unanimous juries, and various legal

organizations in the United States have at times championed non-unanimous juries. See, *e.g.*, Juries Act 1974, ch. 23, § 17 (Eng.); ABA Project on Standards for Criminal Justice, Trial By Jury § 1.1, p. 7 (App. Draft 1968); ALI, Code of Criminal Procedure § 355, p. 99 (1930). And Louisiana's modern policy decision to retain nonunanimous juries— as distinct from its original decision in the late 1800s to adopt non-unanimous juries— may have been motivated by neutral principles (or just by inertia).

But the question at this point is not whether the Constitution prohibits non-unanimous juries. It does. Rather, the disputed question here is whether to overrule an erroneous constitutional precedent that allowed non-unanimous juries. And on that question— the question whether to overrule — the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling, in my respectful view. After all, the non-unanimous jury "is today the last of Louisiana's Jim Crow laws." Aiello, *supra,* at 63. And this Court has emphasized time and again the "imperative to purge racial prejudice from the administration of justice" generally and from the jury system in particular. *PenaRodriguez v. Colorado,* 580 U.S. ___, ___-___, 137 S.Ct. 855, 867, 197 L.Ed.2d 107 (2017) (collecting cases).

[140 S.Ct. 1419] To state the point in simple terms: Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law, that allows convictions of some who would not be convicted under the proper constitutional rule, and that tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?

Third, overruling *Apodaca* would not unduly upset reliance interests. Only Louisiana and Oregon employ non-unanimous juries in criminal cases. To be sure, in those two States, the Court's decision today will invalidate some non-unanimous convictions where the issue is preserved and the case is still on direct review. But that consequence almost always ensues when a criminal-procedure precedent that favors the government is overruled. *See Ring,* 536 U.S. 584, 122 S.Ct. 2428; *Batson,* 476 U.S. 79, 106 S.Ct. 1712. And here, at least, I would "count that a small price to pay for the uprooting of this weed." *Hubbard,* 514 U.S. at 717, 115 S.Ct. 1754 (Scalia, J., concurring in part and concurring in judgment).

Except for the effects on that limited class of directreview cases, it will be relatively easy going forward for Louisiana and Oregon to transition to the unanimous jury rule that the other 48 States and the federal courts use. Indeed, in 2018, Louisiana amended its constitution to require jury unanimity in criminal trials for crimes committed on or after January 1, 2019, meaning that the transition is already well under way in Louisiana.

Importantly, moreover, this Court applies a separate non-retroactivity doctrine to mitigate the disruptive effects of overrulings in criminal cases. Under the Court's precedents, new constitutional rules apply on direct review, but generally do not apply retroactively on habeas corpus review. See *Teague v. Lane,* 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion); *Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). *Teague* recognizes only two exceptions to that general habeas non-retroactivity principle: "if (1) the rule is substantive or (2) the rule is a `watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting,* 549 U.S. 406, 416, 127 S.Ct. 1173,

167 L.Ed.2d 1 (2007) (internal quotation marks omitted). The new rule announced today—namely, that state criminal juries must be unanimous— does not fall within either of those two narrow *Teague* exceptions and therefore, as a matter of federal law, should not apply retroactively on habeas corpus review.

The first *Teague* exception does not apply because today's new rule is procedural, not substantive: It affects "only the *manner of determining* the defendant's culpability." *Schriro v. Summerlin,* 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

The second *Teague* exception does not apply because today's new rule, while undoubtedly important, is not a "watershed" procedural rule. This Court has flatly stated that "it is unlikely that any such rules" have "yet to emerge." *Whorton,* 549 U.S. at 417, 127 S.Ct. 1173 (internal quotation marks omitted). In "the years since *Teague,* we have rejected every claim that a new rule satisfied the requirements for watershed status." *Id.,* at 418, 421, 127 S.Ct. 1173 (rejecting retroactivity for *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)); *see, e.g., Beard v. Banks,* 542 U.S. 406, 420, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (rejecting retroactivity for *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)); *Summerlin,* 542 U.S. at 358, 124 S.Ct. 2519 (rejecting retroactivity for [140 S.Ct. 1420] *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)); *O'Dell* v. *Netherland,* 521 U.S. 151, 167-168, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (rejecting retroactivity for *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)); *Lambrix v. Singletary,* 520 U.S. 518, 539-540, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (rejecting retroactivity for *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (*per curiam*)); *Sawyer v. Smith,* 497 U.S. 227, 241-245, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (rejecting retroactivity for *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)); *see also Allen v. Hardy,* 478 U.S. 255, 261, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (*per curiam*) (rejecting retroactivity for *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)); *DeStefano v. Woods,* 392 U.S. 631, 635, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968) (*per curiam*) (rejecting retroactivity for *Duncan,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491).

