

# THE GEM OF THE CONSTITUTION

The Text and History of the Privileges  
or Immunities Clause of the Fourteenth Amendment

Text and History  
Narrative Series



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# Foreword

For all our disagreements we would be hard pressed to find a conservative or liberal in America today, whether Republican or Democrat, academic or layman, who doesn't subscribe to the basic set of individual liberties identified by our Founders and enshrined in our Constitution and our common law: the right to speak our minds; the right to worship how and if we wish; the right to peaceably assemble to petition our government; the right to own, buy, and sell property and not have it taken without fair compensation; the right to be free from unreasonable searches and seizures; the right not to be detained by the state without due process; the right to a fair and speedy trial; and the right to make our own determinations, with minimal restriction, regarding family life and the way we raise our children.

We consider these rights to be universal, a codification of liberty's meaning, constraining all levels of government and applicable to all people within the boundaries of our political community. Moreover, we recognize that the very idea of these universal rights presuppose the equal worth of every individual. In that sense, wherever we lie on the political spectrum, we all subscribe to the Founders' teaching.

—Barack Obama

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In this passage from *Audacity of Hope*, President-elect Barack Obama captures the best of the American constitutional story. This ability to find common ground where most find only rancor is how Obama won a landslide election in a deeply-divided country. And Obama is right: Americans do believe in a basic set of equal and inalienable rights. This is little more than a restatement of the central passage of the Declaration of Independence, a passage that defines the idea of America and our national creed.

But floating just beneath the surface of this commonality is an angry disagreement about the meaning of our Constitution and the source of our rights. The argument centers on the meaning of the Fourteenth Amendment's Due Process Clause. The Supreme Court has employed the Due Process Clause not only to ensure a fair and common set of procedural safeguards, but also to protect substantive rights and liberties – including free speech, free exercise of religion, and reproductive freedom – from encroachment by state and local governments.

This doctrine, known as “substantive due process,” is a deeply flawed foundation for the protec-

tion of fundamental human rights and civil liberties. The phrase substantive due process reads like a contradiction in terms, and requires courts to engage in legal gymnastics to sustain the protection of the fundamental substantive liberties. The doctrine has a checkered past, with links to reviled old cases such as *Dred Scott v. Sanford*, which protected slave owners’ “property” rights in their slaves, and *Lochner v. New York* and its progeny, which invalidated a host of fair labor laws in the name of economic liberty.

Despite these flaws, progressives defend substantive due process because so many critical rulings – many now deeply settled and uncontroversial – are built off this shaky foundation. Conservatives, outraged in particular by one of these rulings – *Roe v. Wade* – have spent much of the last 40 years viciously attacking substantive due process, making it synonymous with the charge of liberal judicial activism.

This dispute has formed the central battleground in the noisy war over the Constitution and the future of the Supreme Court. Conservatives point to liberal devotion to substantive due process as Exhibit A in their case that liberals care little about the text of the Constitution and are content to have judges make up constitutional law as they go along. Progressives see the conservative attack on substantive due process as evidence that conservative judges are willing to roll back judicial protection for even the

fundamental liberties enshrined in the Bill of Rights.

***This narrative pushes for a change in this constitutional conversation, which is dividing Americans on a topic – substantive constitutional rights and freedoms – that should be glue holding us together.***

This narrative pushes for a change in this constitutional conversation, which is dividing Americans on a topic – substantive constitutional rights and freedoms – that should be glue holding us together.

It tells the sad history of the Privileges or Immunities Clause, which was supposed to be the centerpiece of Section One of the Fourteenth Amendment. Instead, this Clause was written out of the Constitution in 1873 by a Supreme Court unwilling or disinclined to force the “new birth of freedom” Lincoln promised the nation at Gettysburg on a country that was by then retreating from the promises of Reconstruction. For 135 years, this critical constitutional text has laid dead or dormant.

This story of the creation and destruction of the Privileges or Immunities Clause is page-turning history, filled with American heroes and villains, hope and bitter disappointment, which has never fully gotten its due in our history books. Our narrative draws heavily from terrific recent work by scholars and historians, such as Eric Foner, Michael Kent Curtis, and Akhil Amar, who have rescued this history from a century of Jim Crow historians who have tried to keep it hidden under the nation’s floorboards. But this narrative is about more than detailing this new scholarly consensus and helping to set the historical record straight. Two Supreme Court cases decided in the last 10 years – *Saenz v. Roe* (1999) and *Heller v. District of Columbia* (2008) – set the stage for the Privileges or Immunities Clause to finally assume its intended place as the vehicle through which fundamental rights and liberties of citizens are protected.

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In *Saenz*, the Supreme Court invalidated a California welfare reform measure for violating the right to travel protected by the Privileges or Immunities Clause. This was the first time in modern constitutional law that the Court has treated the Clause as anything other than a dead letter. The *Saenz* decision was written by Justice Stevens and joined by Justice Scalia and Justice Kennedy, indicating support across the Court’s ideological landscape for some measure of reconsideration of the meaning of the Clause. The only currently sitting Justice to dissent, Justice Thomas, dissented only on the question of whether the California measure at issue was constitutional: notably, he agreed that the “privileges or immunities of citizens’ were fundamental rights,” and he expressed a willingness to reconsider the 1873 *Slaughterhouse Cases* that wrote the Clause out of the Constitution.

In *Heller*, the Supreme Court ruled that the Second Amendment protects an individual’s right to bear arms from intrusion by the federal government. This ruling sets up a momentous decision about whether, and more importantly how, the Constitution protects this individual, substantive right against encroachment from state and local laws. There is only one textually and historically faithful way to

incorporate the Second Amendment into the Fourteenth Amendment and apply it against the States – the Privileges or Immunities Clause. Already, Alan Gura, a conservative lawyer who argued *Heller*, and, separately, a number of preeminent constitutional historians, are urging lower courts to incorporate the Second Amendment against the states through the Privileges or Immunities Clause.

***At no time since ratification have the prospects for an accurate textual interpretation of the Fourteenth Amendment by the Supreme Court, and a realization of its promise, appeared as strong.***

From the left and the right, on the Court and off, there is movement in the direction of an historic ruling that would overrule portions of the Supreme Court’s decision in the *Slaughterhouse Cases*, and establish the Privileges or Immunities

Clause as a stronger and less controversial foundation for the protection of fundamental American rights. At no time since ratification have the prospects for an accurate textual interpretation of the Fourteenth Amendment by the Supreme Court, and a realization of its promise, appeared as strong.

Nor has any President in U.S. history been better positioned to lead this constitutional renaissance than Barack Obama. The first African American to win the presidency, Obama was put over the top by victories in Virginia and North Carolina – states that formed the heart of the former Confederacy. His election demonstrates the remarkable progress that has been made in bridging the racial and regional divisions that have long clouded the interpretation of the Fourteenth Amendment. Having taught constitutional law for a decade, President-elect Obama knows the contorted history of the Fourteenth Amendment all too well.

Getting this text and history right will certainly require Obama’s leadership. The Supreme Court is deeply divided and generally conservative. The significant changes to constitutional law mandated by the text and history summarized in this narrative entail risks and uncertainties, as well as rewards, for both ideological wings of the Court. For conservatives, the main risk is that providing a stronger textual foundation for the protection of civil and human rights will encourage progressive judges to protect new and expanded rights. For progressives, the concern is that conservatives on the Court will try to use the switch to a Privileges or Immunities analysis to either attack fundamental rights already recognized

under the Due Process Clause or bring back the “economic liberties” focus of the *Lochner* era, or both. These risks will powerfully push each side toward maintaining the constitutional status quo.

We think the risks in both directions are overstated. To be sure, judges will have to decide what are the “privileges or immunities of citizens of the United States.” That is what the text mandates. But the Amendment’s text and history, and the Court’s own history of wrestling with the fundamental rights questions under the Due Process Clause, should helpfully refine, channel and limit this interpretation process.

The Second Amendment incorporation question will begin this process in an area where there should be broad agreement: the idea that the individual rights or liberties enumerated in the Bill of Rights constitute privileges or immunities. A ruling that they are will decide the Second Amendment issue as well as questions involving a small handful of other Bill of Rights protections that have not yet been applied against the states. The Court should also have little trouble deciding that other individual rights, such as habeas corpus, specified in other parts of the Constitution, are privileges or immunities of national citizenship.

The hardest questions will involve rights that are not specifically identified in the Constitution. Most scholars and historians agree that beyond those specified in the Constitution, but that

***While lacking the appropriate textual foundation, the Court has been wrestling with the questions about what constitutes protected liberty for 135 years, and its experience yields important lessons.***

is where consensus generally ends. This is where the Court’s own history seems most relevant. While lacking the appropriate textual foundation, the Court has been wrestling with the questions about what constitutes protected liberty for 135 years, and its experience yields important lessons.

The oldest of the Court’s modern substantive due process cases, *Meyer v. Nebraska*, is also the most enduring. Invalidating a Nebraska statute that prohibited the teaching of modern foreign languages, *Meyer* affirmed the right of parents to direct the education of their children. *Meyer* is relatively uncontroversial today for its identification and protection of personal liberties, including the right “to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the

dictates of [one’s] own conscience . . . .” Obama echoes this formulation above in listing “the right to make our own determinations, with minimal restriction, regarding family life and the way we raise our children.”

While not necessarily exhausting the list of unenumerated liberties protected by the Privileges or Immunities Clause, *Meyer*’s list of liberties of heart and home seems like the best place for courts to

***If we start speaking in common constitutional language, we may just find that President-elect Obama is right – we agree more than we disagree about our equal and inalienable constitutional rights***

start. 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.

Thus, the results reached under substantive due process need not be jettisoned; the Court simply invoked the wrong clause of the Fourteenth Amendment. It is, moreover, probably wise not to ask or expect the Court to do too much, too fast. It seems enough to ask the Court to get the text of the 14th Amendment right. The lead paragraph of such an opinion could be as simple as this:

This Court’s incorporation of fundamental rights cases according constitutional protection to substantive liberties, previously considered to be cases interpreting the Fourteenth Amendment’s Due Process Clause, should be treated as cases interpreting the Fourteenth Amendment’s Privileges or Immunities Clause, the proper source of protection for substantive constitutional rights and liberties. Portions of *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), and subsequent cases that are inconsistent with this opinion are hereby overruled.

Such an opinion will not fully satisfy committed activists on either side, who will continue to argue about the results the Court should reach on specific claims of privileges or immunities. And, it will not be the Court’s final word. Additional scholarship, debate and argument are needed – particularly on the questions of whether and how the Court should look to citizenship principles to inform the set of rights protected by the Clause. But all Americans should cheer a ruling that finally honors some of our Constitution’s most important text and history. And if we start speaking in common constitutional language, we may just find that President-elect Obama is right – we agree more than we disagree about our equal

# Introduction

In 1866, Schuyler Colfax, the Speaker of the House of Representatives, called Section One of the Fourteenth Amendment “the gem of the Constitution . . . because it is the Declaration of Independence placed immutably and forever in our Constitution.”<sup>1</sup> As Colfax’s comment reflects, the Fourteenth Amendment secures and guarantees the protection of human and civil rights, prohibiting government actors from violating fundamental constitutional rights and liberties. Proposed in 1866 and ratified in 1868, the Fourteenth Amendment was designed to make the former slaves into equal citizens in the new republic, securing for the nation the “new birth of freedom” President Lincoln promised at Gettysburg. In service of equal citizenship, Section One of the Amendment confers four guarantees: (1) the Citizenship Clause guarantees citizenship as a birthright of all Americans; (2) the Privileges or Immunities Clause declares that substantive rights and liberties inhere in citizenship, which states may not deny or abridge; (3) the Due Process Clause guarantees procedural fairness; and (4) the Equal Protection Clause prohibits racial and other class-based forms of discrimination and subordination.

