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## Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism

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## DODGING A BULLET: *MCDONALD V. CITY OF CHICAGO* AND THE LIMITS OF PROGRESSIVE ORIGINALISM

Dale E. Ho\*

### ABSTRACT

The Supreme Court's decision in last term's gun rights case, *McDonald v. City of Chicago*, punctured the conventional wisdom after *District of Columbia v. Heller* that "we are all originalists now." Surprisingly, many progressive academics were disappointed. For "progressive originalists," *McDonald* was a missed opportunity to overrule the *Slaughter-House Cases* and to revitalize the Privileges or Immunities Clause of the Fourteenth Amendment. In their view, such a ruling could have realigned progressive constitutional achievements with originalism and relieved progressives of the albatross of substantive due process, while also unlocking long-dormant constitutional text to serve as the source of new unenumerated rights in subsequent cases.

This Article argues that progressives should be relieved by rather than disappointed with the outcome in *McDonald*. Practically speaking, the purported gains that would have accrued from a revitalized Privileges or Immunities Clause were largely illusory. The Clause was unlikely to be a fountain for new unenumerated rights. Moreover, progressive originalists' concerns about substantive due process tend to overestimate the role that academic debates play in the broader public conversation about the meaning of the Constitution. But most importantly, a doctrinal shift away from existing Due Process jurisprudence towards a new reliance on the Privileges or Immunities Clause could have resulted in an unintended rollback of civil rights. Although the Fourteenth Amendment is undoubtedly radically egalitarian in spirit, there can be little doubt that the range of substantive protections that it was originally understood to afford is more limited than what is protected under current Supreme Court precedent. Moreover, reliance on the Privileges or Immunities Clause could have dire consequences for non-citizens, who may fall outside of the Clause's scope. Although progressive originalists have made valuable contributions to constitutional discourse, *McDonald* illustrates

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\* Assistant Counsel & Fried, Frank Fellow, NAACP Legal Defense & Educational Fund, Inc. I offer my deepest gratitude to my colleagues at the Legal Defense Fund, including Debo Adegbile, Josh Civin, Norman Chachkin, Matthew Colangelo, Jeffrey Robinson, and our President and Director Counsel, John Payton. I am also grateful to Jamal Greene, Alan Gura, and Daniel Morales, for reviewing earlier drafts of this Article and/or discussing with me the substantive issues herein, and for providing helpful suggestions. All errors are my own. Although this Article is based in part on an *amicus* brief, of which I was a co-author, submitted by the Legal Defense Fund on behalf of neither party in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the views expressed in this Article are my own and should not be attributed to the Legal Defense Fund.

that a conscious decision by progressives to adopt the language of originalism wholesale is unlikely to be a winning strategy in the long-term. More than any other area of constitutional law, the Court's Fourteenth Amendment jurisprudence demonstrates the tremendous value of modes of interpretation other than originalism. Progressives should not shy away from a tradition of constitutional interpretation that has produced the finest moments in the Court's history.

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#### INTRODUCTION

After the Supreme Court ruled in *District of Columbia v. Heller*<sup>1</sup> that the Second Amendment protects an individual's right to own and use firearms, the conventional

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<sup>1</sup> 128 S. Ct. 2783 (2008).

wisdom became that “we are all originalists now.”<sup>2</sup> Although the soundness of Justice Scalia’s interpretation of the historical record in his *Heller* opinion did not go without criticism from either the left<sup>3</sup> or the right,<sup>4</sup> the opinion itself can be regarded, at least in its aspirations, as a “sterling exemplar of originalism.”<sup>5</sup> But just as notably, commentators observed that even Justice Stevens’s dissent in *Heller* seemed to be premised on originalist principles.<sup>6</sup> It seemed that henceforth, conservatives and progressives alike would speak the language of originalism.<sup>7</sup>

After *McDonald v. City of Chicago*,<sup>8</sup> however, it would appear that reports of originalism’s ascendance have been greatly exaggerated. As the next Second Amendment case to reach the Supreme Court after *Heller*, *McDonald* could have further aligned the Court’s approach to constitutional adjudication along originalist principles. Instead,

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<sup>2</sup> Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUMAN EVENTS (June 27, 2008), <http://www.humanevents.com/article.php?id=27229>; see also Samuel Issacharoff, *Pragmatic Originalism?*, 4 N.Y.U. J. L. & LIBERTY 517, 517 (2009) (discussing *Heller*, and observing that “[t]here has been no more substantial change in constitutional law in the past twenty-five years than the ascendance of ‘originalism’ as a fundamental way of understanding the Constitution”). But see Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325 (2009) (disputing the claim that originalism has “won”).

<sup>3</sup> See, e.g., Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399 (2009); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

<sup>4</sup> See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32.

<sup>5</sup> See Greene, *supra* note 2, at 325; see also Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (“Justice Scalia’s opinion is the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”).

<sup>6</sup> See, e.g., Issacharoff, *supra* note 2, at 518–19.

<sup>7</sup> See, e.g., Pamela S. Karlan, *What Can Brown® Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1051 (2009) (observing that “professed fidelity to some form of ‘original meaning’ or ‘original understanding’ now seems firmly in the ascendancy”). I acknowledge, of course, that “[t]here is not one theory of originalism, but many.” Siegel, *supra* note 3, at 1403 (citing, *inter alia*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009)); see also Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383 (2007); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009). The differences between, for instance, “original intent” originalism, “original understanding” originalism, and “original public meaning” originalism are largely irrelevant for purposes of this Article. In any event, for the purposes of this Article, I adopt Siegel’s broad characterization of “first-generation originalism” as the interpretative theory that “the Constitution should only be interpreted as it was understood at the time of its ratification, and contended that the only legitimate way to change the Constitution . . . [is] by the amending process provided by those whose consent made the instrument binding.” Siegel, *supra* note 3, at 1403–04.

<sup>8</sup> 130 S. Ct. 3020 (2010).

the Court in *McDonald* abandoned the originalist logic of *Heller* in favor of the well-worn and decidedly un-originalist doctrine of selective incorporation via the Due Process Clause.<sup>9</sup> For the *McDonald* plurality, commitment to doctrine trumped fidelity to original understanding.

Surprisingly, many progressive constitutional theorists were disappointed by this result.<sup>10</sup> Progressives, who had generally opposed the expansion of gun rights in *Heller*, did not present a united front in *McDonald*. Rather, as *McDonald* worked its way through the courts, several progressive academics joined with a number of conservative scholars in enthusiastically arguing that the right to keep and bear arms should be applied to the states via the long-dormant Privileges or Immunities Clause,<sup>11</sup> whose substantive component had been largely eviscerated in the almost universally criticized *Slaughter-House Cases*.<sup>12</sup>

These arguments fell in line with what has been described as “progressive originalism,”<sup>13</sup> which, broadly speaking, operates from the premise that progressives have made a strategic error by not embracing the rhetoric and principles of originalism. From this perspective, *McDonald* presented a long-needed opportunity to ground protections for substantive rights against state and local governmental interference in a more solid foundation than the doctrine of substantive due process,<sup>14</sup> while also neutralizing the most common criticism of liberal constitutional theorists: that they sacrifice fidelity to the plain meaning or original understanding of constitutional text in favor of strained readings that advance their own policy goals and value commitments.<sup>15</sup> In this view, a proper ruling in *McDonald* could have corrected the errors of *Slaughter-House*, realigned progressive constitutional achievements with an originalist understanding of the Reconstruction Amendments, and relieved progressives of the doctrinal albatross of substantive due process.

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<sup>9</sup> *Id.* at 3030–31 (“We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.”).

<sup>10</sup> *See infra* notes 115–19 and accompanying text (describing the growing number of constitutional scholars calling for reliance on the Privileges or Immunities Clause for substantive rights protections).

<sup>11</sup> *See* Brief for Constitutional Law Professors as Amici Curiae Supporting Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

<sup>12</sup> 83 U.S. (16 Wall) 36 (1873); *see, e.g.*, Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001) (“Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment.”).

<sup>13</sup> *See, e.g.*, Douglas T. Kendall & James E. Ryan, *Liberal Reading: Taking Back the Constitution*, NEW REPUBLIC, Aug. 6, 2007, at 14, 16–17. For an example of progressive originalism, *see* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009).

<sup>14</sup> *See infra* Part II.B.

<sup>15</sup> *See* Kendall & Ryan, *supra* note 13 (“Progressives have painted themselves into a corner by running away from the text and history of the Constitution for fear that the original meaning of the Constitution would require the abandonment of progressive causes and principles.”).

Although progressive originalism has and will continue to provide valuable insights in the debate over constitutional meanings, this Article argues that progressives should be relieved by the outcome in *McDonald*, and more wary of the promise of progressive originalism generally. Not only were the purported gains that would have accrued from a revitalized Privileges or Immunities Clause largely illusory, such a doctrinal shift could have resulted in an unintended rollback of civil rights protections. Although the Fourteenth Amendment is undoubtedly radically egalitarian in spirit, there can be little doubt that the precise range of substantive protections that it was originally understood to afford is more limited than the contemporary Court's understanding of the Amendment. If a renewed Privileges or Immunities Clause jurisprudence were also accompanied by a return to the original understanding of the range of substantive protections afforded by the Clause, it is no exaggeration to say that the results for civil rights and civil liberties could have been devastating.

This Article proceeds in four parts. Part I provides background on the Fourteenth Amendment and the Privileges or Immunities Clause. Along with the other Reconstruction Amendments, the Fourteenth Amendment fundamentally altered the balance of federal and state power by establishing broad constitutional protections for substantive rights against interference by state and local governments. The promise of the Fourteenth Amendment, however, was denied in the years after Reconstruction, in a line of decisions beginning with the *Slaughter-House Cases*, which largely neutered the Privileges or Immunities Clause.

Part II sets forth the progressive originalist case for revitalizing the Privileges or Immunities Clause. The Privileges or Immunities Clause was probably intended by the framers of the Fourteenth Amendment to be the Amendment's chief source of protections for substantive rights. Progressive originalists argue that a revitalized Privileges or Immunities Clause could displace the Due Process Clause as the textual source of rights that are incorporated by the Fourteenth Amendment, thereby ridding liberals of the liability of having to defend substantive due process doctrine. Moreover, once the Privileges or Immunities Clause is restored to its proper place in the constitutional firmament, progressive originalists argue that it could potentially serve as the source for new unenumerated rights—such as a right to a basic education or a right to marriage, regardless of sexual orientation—thereby advancing progressive goals on a number of fronts.

Part III takes a closer look at the claims by progressive originalists. Here, I argue that the purported benefits of a new Privileges or Immunities Clause jurisprudence are largely overstated. As an initial matter, the project of attempting to ground new unenumerated rights in the Privileges or Immunities Clause is an uncomfortable fit within the broadly originalist project of revitalizing the Clause. But more fundamentally, the concerns animating this project seem largely misplaced. The dispute over the arcana of constitutional text—that is, due process versus privileges or immunities—is one that largely concerns the academy, rather than the broader public, and is unlikely to move the national constitutional conversation about controversial social issues such as reproductive freedom.

Finally, Part IV argues that there are a number of vexing problems that would arise were the Privileges or Immunities Clause to displace the Due Process Clause as the principal source of unenumerated constitutional rights. For one, the range of individuals covered by the Privileges or Immunities Clause is unclear, as its text suggests that it applies to citizens only, unlike the Due Process Clause, which speaks broadly in terms of “person[s].”<sup>16</sup> Moreover, the range of rights that were originally understood as falling among the “privileges or immunities” of citizenship may have been much more limited than what most people today would regard as fundamental rights.

A return to that particular original understanding hardly seems desirable. The Privileges or Immunities debate reveals that, as a project, progressive originalism has its limits. To be sure, progressive originalists have important insights about the promise of historical approaches to constitutional text, and advocates must always be willing to rely on the full range of arguments available to them, including appeals to the plain meaning of text and its original understanding. In many if not most cases, such arguments should be the starting point of analysis. But, as *McDonald* illustrates, a conscious decision by progressives to adopt the language of originalism wholesale is unlikely to be a winning strategy in the long term, and would be more likely to lead to a rollback rather than an expansion of substantive rights protections.

## I. BACKGROUND ON THE PRIVILEGES OR IMMUNITIES CLAUSE

Before addressing the progressive case for revitalizing the Privileges or Immunities Clause, some background on the Fourteenth Amendment and the current state of incorporation doctrine is useful. As the discussion below reveals, the Fourteenth Amendment was intended by its framers to provide strong protections for individual rights against state and local governmental action, thus radically altering the balance of federal and state power.<sup>17</sup> The earliest Supreme Court decisions interpreting the Fourteenth Amendment, however, largely neutered the Privileges or Immunities Clause, leading the Court to rely more heavily on the Due Process and Equal Protection Clauses in subsequent eras. Only in recent years has there “been renewed interest in the Privileges or Immunities Clause.”<sup>18</sup>

### *A. The Fourteenth Amendment and the Federal/State Balance*

The Reconstruction Amendments marked a sea change in the structure of American government. The original Constitution placed few limitations on state governments,

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<sup>16</sup> U.S. CONST. amend. XIV.

<sup>17</sup> See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 1024, 1034 (1866) (statement of Rep. Bingham) (noting that the aim of the proposed amendment was to enforce compliance throughout the entire Republic).

<sup>18</sup> See Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 233 (2009).

with the Bill of Rights generally understood as placing limitations on the federal government alone.<sup>19</sup> The Reconstruction Amendments, however, fundamentally altered the constitutional balance of state and federal power.<sup>20</sup> The Thirteenth Amendment, of course, established a federal prohibition on slavery. The Fifteenth Amendment prohibited states from denying the right to vote on the basis of race.<sup>21</sup> And, in between, the Fourteenth Amendment established that all persons born in the United States are citizens, thus reversing *Dred Scott v. Sandford*,<sup>22</sup> and created a number of protections against state interference.<sup>23</sup> Section One of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>24</sup>

This entailed a radical shift in the constitutional structure of American government. As Justice Marshall so eloquently put it:

While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws.<sup>25</sup>

Enforcement of the Reconstruction Amendments necessarily entails an expansion of federal power at the expense of the states. Not only does Section Five of the Fourteenth

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<sup>19</sup> See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>20</sup> See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 360 (2005) (“[T]he Thirteenth Amendment thus marked a radical break with the antebellum federal Constitution. That prewar document had imposed few limits on what a state could do to its own inhabitants, whereas the Thirteenth pulverized bedrock legal principles and practices in more than one-third of the states and imposed new affirmative federal obligations on every state.”).

<sup>21</sup> U.S. CONST. amend. XV.

<sup>22</sup> 60 U.S. (19 How.) 393 (1857).

<sup>23</sup> U.S. CONST. amend. XIV.

<sup>24</sup> *Id.* § 1.

<sup>25</sup> Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4 (1987); see also AMAR, *supra* note 20, at 360 (“What the bare text does not show is the jagged gash between Amendments Twelve and Thirteen—a gash reflecting the fact that the Founders’ Constitution *failed* in 1861–65. The system almost died, and more than half a million people did die. Without these deaths, the Thirteenth Amendment’s new birth of freedom could never have occurred as it did.”).

Amendment expressly authorize Congress to enact “appropriate legislation” to enforce its provisions,<sup>26</sup> but the Amendment, by establishing individual rights against state action, also necessitates expanded federal judicial review of state governmental action.