So assuming that the Court faithfully applies *Teague,* today's decision will not apply retroactively on federal habeas corpus review and will not disturb convictions that are final.[8]

In addition, as to ineffective-assistance-of-counsel claims, an attorney presumably would not have been deficient for failing to raise a constitutional jury-unanimity argument before today's decision— or at the very least, before the Court granted certiorari in this case. Before today, after all, this Court's precedents had repeatedly allowed non-unanimous juries in state criminal cases. In that situation, the Courts of Appeals have consistently held that an attorney is not ineffective for failing to anticipate or advocate for the overruling of a constitutional precedent of this Court. *See, e.g., Walker v. United States,* 810 F.3d 568, 577 (CA8 2016); *United States v. Smith,* 241 F.3d 546, 548 (CA7 2001); *Honeycutt v. Mahoney,* 698 F.2d 213, 216-217 (CA4 1983); see also *Steiner v. United States,* 940 F.3d 1282, 1293 (CA11 2019) (*per curiam*); *Snider v. United States,* 908 F.3d 183, 192 (CA6 2018); *Green v. Johnson,* 116 F.3d 1115, 1125 (CA5 1997).

For those reasons, the reliance interests at stake in this case are not especially substantial, and they do not mandate adherence to *Apodaca.* [9]

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Justice Kavanaugh, concurring in part. Stare decisis emphasis.

Justice KAVANAUGH, concurring in part.

In *Apodaca* v. *Oregon,* this Court held that state juries need not be unanimous in order to convict a criminal defendant. 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). Two States, Louisiana and Oregon, have continued to use non-unanimous juries in criminal cases. Today, the Court overrules *Apodaca* and holds that state juries must be unanimous in order to convict a criminal defendant.

I agree with the Court that the time has come to overrule *Apodaca.* I therefore join the introduction and Parts I, II-A, III, and IV-B-1 of the Court's persuasive and important opinion. I write separately to explain my view of how *stare decisis* applies to this case.

[140 S.Ct. 1411] I

The legal doctrine of *stare decisis* derives from the Latin maxim " *stare decisis et non quieta movere,* " which means to stand by the thing decided and not disturb the calm. The doctrine reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem. In 1765, Blackstone— "the preeminent authority on English law for the founding generation," *Alden v. Maine,* 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)— wrote that "it is an established rule to abide by former precedents," to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, Commentaries on the Laws of England 69 (1765). The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the "judicial Power" and rooted in Article III of the Constitution. Writing in Federalist 78, Alexander Hamilton emphasized the importance of *stare decisis:* To "avoid an arbitrary discretion in the courts, it is indispensable" that federal judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 529 (J. Cooke ed. 1961). In the words of THE CHIEF JUSTICE, *stare decisis* ' "greatest purpose is to serve a constitutional ideal— the rule of law." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 378, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (concurring opinion).

This Court has repeatedly explained that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals,

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Justice Thomas, concurring in the judgement.

I agree with the Court that petitioner Evangelisto Ramos' felony conviction by a [140 S.Ct. 1421] nonunanimous jury was unconstitutional. I write separately because I would resolve this case based on the Court's longstanding view that the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts, without undertaking a fresh analysis of the meaning of "trial... by an impartial jury." I also would make clear that this right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause.