Today, as we have for most of our history, we focus solely on the last two clauses of Section One. When we talk about the Fourteenth Amendment, we proceed as if the Amendment contained just two guarantees of rights – the Due Process and Equal Protection Clauses. This erasure was entirely the Supreme Court’s doing. In 1873, in the *Slaughterhouse Cases*,<sup>2</sup> the Supreme Court read the Privileges or Immunities Clause out of the Fourteenth Amendment. Interpreting the document in line with States’ rights premises, the Court concluded that the Clause did not protect the fundamental constitutional rights of citizens; rather, it only protected a limited set of rights connected to the workings of the federal government, such as the right to come to the seat of the federal government to transact business, or the right to access federal waterways.<sup>3</sup> So read, the full promise of citizenship the Fourteenth Amendment created in its first two clauses became little more than a dead letter. This erasure stands to this day, despite powerful and cogent arguments rooted in the Constitution’s text and history – raised repeatedly by the *Slaughterhouse* dissenters,<sup>4</sup> Justice Harlan in the early 20th century,<sup>5</sup> Justice Black mid-century,<sup>6</sup> and a host of leading constitutional scholars today<sup>7</sup> – showing that the Privileges or Immunities Clause was

meant to secure the substantive constitutional liberties of citizens.

With the Privileges or Immunities Clause effectively displaced, one of the Fourteenth Amendment's core ideas – that citizens have substantive constitutional rights as citizens that no government may abridge – has no firm textual foundation. This has impoverished our constitutional discourse; we have lost the idea that citizenship is not a mere legal status; it carries with it substantive constitutional rights – rights to be a full participating member of society – that all governments must respect. The Supreme Court has filled this void by turning to the Due Process Clause, but the text of the Due Process Clause says nothing at all about citizenship, and by its very terms concerns procedural fairness, not substantive liberty. Citizenship, which could be a powerful constitutional metric for protecting substantive liberty, languishes unused, while the Due Process Clause is forced to do the work of two clauses.

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Relying on a text whose terms mandate procedural fairness leaves the Fourteenth Amendment's protection of substantive liberty insecure. It forces those who read the Constitution to protect substantive liberty – both on and off the Supreme Court – to perform

legal gymnastics to explain why due process secures substantive constitutional rights, a result hard to square with the procedural focus of the clause. It creates the impression that the protection of civil and human rights is not rooted in the Constitution's text and history, but rather is an invention of judges who wish to perfect the Constitution. That is a tragic state of affairs.

This matters more than ever today. For the last 30 years, conservative politicians and Justices have led a frontal assault on the notion of substantive due process, castigating it as judicial activism pure and simple. At the heart of their attacks is an argument about the primacy of the Constitution's text: they argue the Court's mandate is to enforce the text, not supplement it.

In the face of these attacks, debates over the Fourteenth Amendment's protection of civil rights and human rights have run aground. Many rights claims – such as the right of terminally ill patients to

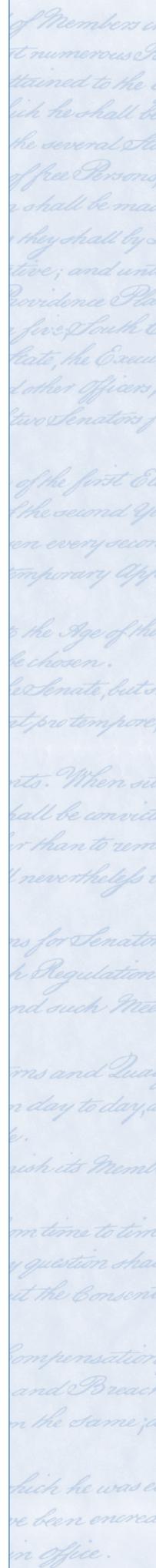
a dignified and less painful death – have been rejected by the Supreme Court in recent years, reflecting worries about the legitimacy of using the Due Process Clause to protect substantive liberty.<sup>8</sup> Rare rulings that recognize new rights or affirm previously recognized rights – such as a woman’s right to choose to terminate a pregnancy<sup>9</sup> or the right to sexual autonomy recognized in *Lawrence v. Texas*<sup>10</sup> – are deeply controversial, leading to loud cries of judicial activism.<sup>11</sup> Without a clear textual mandate to protect substantive liberty, the Court often treats the constitutional protection of fundamental rights as quasi-illegitimate at best,<sup>12</sup> and downright wrong at worst.<sup>13</sup>

In short, the great debates about the Constitution’s protection of substantive liberty have been taking place without any consideration of the Privileges or Immunities Clause, whose text explicitly safeguards the substantive liberty of American citizens. As in Edgar Allen Poe’s famous story,

*As in Edgar Allen Poe’s famous story, The Tell-Tale Heart, the Clause lies buried under our Nation’s floor boards, still sounding the muffled message that the Fourteenth Amendment’s text secures civil and human rights.*

*The Tell-Tale Heart*, the Clause lies buried under our Nation’s floor boards, still sounding the muffled message that the Fourteenth Amendment’s text secures civil and human rights.<sup>14</sup> This is an intolerable state of affairs.

We need to bring the Fourteenth Amendment’s explicit textual protection of substantive liberty back into our constitutional law. Doing so, of course, will not eliminate all the hard constitutional questions. We will still have bitter and hard-fought debates about what constitutional rights all Americans possess. But the debates would change. Working from a text that explicitly protects the substantive liberties of citizens, the Supreme Court would have to engage the constitutional principles of citizenship, and consider what substantive constitutional rights inhere in citizenship. Claims that the Court has no textual basis to safeguard substantive constitutional rights would lose their force, and the protection of fundamental constitutional rights would be on secure textual footing. ■



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# The Text and Original Understanding of the Privileges or Immunities Clause

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 a 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.

*--Section I of the Fourteenth Amendment*

In two short sentences, Section One of the Fourteenth Amendment wrote equal citizenship into our constitutional design, mandating that States abide by fundamental constitutional principles of liberty, equality, and fairness. From the very first words of the Amendment, citizenship is the key constitutional value. The Amendment begins by guaranteeing federal citizenship, and declaring its primacy. All persons born in the United States – as their birthright – are entitled to the protections of citizenship. With these words, our Reconstruction Founders overruled the Supreme Court’s abhorrent decision in *Dred Scott v. Sandford*,<sup>15</sup> which had held that a former slave was not a citizen of the United States under the Constitution. And, importantly, it defined national citizenship as “paramount and dominant instead of being subordinate and derivative,”<sup>16</sup> explicitly overthrowing the idea that federal citizenship was a function of state citizenship. The words of Section One begin with national citizenship, making clear that, by birth, Americans are first “citizens of the United States” and second citizens “of the State in which they reside.” This marked a sea change from most pre-war conceptions of citizenship in which matters were exactly the opposite: Americans were citizens of the United States by virtue of being citizens of the State in which they resided.<sup>17</sup>

These first words were intended to protect full and equal citizenship as the birthright of all Americans. But the framers did not stop there. Those who wrote the Fourteenth Amendment made sure that the citizenship they created in the Citizenship Clause was no empty promise. In the Privileges or Immunities Clause, they explicitly guaranteed that citizens would enjoy all fundamental rights and liberties: “the privileges or immunities of citizens of the United States.” This is a powerful guarantee of equal

citizenship. States must respect the fundamental constitutional rights of all citizens; they may not single out disfavored groups and burden their exercise of fundamental rights.

Today, the words “privileges” and “immunities” are not a regular part of our discourse. When we talk about constitutional rights, we are much more likely to use the words rights, liberties, or freedoms.

But that was not the case for much of our nation’s history. From our very beginnings, Americans used

***From our very beginnings, Americans used the words “privileges” and “immunities” interchangeably with words like “rights” or “liberties.”***

the words “privileges” and “immunities” interchangeably with words like “rights” or “liberties.”<sup>18</sup> For example, when James Madison proposed the Bill of Rights in Congress, he spoke of the “freedom of the press” and “rights of conscience” as the “choicest privi-

leges of the people,” and included in his proposed Bill a provision restraining the States from violating freedom of expression and the right to jury trial because “State governments are as liable to attack these invaluable privileges as the General Government is . . . .”<sup>19</sup> As Amar and Curtis’ careful scholarship shows, this was common ground in American constitutional thought from the founding up through the Civil War. While today’s readers of the text may not have an immediate understanding of “privileges or immunities of citizens of the United States,” those words had specific and powerful meaning to those who wrote them into the Constitution. Reading the words against this background, the Privileges or Immunities Clause is an explicit textual direction to safeguard and protect fundamental, substantive rights of citizens.

The structure of Section One bolsters what the text says. Read as a whole, Section One contains four guarantees, corresponding to Section One’s four clauses: (1) federal citizenship as a constitutional right (the Citizenship Clause); (2) protection for the substantive fundamental rights and liberties of citizens (the Privileges or Immunities Clause); (3) a guarantee of procedural fairness and regularity (the Due Process Clause); and (4) a guarantee of equality (the Equal Protection Clause). This structure shows that it is the Privileges or Immunities Clause that protects substantive constitutional rights and liberties.

The debates in Congress confirm what the plain text of the Amendment provides: the Privileges or Immunities Clause secures the fundamental substantive constitutional rights of citizens. Senator Jacob Howard and Representative John Bingham, the two leading spokesmen for the Fourteenth Amendment, spoke about it in precisely these terms.<sup>20</sup>

Senator Howard offered the most comprehensive analysis of the Privileges or Immunities Clause in the Senate debates on the Amendment. Relying heavily on *Corfield v. Coryell*,<sup>21</sup> an influential 1823 decision interpreting the Privileges

and Immunities Clause contained in Article IV, Section Two of the Constitution,<sup>22</sup> Howard made clear that the Privileges or Immunities Clause would afford broad protections to substantive liberty, encompassing all “fundamental” rights enjoyed by “citizens of all free Governments”: “protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole.”<sup>23</sup> To this set of rights, Howard explained, “should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution.”<sup>24</sup> Howard recognized that the Supreme Court had held that the Bill of Rights constrain only the federal government, and meant to overturn that result. The Fourteenth Amendment, Senator Howard argued, was necessary to prevent state violations of fundamental substantive rights of citizens:

Now sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution . . . some by the first eight amendments of the Constitution; and it is a fact worthy of attention that . . . all of these immunities, privileges, rights, thus guaranteed by the Constitution, or recognized by it, are secured to the citizen solely as a citizen of the United States . . . . They do not operate in the slightest as a prohibition upon State legislation.