### B. Slaughter-House and its Progeny

The practical realization of this new constitutional structure, however, would have to wait, thanks to the *Slaughter-House Cases*.<sup>27</sup> Decided in 1873, *Slaughter-House* was brought by workers in New Orleans who claimed that the Louisiana legislature had violated their fundamental rights of citizenship by granting to a single slaughtering company a monopoly on the butchering of animals within the city of New Orleans.<sup>28</sup> In rejecting the workers’ claims, the Court held that the only “privileges or immunities” protected by the Clause were those “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”<sup>29</sup>

On this reading, most basic freedoms are rights of citizenship of individual States not of federal citizenship, and therefore, are not protected under the Privileges or Immunities Clause,<sup>30</sup> which protects only relatively insignificant national rights, such as the right to travel amongst the states, to “come to the seat” of the federal government, to “transact . . . business . . . with it,” and “to engage in administering its functions.”<sup>31</sup> Ignoring the very purpose of the Fourteenth Amendment,<sup>32</sup> Justice Miller opined that any contrary ruling would improperly and “radically change[ ] the whole theory of the relations of the State and Federal governments to each other.”<sup>33</sup>

The most immediate consequence of *Slaughter-House* and its cramped reading of the Privileges or Immunities Clause was the inauguration of an era in which the Supreme Court construed the Fourteenth Amendment narrowly, with disastrous consequences for African Americans. Over the next few decades, in a line of cases relying on the reasoning of *Slaughter-House*, the Supreme Court consistently rejected federal efforts to protect the rights of freedmen. Two years later, in *United States v. Cruikshank*,<sup>34</sup> the Court cited *Slaughter-House* in holding that the Enforcement Act,<sup>35</sup> which provided for federal prosecution of civil rights violations, could not be applied to individuals acting as private citizens.<sup>36</sup> The Court based its reasoning on two main

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<sup>26</sup> U.S. CONST. amend. XIV, § 5.

<sup>27</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>28</sup> *Id.* at 43.

<sup>29</sup> *Id.* at 79.

<sup>30</sup> *Id.* at 76.

<sup>31</sup> *Id.* at 79; see also *Saenz v. Roe*, 526 U.S. 489, 503 (1999).

<sup>32</sup> See *infra* notes 124–30 and accompanying text.

<sup>33</sup> *Slaughter-House*, 83 U.S. at 78.

<sup>34</sup> 92 U.S. 542 (1875).

<sup>35</sup> Ch. 114, 16 Stat. 140 (1870).

<sup>36</sup> *Cruikshank*, 92 U.S. at 549 (citing *Slaughter-House*, 83 U.S. at 74).

propositions: (1) that the First and Second Amendments have no application to non-federal actors, including both state governments and private citizens; and (2) that Congress has no authority under the Fourteenth Amendment to regulate purely private actors.<sup>37</sup> In reversing the convictions of the perpetrators of the Colfax Massacre, *Cruikshank* essentially gave a green light to the Ku Klux Klan's reign of terror in the South.<sup>38</sup>

The following year, in *United States v. Reese*,<sup>39</sup> the Court dismissed an indictment against a Kentucky election official who refused to register Black voters.<sup>40</sup> There, the Court ruled that the Enforcement Act could not be used to prosecute interference with voting in local, as opposed to federal, elections.<sup>41</sup> The Court's reasoning was tortured—it interpreted the Enforcement Act broadly, as prohibiting any interference with voting, even when such interference was not motivated by race, and held that such a broad prohibition was beyond Congress's remedial powers, which, in the Court's view, only encompassed race-based deprivations.<sup>42</sup> This tortured reading of the statute left southern states free to disfranchise African Americans with literacy, character, and other tests that, while not explicitly based on race, were selectively applied or otherwise had a grossly disproportionate impact on African Americans.<sup>43</sup>

In 1882 in *United States v. Harris*,<sup>44</sup> the Court held that municipal election inspectors who refused to count a Black man's vote could not be prosecuted under a federal criminal statute that prohibited the "invasion" of a person's equal privileges and immunities.<sup>45</sup>

In 1883 in the *Civil Rights Cases*,<sup>46</sup> the Court struck down a federal statute that provided that "all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement."<sup>47</sup> In so ruling, the

<sup>37</sup> *Id.* at 554.

<sup>38</sup> See CHARLES LANE, *THE DAY FREEDOM DIED* 249 (2008) (explaining that *Cruikshank* and its progeny granted southern states "control of their colored population—because the Supreme Court had decreed that the Negroes must look first to the states for protection against violence and fraud").

<sup>39</sup> 92 U.S. 214 (1876).

<sup>40</sup> *Id.* at 221–22.

<sup>41</sup> *Id.* at 218.

<sup>42</sup> *Id.* at 217–22. Thus, even though the conduct at issue in *Reese* was race-based, the Court held that the statute on which the prosecution was based was facially unconstitutional because it reached too broad a range of conduct. *Id.*

<sup>43</sup> See, e.g., FRANK R. PARKER ET AL., *QUIET REVOLUTION IN THE SOUTH* 136, 137 (Chandler Davidson & Bernard Grofman eds., 1994) (noting that the authority to hold a person illiterate resided with clerks of court who were exclusively white).

<sup>44</sup> 106 U.S. 629 (1882).

<sup>45</sup> *Id.* at 637–38. The Court characterized the statute as permitting Congress to "punish a private citizen for an invasion of the rights of his fellow citizen," which, in the Court's view, was beyond the power of Congress under the Reconstruction Amendments. See *id.* at 644.

<sup>46</sup> 109 U.S. 3 (1883).

<sup>47</sup> *Id.* at 19.

Court held that the Fourteenth Amendment did not empower Congress to regulate the actions of private actors; rather, legislation enacted pursuant to Congress's enforcement powers under the Fourteenth Amendment must be "addressed to counteract and afford relief against State regulations or proceedings."<sup>48</sup>

Finally, in 1903 in *James v. Bowman*,<sup>49</sup> a decision that "to some degree, put a nail in the coffin of Reconstruction,"<sup>50</sup> the Court again ruled that a federal law criminalizing interference with the right to vote was unconstitutional insofar as it reached private rather than simply governmental action.<sup>51</sup>

Two general principles emerge from the Court's civil rights jurisprudence during this period: (1) that the Bill of Rights has no application to the states via the Fourteenth Amendment;<sup>52</sup> and (2) that Congress has no authority to regulate private acts of discrimination.<sup>53</sup> These decisions were part of a general renunciation by the Court—and the country generally—of the protection of civil rights after Reconstruction. The sentiment animating these decisions is perhaps best summed up by the following passage from the Court's opinion in the *Civil Rights Cases*:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.<sup>54</sup>

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<sup>48</sup> *Id.* at 23. According to the Court in the *Civil Rights Cases*, "[t]he wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong" that cannot be addressed by federal legislation. *Id.* at 17. In the Court's view, any other interpretation of Congressional authority would be "repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution . . . are reserved to the States respectively or to the people." *Id.* at 15.

<sup>49</sup> 190 U.S. 127 (1903).

<sup>50</sup> David S. Bogen, *Rebuilding the Slaughter-House: The Cases' Support for Civil Rights*, 42 AKRON L. REV. 1129, 1156 (2009).

<sup>51</sup> *Bowman*, 190 U.S. at 136.

<sup>52</sup> *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542, 549 (1875) (citing *Slaughter-House* and holding that, because the First and Second Amendments have no application to non-federal actors—including states—the federal government may not prosecute individuals for civil rights violations).

<sup>53</sup> *See, e.g.*, *Civil Rights Cases*, 109 U.S. at 17 (citing *Slaughter-House*, and holding that "[t]he wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong" that cannot be addressed by federal legislation).

<sup>54</sup> *Id.* at 25; *see also* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 36–41 (2007) (describing the loss of national will in the 1870s to protect the rights of African Americans).

This period represents perhaps the most shameful in the history of the Supreme Court. In this line of cases, the Court violated basic precepts of statutory construction, enunciated principles far broader than were necessary to decide the matters at hand, and too readily struck down Congressional legislation designed to combat discrimination against African Americans after the Civil War. The federal government was left powerless to prevent the establishment of a reconfigured caste system in the form of the Black Codes and Jim Crow, and the Ku Klux Klan's reign of terror.<sup>55</sup>

### *C. Incorporation Under the Due Process Clause*

Today, virtually no one will defend the interpretation of the Privileges or Immunities Clause found in the *Slaughter-House Cases*,<sup>56</sup> which was premised on “antebellum presuppositions of state primacy and state autonomy that had been the justifications of the Confederacy,”<sup>57</sup> and thus failed to recognize the way in which the Reconstruction Amendments, and the Fourteenth Amendment in particular, fundamentally shifted the constitutional balance between federal and state power.<sup>58</sup>

By the mid-twentieth century, however, the Court was finally ready to police deprivations of substantive rights perpetrated by state governments.<sup>59</sup> But, rather than overrule *Slaughter-House*, the Court turned to constitutional text other than the Privileges or Immunities Clause in order to locate the source of its authority.<sup>60</sup> By now, it is well-settled, if not entirely uncontroversial, that the Due Process Clause of the Fourteenth Amendment “incorporates” certain constitutional rights so as to place substantive limits on state and local governmental action.<sup>61</sup>

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<sup>55</sup> See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 93 (2008) (“In the wake of the Supreme Court ruling [in the *Civil Rights Cases*], the federal government adopted as policy that allegations of continuing slavery were matters whose prosecution should be left to local authorities only—a de facto acceptance that white southerners could do as they wished with the black people in their midst.”); Lawrence, *supra* note 54, at 39 (“If [the] *Slaughterhouse* Court had interpreted the Privileges or Immunities Clause of the Fourteenth Amendment as making the federal Bill of Rights applicable to the states, the southern states could not have continued to enact legislation that denied the Bill’s liberties to African-Americans.” (quoting ELIZABETH PRICE FOLEY, *LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY* 36 (2006))).

<sup>56</sup> See Amar, *supra* note 12.

<sup>57</sup> Walter Dellinger, *Remarks on Jeffrey Rosen’s Paper*, 66 *GEO. WASH. L. REV.* 1293, 1294 (1998).

<sup>58</sup> See *supra* Part I.A.

<sup>59</sup> See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 543 (3d ed. 2009).

<sup>60</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1316 (3d ed. 2000) (observing that, after *Slaughter-House*, “responsibility for nationalizing civil rights shifted to the Due Process Clause”).

<sup>61</sup> See, e.g., CHEMERINSKY, *supra* note 59, at 542–43, 545–46.

The test for incorporation of a substantive right under the Due Process Clause has been formulated differently at different times,<sup>62</sup> but it essentially asks whether the right in question is central to our nation's concept of "ordered liberty"<sup>63</sup>—i.e., whether it is so central to our tradition and understanding of freedom that literally no deprivations of that right can be considered "due," regardless of the process used.<sup>64</sup> This test for incorporation under the Due Process Clause has been applied to nearly every individual rights provision of the Bill of Rights.<sup>65</sup> In a long line of cases, the Court has determined that the fundamental protections of the First,<sup>66</sup> Fourth,<sup>67</sup> Fifth,<sup>68</sup> Sixth,<sup>69</sup> and Eighth Amendments<sup>70</sup> are incorporated as against the States through the Due Process Clause.<sup>71</sup>

The Court has yet to analyze only two (relatively insignificant) individual rights found in the Bill of Rights for the purposes of incorporation:<sup>72</sup> the Third Amendment

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<sup>62</sup> See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (describing the test for incorporation as whether the right is "deeply rooted in this Nation's history and tradition"); *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (describing the test for incorporation as whether the right at issue "is necessary to an Anglo-American regime of ordered liberty").

<sup>63</sup> *Duncan*, 391 U.S. at 149 n.14.

<sup>64</sup> See, e.g., *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.").

<sup>65</sup> See CHEMERINSKY, *supra* note 59, at 543.

<sup>66</sup> See *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of expressive association); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (freedom of religion); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech).

<sup>67</sup> See *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement); *Mapp v. Ohio*, 367 U.S. 643 (1961) (protection against unreasonable search and seizure).

<sup>68</sup> See *Benton v. Maryland*, 395 U.S. 784 (1969) (protection against double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (protection against taking without just compensation).

<sup>69</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by an impartial jury); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel); *In re Oliver*, 333 U.S. 257 (1948) (right to a public trial and right to notice of accusations).

<sup>70</sup> See *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment).

<sup>71</sup> The Court has only expressly found two such rights unincorporated: the Fifth Amendment right to grand jury, see *Hurtado v. California*, 110 U.S. 516 (1884), and the Seventh Amendment right to a jury trial in civil cases, see *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). These cases, however, "long predate the era of selective incorporation." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.13 (2010).

<sup>72</sup> See CHEMERINSKY, *supra* note 59, at 545–46 (3d ed. 2009).

prohibition on the quartering of soldiers in private homes<sup>73</sup> and the Eighth Amendment right against excessive bails and fines.<sup>74</sup> Moreover, incorporation applies to both the protections enumerated in the Bill of Rights and also to unenumerated rights, such as the right to abortion.<sup>75</sup> Thus, although *Slaughter-House* largely neutralized the Privileges or Immunities Clause, the constitutionalization of basic rights protections against state and local governmental action has been accomplished through the doctrine of incorporation under the Due Process Clause.<sup>76</sup>

*D. The Privileges or Immunities Clause: Stirrings of a Revival?*

1. *Saenz v. Roe*

Despite the settled nature of incorporation doctrine under the Due Process Clause, there has recently been renewed interest in the Privileges or Immunities Clause. The first stirring from the Court came in a 1999 decision, *Saenz v. Roe*,<sup>77</sup> the Court's first case in decades interpreting the meaning of the Clause. *Saenz* involved a California statute enacted in 1992, which limited the maximum welfare benefits available to newly arrived residents.<sup>78</sup> Plaintiffs challenged the statute under the Privileges or Immunities Clause, arguing that it violated their right as United States citizens to travel freely and resettle amongst the states.<sup>79</sup> Citing *Slaughter-House*, the Court ruled in the plaintiffs' favor, reasoning that the right to travel is one of the privileges or immunities of United States citizenship:

Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases* 16 Wall. 36 (1873), it has always been common ground that this Clause protects . . . the right to travel. Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a

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<sup>73</sup> The Second Circuit has addressed this issue. See *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982).

<sup>74</sup> The Court has recently suggested that the prohibition on excessive bails and fines is in fact incorporated. *Baze v. Rees*, 553 U.S. 35, 47 (2008).

<sup>75</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>76</sup> *TRIBE*, *supra* note 60, at 1316.

<sup>77</sup> 526 U.S. 489 (1999).

<sup>78</sup> CAL. WELF. & INST. CODE § 11450.03 (West 2002).

<sup>79</sup> *Saenz*, 526 U.S. at 502–03.

*bonâ fide* residence therein, with the same rights as other citizens of that State.”<sup>80</sup>

Justice Thomas’s dissent, however, probably did more than the majority opinion to raise the profile of the Privileges or Immunities Clause. Justice Thomas noted that, in his view, it was “likely” that a constitutionally-protected right to travel “was unintended when the Fourteenth Amendment was enacted and ratified.”<sup>81</sup> But he then added words that would embolden future advocates: “Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case.”<sup>82</sup>

## 2. *McDonald v. City of Chicago*

The opportunity for such a reevaluation finally came last term in *McDonald v. City of Chicago*,<sup>83</sup> which involved a challenge to the City of Chicago’s prohibition on the registration of handguns, a set of laws essentially identical<sup>84</sup> to the laws invalidated in *District of Columbia v. Heller*.<sup>85</sup> *Heller* had expressly reserved the question of whether the Second Amendment is incorporated as against the states.<sup>86</sup> Although Justice Scalia’s majority opinion in *Heller* left little doubt about the ultimate outcome,<sup>87</sup> it was unclear at the time whether the Court would hold that the Second Amendment

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<sup>80</sup> *Id.* at 503 (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall) 36 (1873)). In so ruling, the Court reasoned that, although states may generally enact laws that discriminate against the residents of other states (as in the tuition charged to non-state residents at public universities), the justifications for such laws “are simply inapplicable to a nonresident’s exercise of the right to move into another State and become a resident of that State.” *Id.* at 502.