I

I begin with the parties' dispute as to whether the Sixth Amendment right to a trial by jury includes a protection against nonunanimous felony guilty verdicts. On this question, I do not write on a blank slate. As the Court acknowledges, our decisions have long recognized that unanimity is required. See *ante,* at 1396-1397. Because this interpretation is not demonstrably erroneous, I would resolve the Sixth Amendment question on that basis.

A

This Court first decided that the Sixth Amendment protected a right to unanimity in *Thompson v. Utah,* 170 U.S. 343, 18 S.Ct. 620, 42 S.Ct. 1061 (1898). The Court reasoned that Thompson, a Utah prisoner, was protected by the Sixth Amendment when Utah was still a Territory because "the right of trial by jury in suits at common law appl[ied] to the Territories of the United States." *Id.,* at 346, 18 S.Ct. 620. The Court then stated that this right "made it impossible to deprive him of his liberty except by [a] unanimous verdict." *Id.,* at 355, 18 S.Ct. 620; see also *id.,* at 351, 353, 18 S.Ct. 620.

The Court has repeatedly reaffirmed the Sixth Amendment's unanimity requirement. In *Patton v. United States,* 281 U.S. 276, 50 S.Ct. 253, 74 S.Ct. 854 (1930), the Court stated that the Sixth Amendment protects the right "that the verdict should be unanimous," *id.,* at 288, 50 S.Ct. 253. In *Andres v. United States,* 333 U.S. 740, 68 S.Ct. 880, 92 S.Ct. 1055 (1948), the Court repeated that "[u]nanimity in jury verdicts is required" by the Sixth Amendment, *id.,* at 748, 68 S.Ct. 880. And in *Apodaca v. Oregon,* 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), five Justices agreed that "the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous," *id.,* at 414, 92 S.Ct. 1628 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting); see also *Johnson v. Louisiana,* 406 U.S. 356, 371, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (Powell, J., concurring) (explaining views in *Apodaca* and its companion case); *id.,* at 382-383, 108 S.Ct. 1860 (Douglas, J., joined by Brennan and Marshall, JJ., dissenting) (same). We have accepted this interpretation of the Sixth Amendment in recent cases. See *Southern Union Co. v. United States,* 567 U.S. 343, 356, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012); *Blakely v. Washington,* 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey,* 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

B

The question then becomes whether these decisions are entitled to *stare decisis* effect. As I have previously explained, "the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions — meaning decisions outside the realm of permissible interpretation— over the text of the Constitution and other duly enacted federal law." *Gamble* v. *United States,* 587 U.S. ___, ___, 139 S.Ct. 1960, 1981, 204 L.Ed.2d 322 (2019) (concurring [140 S.Ct. 1422] opinion). There is considerable evidence that the phrase "trial ... by ... jury" in the Sixth Amendment was understood since the founding to require that a felony guilty verdict be unanimous. Because our precedents are thus not outside the realm of permissible interpretation, I will apply them.

1

Blackstone— "the preeminent authority on English law for the founding generation," *Alden v. Maine,* 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)— wrote that no subject can "be affected either in his property, his liberty, or his person, but by the unanimous consent" of a jury, 3 W. Blackstone, Commentaries on the Laws of England 379 (1772); see also 4 *id.,* at 343, 124 S.Ct. 2531. Another influential treatise author, Hale, wrote that "the law of England hath afforded the best method of trial, that is possible, ... namely by a jury ... all concurring in the same judgment." 1 M. Hale, Pleas of the Crown 33 (1736) (emphasis deleted). Such views continued in scholarly works throughout the early Republic. See, *e.g.,* 2 J. Story, Commentaries on the Constitution of the United States § 777, p. 248 (1833); 6 N. Dane, Digest of American Law, ch. LXXXII, Art. 2, § 1, p. 226 (1824); 2 J. Wilson, Works of the Honourable James Wilson 349-350 (1804).