[T]here is no power given in the Constitution to [T] enforce and carry out any of these guarantees . . . . [T]hey stand simply as a bill of rights in the constitution, without power on the part of Congress to give them full effect; while at the same time States are not restrained from violating the principles in them . . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these fundamental guarantees.<sup>25</sup>

*The debates in Congress confirm what the plain text of the Amendment provides: the Privileges or Immunities Clause secures the fundamental substantive constitutional rights of citizens.*

Senator Howard's views were shared widely in Congress. Whether in debates over the Fourteenth Amendment or its statutory analogue, the Civil Rights Act of 1866, speaker after speaker affirmed the two central points made by Howard: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship. For example, John Bingham and others, time and again, explained that the Fourteenth Amendment would require state governments to adhere to the guarantees of the Bill of Rights,<sup>26</sup> as the original Constitution had not,<sup>27</sup> and give Congress the power to enforce their guarantees.<sup>28</sup> As Howard had done, many invoked *Cor-*

***Speaker after speaker affirmed the two central points made by Howard: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the Bill of Rights, and that, in line with Corfield, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.***

*field's* broad definition of privileges and immunities, promising that the newly freed slaves would have all the fundamental rights of citizenship.<sup>29</sup>

As crafted, the Privileges or Immunities Clause was meant to secure the substantive liberties protected by the Bill of Rights, as well as unwritten fundamental rights of citizenship. The Clause is “the natural textual home for . . . unenumerated fundamental rights.”<sup>30</sup> It mimics the Ninth Amendment, which provides that there are rights protected by the Constitution not spelled out in the text.<sup>31</sup> The Ninth Amendment is a rule of constitutional construction; it rules out of bounds the argument that a right is not protected by the Constitution because it is not specifically enumerated in the text. In keeping with the Ninth Amendment, the Privileges or Immunities Clause protects all the fundamental rights of citizens, written and unwritten. As one member of Congress observed during the debates:

In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of – “life,” “liberty,” “property,” “freedom of speech,” “freedom of the press,” “freedom in the exercise of religion,” “security of person,” &c; and then lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that “the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights

not enumerated.” This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law.<sup>32</sup>

Indeed, in discussing the fundamental rights of citizenship, the framers regularly included fundamental rights – such as the right of access to courts, the right to enter into contracts and enjoy the fruits of one’s labor, the right to free movement, the right to personal security and bodily integrity, and the right to have a family and direct the upbringing of children – that have no obvious textual basis in the Bill of Rights.<sup>33</sup>

In framing the Amendment, Howard, Bingham and the other framers acted both from principle and experience. The great principle that motivated them was, in the immortal words of the Declaration of Independence, “that all men are created equal” and “endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.” These words, invoked by Lincoln at Gettysburg in his call for a “new birth of freedom,”<sup>34</sup> were at the heart of their credo. Time, and again, the framers invoked the Declara-

tion of Independence to explain the Fourteenth Amendment’s guarantee of human rights and equality. The very point of the Privileges or Immunities Clause was to guarantee to all Americans the “unalienable rights” to which the Declaration referred.

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Rep. Schuyler Colfax, the Speaker of the House, made this point crystal clear in a speech he gave in August 1866 just after Congress had sent the Fourteenth Amendment to the States for ratification. After quoting Section One, Colfax exclaimed: “it’s going to be the gem of the Constitution . . . . I will tell you why I love it. It is because it is the Declaration of Independence placed immutably and forever in our Constitution.”<sup>35</sup> Others made the same point during the debates over the Amendment. In the Senate, Thaddeus Stevens said of Section One: “I can hardly believe that any person can be found who will not

admit that everyone of these provisions is just. They are all asserted in some form or other, in our DECLARATION or organic law.”<sup>36</sup>

The framers, seeking to further the principles of the Declaration, knew from recent experience that the States, particularly in the South, could not be entrusted to comply with these guarantees. In the aftermath of the Civil War, newly formed Southern state governments violated the Bill of Rights and other fundamental rights of citizenship in virtually every way imaginable, as they had done before the Civil War. They violated the constitutional rights of both the former slaves and Southern Unionists, who were hated throughout the South for their support of the Union during the Civil War. This history

***“It’s going to be the gem of the Constitution . . . . I will tell you why I love it. It is because it is the Declaration of Independence placed immutably and forever in our Constitution.”***

loomed large for the men who framed the Fourteenth Amendment.

In 1865, Congress created a Joint Committee on Reconstruction, composed of members of both the House and Senate and tasked with the job of investigating conditions in the South. In a startling departure from normal congressional procedure, this Joint Committee was given both fact-finding powers and legislative jurisdiction: it both took testimony and controlled the framing of constitutional amendments and legislation concerning Reconstruction. Howard, Bingham and other key framers were all on the Committee. It was the Joint Committee that drafted the Fourteenth Amendment in Congress, and thus their findings bear directly on the Amendment they constructed. Their findings – issued in a June 1866 report, 150,000 copies of which were distributed throughout the country<sup>37</sup> – confirm the systematic violation of basic constitutional rights in the South and the need to guarantee basic human and civil rights. The Report explained: if the Southern States were left to their own devices, “the colored people would not be permitted to labor at fair prices, and could hardly live in safety”; “Union men . . . would be obliged to abandon their homes”; “acts of cruelty, oppression and murder” would flourish.<sup>38</sup> In short, it was “impossible to abandon” the freed slaves “without securing them their rights as free men and citizens.”<sup>39</sup> The members of the Joint Committee conducted interviews with Southern men from all walks of life, all confirming this central

lesson.<sup>40</sup> The solution to this sorry state of affairs was obvious. States could no longer be trusted to vindicate the rights of the American people; “changes of the organic law” to secure “the civil rights and privileges of all citizens in all parts of the republic” were necessary.<sup>41</sup>

Central in the minds of the framers were the Black Codes, the South’s post-war attempt to re-institutionalize slavery in a different guise. The Black Codes systematically violated the constitutional rights of the newly freed slaves in myriad ways: (1) they violated freedom of assembly, speech and religion, forbidding the freedmen from holding public gatherings, making the use of insulting gestures a crime, and banning teaching, and preaching the Gospel; (2) they violated the right to bear arms, prohibiting the former slaves from having their own firearms; (3) they imposed cruel and unusual punishments, subjecting freedmen to whippings and excessively harsh punishments, including hanging or being sold into slavery, for minor infractions; (4) they violated the right to property, forbidding the newly freed slaves from owning or renting property in certain areas; (5) they violated liberty without observing due process, using vagrancy laws as a net to criminalize freed slaves not under labor contract with their masters; (6) they required the former slaves, as well as their children, to work sunup to sundown for their master with no real guarantee of wages; and (7) they violated the right to freedom of movement, making it a crime for the freed slaves to go out without a pass.<sup>42</sup> Discussions in Congress echoed the Joint Committee’s findings: “the liberty of free speech does not exist”<sup>43</sup>; the new laws “reduce the freedman to the condition of a serf”<sup>44</sup>; without the Army’s presence, “the entire body of freedman would be annihilated, enslaved, or expatriated”<sup>45</sup> and “[n]o Union man would any have rights there at all.”<sup>46</sup>

The massive violations of constitutional rights in the South in 1866 affirmed a lesson that had long been central to the thinking of Northern Republicans such as Howard and Bingham: subordination and liberty were incompatible. Before the Civil War, the South had not been content to enslave African-American persons; to maintain the slave system, it sought to suppress every exercise of constitutional

*States could no longer be trusted to vindicate the rights of the American people; “changes of the organic law” to secure “the civil rights and privileges of all citizens in all parts of the republic” were necessary.*

rights – all the “privileges or immunities” of citizenship – that sought to undermine slavery. Representative James Wilson had powerfully made this point just a year earlier in debates over the Thirteenth Amendment:

Freedom of religious opinion, freedom of speech and press, and the right of assemblage . . . belong to every American citizen . . . How have these rights essential to liberty been respected . . . ? . . . Religion . . . never has been and never will be allowed free exercise in any community where slavery dwarfs the conscience of men. The Constitution may declare the right, but slavery ever will . . . trample upon the Constitution and prevent enjoyment of the right. . . .

The press have been padlocked, and men’s lips have been sealed. . . . Submission and silence were inexorably extracted. Such . . . is the free discussion which slavery tolerates. Such is its observance of the high constitutional rights of the citizen. . . .

Sir, I might enumerate many other constitutional rights of the citizen which slavery has disregarded . . . but I have enough to illustrate my proposition: that slavery . . . denies to the citizens of each State the privileges or immunities of citizens of the several State.

Indeed, this was a consistent theme of the debates about the Fourteenth Amendment: Congress needed to protect anew all the fundamental constitutional rights of citizens because the Constitution had never been meaningfully enforced to protect these rights.<sup>48</sup>

Lastly, it was not merely Congress’ desire to secure all the fundamental rights of citizenship to the freed slaves; the freedmen themselves pressed for this protection. Conventions of freed slaves gathered in the South, and repeatedly petitioned for enforcement of their constitutional rights. For example, a

***Before the Civil War, the South had not been content to enslave African-American persons; to maintain the slave system, it sought to suppress every exercise of constitutional rights – all the “privileges or immunities” of citizenship – that sought to undermine slavery.***

convention of South Carolina freedmen asked Congress to ensure “that colored men should not be tried by white men, but that they should have juries for themselves”; they demanded that “they should have the constitutional protection of keeping arms, in holding public assemblies,

and in complete liberty of speech and of the press.”<sup>49</sup> Like the Republicans in Congress, the freed slaves pushed for Americans to honor “the fundamental truths laid down in the great charter of Republican liberty, the Declaration of Independence.”<sup>50</sup> At the same time, northern white citizens were making simi-

lar demands for enforcement of basic constitutional rights: Congress had before it petitions for citizens in Illinois and Michigan demanding “free speech, free press, free assembly” and for “protection to free intercourse and personal safety.”<sup>51</sup>

During congressional debates over the Amendment, not a single opponent ever questioned the idea that the Fourteenth Amendment would protect all the fundamental substantive rights of citizens. Rather, those who opposed the Amendment argued that “We the People” should not add this protection of the fundamental rights of citizens to the Constitution because it would greatly upset the federal-state balance, jeopardizing federalism at a time when Southern States had no congressional representation.

For example, Rep. Shanklin argued against passage of the Fourteenth Amendment in the House, claiming that Section One aims “to strike down the reserved rights of the States, those rights which were declared by the framers of the Constitution to belong to the States exclusively . . . .”<sup>52</sup> Representative Rogers made a similar point.

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Section One and its grant of all the privileges and immunities of citizenship, he argued, “destroys the elementary principles of the States . . . .”<sup>53</sup> Bingham delivered the rejoinder to this States’ rights claim: “this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the republic, although many of them assumed and exercised the power . . . .”<sup>54</sup> As Rep. Woodridge had put it earlier, Section One “keep[s] the States within their orbits” and “keep[s] whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country.”<sup>55</sup>

These debates, of course, were not settled in Congress; the ratification debates moved to the States. Ratification of the Fourteenth Amendment was the key political issue of the day. Although a handful of States ratified the Amendment immediately, many considered the issue as the Nation chose a new Congress in 1866. That election, in many ways, was a referendum on the Fourteenth Amendment,

with President Johnson’s supporters calling for the immediate admission of Southern state governments to Congress, and the Republicans demanding the ratification of the Fourteenth Amendment as a precondition to admission. Race riots broke out in Memphis and Louisiana, underscoring the fact that the States could not be entrusted to honor the constitutional rights of the freed slaves. The 1866 congressional elections resulted in a landslide victory for the Amendment’s supporters and ratification by the States followed quickly.<sup>56</sup> By the spring of 1867, more than half of the States had ratified the Amendment. The amendment was finally ratified on July 9, 1868.<sup>57</sup> Evidence from the ratifying legislatures is hard to come by – many state legislatures did not even keep records of their debates on the Amendment<sup>58</sup> – but the available evidence is in line with what the words of the Amendment provide and what the leading framers explained in Congress: the ratifiers of the Amendment understood that the Privileges or Immunities Clause would guarantee to all Americans the substantive constitutional rights of citizens.<sup>59</sup> ■

# “Turning Bread into Stone” The Supreme Court’s Elimination of the Privileges or Immunities Clause in the *Slaughterhouse Cases*

Despite the clear understanding that the Privileges or Immunities Clause was included in the Fourteenth Amendment to protect substantive rights and liberties, the Clause was never allowed to fulfill its promise. With a few short years of ratification, the Supreme Court had effectively written the Privileges or Immunities Clause out of the Fourteenth Amendment, reflecting a national mood that had grown weary of the project of Reconstruction. The erasure came in the *Slaughterhouse Cases*, a case brought by white 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. Going far beyond the analysis necessary to reject the butchers’ claims,<sup>60</sup> the Court’s 5-4 majority drained the Privileges or Immunities Clause of any real meaning.