<sup>81</sup> *Id.* at 521 (Thomas, J., dissenting).

<sup>82</sup> *Id.* at 527–28.

<sup>83</sup> 130 S. Ct. 3020 (2010).

<sup>84</sup> The precise ordinances challenged, however, are slightly more complicated. The four ordinances under challenge are: (1) a ban on the registration of handguns, *see* CHI., ILL., MUN. CODE § 8-20-050(c) (2010); (2) a requirement that guns be registered prior to their acquisition by Chicago residents, *see id.* § 8-20-090(a); (3) a requirement that guns be re-registered on an annual basis, which plaintiffs characterized as an annual tax on the exercise of Second Amendment rights, *see id.* § 8-20-200(a); and (4) a provision that renders any gun permanently nonregisterable if its registration lapses, *see id.* § 8-20-200(c). Lead plaintiff Otis McDonald is the registered owner of “long arms,” and is thus subject to the city’s re-registration requirements.

<sup>85</sup> 128 S. Ct. 2783 (2008).

<sup>86</sup> *Id.* at 2813 n.23.

<sup>87</sup> Justice Scalia’s opinion pointed out that *Cruikshank*, which held that the Second Amendment was inapplicable to the states, relied on anachronistic reasoning. *See id.* (“With respect to *Cruikshank*’s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”).

is applicable to state and local governmental regulations on firearms via the Due Process Clause, or under a revitalized Privileges or Immunities Clause.

Taking their cue from Justice Thomas's dissent in *Saenz*, the petitioners in *McDonald* framed their challenge almost exclusively in terms of the Privileges or Immunities Clause. In their petition for certiorari,<sup>88</sup> they framed the Question Presented in the alternative, asking the Court to consider incorporation under the Privileges or Immunities Clause or under the Due Process Clause. But the petitioners emphasized the Privileges or Immunities Clause question by stating it first:

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.<sup>89</sup>

The petition for certiorari devoted a roughly equal number of pages to analysis under each Clause,<sup>90</sup> but, ultimately, the petitioners' merits brief was devoted almost exclusively to the Privileges or Immunities Clause.<sup>91</sup>

Prior to oral argument, the Court sent a strong signal of doubt regarding the petitioners' Privileges or Immunities claim, by taking the uncommon step of granting oral argument to a third party, in this case, the National Rifle Association,<sup>92</sup> which argued for incorporation under the traditional route of Due Process.<sup>93</sup> And indeed, by a vote of five to four, the Court ruled that the Second Amendment applies to state and local governments, with a plurality of four justices holding that it is incorporated via the Due Process Clause, and not the Privileges or Immunities Clause.<sup>94</sup> Regarding the debate over the proper source of incorporated rights, Justice Alito's plurality opinion relied on established due process doctrine rather than an investigation of the original meaning of the Fourteenth Amendment: "[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding."<sup>95</sup>

Only Justice Thomas was willing to decide the case under the Privileges or Immunities Clause.<sup>96</sup> Although some commentators spun the result as a victory for

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<sup>88</sup> Brief for Petitioner at 6, *McDonald*, 130 S. Ct. 3020 (No. 08-1521) [hereinafter Brief for the Petitioner].

<sup>89</sup> *Id.* at I.

<sup>90</sup> *See id.* at 15–21 (Due Process), 21–28 (Privileges or Immunities).

<sup>91</sup> *Id.* at 66–72 (devoting only the final seven pages of a seventy-two page brief to the Due Process Clause).

<sup>92</sup> Order Granting Divide Argument, No. 08-1521 (U.S. Jan. 25, 2010).

<sup>93</sup> *See* Brief for The Nat'l Rifle Assoc. of Am. Supporting Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

<sup>94</sup> *McDonald*, 130 S. Ct. at 30–31 (2010).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 3058–59 (Thomas, J., concurring in part and concurring in the judgment).

enthusiasts of the Privileges or Immunities Clause,<sup>97</sup> the bottom line is that, in *McDonald*, the originalist-style inquiry into the framers' understanding of Constitutional text on display in *Heller* was replaced with an analysis rooted in doctrine and precedent. Indeed, as Justice Thomas correctly observed in his opinion, "neither [the plurality nor the dissent] argue[d] that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of ratification."<sup>98</sup> Justice Alito's opinion went so far as to reject "turn[ing] back the clock," in favor of respect for "*stare decisis*."<sup>99</sup> For eight of the nine justices, then, doctrine trumped fidelity. After *McDonald*, it seems that originalism's pull on the Court may not be as potent as had been advertised.

## II. THE PROGRESSIVE ORIGINALIST CASE FOR SHIFTING THE TEXTUAL SOURCE OF INCORPORATION

The Court in *McDonald* declined to find new life in the Privileges or Immunities Clause.<sup>100</sup> But how did we arrive at a place where even progressive academics were calling for such a revival? While it is perhaps unsurprising that self-avowed originalists were interested in restoring what they viewed as the original understanding of the Privileges or Immunities Clause, what has been particularly notable in recent years is the growing chorus of left-leaning academics joining the call for a reevaluation of the textual source of incorporation.<sup>101</sup>

Over the past decade, there has been a growing sense amongst some left-of-center academics that progressives should engage in stronger efforts to ground constitutional claims in textualist and originalist principles—what could be called a "progressive

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<sup>97</sup> Randy Barnett went so far as to predict the eventual rise of a Privileges or Immunities Clause-based incorporation jurisprudence, comparing Thomas's concurrence to Justice Powell's famous opinion on the diversity rationale in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), which eventually commanded a majority of the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). See Randy Barnett, *The Supreme Court's Gun Showdown*, WALL ST. J., June 29, 2010, at A19. Time may prove Barnett correct. But for every *Bakke*, there are dozens of cases featuring an opinion expressing the views of a solitary justice who is not joined by a single colleague. Most of those opinions die in obscurity. Powell's *Bakke* opinion was unique in that it advanced a policy argument that captured the imagination of political actors on a hot-button social issue. I would be surprised to see an esoteric debate of this nature capture the same sort of attention outside of the academy.

<sup>98</sup> *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring in part and concurring in the judgment).

<sup>99</sup> *Id.* at 3046 (plurality opinion).

<sup>100</sup> *Id.* at 3030–31.

<sup>101</sup> See, e.g., DAVID H. GANS & DOUGLAS T. KENDALL, *THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT* (2008), [http://www.theconstitution.org/upload/filelists/241\\_Gem\\_of\\_the\\_Constitution.pdf](http://www.theconstitution.org/upload/filelists/241_Gem_of_the_Constitution.pdf).

originalism.”<sup>102</sup> This is largely a response to the powerful originalist criticisms leveled by conservatives on the Warren-era expansion of individual rights,<sup>103</sup> and the sense that conservatives have successfully framed the public debate over the proper method of constitutional interpretation.<sup>104</sup>

For example, Doug Kendall and James Ryan have argued that progressives have essentially lost the rhetorical war with originalists, whose claim to fidelity to constitutional text has powerful common-sense resonance.<sup>105</sup> According to them, if progressive constitutional theorists are to have any success in the larger public sphere, they have no choice but to embrace the rhetoric of textualism and originalism.<sup>106</sup> Doing so would not only open up new opportunities for progressives to engage in modes of argumentation in (the not uncommon) situations where conservatives deviate from the original understanding of constitutional provisions or the plain meaning of statutory text, but would also position liberals as the true keepers of the faith where the Constitution commands broad protections for individual rights or permits robust government efforts to combat inequality.

Thus, Akhil Amar and Daniel Widawsky, have famously argued that child abuse is a form of slavery prohibited by the Thirteenth Amendment.<sup>107</sup> Expanding on their work, Andrew Koppelman<sup>108</sup> and Jack Balkin<sup>109</sup> have attempted to construct originalist arguments in support of abortion rights. Jed Rubenfeld, meanwhile, has argued that an originalist understanding of the Fourteenth Amendment permits race-conscious affirmative action programs, because the same Congress that passed the Amendment also enacted a welfare statute directed specifically at African Americans.<sup>110</sup> And Doug

<sup>102</sup> See, e.g., *id.*; Balkin, *supra* note 13.

<sup>103</sup> See, e.g., James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1347 (1997) (“Originalism is an ism, a conservative ideology that emerged in reaction against the Warren Court. Before Richard Nixon and Robert Bork launched their attacks on the Warren Court, originalism as we know it did not exist.” (emphasis omitted)).

<sup>104</sup> *Id.* at 1345.

<sup>105</sup> Kendall & Ryan, *supra* note 13, at 16 (“Progressives have painted themselves into a corner by running away from the text and history of the Constitution . . .”).

<sup>106</sup> See *id.* at 14 (“To win these debates in the next election, liberals are going to have to borrow from Justice Antonin Scalia and the conservative lexicon.”).

<sup>107</sup> See Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 *HARV. L. REV.* 1359 (1992).

<sup>108</sup> See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 *NW. U. L. REV.* 480 (1990).

<sup>109</sup> See Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007).

<sup>110</sup> In 1867, Congress passed legislation that granted money to “destitute colored persons” in Washington D.C. Jed Rubenfeld, *The Moment and the Millennium*, 66 *GEO. WASH. L. REV.* 1085, 1106–07 (1998) (internal quotation marks omitted); see also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 *VA. L. REV.* 753 (1985). In Rubenfeld’s view, progressives should call out the conservative opposition to affirmative action programs as inconsistent with the radical egalitarian original understanding of the Fourteenth Amendment. While this is certainly an interesting point, it is a “curiously specific way

Kendall has established the Constitutional Accountability Center (CAC), described on its website as “a think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution’s text and history,”<sup>111</sup> and which describes its interpretative approach as “honest textualism and principled originalism.”<sup>112</sup> CAC has made significant contributions to legal thought<sup>113</sup> and has advanced crucial arguments in important cases.<sup>114</sup>

Rather than a broad survey of progressive originalist thought, the focus of this Article is on the progressive originalist case for a reinvigoration of the Privileges or Immunities Clause. There are three rationales: (1) that an incorporation jurisprudence flowing from the Privileges or Immunities Clause would better comport with the text and original understanding of the Fourteenth Amendment, thus aligning progressive achievements with originalist principles; (2) that substantive due process is fundamentally unsound and should be replaced with a doctrine that is easier to defend intellectually; and (3) that a revitalized Privileges or Immunities Clause could subsequently advance progressive goals as the source of new unenumerated rights. A brief description of each rationale is set forth below.

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of identifying the core original purpose of the constitutional text.” Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1245 (1998).

<sup>111</sup> CONST. ACCOUNTABILITY CTR., <http://theconstitution.org/> (last visited Nov. 17, 2010).

<sup>112</sup> *What Is Constitutional Accountability?*, CONST. ACCOUNTABILITY CTR., <http://www.theconstitution.org/page.php?id=91> (last visited Nov. 17, 2010).

<sup>113</sup> *See, e.g.*, GANS & KENDALL, *supra* note 101.

<sup>114</sup> For instance, the Constitutional Accountability Center filed a compelling brief as amicus curiae in *Farrakhan v. Gregoire*, 603 F.3d 1072 (9th Cir. 2010), *aff’d en banc*, 2010 WL 4054429 (9th Cir. Oct. 7, 2010), a case concerning the validity of Washington’s felon disfranchisement laws under Section Two of the federal Voting Rights Act (disclosure: plaintiffs in *Farrakhan* are represented by the Legal Defense Fund, and I am on the team of lawyers working on the case). Some courts that have previously considered the questions presented in *Farrakhan* have read significance into the fact that Section Two of the Fourteenth Amendment contains an “affirmative sanction” for felon disfranchisement laws, and have concluded that Congress therefore has no authority to regulate such laws. *See, e.g.*, *Hayden v. Pataki*, 449 F.3d 305, 315–16 (2d Cir. 2006). The CAC, however, points out in its brief that the Fifteenth Amendment, which prohibits racial discrimination in voting and empowers Congress to enact appropriate legislation to enforce that prohibition, contains no exception for felon disfranchisement laws, and that, significantly, the framers of the Amendment considered but rejected the inclusion of such an exception when the Amendment was adopted. *See* Brief for Constitutional Accountability Center as Amicus Curiae Supporting Plaintiffs-Appellants, *Farrakhan*, 603 F.3d 1072 (No. 06-35669). In other words, by rejecting an “affirmative sanction” for felon disfranchisement laws, the framers of the Fifteenth Amendment understood congressional enforcement powers to reach all discriminatory voting laws, including, in some instances, felon disfranchisement laws. I note that the Brennan Center for Justice made similar arguments as amicus in a previous felon disfranchisement case. *See* Brief for The Brennan Center for Justice at New York University School of Law and The University of North Carolina School of Law Center for Civil Rights as Amici Curiae Supporting Plaintiffs-Appellants, *Hayden*, 449 F.3d 305 (No. 01-7260).

*A. The Text and Original Understanding of the Privileges or Immunities Clause*

Over the past two decades, a growing chorus of constitutional scholars has argued that relying on the Privileges or Immunities Clause as the principal source of protections for substantive rights would better comport with the text and original understanding of the Fourteenth Amendment. This view has been advanced by, among others, Lawrence Tribe,<sup>115</sup> Akhil Amar,<sup>116</sup> Michael Kent Curtis,<sup>117</sup> Doug Kendall,<sup>118</sup> and Michael Anthony Lawrence.<sup>119</sup>

As a plain textual matter, this position makes a great deal of sense. The phrase “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”<sup>120</sup> sounds clearly substantive: “it seems to announce rather plainly that there is a set of entitlements that no state is to take away.”<sup>121</sup> The structure of the Fourteenth Amendment would also seem to confirm that the Privileges or Immunities Clause includes substantive rights protections. The first clause of the Amendment announces the new status of United States citizenship as a birthright, extended to all regardless of race, thus reversing *Dred Scott*.<sup>122</sup> The Privileges or Immunities Clause follows immediately thereafter, and appears to safeguard all of the attendant rights of United States citizenship (i.e., fundamental rights, including the Bill of Rights).<sup>123</sup>

Comments during ratification debates support the notion that the Privileges or Immunities Clause was intended to safeguard substantive rights against state and local governmental action.<sup>124</sup> The framers of the Fourteenth Amendment were well aware of the fact that, in the aftermath of the Civil War, southern states were violating the rights of unionists and freedmen. Reconstruction Republicans indicated that they drafted the Privileges or Immunities Clause specifically to resolve Southern

<sup>115</sup> See TRIBE, *supra* note 60, at 1300–01.

<sup>116</sup> See AMAR, *supra* note 20, at 386–88.

<sup>117</sup> See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1990) [hereinafter, CURTIS, NO STATE SHALL ABRIDGE]; see also Michael Kent Curtis, *The Bill of Rights and the States Revisited After Heller*, 60 HASTINGS L.J. 1445, 1450–63 (2009).

<sup>118</sup> See GANS & KENDALL, *supra* note 101.

<sup>119</sup> See, e.g., Lawrence, *supra* note 54, at 23 (quoting the Fourteenth Amendment ratification debates).

<sup>120</sup> U.S. CONST. amend. XIV, § 1.

<sup>121</sup> JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 24 (1980). According to Curtis, the term “privileges or immunities” is essentially synonymous with “rights and liberties,” and is a “shorthand description of fundamental or constitutional rights.” CURTIS, NO STATE SHALL ABRIDGE, *supra* note 117, at 64.

<sup>122</sup> 60 U.S. (19 How.) 393 (1856).

<sup>123</sup> See Akhil Reed Amar, Heller, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 175–76 (2008).