The uniform practice among the States was in accord. Despite isolated 17th-century colonial practices allowing nonunanimous juries, "unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems." *Apodaca, supra,* at 408, n. 3, 92 S.Ct. 1628 (plurality opinion). In the founding era, six States explicitly mentioned unanimity in their constitutions. See Del. Declaration of Rights § 14 (1776); Md. Declaration of Rights, Art. XIX (1776); N. C. Declaration of Rights § IX (1776); Pa. Declaration of Rights, Art. IX (1776); Vt. Const., Art. XI (1786); Va. Declaration of Rights § 8 (1776). Four more States clearly referred to the common-law jury right, which included unanimity. Ky. Const., Art. XII, § 6 (1792); N. J. Const., Art. XXII (1776); N. Y. Const., Art. XLI (1777); S. C. Const., Art. IX, § 6 (1790). Some States did not explicitly refer to either the common law or unanimity. See, *e.g.,* Ga. Const., Art. LXI (1777); Mass. Declaration of Rights, Art. XII (1780). But there is reason to believe that they nevertheless understood unanimity to be required. See, *e.g., Rouse v. State,* 4 Ga. 136, 147 (1848).

In light of the express language used in some State Constitutions, respondent Louisiana argues that the omission of an express unanimity requirement in the Sixth Amendment reflects a deliberate choice. This argument fails to establish that the Court's decisions are demonstrably erroneous. The House of Representatives passed a version of the amendment providing that "[t]he trial of all crimes ... shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites," 1 Annals of Cong. 435 (1789), but the final Amendment contained no reference to vicinage or

unanimity. See Amdt. 6. I agree with Justice Harlan and the Court that "the meaning of this change is wholly speculative" and that there is "no concrete evidence" that the Senate rejected the requirement of unanimity. *Baldwin v. New York,* 399 U.S. 66, 123, n. 9, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) (Harlan, J., dissenting); see also *ante,* at 11-12; Letter from J. Madison to E. Pendleton (Sept. 14, 1789), in 1 Letters and Other Writings of James Madison 491 (1867). There is thus sufficient evidence to [140 S.Ct. 1423] support this Court's prior interpretation that the Sixth Amendment right to a trial by jury requires unanimity.

2

There is also considerable evidence that this understanding persisted up to the time of the Fourteenth Amendment's ratification. State courts, for example, continued to interpret the phrase "trial by jury" to require unanimity in felony guilty verdicts. The New Hampshire Superior Court of Judicature expounded on the point:

"The terms `jury,' and `trial by jury,' are, and for ages have been well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. "A jury for the trial of a cause ... must return their unanimous verdict upon the issue submitted to them. "All the books of the law describe a trial jury substantially as we have stated it. And a `trial by jury' is a trial by such a body, so constituted and conducted. So far as our knowledge extends, these expressions were used at the adoption of the constitution and always before, in these senses alone by all classes of writers and speakers." *Opinion of Justices,* 41 N.H. 550, 551-552 (1860).

Other state courts held the same view. The Missouri Supreme Court in 1860 called unanimity one of the "essential requisites in a jury trial," *Vaughn v. Scade,* 30 Mo. 600, 603, and the Ohio Supreme Court in 1853 called it one of "the essential and distinguishing features of the trial by jury, as known at common law, and generally, if not universally, adopted in this country," *Work v. State,* 2 Ohio St. 296, 306.

Treatises from the Reconstruction era likewise adopted this position. A leading work on criminal procedure explained that if a "statute authorizes [a jury] to find a verdict upon anything short of ... unanimous consent," it "is void." 1 J. Bishop, Criminal Procedure § 761, p. 532 (1866). A widely read treatise on constitutional law reiterated that "`by a jury' is generally understood to mean" a body that "must *unanimously* concur in the guilt of the accused before a conviction can be had." G. Paschal, The Constitution of the United States 210 (1876) (capitalization omitted). And a volume on the jury trial was in agreement. See J. Proffatt, Trial by Jury § 77, p. 112 (1877).

* * *

Based on this evidence, the Court's prior interpretation of the Sixth Amendment's guarantee is not demonstrably erroneous. It is within the realm of permissible interpretations to say that "trial ... by ... jury" in that Amendment includes a protection against nonunanimous felony guilty verdicts.

II

The remaining question is whether that right is protected against the States. In my view, the Privileges or Immunities Clause provides this protection. I do not adhere to this Court's decisions applying due process incorporation, including *Apodaca* and— it seems— the Court's opinion in this case.

The Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Amdt. 14, § 1. At the time of the Fourteenth Amendment's ratification, "the terms `privileges' and `immunities' had an established meaning as synonyms of `rights.'" *McDonald v. Chicago,* 561 U.S. 742, 813, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment).

[140 S.Ct. 1424] "[T]he ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights" against abridgment by the States. *Id.,* at 837, 130 S.Ct. 3020. The Sixth Amendment right to a trial by jury is certainly a constitutionally enumerated right. See *Maxwell v. Dow,* 176 U.S. 581, 606-608, 20 S.Ct. 448, 44 S.Ct. 597 (1900) (Harlan, J., dissenting).

The Court, however, has made the Due Process Clause serve the function that the Privileges or Immunities Clause should serve. Although the Privileges or Immunities Clause grants "United States citizens a certain collection of rights— *i.e.,* privileges or immunities— attributable to that status," the Court has interpreted the Clause "quite narrowly." *McDonald,* 561 U.S. at 808, 130 S.Ct. 3020 (opinion of THOMAS, J.). Perhaps to compensate for this limited view of the Privileges or Immunities Clause, it has incorporated individual rights against the States through the Due Process Clause. *Id.,* at 809, 130 S.Ct. 3020.

Due process incorporation is a demonstrably erroneous interpretation of the Fourteenth Amendment. As I have explained before, "[t]he notion that a constitutional provision that guarantees only `process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *Id.,* at 811, 130 S.Ct. 3020. The unreasonableness of this interpretation is underscored by the Court's struggle to find a "guiding principle to distinguish `fundamental' rights that warrant protection from nonfundamental rights that do not," *ibid.,* as well as its many incorrect decisions based on this theory, see *Obergefell* v. *Hodges,* 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393, 15 S.Ct. 691 (1857).

I "decline to apply the legal fiction" of due process incorporation. *Timbs v. Indiana,* 586 U.S. ___, ___, 139 S.Ct. 682, 692, 203 L.Ed.2d 11 (2019) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). As a result, I part ways with the Court on both its affirmative argument about the Fourteenth Amendment and its treatment of *Apodaca,* in which five Justices agreed the Sixth Amendment included a right to unanimity but a different majority concluded that the right did not apply to the States. See *ante,* at 1397-1400.

I would accept petitioner's invitation to decide this case under the Privileges or Immunities Clause. The Court conspicuously avoids saying which clause it analyzes. See, *e.g., ante,* at 1394-1395, 1397. But one assumes from its silence that the Court is either following our due process incorporation precedents or believes that "nothing in this case turns on" which clause applies, *Timbs, supra,* at ___, 139 S.Ct., at 691 (GORSUCH, J., concurring).

I have already rejected our due process incorporation cases as demonstrably erroneous, and I fundamentally disagree with applying that theory of incorporation simply because it reaches the same result in the case before us. Close enough is for horseshoes and hand grenades, not

constitutional interpretation. The textual difference between protecting "citizens" (in the Privileges or Immunities Clause) and "person[s]" (in the Due Process Clause) will surely be relevant in another case. And our judicial duty— not to mention the candor we owe to our fellow citizens— requires us to put an end to this Court's due process prestidigitation, which no one is willing to defend on the merits.

I would simply hold that, because all of the opinions in *Apodaca* addressed the [140 S.Ct. 1425] Due Process Clause, its Fourteenth Amendment ruling does not bind us because the proper question here is the scope of the Privileges or Immunities Clause. I cannot understand why the Court, having decided to abandon *Apodaca,* refuses to correctly root its holding in the Privileges or Immunities Clause.[1]

III

There is no need to prove the original meaning of the Sixth Amendment right to a trial by jury in this case.[2] The evidence that I have recounted is enough to establish that our previous interpretations of the Sixth Amendment are not demonstrably erroneous. What is necessary, however, is a clear understanding of the means by which the Sixth Amendment right applies against the States. We should rely on the Privileges or Immunities Clause, not the Due Process Clause or the Fourteenth Amendment in some vague sense. Accordingly, I concur only in the judgment.