Two moves were critical to the Court’s reading of the Privileges or Immunities Clause. First, the Court drew a distinction between national and state citizenship, and treated the vast bulk of constitutional and common law rights as rights of state citizenship. Perverting the *Corfield* definition which had been so influential to the framers of the Amendment, the Court claimed that virtually all privileges and immunities were privileges of state citizenship, and consequently not protected by the Privileges or Immunities Clause – a result it reached by misquoting Article IV’s Privileges and Immunities Clause to suggest a state-citizenship gloss not found in the actual text.<sup>61</sup>

By comparison, the only privileges of national citizenship the Court recognized were those “which own their existence to the Federal government, its national character, its Constitution, or its laws,” a list that included the right “to come to the seat of the government,” “the right of free access to its sea ports” and the right to demand the government’s protection “when on the high seas or within the jurisdiction of a foreign government.”<sup>62</sup> The Court substituted the rights that were front and center in the debates on the

Amendment and the Joint Committee’s Report – the substantive rights set forth in the Bill of Rights and other fundamental rights of citizens – with an amalgam of rights connected to the access to the federal government, right to access waterways and the like – a peripheral set of rights that would, in any event, have been protected from state interference under the settled Supremacy Clause principle that states cannot burden the workings of the federal government or the Union.<sup>63</sup> Thus, as the dissenters complained, the Court converted the Fourteenth Amendment’s explicitly textual protection of “the fundamental rights of life, liberty, and property”<sup>64</sup> into “a vain and idle enactment, which accomplished nothing, and unnecessarily excited Congress and the people on its passage.”<sup>65</sup>

Second, the Court operated from the premises of those opposed to the Fourteenth Amendment: they viewed the Constitution, fundamentally, as a States’ Rights document. The *Slaughterhouse* majority refused to assume that the framers intended “to transfer the security and protection of all the civil

***The Slaughterhouse Court operated from the premises of those opposed to the Fourteenth Amendment: they viewed the Constitution, fundamentally, as a States’ Rights document.***

rights . . . from the States to the federal government” for that would make both Congress and the Supreme Court into “a perpetual censor upon all legislation of the States” and “would fetter and degrade the State governments . . . .”<sup>66</sup>

But the *Slaughterhouse* majority’s States’ rights premises had not, in fact, carried the day when the Fourteenth Amendment was drafted, debated, and ratified: it had been routed both in the election of 1866 and in the Fourteenth Amendment’s ratification. The Fourteenth Amendment achieved a revolution in federalism. State citizenship no longer had pride of place in the constitutional order; states no longer were the primary guardians of civil and human rights. Under the Citizenship Clause, federal citizenship is primary; state citizenship is derivative. At the heart of this redefinition of citizenship is the Privileges or Immunities Clause’s explicit textual protection for the fundamental substantive rights of citizenship, and the grant of power in Section Five of the Fourteenth Amendment to enforce the newly granted rights of federal citizenship. Through these provisions, the Fourteenth Amendment nationalized the constitutional rights of citizens, giving both the courts and Congress the power to “keep the States within their

orbits” by “keep[ing] whatever sovereignty [a State] may have in harmony with . . . the Constitution of the country.”<sup>67</sup> What the *Slaughterhouse* Court viewed as abhorrent was precisely what the framers of the Amendment intended and what its words compel.

Through its States’ rights premises, the Court effectively rewrote the Fourteenth Amendment’s citizenship provisions, making state citizenship dominant and leaving states free from supervision for violating the fundamental rights of citizenship – the very result that the framers had sought to overthrow. As Justice Swayne observed in dissent, “[t]hese amendments are a new departure. . . . They trench directly upon the power of the States, and deeply affect those bodies.”<sup>68</sup> The majority’s cramped reading of the Clause, thus, “turns . . . what was meant for bread into stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment.”<sup>69</sup>

But this was a Court that came to bury, not enforce, the guarantees of the Fourteenth Amendment. The nation’s mood was tilting against Reconstruction and the continued enforcement of the rights of the newly freed slaves.<sup>70</sup> With a majority of the Justices inclined against the Amendment to begin with,<sup>71</sup> the Court took a cue from this national mood and buried the sweeping promise of the Privileges or Immunities Clause.

Later decisions continued the retreat from the text and original understanding of the Privileges or Immunities Clause. In *United States v. Cruikshank*,<sup>72</sup> the Court overturned the convictions of white supremacists who had been convicted in federal court of conspiring to intimidate African American citizens in their exercise of federal constitutional rights to peacefully assemble and to bear arms. Relying on *Slaughterhouse*, the Court found that these constitutional rights were guarantees against Congress

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only, and could not support a federal criminal conviction. Speaking of the First Amendment right of assembly, the Court explained: “[t]he right was not created by the amendment; neither was its continuance guaranteed, except as against federal interference. For their protection in its enjoyment, therefore, people must look to the States.”<sup>73</sup> On the same reasoning, the Court affirmed that the Second Amendment “has no other effect than to restrict the powers of the national government . . . .”<sup>74</sup>

In case after case, the Court reaffirmed this impossibly narrow reading of the Privileges or Immunities Clause. For example, in *Maxwell v. Dow*,<sup>75</sup> the Court held that a state statute mandating a criminal trial with a jury of eight persons did not violate the Privileges or Immunities Clause, even though the Sixth Amendment would require a jury of twelve persons for criminal cases tried in federal court. Quoting extensively from *Slaughterhouse* and later cases, the Court concluded that the Privileges or Immunities Clause does not protect a right to a twelve-member jury; that right “rest[s] with the state govern-

***Justice Harlan filed strongly-worded dissents in both Maxwell and Twining, arguing in Maxwell that the Court’s interpretation of the Privileges or Immunities Clause “is opposed to the plain words of the Constitution, and defeats the manifest object of the Fourteenth Amendment.”***

ments.”<sup>76</sup> Likewise, in *Twining v. New Jersey*,<sup>77</sup> the Court held that the Fifth Amendment’s privilege against self-incrimination does not apply to the States. Assuming that the right against self-incrimination is a fundamental right, under *Slaughterhouse*, “it is, so far as the states are concerned, a fundamental right inherent in state citizenship, and is a privilege of state citizenship only.”<sup>78</sup>

Once again, then, the Court relied on the *Slaughterhouse* dichotomy of rights of state and national citizenship to conclude that the States need not abide by the protections set forth in the Bill of Rights.

Justice Harlan filed strongly-worded dissents in both *Maxwell* and *Twining*. In both cases, he relied on a simple textual argument to show that the States were bound to follow the guarantees set forth in the Bill of Rights. In his *Twining* dissent, he argued that the Privileges or Immunities Clause must encompass the guarantees of liberty set forth in the Constitution itself: “[t]he privileges and immunities mentioned in the original Amendments, and universally regarded as our heritage of liberty from the common

law was thus secured to every citizen of the United States, and placed beyond assault by every government . . . .”<sup>79</sup> Harlan rebelled against the idea that States had perfect freedom to trample on the rights set out in the Bill of Rights in the teeth of the Privileges or Immunities Clause. However one defined the privileges and immunities of citizens protected by the Clause, at the very least the guarantees of the Bill of Rights must be considered privileges of national citizenship secured by the Fourteenth Amendment. The Court’s contrary conclusion, he pointed out in his *Maxwell* dissent, “is opposed to the plain words of the Constitution, and defeats the manifest object of the Fourteenth Amendment.”<sup>80</sup> ■

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# The Shift to the Due Process Clause as Basis for Protecting Fundamental Rights

## *DUE PROCESS AND THE WARREN COURT'S INCORPORATION OF THE BILL OF RIGHTS*

**T**hroughout the 20th century, the Court steadfastly refused to give any real content to the Privileges or Immunities Clause, holding to *Slaughterhouse's* abrogation of the Clause in case after case. There were dissenters along the way, most notably Justice Black, who amplified the arguments Justice Harlan had made in his dissents in *Maxwell* and *Twining*.

Justice Black's moment came in 1947 in *Adamson v. California*,<sup>81</sup> which considered once again whether States were obligated to comply with the Fifth Amendment's privilege against self-incrimination in criminal cases tried in state courts. A slender majority of five justices hastily disposed of the case on the basis of *Slaughterhouse* and *Twining*, finding that *Slaughterhouse's* conclusions were now "embedded in our federal system as a functioning element in preserving the balance between state and national power."<sup>82</sup> Indeed, were it not for *Slaughterhouse*, Justice Frankfurter contended, the Clause "would lend itself" to all sorts of "mischievous uses . . . ."<sup>83</sup>

In a powerful dissent, Justice Black showed that *Slaughterhouse* and its progeny were fatally inconsistent with the original understanding of the Privileges or Immunities Clause. As Black explained, "those who conceived, shaped, and brought about the adoption of the Fourteenth Amendment intended . . . to make the Bill of Rights applicable to the States."<sup>84</sup> In a lengthy appendix, Justice Black painstakingly went through the history of the framing of the Privileges or Immunities Clause, showing that the framers of the Fourteenth Amendment intended to apply the guarantees of the Bills of Rights to the States.<sup>85</sup> Unfortunately, Justice Black's plea to resurrect the Clause's original meaning fell one vote short.

After *Adamson*, the Privileges or Immunities Clause simply dropped out of the debate, and the

Court turned to the Due Process Clause to apply to the States virtually all the guarantees listed in the Bill of Rights – only the Second, the Third, the Grand Jury Clause of the Fifth, and the Seventh Amendments are currently not applicable to the States. This shift, in fact, had begun as early as 1897, when the Court had held that the Due Process Clause of the Fourteenth Amendment requires states to comply with the Fifth Amendment’s Takings Clause,<sup>86</sup> but it was only after *Adamson* that the Warren Court’s “due process revolution” began in earnest. In just eight years, between 1961-1969, the Court incorporated and applied against the States the Fourth Amendment’s ban on unreasonable searches and seizures,<sup>87</sup> the Fifth Amendment’s privilege against self-incrimination<sup>88</sup> and its ban on double jeopardy,<sup>89</sup> the Sixth Amendment’s rights to counsel,<sup>90</sup> to a speedy trial,<sup>91</sup> to confrontation of opposing witnesses,<sup>92</sup> to compulsory process for obtaining witnesses,<sup>93</sup> and to jury trial,<sup>94</sup> and the Eighth Amendment’s ban on cruel and unusual punishments.<sup>95</sup> Thus, although Justice Black’s position was never vindicated, the results the Court reached came close to the total incorporation he urged. In the process, the Court essentially repudiated *Slaughterhouse’s* conception of federalism, encouraging citizens to look to the federal government for the protection of a long list of constitutional rights.