<sup>124</sup> See Lawrence, *supra* note 54, at 18–23.

recalcitrance.<sup>125</sup> Two sources are particularly noteworthy: (1) Senator Howard of the Joint Committee on Reconstruction, who expressly stated that the Privileges or Immunities Clause was meant to include the first eight amendments,<sup>126</sup> and (2) Representative Bingham, the principal author of Section One of the Fourteenth Amendment, who, after ratification, made several statements to the same effect, e.g.:

[T]he privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. . . . These eight articles . . . never were limitations upon the power of the States, until made so by the [F]ourteenth [A]mendment.<sup>127</sup>

There was no dispute in Congress over this interpretation of the Privileges or Immunities Clause,<sup>128</sup> which suggests that the views expressed above were not limited to only a small group of legislators. Thus, as John Hart Ely observed, the Privileges or Immunities Clause “was probably the clause from which the framers of the Fourteenth Amendment expected the most.”<sup>129</sup> From a textual and historical perspective, therefore, the case for incorporation under the Privileges or Immunities Clause seems clear. And, as an added bonus, overruling *Slaughter-House* could be seen as atoning for the historical wrongs of the post-Reconstruction era Court described above.<sup>130</sup>

### B. Substantive Due Process

Second, some progressives have argued that a return to the original understanding of the Privileges or Immunities Clause, by solving the problem of incorporation, would eliminate the need to rely on substantive due process doctrine.<sup>131</sup> In this view, there are essentially two related problems with substantive due process, one textual and the other pragmatic. Amar has summed up the textual problem succinctly: “how does a clause about *procedural* rights incorporate *substantive* freedoms such as freedom

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<sup>125</sup> GANS & KENDALL, *supra* note 101, at x (“The framers of the Fourteenth Amendment recoiled at the treatment of slave families—parents were denied the right to marry and often separated, children were taken from them, and education and free worship were limited or prohibited altogether—and they wrote the Privileges or Immunities Clause at least in part to protect these liberties of heart and home.”).

<sup>126</sup> CONG. GLOBE, 39TH CONG., 1ST SESS. 2765–66 (1866).

<sup>127</sup> CONG. GLOBE, 42D CONG., 1ST SESS. app. at 84 (1871).

<sup>128</sup> See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 117, at 91; Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1238 (1992).

<sup>129</sup> ELY, *supra* note 121, at 22.

<sup>130</sup> See *supra* Part I.B.

<sup>131</sup> See, e.g., TRIBE, *supra* note 60, at 1319.

of expression and religion?”<sup>132</sup> The clauses of the Fourteenth Amendment in which substantive rights protections are currently grounded—the Due Process and Equal Protection Clauses—can seem ill-suited to the task of protecting substantive rights. “Due process” sounds like it refers to nothing more than ensuring the basic fairness of certain *procedures*, while “equal protection” addresses *equality*. Neither clause, as a plain textual matter, seems to do much in that way of articulating protections of baseline substantive rights.

According to Tribe, the “insuperable” problem of substantive due process can only be resolved with “textual gymnastics” that are ultimately unconvincing.<sup>133</sup> This dim view of substantive due process has, of course, long held currency amongst conservatives,<sup>134</sup> what is new is that some of the foremost constitutional theorists associated with the mainstream left have essentially conceded this point.

The second problem is more pragmatic: judicial rulings establishing unenumerated rights as constitutional guarantees under substantive due process doctrine raise the specter of *Lochner v. New York*<sup>135</sup> and *Dred Scott*.<sup>136</sup> In Tribe’s view, such decisions, which appear to be unmoored from constitutional text, ultimately threaten the legitimacy of the judiciary as an institution: “There is the very real threat that the doctrinal shakiness of substantive due process may in turn undermine public confidence in the institution of judicial review and in the ability of judges honestly to interpret the dictates of the Constitution.”<sup>137</sup> From this perspective, the linguistic incoherence of the term “substantive due process” is not merely an academic matter. Rather, given its relation to historically dubious cases such as *Dred Scott* and *Lochner*, substantive due process ultimately undermines respect for judicial review and the courts generally. In light of these concerns, Tribe suggests that we consider transferring the textual source of incorporation to “less shaky” grounds.<sup>138</sup>

Much of the Warren-era expansion of individual rights was largely accomplished through incorporation doctrine, which has been a frequent target of conservative ire. Indeed, the more conservative members of the Court have only acceded to the application of incorporation doctrine grudgingly.<sup>139</sup> Thus, a new Fourteenth Amendment

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<sup>132</sup> AMAR, *supra* note 20, at 389; *see also* TRIBE, *supra* note 60, at 1317 (describing the intellectual difficulties in “find[ing] protection of *substantive* rights in a provision whose words seem most apparently concerned with *process*”). As John Hart Ely famously put it, substantive due process sounds like a contradiction in terms like “green pastel redness.” ELY, *supra* note 121, at 18.

<sup>133</sup> *See* TRIBE, *supra* note 60, at 1317.

<sup>134</sup> *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (referring to “the current disarray of our Fourteenth Amendment jurisprudence”).

<sup>135</sup> 198 U.S. 45 (1905); TRIBE, *supra* note 60, at 1318.

<sup>136</sup> *See* AMAR, *supra* note 20, at 389 (arguing that the term “substantive due process [ ] not only verges on oxymoron, but also perversely builds on *Dred Scott*”).

<sup>137</sup> *See* TRIBE, *supra* note 60, at 1317.

<sup>138</sup> *See id.* at 1319.

<sup>139</sup> *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) (seeking to limit incorporation doctrine so as to exclude the Establishment Clause);

jurisprudence that relies principally on the Privileges or Immunities Clause as the textual source for incorporation could alleviate the textual concerns described above, while consolidating support across the ideological spectrum for the constitutionalization of substantive rights protections against state interference. Recasting incorporation doctrine in an originalist mold would provide a powerful defense against those who would attack progressive victories of the past, by realigning the outcomes in those cases, if not their precise reasoning, with the text of the Fourteenth Amendment and with academic consensus as to the Amendment's original understanding.

### C. *New Substantive Rights*

The third rationale advanced by progressives for revitalizing the Privileges or Immunities Clause is the possibility that the Clause could serve as the foundation for new substantive rights protections. Initially, I note that, whereas substantive due process remains limited by selective incorporation doctrine,<sup>140</sup> the historical record seems to suggest that the Privileges or Immunities Clause was intended to encompass all of the first eight amendments cleanly (“total incorporation”),<sup>141</sup> which would immediately expand the range of rights protected against state interference to include the Third Amendment right against the quartering of soldiers in homes,<sup>142</sup> the Fifth Amendment right to a grand jury,<sup>143</sup> the Seventh Amendment right to a jury in civil trials,<sup>144</sup> and the Eighth Amendment right against excessive bails and fines.<sup>145</sup>

But the more interesting possibility is that of new unenumerated rights. Contemporary interest in the Privileges or Immunities Clause can largely be traced back to a 1972 law review article by Philip Kurland, arguing that the Clause could serve as the new frontier for liberal constitutional theory.<sup>146</sup> By the 1970s, liberals had determined that they had obtained as much mileage from the Due Process and Equal Protection Clauses as they were likely to get, but Kurland hypothesized that the Privileges or Immunities Clause might prove fertile terrain for establishing constitutional guarantees such as a right to police protection, to welfare, and to basic health services.<sup>147</sup> More

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Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) (accepting incorporation, but only because “it is both long established and narrowly limited”).

<sup>140</sup> See Wolf v. Colorado, 338 U.S. 25, 26 (1949) (observing that the Due Process Clause only selectively incorporates provisions of the Bill of Rights), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

<sup>141</sup> See *supra* text accompanying note 127. *But see* McDonald v. City of Chicago, 130 S. Ct. 3020, 3033 n.10 (2010) (citing commentary rejecting total incorporation doctrine).

<sup>142</sup> See Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982).

<sup>143</sup> This right is currently unincorporated. See Hurtado v. California, 110 U.S. 516 (1884).

<sup>144</sup> This right is currently unincorporated. See Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916).

<sup>145</sup> This right is currently unincorporated. See Baze v. Rees, 553 U.S. 35 (2008).

<sup>146</sup> See Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round At Last”?*, 1972 WASH. U. L. Q. 405 (1972).

<sup>147</sup> *Id.* at 419.

recently, others have suggested that the Privileges or Immunities Clause could serve as a basis on which to establish a guarantee for a range of rights, including positive rights to basic life essentials such as government assistance<sup>148</sup> and a basic education;<sup>149</sup> or a national right to vote.<sup>150</sup> Still others have suggested that a fundamental right to marriage could also be on the menu,<sup>151</sup> which would obviously be of interest to gay rights advocates.

There is some historical support for a broad reading of the Privileges or Immunities Clause. In attempting to define the term “privileges or immunities” during the Fourteenth Amendment ratification debates, Representative Rogers described it extremely broadly:

What are the privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities.<sup>152</sup>

This does not, of course, demonstrate that the framers of the Fourteenth Amendment expected the Privileges or Immunities Clause to become a catch-all for progressive goals; but it does suggest that a rather expansive understanding of what the Clause entails might be consistent with its original understanding.

Thus, progressive originalists like David Gans and Doug Kendall have urged a broad reading of the Privileges or Immunities Clause, pointing to the Court’s expansive list of freedoms associated with Due Process, as stated in *Meyer v. Nebraska*,<sup>153</sup> as a starting point for interpreting the scope of the Privileges or Immunities Clause.<sup>154</sup>

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<sup>148</sup> See, e.g., Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimal Entitlements*, 44 MERCER L. REV. 525, 538 (1993).

<sup>149</sup> See Goodwin Liu, *National Citizenship and the Promise of Equal Educational Opportunity*, in THE CONSTITUTION IN 2020, at 119, 120 (Jack M. Balkin & Reva B. Siegel eds., 2009).

<sup>150</sup> See John Benjamin Schrader, Note, *Reawakening “Privileges or Immunities”: An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws*, 62 VAND. L. REV. 1285, 1307–09 (2009) (observing that the majority of state legislatures that ratified the Fourteenth Amendment concluded that the right to vote was among the Privileges or Immunities protected by the Amendment).

<sup>151</sup> See TRIBE, *supra* note 60, at 1329–30.

<sup>152</sup> CONG. GLOBE, 39TH CONG., 1ST SESS. 2538 (1866).

<sup>153</sup> 262 U.S. 390, 399 (1923).

<sup>154</sup> GANS & KENDALL, *supra* note 101, at 31.

In *Meyer*, which invalidated a Nebraska statute that prohibited the teaching of modern foreign languages, the Court held that Due Process includes

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>155</sup>

Gans and Kendall conclude that a revitalized Privileges or Immunities Clause could similarly be construed broadly, and serve as the basis for a new Fourteenth Amendment jurisprudence that provides robust protections for individual rights.<sup>156</sup>

### III. THE ILLUSORY BENEFITS OF A REVITALIZED PRIVILEGES OR IMMUNITIES CLAUSE

I have no quarrel with the textual and historical analysis by Amar and others concerning the original understanding of the Privileges or Immunities Clause (although I note that the meaning of the Clause might not be as clear-cut as the above discussion would suggest).<sup>157</sup> The effort to emphasize the consistency between the original understanding of the Fourteenth Amendment and the outcomes of the Warren Court's incorporation decisions is both admirable and long overdue. In my view, however, the *practical* benefits of progressive originalism generally, and a revitalization of the Privileges or Immunities Clause in particular, may not be as strong as advertised. I examine each of the rationales for shifting the source of incorporation to the Privileges or Immunities Clause in turn below, in reverse order from the preceding discussion. The following discussion will, I hope, demonstrate that the purported benefits for progressives of a tight embrace of originalist modes of argumentation may be exaggerated in some contexts.

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<sup>155</sup> *Meyer*, 262 U.S. at 399.

<sup>156</sup> GANS & KENDALL, *supra* note 101, at 30.

<sup>157</sup> See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3089 (2010) (Stevens, J., dissenting) (observing that the original meaning of the Privileges or Immunities Clause “is not as clear as [petitioners] suggest”); David Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 393 (2004) (arguing that the public understanding of the Fourteenth Amendment may have differed from the intent of the Amendment's framers); Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 75 (2009) (noting the mixed historical evidence for incorporation of the Second Amendment, and arguing that it is “far from settled” that the Privileges or Immunities Clause was understood to include the entirety of the Bill of Rights).

*A. New Substantive Rights?*

Let us begin with what is surely a tantalizing prospect for progressives: that the Privileges or Immunities Clause could become a fountain for new constitutionally-protected rights, like a right to a basic education or a fundamental right to marriage that includes same-sex couples. While progressives can and should be open to ideas and litigation strategies that enhance protections for fundamental constitutional rights, it is not entirely clear why, for instance, same-sex marriage would be more likely to find a home in the Privileges or Immunities Clause than in the Due Process or Equal Protection Clauses. There is, of course, the statement from Representative Rogers stating that the right to marry is a “privilege” protected by the Privileges or Immunities Clause.<sup>158</sup> But the Supreme Court has already recognized a fundamental right to marry under the Due Process Clause;<sup>159</sup> the net benefit of having additional constitutional text on which to ground the right to marriage seems marginal at best.<sup>160</sup>

As for items like a right to a basic education, we can certainly argue that a right to a sound public education through the twelfth grade should properly be understood as a fundamental “privilege” of American citizenship, but it is highly unlikely that the framers, ratifiers, or the general public at the time of the adoption of the Fourteenth Amendment understood that this was the case.<sup>161</sup> Moreover, the very project of attempting to ground unenumerated rights in the Privileges or Immunities Clause may encounter additional difficulties stemming from the fact that, while the framers of the Fourteenth Amendment spoke repeatedly about the incorporation of the first eight amendments, they are noticeably silent about the Ninth Amendment’s guarantee of unenumerated rights,<sup>162</sup> which could be interpreted to suggest that the Clause was not meant to encompass a broad set of rights that are not expressly set forth in the Constitution.

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<sup>158</sup> See *supra* text accompanying note 152.

<sup>159</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>160</sup> *Id.* at 12 (showing that the right is firmly grounded and widely recognized).

<sup>161</sup> After all, while the Court in *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) observed that, by the mid-twentieth century, education had become “perhaps the most important function of state and local governments,” it implicitly recognized that this was not the case at the time that the Fourteenth Amendment was framed and ratified. Indeed, secondary education did not become widespread in the United States until the “high school movement” of the early twentieth century. See, e.g., JURGEN HERBST, *THE ONCE AND FUTURE SCHOOL: THREE HUNDRED AND FIFTY YEARS OF AMERICAN SECONDARY EDUCATION* 141 (1996); Karen Kornbluh & Rachel Homer, *The New Family Values Agenda: Renewing Our Social Contract*, 4 HARV. L. & POL’Y REV. 73, 83 (2010) (citing CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1998)). Even by 1910, fewer than twenty percent of all fifteen to eighteen year olds were enrolled in high school, with fewer than ten percent graduating. CLAUDIA GOLDIN & LAWRENCE F. KATZ, *THE RACE BETWEEN EDUCATION AND TECHNOLOGY* 195 (2008).

<sup>162</sup> Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1540–64 (2007).

Of course, the precise original understanding of the Fourteenth Amendment might not matter to progressives who are committed to other modes of constitutional interpretation. But if the case for locating substantive rights in the Privileges or Immunities Clause rests largely on the grounds that doing so would better comport with the understanding of the Reconstruction-era framers,<sup>163</sup> then it would be difficult, after successfully reinvigorating the Clause on strictly originalist grounds, to turn around suddenly and attempt to deploy the Clause for decidedly un-originalist goals.

This difficulty is common to many of the more creative efforts to ground unenumerated rights in originalist arguments. For instance, Koppelman's theory of reproductive freedom is incisive,<sup>164</sup> but it is also hard to square with what most would describe as an originalist understanding of the Thirteenth Amendment. If anything, it draws on a general anti-servitude principle that is embedded in the Amendment, and then analogizes it to a more specific contemporary problem that was probably not considered by the Amendment's framers.<sup>165</sup> In that sense, it is an argument that is more of a piece with Ronald Dworkin's concept/conception distinction<sup>166</sup> than with a conventional understanding of originalism.

What I hope this discussion illustrates is that there is always a general difficulty in attempting to assign unenumerated rights to constitutional text, a difficulty that does not vanish simply because we replace the Due Process Clause with the Privileges or Immunities Clause. Tellingly, in attempting to outline the scope of what might be covered under the Privileges or Immunities Clause, Gans and Kendall make no effort to chart new ground, but simply turn to one of the Court's earliest substantive due process cases from the twentieth century, *Meyer*.<sup>167</sup> The laundry list in *Meyer* represents, of course, a number of important fundamental rights,<sup>168</sup> but if the Court has already held that these particular rights fall within the concept of due process, and if the test for incorporation under the Privileges or Immunities Clause is the same as that under the Due Process Clause, then one might be forgiven for asking what we can reasonably expect a new Privileges or Immunities Clause jurisprudence to accomplish.

Ultimately, the very project of attempting to find a federal constitutional guarantee to positive rights like a basic education, at least in the near term, probably ignores political reality. The rightward tilt of the federal judiciary is well-known, and unsurprising given that the presidency had been controlled by the Republican party for twenty-eight out of the forty years preceding the Obama administration.<sup>169</sup> And while the Obama

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<sup>163</sup> See *supra* Part II.A.

<sup>164</sup> See Koppelman, *supra* note 108, at 486–93 (arguing that coerced pregnancy is a form of involuntary servitude).

<sup>165</sup> *Id.*

<sup>166</sup> See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 71 (1986).

<sup>167</sup> See GANS & KENDALL, *supra* note 101, at ix.

<sup>168</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); GANS & KENDALL, *supra* note 101, at iv.

<sup>169</sup> Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT'L L.J. 37, 73 n.150 (2009); see also The

administration will likely stem the tide somewhat, it will probably not reverse it, particularly in light of the slow pace of nominations,<sup>170</sup> and, if it is a harbinger of things to come, the current gridlock surrounding the confirmation process.<sup>171</sup> In any event, Republican appointees to the judiciary are hardly the only obstacle to guarantees like a right to a basic education; Justice Brennan famously referred to the “the law of five! With five votes, you can do anything around here!”<sup>172</sup> but I have a difficult time counting even to one vote on the current Court for things like a constitutional right to government assistance or a basic education, regardless of whether the Privileges or Immunities Clause is involved.

### *B. Replacing Substantive Due Process with a More “Stable” Foundation?*

If the ambitious goal of discovering new substantive rights in the Privileges or Immunities Clause is out of reach for now, what about the more modest objective of relieving progressive constitutional theorists of the substantive due process albatross? Might not a revitalized Privileges or Immunities Clause at least allow progressives to put us on a level playing field with the originalists?

To answer a question with a question, why would this be a worthwhile goal? Although substantive due process is much-maligned, it is not universally regarded as an incoherent legal concept,<sup>173</sup> and it is not quite clear that it is actually that much of a liability for progressive constitutional theorists.

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Presidents of the United States, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/> (last visited Nov. 17, 2010).

<sup>170</sup> See, e.g., Al Kamen, *On the Plus Side, the Robe-and-Gavel Savings are Huge*, WASH. POST, April 7, 2010, at A15 (“The Obama administration has a good shot at setting a couple of modern indoor records for a president halfway through his first term: fewest number of judicial nominees . . .”). As of April 2010, Obama had nominated only fifty-six judges for the federal district and appeals courts (not counting one for the Supreme Court), as compared to ninety-eight for George W. Bush and seventy-seven for Bill Clinton at the same point in their first terms.

<sup>171</sup> Witness, for instance, the acrimony around the nomination of David Hamilton to the Seventh Circuit, a moderate who had strong bipartisan support in his home state and an insider pedigree. See Warren Richey, *Senate OK’s David Hamilton to be US Appeals Court Judge*, CHRISTIAN SCI. MONITOR (Nov. 19, 2009), <http://www.csmonitor.com/USA/Politics/2009/1119/senate-oks-david-hamilton-to-be-us-appeals-court-judge>. Or the delay surrounding the confirmation of Barbara Keenan to the Fourth Circuit despite the absence of any opposition to her confirmation. See Steve Benen, *Meet Barbara Milano Keenan*, WASH. MONTHLY (Mar. 2, 2010), [http://www.washingtonmonthly.com/archives/individual/2010\\_03/022664.php](http://www.washingtonmonthly.com/archives/individual/2010_03/022664.php).

<sup>172</sup> See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 85 (2007).

<sup>173</sup> See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 644–45 (2009) (arguing that substantive due process is consistent with naturalist legal theory which holds that an unjust law is not really law).

There are two separate points here. First, the basic ideas underlying substantive due process are not as far-fetched as some would argue, and, even if they are, they are so firmly rooted in the Court's jurisprudence that they are not "unstable" in any sense of the word.<sup>174</sup> Although a full-throated defense of substantive due process is beyond the scope of this Article, the proposition that some infringements on liberty are so extreme that they cannot be tolerated by the Constitution under any circumstances is not *prima facie* unpersuasive. The basic principle here is that there are some deprivations so odious to our concept of liberty that, quite literally, no procedures for effecting them can be considered "due" under the law.<sup>175</sup> This principle is deeply entrenched in the Court's jurisprudence,<sup>176</sup> and, far from a recent innovation, the doctrine has roots that stretch back at least to the early nineteenth century,<sup>177</sup> and perhaps as far back as the Magna Carta.<sup>178</sup> At least one commentator has recently argued that substantive due process is entirely consistent with originalist principles.<sup>179</sup>

None of this is meant to suggest that the case for substantive due process is clean, only that the case against it is perhaps not open and shut. But in any event, even if substantive due process is untidy as an intellectual concept, it seems so deeply-rooted in the Court's jurisprudence that it does not appear to be in any danger of revision any time soon. Even Justice Scalia, who has described substantive due process as a "judicial usurpation"<sup>180</sup> and an "oxymoron,"<sup>181</sup> acknowledged during oral argument in *McDonald* that "as much as I think it's wrong, I have—even I have acquiesced in it,"<sup>182</sup> and concurred in the plurality's conclusion that the right to keep and bear arms is one of the substantive rights that is protected by the Due Process Clause.<sup>183</sup> The

<sup>174</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (describing the "long line of cases" establishing various rights under the Due Process Clause).

<sup>175</sup> See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (holding that the Due Process Clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them"); see also Bogen, *supra* note 157, at 392.

<sup>176</sup> See *Glucksberg*, 521 U.S. at 720 (1997).

<sup>177</sup> See, e.g., *id.* at 757–61 (Souter, J., concurring) (tracing the development of substantive due process jurisprudence from the early nineteenth century).

<sup>178</sup> *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) ("Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could . . . nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884))).

<sup>179</sup> Gedicks, *supra* note 173, at 644–45.

<sup>180</sup> *Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

<sup>181</sup> *United States v. Carlton*, 512 U.S. 26, 139 (1994) (Scalia, J., concurring).

<sup>182</sup> Transcript of Oral Argument at 7, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

<sup>183</sup> *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in [it] . . . . This case does

purported need for a more “stable” foundation for substantive rights than the Due Process Clause is therefore perhaps a bit overstated.

Second, even if the intellectual underpinnings of substantive due process are “shaky,” academics seem to overestimate the importance of that “shakiness” in the public sphere when fiercely-contested political issues are at stake.<sup>184</sup> As an initial matter, it is not entirely clear that originalism has as powerful a place in popular culture as is often ascribed to it, as at least one important survey suggests that a majority of the public does not subscribe to originalist views.<sup>185</sup> But more fundamentally, even if we agree that substantive due process makes little sense from a textualist or an originalist perspective, the debate over whether the Due Process Clause or the Privileges or Immunities Clause represents the proper source of substantive rights “seems to be,” as Walter Dellinger has put it, “more of interest to a compiler of head notes than to citizens . . . .”<sup>186</sup> While Tribe and others have expressed the possibility that substantive due process weakens the legitimacy of the courts in the eyes of the general public,<sup>187</sup> this concern may overestimate the role that legal doctrine plays in shaping public opinion of the judiciary.

To the extent that they profess a preference for a particular form of constitutional interpretation, conservative members of the public—and even most conservative political actors—are likely drawn towards what they understand to be originalism not because it comports with their views on legal interpretation per se, but because the results it produces are consistent with their broader political goals or cultural world-views.<sup>188</sup> As Robert Post and Reva Siegel have argued, originalism has become the constitutional theory of the political right *because* it conforms to the cultural views of members of the right and advances their political objectives, rather than the other way around:

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not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.”).

<sup>184</sup> See *infra* text accompanying note 188 (arguing that the public cares more about political outcomes than the judicial methods).

<sup>185</sup> See Jamal Greene et al., *Profiling Originalism 2* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 10-232, 2010) (on file with author). Respondents were asked the following question:

Which comes closer to your point of view?

- 1) In making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution.
- 2) In making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution.

A significant plurality selected the latter, leading the authors to conclude “we certainly are not all originalists.” *Id.* at 2.

<sup>186</sup> Dellinger, *supra* note 57, at 1293.

<sup>187</sup> See TRIBE, *supra* note 60, at 1317.

<sup>188</sup> Robert Post & Reva Siegel, *Liberal Originalism*, NEW REPUBLIC (Sept. 17, 2007, 12:00 AM), <http://www.tnr.com/print/article/liberal-originalism>.

Originalism rose to prominence in the Reagan era because, as Edwin Meese put it in an uncharacteristic moment of candor, it promised to remake the Court in a way that would halt the slide toward ‘the radical egalitarianism and expansive civil libertarianism of the Warren Court.’ Originalism was successful because it implicitly pledged to reconstitute the Court in ways that would entrench conservative values in matters of faith, family, race and property. Wherever the theory of originalism produces results that are inconsistent with this pledge, it is blithely ignored. Voters are not attracted to the discipline or jurisprudence of originalism; they are drawn instead to its capacity to reshape Supreme Court precedents into a ‘living constitution’ for right-wing convictions.<sup>189</sup>

Post and Siegel’s views appear to have some empirical confirmation.<sup>190</sup> As Jamal Greene, Stephen Ansolabehere, and Nathaniel Persily have demonstrated, there is an extremely high correlation between the cultural views associated with political conservatives and a professed preference for originalist principles.<sup>191</sup> As an empirical matter, although the causation/correlation link is of course difficult to discern, one would be hard-pressed to argue that an individual’s views on constitutional interpretation color her cultural values rather than vice versa. For most professed originalists, it is likely the case that “originalism is itself an expression of deeper cultural commitments, such as family structure, morality, or the role of government in public life.”<sup>192</sup>

To be sure, progressive originalists have made important contributions to academic thought, and in actual cases where arguments over legal doctrine naturally have the greatest impact.<sup>193</sup> But I would not expect progressive constitutional theorists to win many converts among the general public or among political actors by embracing the Privileges or Immunities Clause, which might seem like a simple attempt to repackage traditional liberal principles in an originalist wrapping. It is not highly likely, for instance, that conservatives who are opposed to abortion rights could be convinced that the right to abortion, while not an element of fundamental freedom under the Due Process Clause, must be protected as one of the “privileges or immunities” of United States citizenship. Thus, while originalist modes of argumentation undoubtedly can be valuable in individual cases, this is not necessarily true in the wider public debate over hot-button social issues. In that broader context, progressive originalists like Balkin have “brought a knife to a gun fight,”<sup>194</sup> as Greene has put it.

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<sup>189</sup> *Id.* (internal citation omitted).

<sup>190</sup> *See supra* note 185.

<sup>191</sup> Greene et al., *supra* note 185, at 25–26.

<sup>192</sup> *Id.* at 10.

<sup>193</sup> *See GANS & KENDALL, supra* note 101, at 1–3.

<sup>194</sup> Greene et al., *supra* note 185, at 26.

It would seem, then, that some advocates of progressive originalism “confuse the constitutional arguments of the right for its mobilizing vision—as if Americans were moved to demand a conservative Court in order to preserve a method of interpretation.”<sup>195</sup> This misapprehension of the importance of legal doctrine in the broader public debate about the role of the judiciary stems from what is perhaps the academy’s overestimation of its own importance in shaping public opinion,<sup>196</sup> as though formulating the “right” construction of the Constitution would enshrine forever a favored interpretation.

None of this is meant to suggest that these issues are unimportant; on the contrary, these academic debates are a vital piece of our national discourse about the meaning of the Constitution. But perhaps it is the case that in the broader public debate over what rights should properly be understood as fundamental, the issue of whether one piece of constitutional text or another is the proper source of incorporation might not be as urgent as some have argued. As Justice Scalia joked during oral argument in *McDonald*, the Privileges or Immunities Clause is “the darling of the professoriate”—but it is also entirely unnecessary to the outcome of the case “unless you’re bucking for a—a place on some law school faculty—.”<sup>197</sup>

### C. Correcting the History

But even if there are little to no tangible benefits to replacing substantive Due Process with a new Privileges or Immunities Clause jurisprudence, might there at least be some symbolic value in the Court overruling *Slaughter-House*, insofar as doing so could wipe away the stain of the post-Reconstruction Court’s civil rights record?

In a word, yes. But I note that the goal of overruling *Slaughter-House* might be overrated, for two reasons. First, from a practical civil rights perspective, a revitalized Privileges or Immunities Clause would do nothing new to correct the doctrinal errors of the post-Reconstruction era Court. As noted above, the Court’s civil rights jurisprudence during that era was marked by two principles: (1) that the Bill of Rights places no limits on state and local governments, and (2) that the federal government has no authority to regulate private acts of discrimination.<sup>198</sup> As the Court has itself observed, however, the “central rule” of the *Slaughter-House Cases* through the *Civil Rights*

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<sup>195</sup> Post & Siegel, *supra* note 188.

<sup>196</sup> See, e.g., Daniel Ibsen Morales, *A Matter of Rhetoric: The Diversity Rationale in Political Context*, 10 CHAP. L. REV. 187, 196 (2006) (“[T]he professoriate seldom takes full account of the context in which the Supreme Court authors an opinion. Instead, academics nearly always evaluate the Court’s pronouncements as if they, academics themselves, were the Justices’ primary audience. Indeed, most constitutional scholarship operates under the fiction that the persuasive values of the academy should actually dictate the Court’s jurisprudence.”).

<sup>197</sup> Transcript of Oral Argument at 7, *McDonald v. City of Chicago*, 103 S. Ct. 3020 (2010) (No. 08-1521).

<sup>198</sup> See *supra* notes 52–53 and accompanying text.

*Cases*—namely, that the Bill of Rights has no application to the states—is already regarded as “a doctrinal anachronism” in light of the development of incorporation doctrine under the Due Process Clause.<sup>199</sup> Indeed, in *Heller*, the Court observed that *Cruikshank* itself, which held that the Due Process Clause “adds nothing to the rights of one citizen as against another,”<sup>200</sup> lacked “the sort of Fourteenth Amendment inquiry required by our later cases.”<sup>201</sup> Even Justice Thomas acknowledged in his *McDonald* opinion that *Cruikshank* should no longer be considered good law.<sup>202</sup>

Meanwhile, the second principle of the Court’s post-Reconstruction civil rights cases—namely, the state action doctrine—is not widely regarded as a doctrinal anachronism at this point,<sup>203</sup> but overruling the *Slaughter-House Cases* would not change that fact. To be sure, the state action requirement has been substantially cabined through the Court’s rulings concerning Congressional authority pursuant to the Commerce Clause and to Section 5 of the Fourteenth Amendment.<sup>204</sup> But to the extent that the state action

<sup>199</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

<sup>200</sup> *United States v. Cruikshank*, 92 U.S. 542, 554 (1875).