The Warren Court’s “due process revolution” was largely in the area of criminal procedure (the First Amendment’s free speech guarantee, like the Fifth Amendment’s Takings Clause, had been incorporated long before),<sup>96</sup> and the Due Process Clause was a good fit for protecting the procedural guarantees of the Bill of Rights. After all, the Due Process Clause is *the* provision of the Fourteenth Amendment that demands procedural fairness, ensuring that states not use unfair procedures to deprive people of their life, liberty, or property. Even Justice Black, who believed that the words of the Privileges or Immunities Clause were “an eminently reasonable way of expressing the idea that . . . the Bill of Rights shall apply to the States,”<sup>97</sup> also saw that the Due Process Clause offered a basis to incorporate the Bill’s procedural guarantees. “The due process of law standard,” Justice Black observed, “is one in accordance with the Bill of Rights . . . guaranteeing to all alike a trial under the general law of the land.”<sup>98</sup>

## DUE PROCESS AND SUBSTANTIVE LIBERTY

If the Due Process Clause was a good fit for forcing states to bring their criminal justice systems in line with the fundamental guarantees of the Bill of Rights, it was just as poor a tool for guaranteeing substantive liberty – the fundamental rights of citizens that the Privileges or Immunities Clause was designed to secure. It is difficult, at best, to read the words of the Due Process Clause to secure substantive liberty. The words, on their face, seem to demand only procedural fairness. As John Hart Ely famously put it, “there is simply no avoiding the fact that the word that follows ‘due’ is ‘process.’ . . . ‘[S]ubstantive due process’ is a contradiction in terms – sort of like ‘green pastel redness.’”<sup>99</sup> As such, the words tell us nothing about what substantive liberties the Constitution guarantees. Unlike the Privileges or Immunities Clause, the Due Process Clause does not offer a secure textual footing for the protection of

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substantive liberty.

Reflecting these difficulties, the history of substantive due process is a checkered one, beset with difficulties. The story of the doctrine begins before the Civil War with *Dred Scott*, which invoked the Due Process Clause of the Fifth Amendment, which is identical to the Due Process

Clause of the Fourteenth Amendment but applies only to the federal government. The Court interpreted the Due Process Clause to protect a fundamental right to hold property, with which the federal government could not interfere. This right to hold property, the *Dred Scott* Court held, included the right to take slaves – recognized as property under the law of Southern states – to new territories, and Congress lacked the power to prohibit slavery in its territorial possessions.<sup>100</sup> Thus, the Court invalidated the Missouri Compromise of 1820, which prohibited the holding of slaves in certain territories. This first experiment in substantive due process did not last long. *Dred Scott* was overruled by the Thirteenth Amend-

ment, which eliminated slavery and the notion that slaves were property protected by the Constitution.

If *Dred Scott* is the most reviled case in our constitutional law, the Court's next encounter with substantive due process is almost equally despised. In the aftermath of *Slaughterhouse* with the Privileges or Immunities Clause essentially erased, the Supreme Court turned to the Fourteenth Amendment's Due Process Clause to safeguard business prerogatives, freeing corporations and business owners from state regulation over the terms and conditions of labor. These cases are universally condemned to this day as the epitome of judicial activism.

***The framers of the Fourteenth Amendment struck a balance between protecting the fundamental rights of citizens – human beings, not business corporations – and the needs of the community as a whole.***

The high water mark of this era is *Lochner v. New York*,<sup>101</sup> in which the Supreme Court invalidated a New York law setting the maximum hours bakers could work, concluding that the Due Process Clause protected liberty of contract and that the maximum hour limit unduly interfered with that liberty. In overturning this and other forms of economic regulation designed to protect workers from oppressive working conditions, the Supreme Court made no effort to root its judgment in either the text of the Constitution or its history; it simply substituted its judgment for that of the legislature, concluding that the legislature has no basis to regulate the hours of bakers as they were not “wards of the state.”<sup>102</sup> *Lochner*'s error was not that it invoked freedom of contract – the framers of the Fourteenth Amendment, too, had spoken of that liberty – but the protection it gave: “it treated freedom of contract as a cornerstone of the constitutional order . . . that repeatedly prevails over legislation that, in the eyes of elected representatives, serves important social purposes.”<sup>103</sup> The *Lochner*-era Court constitutionalized fundamentally unjust working arrangements and gave no meaningful consideration to legislative judgments that regulations were necessary to protect workers from dangerous and unhealthy working conditions.<sup>104</sup>

The framers of the Fourteenth Amendment struck a balance between protecting the fundamental rights of citizens – human beings,<sup>105</sup> not business corporations<sup>106</sup> – and the needs of the community as a whole. They sought to protect the rights of former slaves to enter into contracts freely, finding that this

right was essential to their new status as citizens. The former slaves could not be citizens in any meaningful sense, they found, if they could not control their labor. At the same time, the framers recognized that governments had an important role to play in protecting the community against abuses; through “the common and universal police power of the State,”<sup>107</sup> the government had a wide latitude to protect its citizens against depredations.<sup>108</sup> Indeed, at the end of the Civil War, the Freedman’s Bureau – the agency authorized by Congress to protect the rights of the former slaves – set aside contracts in which plantation owners demanded that their former slaves agree to forfeit constitutional rights as a condition of employment.<sup>109</sup> The liberty of contract did not extend to such unjust bargains.

In its earliest cases interpreting the Fourteenth Amendment, the Court properly recognized this balance, affirmed that states had authority to enact “laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure one another.”<sup>110</sup> *Lochner* disregarded these cases and perverted the constitutional balance underlying them. Far from being an appropriate reading of the rights of citizenship, *Lochner* and its progeny left citizen workers defenseless against employers who demanded harsh and harmful terms of employment. Thirty years later, in the throes of the Great Depression, the Supreme Court recognized as much, limiting liberty of contract to protection against arbitrary restraints on contracts and returning to legislatures the plenary power to regulate oppressive working conditions. “[T]he legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and . . . wholesome conditions of work and freedom from oppression.”<sup>111</sup>

After these two false starts, modern substantive due process doctrine begins with *Meyer v. Nebraska*,<sup>112</sup> which held that Nebraska could not standardize its citizenry by banning the teaching of German and other modern foreign languages. As *Meyer* explained, the Constitution protects substantive liberty, beyond the specific rights enumerated in the Bill of Rights: “it denotes 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>113</sup> In *Meyer*’s view, these are the fundamental liberties of American citizens states must respect. If not for *Slaughterhouse*, this could have been a foundation for declaring the fundamental rights of citizenship protected by the Privileges or Immunities Clause.

*Meyer* has almost universally proved uncontroversial,<sup>114</sup> but the Warren and Burger Court’s efforts to build on *Meyer* produced a firestorm of criticism. The first of these cases, *Griswold v. Connecticut*,<sup>115</sup> illustrates the Court’s struggle to find a basis for protecting substantive liberty under the Due Process Clause in the wake of *Lochner*’s repudiation. By a 7-2 vote, *Griswold* invalidated a ban on the use of contraceptives by married couples, emphasizing, as *Meyer* had, the constitutional right to “marry, establish a home, and bring up children . . . .”<sup>116</sup> The Justices, however, were sharply divided about the constitutional basis for their ruling. Seeking to escape the shadow of *Lochner*, Justice Douglas’ opinion for the Court relied on “penumbras” from the “specific guarantees in the Bill of Rights . . . that help give them life and substance” to protect a “zone of privacy.”<sup>117</sup> Although undoubtedly clever, this approach asked the text to bear too much weight, and the other Justices distanced themselves from it. Justice Goldberg, speaking for three Justices, relied on the Ninth Amendment’s recognition of unwritten constitutional rights to buttress substantive due process protection “of the marital relation and the marital home.”<sup>118</sup> Justices Harlan and White, each writing separately, relied solely on substantive due process, finding that it properly protected fundamental substantive liberties of married couples.<sup>119</sup>

Justices Black and Stewart both dissented, and took the majority to task for protecting a substantive constitutional right without any basis in the Constitution’s text. Both emphasized that there was no specific constitutional provisions that forbade a State from limiting the use of contraceptives, and the Court had no basis to use the Due Process Clause – a purely procedural guarantee – to create one. In their view, using the Due Process Clause to protect personal liberties was just as illegitimate as *Lochner*’s effort to protect economic ones.<sup>120</sup>

The best answer to these charges, of course, would be to point to the Fourteenth Amendment's explicit textual direction to safeguard the fundamental rights of citizens – the Privileges or Immunities Clause. But that move was foreclosed by *Slaughterhouse*, and the Justices never considered reopening the question.<sup>121</sup> Instead, they weathered the attacks, pushing on despite them. In 1972, *Eisenstadt v.*

***To a considerable extent, this is where constitutional law stands today – with the Supreme Court divided between the reluctant defenders of substantive due process and those who view it as an abomination.***

*Baird*<sup>122</sup> expanded *Griswold*, emphasizing that the right to use contraceptives was not confined to people in a married relationship. “If the right of privacy means anything,” Justice Brennan explained, “it is the right of the *individual*, married or single, to be free from unwarranted governmental

intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>123</sup> Of course, one year later, the Court invoked this language in *Roe v. Wade*, holding that the Due Process Clause protected the right of a woman to terminate her pregnancy.<sup>124</sup> Justice Rehnquist's dissent in *Roe* covered the same ground as the *Griswold* dissents, finding the Court's approach too reminiscent of *Lochner*.

*Roe* was bitterly attacked from its inception, and much of the attack centered on the very notion of substantive due process. Even its defenders mustered only a timid defense. The Court's 1977 decision in *Moore v. City of East Cleveland*<sup>125</sup> powerfully illustrates the doctrine's weakness as a protector of substantive liberty.<sup>126</sup> In *Moore*, the Court invalidated a zoning ordinance that made it a crime for a grandmother to share her apartment with her son and two grandsons, invoking *Meyer's* protection of family life. But it did so with extreme hesitation. As the lead opinion explained:

Substantive due process has at times been a treacherous field for the Court. There are risks when the judicial branch gives enhanced protections to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment . . . .<sup>127</sup>

To a considerable extent, this is where constitutional law stands today – with the Supreme Court divided between the reluctant defenders of substantive due process and those who view it as an abomina-

tion. *Planned Parenthood v. Casey*,<sup>128</sup> the 1992 decision that reconsidered *Roe* after nearly twenty years of attacks, illustrates the current thinking on substantive due process. In a joint opinion co-authored by Justices O'Connor, Kennedy, and Souter, the Court by a 5-4 vote preserved the "essential holding" of *Roe* not with a ringing endorsement of *Roe* and the Constitution's protection of substantive liberty, but with a heavy *paean* to *stare decisis*.<sup>129</sup> Whether or not they would have agreed to protect a woman's right to terminate her pregnancy as an initial matter, the joint opinion agreed to preserve *Roe* out of respect for precedent. This is not to say that the Court did not defend substantive protection of liberty under the Due Process Clause; it did. The joint opinion specifically recognized that "choices central to dignity and autonomy" are "central to the liberty protected by the Fourteenth Amendment."<sup>130</sup> But its defense was a tepid one; the joint opinion was unwilling to say that *Roe* was right as an initial matter. Only Justices Blackmun and Stevens – the only members of the *Roe* majority then still on the Court – reaffirmed *Roe*'s correctness.<sup>131</sup> The result is that today the doctrine of *stare decisis* plays a great role in sustaining a key part of the Constitution's protection of substantive liberty. The dissenters, of course, were crystal clear in their belief that *Roe* should be discarded.<sup>132</sup>

Since *Casey*, the battle rolls on, with the Court tacking back and forth between two diametrically opposed conceptions of substantive due process. In 1997, *Washington v. Glucksberg* held that terminally-ill patients had no constitutional right to assistance from their physicians in dying a less painful death.<sup>133</sup> Sounding once again the now-common refrain about the illegitimacy of substantive due process, Chief Justice Rehnquist rejected the claim. Since states had a long history of prohibiting physician-assisted suicide, ipso facto the Constitution does not protect it.<sup>134</sup> The 2003 ruling in *Lawrence v. Texas*, however, dashed any conservative hopes that *Glucksberg* marked a shift against substantive due process. *Lawrence* held that the Due Process Clause protected a right of sexual autonomy for gay men and lesbians. Alone among the recent cases, the Court in *Lawrence* exuded confidence in protecting substantive liberty. Justice Kennedy marched through the Court's precedents from *Meyer* to *Casey*, using them to explain why all persons, regardless of sexual orientation, have a constitutional right of sexual autonomy.<sup>135</sup>

Substantive due process, thus, hangs on, but its legitimacy continues to be vigorously challenged.