<sup>201</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008); *cf.* *United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (noting that *Cruikshank* “came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment,” and that it therefore does not “establish[ ] any principle governing” the question of incorporation); *Nordyke v. King*, 563 F.3d 439, 447–48 (9th Cir. 2009) (stating that *Cruikshank* did not address “incorporation through the Due Process Clause”), *vacated*, 611 F.3d 1015 (9th Cir. 2010) (for further reconsideration in light of *McDonald*).

<sup>202</sup> *See McDonald*, 130 S. Ct. at 3088 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas’s rejection of *Cruikshank* is somewhat ironic given that he cited the opinion with approval during the previous term in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2519 (2009) (Thomas, J., dissenting), in arguing that Section Five of the Voting Rights Act exceeds Congressional enforcement power under the Fourteenth Amendment.

<sup>203</sup> The state action doctrine has been limited in important ways during the twentieth century, but “the assumption that there is a sphere of private behavior in which individuals are free of constitutional norms . . . is recognized by even those Justices who have advocated the broadest extensions of the state action concept.” KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 871 (14th ed. 2001).

<sup>204</sup> Notwithstanding the Court’s ruling in the *Civil Rights Cases*, the constitutional validity of statutes such as the 1964 Civil Rights Act and the 1965 Voting Rights Act makes clear that federal legislation may reach private acts of discrimination whenever such acts fall within Congress’s Commerce Clause authority; or, in absence of some connection to interstate commerce, where private actor who are entwined with state action or operate in a public function. The Court has, since the mid-twentieth century, sustained statutes essentially identical to those at issue in *Cruikshank* and the *Civil Rights Cases*. For instance, 18 U.S.C. § 241, much like the statute at issue in *Cruikshank*, enables the federal criminal prosecution of individuals for entering into a conspiracy “to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.” 18 U.S.C. § 241 (2006). Notwithstanding *Cruikshank*, this statute has been upheld under constitutional challenge. *See United States v. Price*, 383 U.S. 787 (1966)

doctrine is still relied on by courts to limit the enforcement authority of federal government,<sup>205</sup> a revitalized Privileges or Immunities Clause would do nothing to alter that equation as the Clause's terms are expressly limited to state governments and make no reference to private actors.<sup>206</sup> A more robust understanding of the federal government's authority to enforce civil rights protections would therefore be unlikely to arise from the Privileges or Immunities Clause.

Second, one could argue that, as an historical matter, *Slaughter-House* itself has been unfairly maligned as a reactionary case. The statute at issue in *Slaughter-House* was enacted by a Reconstruction, Republican government in Louisiana that had also enacted a bill prohibiting segregation in public schools, and whose every legislative act was opposed by Southern Democrats.<sup>207</sup> The plaintiffs in *Slaughter-House* were represented by former Supreme Court Justice John Campbell, who himself was a member of the *Dred Scott* majority and had served in the Confederate government.<sup>208</sup> Viewed from this lens, *Slaughter-House* might be more properly understood as an effort to preserve the work of a Reconstruction government, rather than an effort to cut back on individual liberties.<sup>209</sup>

Although *Slaughter-House* may have allocated power to state governments, it did so at a time when state governments were largely controlled by radical Republicans

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(upholding the constitutionality of 18 U.S.C. § 241); *United States v. Guest*, 383 U.S. 745 (1966) (upholding constitutionality of 18 U.S.C. § 241 as applied to prosecution of private defendants interference with victim's right to travel). Moreover, the Court has permitted the criminal prosecution of individuals who, like the defendants in *Cruikshank*, attempt to interfere with the right to vote. *See United States v. Anderson*, 481 F.2d 685, 700 (4th Cir. 1973) (“[c]onspiracy by the defendants . . . to dilute . . . the constitutionally protected right of suffrage, as is claimed here, is within the broad language of Section 241, and this is true whether the conspiracy is directed at an election for a state or a federal office . . .”), *aff'd*, 417 U.S. 211 (1974). Similarly, the Civil Rights Act of 1964 prohibits many private acts of discrimination, including, under Title II, discrimination in public accommodations. *See* 42 U.S.C. § 2000(a) (2006). Discrimination in public accommodation, was, of course, the same subject of the legislation that had been ruled unconstitutional in the *Civil Rights Cases*. *See United States v. Stanley*, 109 U.S. 3, 16–17 (1883). Title II is unquestionably constitutional. *See Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (“The power of Congress in this field is broad and sweeping . . . . The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude.”); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 251–52 (1964) (upholding Title II of the Civil Rights Act of 1964, explaining that the *Civil Rights Cases* did not examine the issue of Congressional power under the Commerce Clause).

<sup>205</sup> *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>206</sup> U.S. CONST. amend. XIV.

<sup>207</sup> Bogen, *supra* note 50, at 1132.

<sup>208</sup> *Id.*

<sup>209</sup> *See id.* at 1163–64; *see also* Leslie Friedman Goldstein, *The Second Amendment, The Slaughter-House Cases (1873), and United States v. Cruikshank (1876)*, 1 ALB. GOV'T L. REV. 365, 379 (2008).

who favored strong measures to protect civil rights.<sup>210</sup> And, while the Court's subsequent civil rights cases in the nineteenth century blocked the federal government from reaching private conduct, it is not clear that those decisions were, strictly speaking, a necessary outgrowth from *Slaughter-House*'s relatively limited holding that the Privileges or Immunities Clause does not encompass the Bill of Rights or other fundamental liberties.<sup>211</sup> Indeed, Justice Miller, the author of *Slaughter-House*, did not himself subscribe to the view that federal enforcement power under the Fourteenth Amendment could not reach private discriminatory conduct.<sup>212</sup> Thus, it is perhaps an oversimplification, as an historical matter, to attribute the lack of national commitment to racial equality in the 1870s and beyond to *Slaughter-House*.

#### IV. THE DEVIL YOU KNOW: UNINTENDED CONSEQUENCES OF REPLACING SUBSTANTIVE DUE PROCESS DOCTRINE WITH A NEW PRIVILEGES OR IMMUNITIES JURISPRUDENCE

While the gains that might be associated with a revitalized Privileges or Immunities Clause are unclear, it is, by contrast, quite clear that a new Privileges or Immunities Clause jurisprudence—if not properly tempered by principles of stare decisis—would raise a number of vexing questions, which could have the unintended effect of leading to a rollback of civil rights. If advocates of progressive originalism overestimate the likely benefits of revitalizing the Privileges or Immunities Clause, they also underestimate the possible pitfalls of charting such a new constitutional course. Reliance on the Privileges or Immunities Clause as the exclusive source of substantive rights protections in the Fourteenth Amendment could reduce constitutional protections for non-citizens, who may be excluded from the provision's scope, and may also call into question the range of rights currently protected under the Fourteenth Amendment.<sup>213</sup> At the same time, an originalist understanding of the Privileges or Immunities Clause could raise the specter of *Lochner*, by providing conservatives with a new weapon to strike down economic regulations as an infringement upon freedom of contract.<sup>214</sup> These concerns are addressed in turn below.

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<sup>210</sup> See *Price*, 383 U.S. at 804; see also Bogen, *supra* note 50, at 1163–64.

<sup>211</sup> See Bogen, *supra* note 50, at 1139.

<sup>212</sup> See *id.* at 1148 (citing *Ex parte Yarbrough*, 110 U.S. 651, 660–67 (1884)).

<sup>213</sup> Progressive proponents of revitalizing the Privileges or Immunities Clause would undoubtedly argue that any protections afforded under the Clause would simply be additive of existing Due Process protections, but it would be strangely inconsistent to argue that the original understanding of the Privileges or Immunities Clause must be restored so that the Clause can take its rightful place as the fountain of substantive rights protections in the Fourteenth Amendment, but then to deny that the range of those protections should not be limited by the original understanding of the Clause. Indeed, that is precisely the test for incorporation under the Privileges or Immunities Clause that its lone proponent on the Court, Justice Thomas, would favor. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3086 (2010) (Thomas, J., concurring in part and concurring in the judgment).

<sup>214</sup> See GANS & KENDALL, *supra* note 101, at vi–vii.

*A. Who's Covered?*

If we imagine for a moment that the Privileges or Immunities Clause were to replace the Due Process Clause as the source of incorporation, the first question would be what individuals and entities are entitled to the Privileges or Immunities Clause's protections. While the Due Process and Equal Protection Clauses of the Fourteenth Amendment extend their protections to "person[s]," the Privileges or Immunities Clause refers only to "citizens."<sup>215</sup> This could have important implications for at least two classes of non-citizen "persons" who are currently covered by the Due Process Clause: non-citizen aliens and corporations.

1. Aliens

A revitalized Privileges or Immunities Clause could result in an unintended roll-back of the constitutional rights of aliens (including lawful residents, visitors, and undocumented immigrants). As explained by the Court in *Yick Wo v. Hopkins*,<sup>216</sup> the Constitution, in a broad sense, embodies ideals that apply universally to all persons within the jurisdiction of the United States, regardless of formal citizenship status:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.<sup>217</sup>

The Constitution therefore requires the protection of the rights and liberties of all persons *as such*, and not merely as United States citizens.<sup>218</sup> This universality embodied in our constitutional commitment to personhood is a core value of our nation's history and tradition. As Alexander Bickel observed, "the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen."<sup>219</sup> Indeed, during

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<sup>215</sup> U.S. CONST. amend. XIV, § 1.

<sup>216</sup> 118 U.S. 356 (1886).

<sup>217</sup> *Id.* at 369.

<sup>218</sup> *See id.* (noting the Fourteenth Amendment is universally applied to all persons within the territorial jurisdiction of the United States).

<sup>219</sup> Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 370 (1973).

the eighteenth century, “the line separating citizens from aliens was not clearly or consistently drawn, either in law or in practice,” and most states did not restrict even the right to vote based on citizenship.<sup>220</sup>

Thus, under existing Due Process jurisprudence, non-citizens are entitled to the protections of the Bill of Rights,<sup>221</sup> and thanks to incorporation under the Due Process Clause, these basic constitutional protections safeguard both citizens and non-citizens alike against state as well as federal action.<sup>222</sup> This clarity, however, might not remain in place if the Privileges or Immunities Clause were to come to be understood as the textual source of incorporated rights.<sup>223</sup> Indeed, at least one commentator has argued that the framers of the Fourteenth Amendment limited the Privileges or Immunities Clause to citizens for the specific purpose of restricting certain rights, such as the right to own property, to citizens only<sup>224</sup> (although I note that others have disputed this view).<sup>225</sup>

We can easily imagine that, under a new Privileges or Immunities Clause jurisprudence, some might argue that, in the context of state and local governmental action, non-citizens are not subject to the criminal procedure protections of the Constitution, such as the right to be free from unreasonable search and seizure or the right to counsel.<sup>226</sup> Anti-immigrant groups might even advance arguments claiming that non-citizens are not entitled to the protections of the Bill of Rights at all. Such concerns are well-founded given the recent explosion of anti-immigrant legislation, including Arizona’s statute requiring all non-citizens to carry proof of immigration status and permitting police to arrest any person upon reasonable suspicion of undocumented status,<sup>227</sup> as

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<sup>220</sup> See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 32 (2000).

<sup>221</sup> See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the criminal procedure protections of the Fifth and Sixth Amendments are applicable to all individuals, regardless of formal citizenship status).

<sup>222</sup> See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006) (noting these protections apply to a non-citizen).

<sup>223</sup> See, e.g., Greene, *supra* note 2, at 344 (“Reliance on the Privileges or Immunities Clause as the path of incorporation could have disturbing implications . . . for resident aliens and undocumented immigrants, whom the text of the Clause excludes from its protection.”).

<sup>224</sup> See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1442 (1992) (arguing the original word inhabitants was changed to citizens to avoid any implication that aliens could own real property).

<sup>225</sup> See ELY, *supra* note 121, at 25 (“It seems to be generally agreed that no conscious intention to limit the protection of the clause to citizens appears in the historical records.”).

<sup>226</sup> This is no trivial matter. One recent survey by the National Immigrant Justice Center indicates that nearly eighty percent of those held in immigration detention facilities nationwide were not permitted private phone calls with their attorneys. See Ken Dilanian, *Illegal Immigrants Held in Isolated Jails Struggle for Legal Help, Survey Shows*, *L.A. TIMES*, Sept. 14, 2010, at A1.

<sup>227</sup> See, e.g., Randal C. Archibold, *Arizona’s Effort to Bolster Local Immigration Authority Divides Law Enforcement*, *N.Y. TIMES*, April 22, 2010 at A16.

well as a wave of anti-immigrant ordinances at the municipal level.<sup>228</sup> Some have even called for a reevaluation of *jus soli*, and a return to a conception of citizenship premised on bloodlines.<sup>229</sup>

In this context, reliance on a new constitutional doctrine that potentially excludes non-citizens could leave state and local governments free to commit civil rights violations in an area of growing concern. Lest one think that these points are alarmist, at least one amicus group in *McDonald* argued for precisely this limitation, arguing that the Second Amendment right to keep and bear arms arises from citizenship status.<sup>230</sup> And although Justice Thomas stated that he took “no view” on the issue of whether aliens were entitled to the protection of the Second Amendment,<sup>231</sup> he was clear elsewhere in his opinion that, in his view, the right to bear arms is “a privilege of American *citizenship*.”<sup>232</sup>

This is not to concede that incorporation under the Privileges or Immunities Clause would necessarily exclude non-citizens. John Hart Ely, for example, argued that the Privileges or Immunities Clause’s “reference to citizens may define the class of rights [protected,] rather than limit the class of beneficiaries [covered].”<sup>233</sup> In other words, the Clause may simply state that the bundle of rights typically associated with citizenship falls within its purview, but those rights might properly extend to all persons under the Fourteenth Amendment.<sup>234</sup> Indeed, as the Petitioners in *McDonald* noted, the Congressional Record supports this reading: Senator Howard stated, without contradiction, that the Fourteenth Amendment would “forever disable [the states] from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.”<sup>235</sup> As noted above, the founding generation did not subscribe to a firm

<sup>228</sup> See, e.g., *Illegal Immigrants Restricted*, N.Y. TIMES, June 22, 2010, at A14 (noting a small city in Nebraska voted to banish illegal immigrants from jobs and rental homes); Monica Davey, *Nebraska Town Votes to Banish Illegal Immigrants*, N.Y. TIMES, June 22, 2010, at A14; *State and Local Anti-Immigrant Ordinances Backfire*, MEXICAN AM. LEGAL DEF. & EDUC. FUND, [http://www.maldef.org/truthinimmigration/state\\_and\\_local\\_anti-immigrant\\_ordinances\\_backfire05092008/](http://www.maldef.org/truthinimmigration/state_and_local_anti-immigrant_ordinances_backfire05092008/) (listing local anti-immigration proposals).

<sup>229</sup> See, e.g., Julia Preston, *Citizenship as Birthright Is Challenged on the Right*, N.Y. TIMES, Aug. 7, 2010, at A8 (discussing amending the Fourteenth Amendment to deal with the purported “mistake” of birthright citizenship).

<sup>230</sup> See Brief for the Rutherford Institute as Amicus Curiae Supporting Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

<sup>231</sup> *McDonald*, 130 S. Ct. at 3084 n.19 (Thomas, J., concurring in part and concurring in the judgment).

<sup>232</sup> *Id.* at 3086 (emphasis added).

<sup>233</sup> See ELY, *supra* note 121, at 25.

<sup>234</sup> *Id.*; see also Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285 (2002) (noting how aliens may enjoy “equal citizenship” or citizen rights while not having formal citizenship status).

<sup>235</sup> See Brief for Petitioner, *supra* note 88, at 63–64 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 2766 (1866) (emphasis added)). Representative Bingham added, “That great want

distinction between citizens and aliens, and despite an upsurge of nativism in the mid-1800s, that fluid understanding persisted through the Civil War generation.<sup>236</sup>

Moreover, even if it were determined that non-citizens are in fact excluded from the reach of the Privileges or Immunities Clause, the Equal Protection Clause might serve as an independent check on deprivations against aliens.<sup>237</sup> Thus, while Tribe concedes that “there may be no convincing escape from the conclusion that the Privileges or Immunities Clause . . . protects only a limited group of persons—United States citizens,” he also argues that, “by prohibiting discrimination in legal rights among all *persons*—citizens and aliens alike—[the Equal Protection Clause] would, in effect . . . secure the ‘privileges or immunities of citizens of the United States’ to all persons within the jurisdiction of a particular state.”<sup>238</sup>

In any event, one must acknowledge that there is at least some risk to the rights of non-citizen aliens present here. And it would be ironic indeed if, in the course of attempting to atone for the errors of the post-Reconstruction Court, progressives pushed for a new Privileges or Immunities Clause jurisprudence that ended up contracting the civil rights of non-citizens. The Fourteenth Amendment, after all, only became necessary after *Dred Scott* famously held that African Americans were not “citizens,” and therefore had “no rights which the white man was bound to respect.”<sup>239</sup> A new Fourteenth Amendment jurisprudence in which substantive constitutional protections are premised on formal citizenship status would fail to heed Bickel’s warning that “[i]t has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson, which is the point of the *Dred Scott* case.”<sup>240</sup>

## 2. Corporations

Another question that could be raised is the status of corporations. Over a century ago, the Court recognized corporations as “persons,” thus entitling them to a broad array of constitutional protections against state governmental action under the Due Process Clause.<sup>241</sup> At the same time, however, the Court has long held that corporations

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of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment.” *Id.* (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 2543 (1866)).

<sup>236</sup> See KEYSSAR, *supra* note 220, at 83 (noting that it alien suffrage was common at constitutional conventions during the 1850s and was supported by “large and decisive majorities”).

<sup>237</sup> TRIBE, *supra* note 60, at 1325; *cf.* Plyler v. Doe, 457 U.S. 202, 213 (1982) (“The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”); Graham v. Richardson, 403 U.S. 365, 371–72 (1973) (“[T]he Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”).

<sup>238</sup> TRIBE, *supra* note 60, at 1325.

<sup>239</sup> *Dred Scott v. Sandford*, 60 U.S. (16 How.) 393, 407 (1857).

<sup>240</sup> See Bickel, *supra* note 219, at 387.

<sup>241</sup> See *S. Ry. Co. v. Greene*, 216 U.S. 400 (1910); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578 (1896).

are not regarded as “citizens” under the Privileges or Immunities Clause.<sup>242</sup> It is therefore hard to see how corporations would continue to benefit from the same legal protections to which they are currently entitled in a new Privileges or Immunities Clause jurisprudence.<sup>243</sup>

Of course, given the fallout after the Court’s recent decision striking down aspects of the McCain-Feingold campaign finance legislation in *Citizens United v. Federal Election Commission*,<sup>244</sup> many would undoubtedly regard such a shift as a good thing. I note, however, that non-profit corporations such as the NAACP have also benefited from the Court’s decisions on corporate personhood.<sup>245</sup> In any event, irrespective of the ultimate merits of the normative question of corporate personhood, the uncertain status of corporations in a new Privileges or Immunities Clause jurisprudence demonstrates a basic point: the full consequences of such a doctrinal shift would be difficult to predict, and may not always inure to the benefit of progressive goals.

### B. Which Rights?

If the Privileges or Immunities Clause were to replace the Due Process Clause as the exclusive basis for the protection of substantive constitutional rights against state action, a second set of questions would emerge, namely, which rights would be considered the “Privileges or Immunities” of citizenship.

If we limit our analysis of the Privileges or Immunities Clause to the original understanding of its framers, we would probably be forced to conclude that the Clause protects far less than what most contemporary observers would regard as fundamental freedoms. Notwithstanding Representative Rogers’s description of the right to vote as a “privilege” covered by the Clause,<sup>246</sup> most prominent academics on both the left and right agree that, generally speaking, the framers and ratifiers of the Fourteenth Amendment had a very different understanding of fundamental rights than that to which most of us subscribe today.<sup>247</sup>

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<sup>242</sup> See *W. Turf Ass’n v. Greenberg*, 204 U.S. 359 (1907); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888).

<sup>243</sup> See *TRIBE*, *supra* note 60, at 1327 (“[I]t seems difficult to escape the possibility that the protections afforded corporations as against the states by even a revitalized Privileges or Immunities Clause would be fewer than those that might be recognized under the Due Process Clause.”).

<sup>244</sup> 130 S. Ct. 876 (2010).

<sup>245</sup> For instance, as the Court explained in *NAACP v. Button*, 371 U.S. 415 (1963), for-profit and non-profit corporations alike enjoy a degree of First Amendment freedom of speech protection. See *id.* at 428–29; see also *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 780 (1978).

<sup>246</sup> See *supra* text accompanying note 152.

<sup>247</sup> See, e.g., *Saenz v. Roe*, 526 U.S. 498, 527 (1999) (Thomas, J., dissenting); *AMAR*, *supra* note 20, at 391.

Although such distinctions are largely alien to us today, Amar and others have argued that the framers of the Reconstruction Amendments would probably have understood the Privileges or Immunities Clause as protecting only what were then understood as “civil” rights (i.e., those rights associated with living in organized society generally), such as the right to free speech or to own property, as distinct from: (1) “political” rights (i.e., those rights deriving from the particular arrangements of specific societies), such as the right to vote or to hold office,<sup>248</sup> and (2) “social” rights (i.e., those rights exercised amongst private citizens) that would encompass full equality in all spheres of life.<sup>249</sup> A Fourteenth Amendment jurisprudence that failed to protect so-called “political” and “social” rights would, of course, be disastrous.

It is probably unthinkable today that the Fourteenth Amendment would be interpreted by courts as failing to protect basic rights such as the right to serve on a jury. But it is not out of the question that an originalist understanding of the Privileges or Immunities Clause could result in a contraction rather than an expansion of protections for individual rights. It is worth remembering that Justice Thomas’s dissent in *Saenz*, which kicked off the last decade of speculation about the Privileges or Immunities Clause, actually endorsed a much narrower interpretation of the Clause’s reach than the majority opinion.<sup>250</sup> In *Saenz*, seven Justices concluded that, under *existing* Privileges or Immunities Clause doctrine, a California durational residency requirement for the receipt of food stamps impermissibly infringed on the right to travel.<sup>251</sup> But Justice Thomas *dissented* from that outcome, reasoning that the Privileges or Immunities Clause, as originally understood, protects only “fundamental rights, rather than every public benefit established by positive law.”<sup>252</sup>

Given his narrow understanding of what sorts of rights might fall within the scope of the Privileges or Immunities Clause, it is perhaps unsurprising that Justice Thomas indicated that he would view a reconsideration of the meaning of the Privileges or Immunities Clause as an opportunity to “displace” rather than “augment” existing rights protections under substantive due process precedents,<sup>253</sup> a fact that Justice Stevens

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<sup>248</sup> See, e.g., AMAR, *supra* note 20, at 391 (noting that the Privileges or Immunities Clause was probably understood by its framers as “appli[cable] only to civil rights and not to political rights such as voting, jury service, militia service, and officeholding”); Harrison, *supra* note 224, at 1417 (“Most Republicans agreed that neither civil rights nor privileges and immunities included political rights, and legal usage generally appears to have reflected this approach.” (internal citation omitted)).

<sup>249</sup> See, e.g., Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 224–26 (1987) (arguing that Republicans at the time did not agree on whether blacks were entitled to equality beyond basic natural rights).

<sup>250</sup> *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting).

<sup>251</sup> See *id.* at 501, 503 (majority opinion).

<sup>252</sup> *Id.* at 527 (Thomas, J., dissenting).

<sup>253</sup> *Id.* at 528.

recognized in his *McDonald* dissent.<sup>254</sup> Thus, if the impetus to revive the Privileges or Immunities Clause stems from an urge to seek progressive ends through originalist methods, we should be wary of where the road ultimately leads. Although Justice Thomas's urge to pare back existing rights protections might not surprise us, what is truly troubling is that even ostensibly progressive academics, in their zeal to revive the Privileges or Immunities Clause, emphasize what they view as the poor fit between the Due Process Clause and protections for substantive rights.<sup>255</sup> This troubling lack of concern for *stare decisis* amounts to a willingness to risk the progressive victories of the past for amorphous benefits.

Ultimately, if we are serious about returning to the original understanding of the Privileges or Immunities Clause, we have to accept the possibility that doing so could end up paring back the range of substantive rights currently protected by the Constitution. As things currently stand, the Court has held that the Due Process Clause includes many unenumerated rights, such as the right to marry,<sup>256</sup> to have children,<sup>257</sup> to direct the education of one's children,<sup>258</sup> to marital privacy,<sup>259</sup> to use contraception,<sup>260</sup> to bodily integrity,<sup>261</sup> to reproductive freedom,<sup>262</sup> and to intimate relations.<sup>263</sup> As Tribe has admitted, the status of these unenumerated rights might suddenly become unclear in a new incorporation doctrine that relies exclusively on the Privileges or Immunities Clause.<sup>264</sup>

Indeed, during oral argument in *McDonald*, counsel for Petitioners conceded as much:

CHIEF JUSTICE ROBERTS: Your approach—your original approach would give judges a lot more power and flexibility in determining what rights they think are a good idea than they have now with the constraints of the Due Process Clause.

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<sup>254</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3089 n.3 (Stevens, J., dissenting) (“It is no secret that the desire to ‘displace’ major ‘portions of our equal protection and substantive due process jurisprudence’ animates some of the passion that attends this interpretive issue.” (quoting *Saenz v. Roe*, 526 U.S. 498, 528 (1999) (Thomas, J., dissenting))).

<sup>255</sup> See, e.g., *GANS & KENDALL*, *supra* note 101, at v–vi (“The phrase substantive due process reads like a contradiction in terms, and requires courts to engage in legal gymnastics to sustain the protection of fundamental substantive liberties.”); see also Part II.B.

<sup>256</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>257</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

<sup>258</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>259</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>260</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>261</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>262</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>263</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>264</sup> See Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 195–96 (1999) (“Who can say with confidence which of the salutary traditions surrounding substantive due process would be preserved intact once the transplantation had occurred?”).

MR. GURA: No, Your Honor; our approach might actually provide judges with perhaps no more than what they have now, perhaps even less, because our approach is rooted in text and history.<sup>265</sup>

Although it is not surprising that counsel for Petitioners would avoid taking a position that would offer judges in future cases too much discretion, this seeming concession that the Privileges or Immunities Clause might restrict the range of rights currently protected by the Fourteenth Amendment is alarming.

Thus, although the progressive originalist call for closer attention to text and history is welcome and long overdue, it must not replace proper respect for doctrine and *stare decisis*. Indeed, what separated the plurality from Justice Thomas most clearly was the plurality's restraint, and the level of respect that it accorded precedent,<sup>266</sup> which is no small matter given the quite obvious fact that our current understanding of what is required by the Constitution generally—and by the Fourteenth Amendment in particular—has traveled some distance from the original understanding.<sup>267</sup>

For progressives, and I would argue for the country as a whole, this has been a very good development. Those who advocate a return to the original understanding of the Fourteenth Amendment tend to forget that the almost universally accepted understanding of, for instance, the ideals of racial equality embodied by the Amendment did not fully emerge until *Brown v. Board of Education*,<sup>268</sup> which was not decided until almost ninety years after the Fourteenth Amendment was adopted.<sup>269</sup> And while *Brown* is of course consistent with the egalitarianism at the heart of the Fourteenth Amendment,<sup>270</sup> most would agree that it is difficult to argue with confidence that the framers of the Fourteenth Amendment would have foreseen the precise outcome of *Brown*.

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<sup>265</sup> Transcript of Oral Argument at 64–65, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

<sup>266</sup> *Compare McDonald*, 130 S. Ct. at 3046 (“Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States . . . .” (footnote omitted)), *with McDonald*, 130 S. Ct. at 3062–63 (Thomas, J., concurring in part and concurring in the judgment) (“I acknowledge the volume of precedents that have been built upon the substantive due process framework . . . . But *stare decisis* is only an ‘adjunct’ of our duty as judges to decide by our best lights what the Constitution means.” (quoting *Casey*, 505 U.S. at 963)).

<sup>267</sup> See notes 247–52 and accompanying text.

<sup>268</sup> 347 U.S. 483 (1954).

<sup>269</sup> See, e.g., AMAR, *supra* note 20, at 476 (discussing how the status of blacks changed significantly in the 1950s and 1960s because of *Brown* and accompanying legislation); BLACKMON, *supra* note 55, at 381–82 (noting that *Brown* reversed the oppression of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

<sup>270</sup> See, e.g., Karlan, *supra* note 7, at 1054 (“To say that the Supreme Court in *Brown* sidestepped how the framers of the Fourteenth Amendment acted or thought about school segregation, however, is not to say that the Court ignored contemporaneous understanding of the amendment altogether. To the contrary, Chief Justice Warren’s opinion for the Court explicitly hearkened back to its earliest decisions concerning the Reconstruction amendments,

I admit that, when arguing against originalism, it is perhaps a bit too easy to fall back on the “bloody shirt of *Brown*,”<sup>271</sup> but *Brown* is the trump card for a reason: it remains the gold standard of constitutional adjudication, one that most conservatives and liberals alike regard as unassailable.<sup>272</sup> It is not, however, what most would describe as an “originalist” opinion.<sup>273</sup> As Pam Karlan has observed, constitutional scholars have essentially given up any pretense of originalism in the Equal Protection context in favor of fidelity to *Brown* itself:

[W]hatever originalism means with respect to other constitutional issues, when it comes to the Equal Protection Clause and its application to questions of race-conscious government action, the Court seldom looks back beyond *Brown*. Put simply, the Court has abandoned “Framers’ originalism” in favor of “*Brown* originalism”, in which Justices claim fidelity, not to what the Equal Protection Clause meant in 1868, but rather to what the Supreme Court meant in 1954.<sup>274</sup>

*Brown* emerged after nearly a century of constitutional development, and there is no need to shy away from that fact.<sup>275</sup> We as a nation are rightfully proud of its achievements, and of the interpretative approach to constitutional decisionmaking that it embodies. “Progressives should speak from this pride rather than adopt modes of argument that would shackle them to the constitutional understandings of the nineteenth century.”<sup>276</sup>

### C. *Lochner* Reborn?

Finally, there is the possibility that a renewed Privileges or Immunities Clause could be used as a vehicle by conservatives to reinvigorate a constitutional basis for

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which had located their meaning in the particular history of black slavery and emancipation.” (citing *Brown*, 347 U.S. at 490 n.5)).