For the doctrine’s entire existence, it has been dogged by charges that it has no basis in the text of the Constitution. Despite efforts by some of the greatest Justices in our country’s history, there still is no account of substantive due process that commands respect. This weakness leaves the Constitution’s

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protection for substantive liberty radically insecure. There is every reason to believe that this insecurity is even greater today, with the recent appointments of Chief Justice Roberts and Justice Alito. Both Justices joined Justice Kennedy’s recent opinion in *Gonzales v. Carhart*, which

treated as an open and contestable issue the correctness of *Casey*’s conclusion that the Due Process Clause protects a women’s right to terminate a pregnancy.<sup>136</sup>

Apparently growing weary of the continuing struggles over substantive due process, Justice Ginsburg’s dissent in *Carhart* offered a new way to think about substantive liberty, fusing together the Constitution’s protection of the fundamental rights of citizenship and of equality. “[L]egal challenges to undue restrictions on abortion procedures,” she wrote, “do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”<sup>137</sup> In these words is the germ of a brilliant idea: it is time to reinvigorate the Fourteenth Amendment’s protection of equal citizenship – those long lost words that begin Section One of the Fourteenth Amendment. ■

# The Privileges or Immunities Clause, and the Future of Substantive Constitutional Rights

Today the prospects for rejuvenating the Privileges or Immunities Clause are better than they have ever been. In 1999, in *Saenz v. Roe*, the Court invalidated a California welfare reform measure for violating the right to travel protected by the Privileges or Immunities Clause – one of the unwritten constitutional rights the Clause has always protected, even under *Slaughterhouse*.<sup>138</sup> Since Justice Black’s dissent in *Adamson*, this was the first time the Justices had recognized the Privileges or Immunities Clause as a source of fundamental liberties; this was the first time in modern constitutional law that the Court had treated the Clause as something other than a dead letter. Justice Thomas, too, agreed that the Privileges or Immunities Clause protects substantive fundamental rights, though he disagreed that California had violated any such right. Invoking *Corfield*’s famous definition and showing its central place in the thinking of the framers of the Fourteenth Amendment, Justice Thomas agreed that “privileges or immunities of citizens’ were fundamental rights,” and expressed willingness to reconsider *Slaughterhouse*’s erasure of the Clause.<sup>139</sup> Justice Thomas repeated this refrain in 2000, concurring in the judgment in *Troxel v. Granville*, a case about the unwritten fundamental constitutional right of parents to direct the upbringing of their children. In affirming a finding that the parents’ fundamental rights had been abridged, Thomas noted that “the case does not involve a challenge based on the Privileges or Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause.”<sup>140</sup>

It looks likely that the Court will soon face a case that raises these issues. We are fast approaching the question of whether the Second Amendment right to bear arms, recognized last Term in *District of Columbia v. Heller*,<sup>141</sup> applies to the States, a question the Court left open in *Heller*.<sup>142</sup> In the wake of *Heller*, plaintiffs have brought suits challenging state and local laws for violating the Second Amendment right recognized in *Heller*, and the plaintiffs in these cases are urging incorporation via the Privileges or Immunities Clause.<sup>143</sup> The *Heller* right is a substantive constitutional right, and thus forces the

Court to decide what provision in the Fourteenth Amendment secures substantive constitutional rights: the Due Process Clause or the Privileges or Immunities Clause.

While the Due Process route has precedent on its side, the Fourteenth Amendment's text and history point powerfully toward overruling *Slaughterhouse* and applying the Second Amendment to the States

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via the Privileges or Immunities Clause. For good reasons, the Court is hesitant to overrule long-standing rulings, but that is unavoidable here: *Cruikshank* as well as later cases squarely hold that the Second Amendment does not apply to the States. These cases are built on the errors of *Slaughterhouse* and the root of the problems should fall right along

with its manifestations. After all, the Court itself has already hollowed out *Slaughterhouse*. In overruling earlier cases such as *Maxwell*, *Twining*, and *Adamson*,<sup>144</sup> the Court has rejected the foundation upon which *Slaughterhouse* was built – the idea that the 14th Amendment did not fundamentally change the balance of federal/state power and that Americans should look to state government for the protection of their rights, save only those few rights connected to the workings of the federal government. *Slaughterhouse* was wrong when written and it is wrong today. Its continuing legacy is purely ignoble: it forces supporters of fundamental constitutional rights to engage in the gymnastics required to sustain substantive due process. Its interpretation of the Privileges or Immunities Clause should be confronted by the Court and squarely overruled – and the prospects for such a ruling have never been better.

To be sure, the support by prominent conservatives such as Clarence Thomas and the Cato Institute's Robert Levy for the restoration of the Privileges or Immunities Clause is reason for progressive concern. Justice Thomas, the Clause's most vocal defender on the conservative wing of the Court, may

be quite stingy when it comes to considering the scope of the Clause. In his *Saenz* dissent, he argues that the Clause “should displace, rather than augment, portions of our . . . substantive due process jurisprudence” and should not be treated as “another convenient tool for inventing new rights

. . . .”<sup>145</sup> Some conservatives will surely argue that the Court should rethink its fundamental rights jurisprudence during the course of reviving the Privileges or Immunities Clause and abandon *Roe*, or return to *Lochner*.<sup>146</sup>

But the simple fact is that a historic debate over the meaning of the Privileges or Immunities Clause is very likely coming, and progressives need to participate to ensure an appropriate construction of the Clause. They cannot afford to absent themselves simply because the first beneficiary of the demise of *Slaughterhouse* may be a conservative cause, Second Amendment rights. Moreover, there are compelling reasons to believe that if progressives devote time, resources and energies into rejuvenating the Privileges or Immunities Clause, the result will be a stronger foundation for the protection of fundamental constitutional rights.

First, and foremost, the text matters. As the conservatives on the Supreme Court are fond of saying, it is the text that “We the People” enacted that binds us. Reading the Fourteenth Amendment’s text, it is the Privileges or Immunities Clause that guarantees substantive liberty, demanding that the fundamental rights of citizenship be safeguarded. Working from a text that unambiguously protects substantive liberty will provide a secure and stable foundation for human and civil rights. Progressives can argue from the plain meaning of the text for the protection of substantive fundamental rights; they will not have to engage in legal gymnastics to show that the Court has a role to play in safeguarding fundamental rights and liberties.

Second, the history of the Privileges or Immunities Clause resolves the debate about whether so-called unenumerated rights are secured by the Constitution. The Privileges or Immunities Clause is

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“the natural textual home for . . . unenumerated fundamental rights.”<sup>147</sup> The Fourteenth Amendment’s history shows that, from the start, the Framers expected the Privileges or Immunities Clause to safeguard rights protected by the Bill of Rights as well as substantive liberties at the core of citizenship that were not explicitly enumerated in the Bill of Rights. The hard question about the Clause are which substantive liberties it protects, and the level of scrutiny applied to those liberties, not whether the Supreme Court can enforce the guarantee of substantive liberty outside the confines of the few substantive rights enumerated in the Bill of Rights.

How, then, should the Supreme Court give content to the Privileges or Immunities Clause? This is an extraordinarily complex and difficult question. Needless to say, should the Court overrule *Slaughterhouse*, this will be the hotly-contested issue. As a starting point, however, three important sources

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inform the meaning of the Clause.

First, the Court should rely heavily on its substantive due process precedents. Despite lacking a strong textual foundation, the Court has devoted enormous energies over the past 135 years to identifying fundamental constitutional rights, and it has learned invaluable lessons in doing so. *Meyer* is probably the most respected of the Court’s substantive due process precedents and it provides the best starting point. *Meyer* broadly defines the Constitution’s protection of substantive liberty, and relates those liberties to citizenship. Citizenship is at the core of *Meyer*: the Court invalidated the ban on teaching German in any school as an effort to standardize the citizenry. That effort was constitutionally impermissible because a fundamental right of citizenship is the right of parents to direct the upbringing of their children. *Meyer*’s focus and enduring legacy centers around personal freedoms and liberties of heart and home: “to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of [one’s] own conscience. . . .”<sup>148</sup> Belying the notion that identifying fundamental rights

is inherently political or value laden, there was near unanimity on the Supreme Court in *Troxel* that the childrearing and educational rights recognized by *Meyer* were rightly viewed as fundamental.

*Meyer*, of course, was decided during the *Lochner* era and also invoked the liberty of contract *Lochner* had protected, but there are powerful reasons not to view that liberty as enduring. *Lochner* taught us a valuable lesson: it is often impossible for courts to draw a coherent line between a

valid police power regulation and an invalid restriction on contractual and other economic liberties. The state police power is near its apex when dealing with regulation of business relationships, particularly those situations involving corporate actors; the same cannot be said for the parenting and familial decisions *Meyer* secured to all Americans. 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, a result compelled not only by the Privileges or Immunities Clause but also by the Amendment's Equal Protection Clause and the Reconstruction-era civil rights legislation passed to enforce the Amendment. 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.

Second, the debates over the Fourteenth Amendment provide guidance about the substantive rights the Privileges or Immunities Clause protects. As we have seen, the framers wrote the Privileges or Immunities Clause to protect substantive liberties, including: the specific rights set out in the Bill of Rights;

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rights of personal liberty, including the right to form families, and control the upbringing of one's children; and rights of personal security, including bodily integrity. These rights are paradigm cases that the Supreme Court can use to flesh out the contours of the Privileges or Immunities Clause. In fact, this list closely matches the Court's case law. The Supreme Court has already recognized that many of these specific rights are part of the Constitution's protection of substantive liberty.

Finally, the Privileges or Immunities Clause may itself supply a textual metric to guide courts in defining constitutional liberties – it instructs courts to protect the substantive liberty that inheres in the citizenship the Fourteenth Amendment creates and defines. This is the idea at the core of Justice Ginsburg's dissent in *Carhart*. Women's control over their bodies – what the framers of the Fourteenth Amendment might have termed their right of personal security – is vital to their citizenship. Without bodily autonomy and integrity, she argues, women cannot participate as equal citizens in their communities. The right to choose abortion is thus less about the ability to terminate a pregnancy and more about ensuring that women have the ability to strive for their full potential as citizens, aspirations that might be denied if pregnant women were forced to carry unwanted pregnancies to term. Working from the idea that citizenship guarantees to all Americans the right to full and equal participation in American communities, Justice Ginsburg finds a textual home for the right to choose abortion in the Fourteenth Amendment's promise of citizenship. To her credit, she rightly sees how the Constitution's protection of substantive liberty and of equality work together to secure equal citizenship.