<sup>271</sup> Adam Liptak, *From 19th-Century View, Desegregation Is a Test*, N.Y. TIMES, Nov. 10, 2009, at A16 (emphasis added) (quoting Justice Scalia). It is ironic, of course, that Justice Scalia would characterize the exaltation of *Brown* as a form of demagoguery and characterize advocates of non-originalist modes of interpretation as sympathetic to dictatorship. *Id.* at A23. It seems odd to describe the Warren-era decisions on civil rights as anti-democratic judicial impositions, given that segregation was, after all, hardly democratic given the widespread disenfranchisement of African Americans for most of the twentieth century.

<sup>272</sup> As Pam Karlan has observed, *Brown*’s place in the constitutional firmament is universally regarded as sacrosanct such that “[a] constitutional theory that cannot produce the result reached in *Brown*—the condemnation of de jure Jim Crow—is a constitutional theory without traction.” Karlan, *supra* note 7, at 1060.

<sup>273</sup> *Id.* at 1052.

<sup>274</sup> *Id.* (footnote omitted).

<sup>275</sup> See *supra* note 269 and accompanying text.

<sup>276</sup> Post & Siegel, *supra* note 188.

a robust form of property rights, in order to strike down various economic regulations. Critics of substantive due process often attempt to draw a straight line connecting the Court's more recent substantive due process decisions to the discredited doctrine of *Lochner v. New York*,<sup>277</sup> but the irony is that displacing the Due Process Clause as the source of incorporated rights in favor of the Privileges or Immunities Clause could run the risk of bringing us closer to *Lochner*-era jurisprudence.

The most basic goal of Reconstruction was the end of chattel slavery.<sup>278</sup> Undoubtedly, the framers of the Fourteenth Amendment saw freedom of contract as an essential guarantee for freedmen.<sup>279</sup> From one perspective, restoring an individual's right to control the fruits of her own labor is, in essence, the antithesis of slavery, and a robust notion of freedom of contract flows rather naturally. After all, if we consider the chief evil of slavery to be that it prevents some persons from controlling their own labor, the right of all individuals to freely alienate their labor without any form of government restrictions or regulations might seem like a necessary corollary to ending slavery. And indeed, freedom of contract was one of the "privileges" that Representative Rogers argued was protected by the Clause,<sup>280</sup> and others have argued that the Fourteenth Amendment was intended to protect the right to work freely without state intervention.<sup>281</sup>

Viewed from this perspective, the phrase "privileges or immunities," therefore, appears to have a more specific meaning than simply "rights." It begins to take on the character of negative freedoms, or a libertarian understanding of "natural rights." And, in fact, academics advocating the revitalization of the Privileges or Immunities Clause have sometimes spoken in the language of "natural rights."<sup>282</sup> A libertarian theory of "natural rights," of course, was relied on by the Court in *Lochner*<sup>283</sup> in holding that limitations on the maximum hours that individuals could work in bakeries violated their freedom of contract, effectively prohibiting any robust forms of labor or economic regulation for decades.<sup>284</sup> Thus, various academics, even those who have argued in favor of a new Privileges or Immunities Clause jurisprudence,<sup>285</sup> have

<sup>277</sup> 198 U.S. 45 (1905).

<sup>278</sup> See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

<sup>279</sup> See, e.g., *supra* text accompanying note 152; *infra* note 289.

<sup>280</sup> See *supra* text accompanying note 152.

<sup>281</sup> See, e.g., Alfred Avins, *The Right to Work and the Fourteenth Amendment: The Original Understanding*, 18 LAB. L.J. 15, 28 (1967).

<sup>282</sup> See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 117, at 64 (noting that, according to Blackstone, "'immunities' . . . were the residuum of natural liberties and . . . 'privileges' [were those] that society had provided in lieu of natural rights").

<sup>283</sup> See *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (criticizing the Court's reliance upon "certain opinions natural").

<sup>284</sup> *Id.* at 62–64 (majority opinion).

<sup>285</sup> See Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C.L. REV. 1, 2 (1996) ("Can we resurrect the Privileges or Immunities Clause

expressed the concern that “any attempts to resurrect the text in its original context creates [sic] a big problem: *Lochner* will bite us one way or the other.”<sup>286</sup>

Indeed, the return of *Lochner* era prohibitions on economic regulations is the not-so-secret goal of various commentators and several groups filing briefs as amici in *McDonald*.<sup>287</sup> The mere fact that libertarian groups think that they can mine the Privileges or Immunities Clause for greater protections for property rights should have given progressives pause. Gans and Kendall have tried to defuse these concerns by arguing that the Privileges or Immunities Clause has little to do with economic regulations:

While the framers of the Fourteenth Amendment undoubtedly cared deeply about securing free labor rights for the freedmen, the concern was mostly about securing the newly freed slaves the same set of rights enjoyed by white citizens under the common law . . . . The Framers did not intend to create a constitutional law of contract that would displace all state common law. They recognized the continuing role of state police power regulation to protect the citizenry from abuses, even when it interfered with the liberty of contract, and *Lochner* powerfully showed that the judiciary is ill-equipped to second guess the vast array of safeguards and restrictions necessary to control corporate activity in our modern economy. It is no wonder that commentators all across the political spectrum have viewed *Lochner* as a shameful experience that we should not repeat.<sup>288</sup>

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and revive *Slaughter-House* without exhuming *Lochner*, a case that too often left the worker and the small business person to be regulated by massive combinations of corporate power?”).

<sup>286</sup> Rosen, *supra* note 110, at 1242.

<sup>287</sup> See, e.g., Brief for Cato Inst. & Pac. Legal Found. as Amici Curiae Supporting Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521); Brief of Inst. for Justice as Amicus Curiae Supporting Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521). The mission of the Cato Institute “is to increase the understanding of public policies based on the principles of limited government, free markets, individual liberty, and peace.” *About Cato*, CATO INST., <http://www.cato.org/about-mission.html> (last visited Nov. 17, 2010). The Pacific Legal Foundation describes itself as “the oldest and most successful public interest legal organization that fights for limited government, property rights, individual rights and a balanced approach to environmental protection.” *About PLF*, PAC. LEGAL FOUND., <http://community.pacificlegal.org/Page.aspx?pid=262> (last visited Nov. 17, 2010). The Institute for Justice “litigates to secure economic liberty, school choice, private property rights, freedom of speech and other vital individual liberties, and to restore constitutional limits on the power of government.” See *Institute Profile: Who We Are*, INST. FOR JUSTICE, <http://www.ij.org/about> (last visited Nov. 17, 2010).

<sup>288</sup> GANS & KENDALL, *supra* note 101, at 32.

Gans and Kendall's view of what the framers understood to be the core components of the Fourteenth Amendment makes some intuitive sense, but it is unclear if it is supported by primary historical sources.<sup>289</sup>

Thankfully, the Court did not take *McDonald* as an opportunity to lay the groundwork for a new campaign against economic regulation. But, given the current ideological makeup of the Court, these concerns should have been taken more seriously by progressives who have argued rather blithely in favor of revitalizing the Privileges or Immunities Clause. Justices Scalia, Kennedy, and Thomas are highly skeptical of what they view as improper infringements on property rights.<sup>290</sup> During oral argument in *McDonald*, Justice Alito indicated that he understood freedom of contract to be an unenumerated "privilege" covered by the Clause, a proposition with which plaintiffs' counsel agreed.<sup>291</sup>

Of course, a wholesale return to *Lochner* is probably unlikely, as not even Justice Scalia seems willing to overturn decades of Commerce Clause precedents.<sup>292</sup> But the framers of the Fourteenth Amendment may have had a view of property rights that was closer to *Lochner* than to the more flexible approach towards economic regulation to which most Americans subscribe today. A return to that original, robust understanding of property rights is probably not desirable. Given the current composition of the judiciary, however, it is much more likely that a revitalized Privileges or Immunities Clause would result in a jurisprudence that provides stronger protections for property rights, rather than one that would yield a panoply of rights favored by progressives, such as a right to a basic education.

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<sup>289</sup> See, e.g., Damon W. Root, *Restoring the Privileges or Immunities Clause: Why the 14th Amendment Matters in the Fight for a Free Society*, REASON ONLINE (Feb. 23, 2009), <http://reason.com/archives/2009/02/23/restoring-the-privileges-or-im> ("[T]he 14th Amendment was written and ratified both to nationalize the Bill of Rights . . . and to enshrine the free labor philosophy of the anti-slavery movement, which was based on an individualistic and market-oriented form of self-ownership. . . . Modern liberals might not like the sound of it, but the fact remains that the 14th Amendment was specifically designed and ratified to protect a sweepingly libertarian idea of self-ownership. That idea includes the right to acquire property, run a business, and buy and sell labor without unnecessary or improper interference by the government.").

<sup>290</sup> For example, in his dissenting opinion in *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 241 (2003), Justice Scalia (joined by Justices Kennedy, Thomas, and Rehnquist), indicated that he holds a broad view of when certain regulations might constitute a taking. In that case, a Washington State law required attorneys, under certain circumstances, to place some clients' funds into "interest on lawyers' trust accounts (IOLTA)," with the interest used to pay for legal services for the needy. *Id.* at 223-26 (majority opinion). The dissenters viewed the law as an unconstitutional "taking" of private property, displaying a high level of sympathy to parties asserting claims that their property rights have been infringed upon. *Id.* at 252 (Scalia, J., dissenting). A revitalized Privileges or Immunities Clause could give them an effective means to expand property rights at the expense of economic regulations.

<sup>291</sup> Transcript of Oral Argument at 64, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521).

<sup>292</sup> Justice Scalia has famously described himself as a "faint-hearted" originalist. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

## CONCLUSION

The *McDonald* case and the debate over the Privileges or Immunities Clause reveal that “progressive originalism,” if not tempered by principles of stare decisis, might hold more dangers than practical benefits. While progressive advocates, like conservatives, have been and should be willing to use whatever interpretative methods ultimately are appropriate in a given case, originalism is not a method of constitutional interpretation that can reliably lend itself to progressive outcomes in all or even most matters.<sup>293</sup> Ultimately, while the call to search for progressive original understandings of the Constitution has been a valuable project and will continue to be so, progressives should be wary of adopting the rhetoric of originalism wholesale. This is the case for four reasons.

First, if a major goal of progressive advocates is to establish and sustain protections for unenumerated rights, originalism does not get us where we want to go. It is highly unlikely that progressive advocates will be able to build a convincing originalist case for rights that were not literally understood as falling within the scope of the Privileges or Immunities Clause at the time that the Fourteenth Amendment was adopted. As argued above, there is a fundamental incoherence in using an originalist framework to revitalize the Privileges or Immunities Clause with the ultimate goal of deploying the Clause for decidedly un-originalist purposes.<sup>294</sup> It is perhaps telling that, despite the suggestion that the Privileges or Immunities Clause could be a wellspring of new rights, freedom of contract was the only unenumerated right identified during oral argument in *McDonald* as a “privilege” of citizenship.<sup>295</sup>

This leads to the second point, which is that enthusiasm for progressive originalism must be tempered by respect for stare decisis. Essentially the entire argument for reviving the Privileges or Immunities Clause is that doing so would better comport with the original understanding of the framers of the Fourteenth Amendment. While that idea might appear unassailable as an academic matter, it may also be incompatible with decades of Supreme Court decisions, such that the practical implications of its implementation could be disturbing. A reversion to the framers’ original understanding of what rights qualify as civil rights, or of who might be entitled to the protections afforded by the Privileges or Immunities Clause, could be highly undesirable. As Jeffrey Rosen has argued,

[W]e can make a conscientious effort to resurrect the Privileges or Immunities Clause in its original context, but only if we are willing to look into the abyss and to acknowledge the fact that

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<sup>293</sup> See *supra* note 213 and accompanying text (describing inconsistencies in progressive originalist methods).

<sup>294</sup> See *supra* Part III.A.

<sup>295</sup> Transcript of Oral Argument at 64, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

the practical consequences of a privileges or immunities revival would be, for nearly all of us, unacceptable. Alternatively, we can choose restraint and abandon the pretense of fidelity.<sup>296</sup>

Given how radically different our precise understanding of civil rights is from that of the framers of the Fourteenth Amendment, and how much of our jurisprudence would be upended by a return to the original understanding of the Fourteenth Amendment, it is hardly surprising that even Justice Scalia opted not to accept the *McDonald* plaintiffs' invitation to revitalize the Privileges or Immunities Clause.<sup>297</sup> Because such a course would have entailed such a high degree of uncertainty, judicial restraint was certainly the right choice in *McDonald*.

Of course, progressive originalists might respond that a fresh look at the Privileges or Immunities Clause need not require that we adopt the precise original understanding of the framers wholesale, but such a concession would put the most zealous progressive originalists in an awkward position: it renders the very project of aligning progressive constitutionalism with originalism far less urgent, while leaving unanswered the question of when the original understanding should be controlling, thus opening progressive originalists to charges of inconsistency.<sup>298</sup>

Third, relying too heavily on originalist modes of argumentation might cede too much rhetorically to those who would interpret the Constitution to cut back on, rather than expand and protect, individual rights.<sup>299</sup> Progressives would do well to remember that originalism's chief appeal lies not in its purported coherence per se, but rather in its ability to distill conservative political ends into a tidy theory of constitutional interpretation.<sup>300</sup> Conceding the primacy of that theory makes advocates for any other mode of constitutional interpretation seem outside of the mainstream,<sup>301</sup> when, in fact, non-originalist modes of interpretation have been dominant throughout most of the Court's history, and much of the public does not believe that judges should be originalists.<sup>302</sup>

Fourth, progressives should not shy away from articulating an alternate vision of constitutional interpretation to compete with originalism. Kendall and Ryan are surely

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<sup>296</sup> Rosen, *supra* note 110, at 1268.

<sup>297</sup> See *McDonald*, 130 S. Ct. 3020 (Scalia, J., concurring).

<sup>298</sup> See Rosen, *supra* note 110, at 1268 (elaborating on the delicate balance between strict originalism and modern aims).

<sup>299</sup> See TRIBE, *supra* note 60.

<sup>300</sup> See *supra* note 188 and accompanying text (noting the use of originalism where consistent with "right-wing convictions").

<sup>301</sup> As Dahlia Lithwick has observed, the primacy of originalism has rendered liberal lights of constitutional advocacy such as Dawn Johnsen, Eric Holder, Pamela Karlan, John Payton, Laurence Tribe, Goodwin Liu, David Cole, and Walter Dellinger seemingly unconfirmable to the judiciary. See Dahlia Lithwick, *What are Liberal Law Students So Sad About?*, SLATE (Apr. 15, 2010), <http://www.slate.com/id/2249535/>.

<sup>302</sup> See *supra* note 185 and accompanying text.

correct when they argue that progressive legal theorists need to do better in summing up their views in pithy sound bites.<sup>303</sup> But as Post and Siegel warn,

Progressives ought to be wary of a method of interpretation that strongly privileges the history of constitutional lawmaking over the experience of living under the Constitution. Our Constitution has emerged from the understandings of those who made and applied it over many generations. We are faithful to the Constitution when we respect this trust. The many forms of constitutional argument Americans use represent our best efforts to appreciate the meaning of this trust. They are our attempts to understand the purposes of the Constitution.<sup>304</sup>

This is, of course, easier said than done. But there is no context in which Post and Siegel's admonition to progressives rings more true than in Fourteenth Amendment jurisprudence. The Court's greatest decisions under the Fourteenth Amendment relied on interpretative methods that did not simply "turn the clock back"<sup>305</sup> to an earlier era, but rather operated from the premise that the lived experience of contemporary Americans informs constitutional decisionmaking. This is far from a novel or embarrassing concept,<sup>306</sup> and progressives should not shy away from it.

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<sup>303</sup> Kendall & Ryan, *supra* note 13.

<sup>304</sup> Post & Siegel, *supra* note 188.

<sup>305</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

<sup>306</sup> *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era.").