These conclusions, of course, are controversial and would be deeply contested by many. But Justice Ginsburg's underlying point is a powerful one with which all should agree: citizenship is not an empty promise. For too long, we have lost sight of our constitutional heritage of equal citizenship. For 135 years, *Slaughterhouse* has erased constitutional protections for the fundamental rights of citizenship. It is now time for us to reclaim the words of the Fourteenth Amendment, and secure its protection of the substantive liberty of citizens. ■

# Endnotes

- 1 See Cincinnati Commercial, Aug. 9, 1866, at col.3, quoted in Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan. L. Rev. 5, 73 (1949).
- 2 83 U.S. (16 Wall.) 36 (1873).
- 3 *Id.* at 78-80.
- 4 *Id.* at 93-101 (Field, J., dissenting); *id.* at 112-19 (Bradley, J., dissenting); *id.* at 124-29 (Swayne, J., dissenting).
- 5 See *Twining v. New Jersey*, 211 U.S. 78, 117-27 (1908) (Harlan, J., dissenting); *Maxwell v. Dow*, 176 U.S. 581, 606-17 (1900) (Harlan, J., dissenting).
- 6 See *Adamson v. California*, 332 U.S. 46, 69-123 (1947) (Black, J., dissenting).
- 7 See, e.g. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163-230 (1998); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22-30 (1980); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 7-6, at 1320-31 (2000); Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313-15, 317-18 (2007). The arguments of these, and many other, scholars have demolished *Slaughterhouse* everywhere but the Court. “Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughterhouse*] is a plausible reading of the Amendment.” Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).
- 8 See *Washington v. Glucksberg*, 521 U.S. 702 (1997).
- 9 See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
- 10 539 U.S. 558 (2003).
- 11 *Id.* at 602 (Scalia, J., dissenting) (“Today’s opinion is the product of a Court . . . that has largely signed on to the so-called homosexual agenda . . .”); *Casey*, 505 U.S. at 984 (Scalia, J., dissenting) (“It is not reasoned judgment that supports the Court’s decision; only personal predilection.”).
- 12 *Glucksberg*, 520 U.S. at 720 (“We must . . . ‘exercise the utmost care when we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).
- 13 *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting) (“There is no right to ‘liberty’ under the Due Process Clause . . . . The Fourteenth Amendment expressly allows States to deprive their citizens of ‘liberty,’ so long as due process of law is provided.”).
- 14 The analogy to Poe’s tale comes from Laurence Tribe, who treatise powerfully argues for resurrecting the Clause. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 7-6, at 1321.
- 15 60 U.S. (19 How.) 393 (1856).
- 16 See *Arver v. United States*, 245 U.S. 366, 389 (1918).
- 17 See *Dred Scott*, 60 U.S. at 406 (“[E]very person . . . who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body . . . .”); *id.* at 577 (Curtis, J., dissenting) (observing that the Constitution “left to each State to determine what free persons . . . shall be citizens of such State, and thereby be citizens of the United States”).

- 18 See AMAR, *supra*, at 166-69; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1094-1136 (2000).
- 19 1 Annals of Congress 453, 458 (1789); see also *id.* at 766 (discussing the proposed Bill of Rights as “securing the rights and privileges of the people of America”).
- 20 For extensive discussion of the drafting history of the Amendment, see AMAR, *supra*, at 181-214; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57-92 (1986).
- 21 6 F. Cas. 546 (C.C.E.D. Pa. 1823).
- 22 Article IV, Section Two provides: “The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”
- 23 39 Cong. Globe., 1st Sess. 2765 (1866) (quoting *Corfield*, 6 F. Cas. at 551).
- 24 *Id.*
- 25 *Id.* at 2765-66; see also *id.* at 2766 (“It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States . . .”).
- 26 See Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (Rep. Nye) (“Will it be contended . . . that any State has the power to subvert or impair the natural and personal rights of the citizen?”); *id.* at 1095 (Rep. Hotchkiss) (“I desire to secure every privilege and every right to every citizen in the United States . . .”); *id.* at 1153 (Sen. Thayer) (“if the freedmen are now citizens . . . they are clearly entitled to those guarantees of the Constitution of the United States, which are intended for the protection of all citizens.”); *id.* at 2465 (Sen. Thayer) (“[I]t simply brings into the Constitution what is found in the Bill of Rights in every State of the Union.”); Cong. Globe, 42nd Cong., 1st Sess. App. 84 (1871) (Rep. Bingham) (“[T]he privileges and immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States.”).
- 27 See *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). For discussion of *Barron*, see Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866) (Rep. Bingham).
- 28 See Cong. Globe, 39th Cong., 1st Sess. 586 (1866) (Rep. Donnelly) (“Are the promises of the Constitution mere verbiage? Are its sacred pledges of life, liberty, and property to fall to the ground for lack of power to enforce them? . . . Or shall that great Constitution be what its founders meant it to be, a shield and protection over the head of the lowliest and poorest citizen. . . .”); *id.* at 1088 (Rep. Woodbridge) (“It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty . . .”); *id.* at 1094 (Rep. Bingham) (“I urge the amendment for the enforcement of these essential provisions of the Constitution . . . , which declare that all men are equal in the rights of life and liberty before the majesty of American law.”).
- 29 See Cong. Globe, 39th Cong., 1st Sess. 474-75 (1866) (Sen. Trumbull) (invoking *Corfield*); *id.* at 1117-18 (Sen. Wilson) (same); *id.* at 1837 (Rep. Lawrence) (same); see also *id.* at 1266 (Rep. Raymond) (“[T]he right of citizenship involves everything else. Make the colored man a citizen and he has every right which you and I have as citizens of the United States under the laws and the Constitution of the United States.”); *id.* at 1757 (Sen. Trumbull) (“To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights, which belong to free citizens or free men in all countries . . .”).

- 30 See Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990); see also Balkin, *supra*, at 314 (observing that “many” of the fundamental rights the framers sought to protect “were unenumerated” elsewhere in the Constitution).
- 31 See Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).
- 32 Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (Rep. Nye).
- 33 See Cong. Globe, 39th Cong., 1st Sess. 504 (1866) (Sen. Howard); *id.* at 589 (Rep. Donnelly); *id.* at 1090-91 (Rep. Bingham); *id.* at 1117-18 (Rep. Wilson); *id.* at 1151-52 (Rep. Thayer); *id.* at 1159-60 (Rep. Windom); *id.* at 1266-67 (Rep. Raymond); *id.* at 1294 (Rep. Shellabarger); *id.* at 1757 (Sen. Trumbull); *id.* at 1833, 1835 (Rep. Lawrence).
- 34 See Garry Wills, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1993).
- 35 See Cincinnati Commercial, Aug. 9, 1866, at col.3, *quoted in* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5, 73 (1949).
- 36 Cong. Globe, 39th Cong., 1st Sess. 2459 (1866); see also *id.* at 2510 (Rep. Miller) (“[Section One is] . . . so clearly within the spirit of the Declaration of Independence that no member of this House can seriously object to it.”); *id.* at 2961 (Sen. Poland) (“It is the very spirit and inspiration of our system of government, the absolute foundation on which it is established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution.”); *id.* at 429 (urging amendment to enforce constitutional rights of citizens because it “is the law of the Republic. So it was proclaimed in your imperishable Declaration . . .”).
- 37 See Benjamin B. Kendrick, *THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION* 265 (1914).
- 38 See *REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION* xvii (1866).
- 39 *Id.* at xiii.
- 40 *Id.* at Pt. II, 4 (“All of the people . . . are extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property . . .”); *id.* at Pt. II, 176 (“There would . . . be no hope of the freedmen exercising any of his rights. He would have no chance in a court. He would have no chance anywhere.”); *id.* at Pt. II, 218 (“[I]t will be the purpose of their former masters to reduce them as near to a condition of slaves as it will be possible to do; that they would deprive them by severe legislation of most of the rights of freedmen.”); *id.* at Pt. II, 240 (“The planters are disposed . . . to insert into their contracts tyrannical provisions . . . to prevent the negroes from leaving the plantation . . .; or to have fire-arms in their possession . . .”); *id.* at Pt. II, 243 (“It seemed everywhere quite determined that he should not be an owner of land.”); *id.* at Pt. III, 10 (“Now the general disposition is to mistreat them in every manner possible.”).
- 41 *Id.* at xxi.
- 42 See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 199-201 (1988); CURTIS, *supra*, at 35. For discussions of the Black Codes in Congress, see Cong. Globe, 39th Cong., 1st Sess. 93-94 (1865); *id.* at 340 (1866); *id.* at 474-75; *id.* at 516-17; *id.* at 588-89; *id.* at 632; *id.* at 651; *id.* at 783; *id.* at 1123-24; *id.* at 1160; *id.* at 1617; *id.* at 1621; *id.* at 1838.
- 43 Cong. Globe, 39th Cong., 1st Sess. 93 (1865); see also *id.* at 783 (1866) (“Freedom of speech, as of old, is a mockery.”); *id.* at 1617 (“There is neither freedom of speech, of the press, or protection to life, liberty, or property.”).

- 44 Cong. Globe, 39th Cong., 1st Sess. 340 (1866).
- 45 Cong. Globe, 39th Cong., 1st Sess. 633 (1866).
- 46 *Id.*
- 47 Cong. Globe, 38th Cong., 1st Sess. 1202 (1865). For further discussion, see CURTIS, *supra*, at 26-34, 36-41; Cong. Globe, 39th Cong., 1st Sess. 1066 (1866) (Rep. Price) (“[F]or the last thirty years, a citizen of a free State dared not express his opinion of slavery in a slave State.”); *id.* at 1013 (Rep. Plants) (“[T]he system would not be secure if men . . . were permitted to discuss [slavery] in any form, and hence freedom of speech and the press must be suppressed as the highest of crimes . . .”); *id.* at 1263 (Rep. Broomal) (“For thirty years prior to 1860 everybody knows that the rights and immunities of citizens were systematically denied . . .”).
- 48 *See, e.g.* Cong. Globe, 39th Cong., 1st Sess. 2542 (1866) (Rep. Bingham) (noting that many states “assumed and exercised the power” to “abridge the privileges or immunities of citizens of the Republic”); *id.* at 2961 (Sen. Poland) (arguing that the Privileges and Immunities Clause provided in the 1787 Constitution was “disregarded in many states” and “[s]tate legislation was allowed to override it”); *see also id.* at 429 (Rep. Bingham) (noting that the “rights guaranteed” to citizens “from the beginning” have “unhappily been disregarded”); *id.* at 1065 (Rep. Hale) (finding “much force” in Rep. Bingham’s argument that “there has been from first to last a violation of the bill of rights by the very existence of slavery itself”).
- 49 Cong. Globe, 39th Cong., 1st Sess. 337 (1866) (introduction of memorial of South Carolina convention);
- 50 *See FONER, supra*, at 114.
- 51 Cong. Globe, 39th Cong., 1st Sess. 436 (1866) (introduction of petition of citizens of Quincy, Illinois); *id.* at 494 (memorial of citizens of Detroit, Michigan).
- 52 Cong. Globe, 39th Cong., 1st Sess. 2500 (1866); *see also id.* at 2530 (Rep. Randall) (arguing that Section One “relate[s] to matters appertaining to State citizenship, and there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of the States”).
- 53 Cong. Globe, 39th Cong., 1st Sess. 2538 (1866).
- 54 Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).
- 55 Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).
- 56 For discussion of the campaign of 1866, see FONER, *supra*, at 261-71.
- 57 The Southern States, of course, had no meaningful choice of whether to ratify the Amendment. In the Reconstruction Act of 1867, Congress demanded ratification of the Amendment as a precondition to re-admission to the Union. *See FONER, supra*, at 271-77. For the argument that the Fourteenth Amendment was validly ratified despite this ratification requirement, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).
- 58 *See CURTIS, supra*, at 145.
- 59 *See id.* at 145-53.
- 60 At its core, *Slaughterhouse* involved a question of whether the restrictions on butchering imposed by Louisiana were valid police power measures. If the *Slaughterhouse* majority had stopped after concluding that the restrictions were justified by the health risks of butchering, the ruling would have been unremarkable and forgotten today.
- 61 *See Slaughterhouse*, 83 U.S. at 73-77. The *Slaughterhouse* majority incorrectly stated that the Privileges and Immunities

- Clause—the text under consideration in *Corfield*—protects the privileges and immunities “of citizens of the several states.”
- Id.* at 75. The actual text, Justice Bradley observed in dissent, “speak of the privileges and immunities of citizens in a State; not citizens of a state. It is the privileges and immunities of citizens, that is of citizens as such . . . .” *Id.* at 117 (Bradley, J., dissenting).
- 62 *Id.* at 79.
- 63 See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868) (pre-Fourteenth Amendment decision cited by the *Slaughterhouse* majority invalidating state law exit tax); cf. *Slaughterhouse Cases*, 83 U.S. at 96 (Field, J., dissenting) (“The supremacy of the Constitution . . . always controlled legislation of that character.”).
- 64 *Id.* at 126 (Swayne, J., dissenting); see also *id.* at 97 (Field, J., dissenting) (“The privileges and immunities designated are those which belong to the citizens of all free governments.”).
- 65 *Id.* at 96 (Field, J., dissenting).
- 66 *Id.* at 78.
- 67 Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).
- 68 *Slaughterhouse*, 83 U.S. at 125 (Swayne, J., dissenting).
- 69 *Id.* at 129 (Swayne, J., dissenting).
- 70 See FONER, *supra*, at 524-28 (discussing retreat from Reconstruction in Northern public opinion in early 1870s).
- 71 See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughterhouse Cases*, 70 Chi.-Kent. L. Rev. 627, 655-70 (1994). Tellingly, during ratification, Miller had been a supporter of an alternative version of the Fourteenth Amendment, pressed by President Johnson, which included all the provisions save the Privileges or Immunities Clause. Through his opinion in *Slaughterhouse*, he effectively rewrote the Amendment enacted to comport with the one he had preferred. *Id.* at 660 n.228; see also CURTIS, *supra*, at 151 (discussing alternative version).
- 72 92 U.S. (2 Otto) 542 (1875).
- 73 *Id.* at 552.
- 74 *Id.* at 553.
- 75 176 U.S. 581 (1900).
- 76 *Id.* at 601.
- 77 211 U.S. 78 (1908).
- 78 *Id.* at 97.
- 79 *Twining*, 211 U.S. at 123 (Harlan, J., dissenting); *Maxwell*, 176 U.S. at 612-13 (Harlan, J., dissenting).
- 80 *Id.* at 612 (Harlan, J., dissenting). See also *O’Neill v. Vermont*, 144 U.S. 323, 361 (1892) (Field, J., dissenting); *id.* at 370 (Harlan, J., dissenting).
- 81 332 U.S. 46 (1947).
- 82 *Id.* at 53.
- 83 *Id.* at 61 (Frankfurter, J., concurring).
- 84 *Id.* at 73 (Black, J., dissenting).
- 85 *Id.* at 92-123 (Black, J., dissenting).

- 86 *Chicago, B. & Q. Ry. Co. v. City of Chicago*, 166 U.S. 226, 235-41 (1897)
- 87 *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961).
- 88 *Malloy v. Hogan*, 378 U.S. 1, 4-6 (1964).
- 89 *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969).
- 90 *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963).
- 91 *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967).
- 92 *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965).
- 93 *Washington v. Texas*, 388 U.S. 14, 17-19 (1967).
- 94 *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968).
- 95 *Robinson v. California*, 370 U.S. 660, 666-67 (1962).
- 96 *Gitlow v. New York*, 268 U.S. 652, 666 (1925).
- 97 *Duncan*, 391 U.S. at 166 (Black, J., concurring).
- 98 *Id.* at 170 (Black, J., concurring).
- 99 JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).
- 100 *See Dred Scott*, 60 U.S. at 449-52.
- 101 198 U.S. 45 (1905).
- 102 *Id.* at 57. Other leading of the Lochner era include *Adair v. United States*, 208 U.S. 161 (1908), *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).
- 103 *See* David A. Strauss, *Why Was Lochner Wrong*, 70 CHI. L. REV. 373, 375 (2003).
- 104 *Id.* at 69-72 (Harlan, J., dissenting) (discussing health justifications for regulating hours of bakers).
- 105 Some have argued that we should not resuscitate the Privileges or Immunities Clause because it provides constitutional protections only to citizens, and thus excludes resident aliens. But the framers did guarantee aliens equal protection and due process, protections that the Court has often invoked to invalidate discriminatory legislation. Rejuvenating the Privileges or Immunities Clause would not undermine this case law. For discussion of the issue, *see* AMAR, *supra*, at 169-74, 364-65 n.42; TRIBE, *supra*, at § 7-6, at 1324-26.
- 106 *Western Turf Association v. Greenberg*, 204 U.S. 359, 363 (1907) (“[A] corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridge or impaired by the law of the state.”); *see also New York Life Ins. Co v. Dodge*, 246 U.S. 357, 387-88 (1918) (Brandeis, J., dissenting).
- 107 Cong. Rec., 43rd Cong., 1st Sess. 408 (1874) (Rep. Elliott).
- 108 *See* 39 Cong. Globe 1st Sess. 1090 (1866) (Rep. Bingham) (discussing state authority to enact laws “for the punishment of crimes against life, liberty, and property”); *id.* at 2483-85, 2583, 2587 (discussing police power of states to regulate the public health of citizens).
- 109 *See* REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, Pt. II at 240.
- 110 *Munn v. Illinois*, 94 U.S. 113, 124 (1877).
- 111 *See West Coast Hotel v. Parrish*, 300 U.S. 379, 393 (1937).

- 112 262 U.S. 390 (1923).
- 113 *Id.* at 399; *see also* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (invalidating ban on private school teaching under *Meyer* because the ban “unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control”).
- 114 *But see* *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting) (arguing that “the theory of unenumerated parental rights . . . has small claim to stare decisis protection”).
- 115 381 U.S. 479 (1965).
- 116 *Meyer*, 262 U.S. at 399.
- 117 *Griswold*, 381 U.S. at 484, 485; *see also id.* at 481-82 (“Overtones of some arguments suggest that *Lochner* . . . should be our guide. But we decline that invitation . . .”).
- 118 *Id.* at 486-95 (Goldberg, J., concurring).
- 119 *Id.* at 499-500 (Harlan, J., concurring); *id.* at 502-03 (White, J., concurring).
- 120 *Id.* at 507-27 (Black, J., dissenting); *id.* at 527-31 (Stewart, J., dissenting).
- 121 The one Justice who might have considered the Privileges or Immunities Clause—Justice Black—had long before insisted that the Clause protects the liberties enumerated in the Bill of Rights, and nothing else, *Adamson*, 332 U.S. at 90-92 (Black, J., dissenting), an approach inconsistent with the same framers’ history on which Black relied to resuscitate the Clause. *See* ELY, *supra*, at 28 (“[N]othing in the material . . . supports Justice Black’s limitation of the Fourteenth Amendment’s Privileges or Immunities Clause to the function of incorporating the Bill of Rights. There is some . . . history suggesting an intent to incorporate the Bill of Rights; there is none at all suggesting that this was *all* the . . . Clause was designed to do . . .”).
- 122 405 U.S. 438 (1972)
- 123 *Id.* at 453.
- 124 *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *id.* at 168-70 (Stewart, J., concurring).
- 125 431 U.S. 494 (1977).
- 126 For a compelling discussion of this point, *see* CHARLES BLACK, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED* 101-05 (1997).
- 127 *Id.* at 502 (plurality opinion).
- 128 505 U.S. 833 (1992).
- 129 *Id.* at 846-69.
- 130 *Id.* at 851.
- 131 *Id.* at 912-16 (Stevens, J., concurring in part and dissenting in part); *id.* at 926-29 (Blackmun, J., concurring in part and dissenting in part).
- 132 *Id.* at 980 & n.1, 998-999, 1001-02 (Scalia, J., concurring in part and dissenting in part); *id.* at 951-53 (Rehnquist, C.J., concurring in part and dissenting in part).
- 133 The ruling, however, was a narrow one. Four justices emphasized that the Court had before it only a facial challenge to the statute, and that were a State to prevent a terminally ill patient from alleviating her suffering, including by hastening death, there might well be a Fourteenth Amendment violation. *See id.* at 736-38 (O’Connor, J., concurring); *id.* at 742-52 (Stevens,

- J., concurring); *id.* at 789 (Ginsburg, J., concurring); *id.* at 791-92 (Breyer, J., concurring).
- 134 *Glucksberg*, 521 U.S. at 719-28.
- 135 *Lawrence*, 539 U.S. at 564-67, 574.
- 136 127 S. Ct. 1610, 1626-27 (2007).
- 137 *Id.* at 1641 (Ginsburg, J., dissenting).
- 138 *Saenz v. Roe*, 526 U.S. 489, 502-03 (1999).
- 139 *Id.* at 527, 528 (Thomas, J., dissenting).
- 140 *See Troxel*, 530 U.S. at 80 n.\* (Thomas, J., concurring). Further signaling his willingness to abandon substantive due process, Justice Thomas pointed out that neither party “has argued that our substantive due process cases were wrongly decided. . . .” *Id.* at 80 (Thomas, J., concurring).
- 141 128 S. Ct. 2783 (2008).
- 142 *Id.* at 2813 n.23.
- 143 *See McDonald v. City of Chicago*, No. 08-CV-3645 (N.D. Ill.), Plaintiff’s Motion for Summary Judgment (filed July 31, 2008) (available at [http://www.chicagoguncase.com/wp-content/uploads/2008/08/chicago\\_summary\\_judgment\\_brief.pdf](http://www.chicagoguncase.com/wp-content/uploads/2008/08/chicago_summary_judgment_brief.pdf)). It is worth noting that the *McDonald* case is being litigated by Alan Gura, counsel for the plaintiffs in *Heller*.
- 144 *See, e.g. Malloy*, 378 U.S. at 5-7 (overruling *Twining* and *Adamson*); *Duncan*, 391 U.S. at 154-55 (rejecting dicta in *Maxwell*).
- 145 *Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).
- 146 *See Randy Barnett, Forward: What’s so Wicked About Lochner*, 1 N.Y.U. J. L. & Lib. 325, 333 (2005) (“Reverse *Slaughterhouse* and the ‘evils’ of *Lochner* would simply melt away like the Wicked Witch of the West.”)
- 147 *See Gerhardt, supra*, at 449.
- 148 *Meyer*, 262 U.S. at 399.
- 149 *See Troxel*, 530 U.S. at 65-66 (plurality opinion); *id.* at 77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 86-87 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). *But see id.* at 91-93 (Scalia, J., dissenting).

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