

THE ONCE AND FUTURE PRIVILEGES OR IMMUNITIES CLAUSE

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INTRODUCTION

In 1935, Congress created the U.S. Constitution Sesquicentennial Commission to “prepare a plan or plans and a program for the adequate celebration of” the Constitution’s 150th birthday.¹ Five decades later, Chief Justice Warren Burger chaired the Constitution’s Bicentennial Commission.² Both of these commemorations traced the charter’s origin to September 17, 1787, when the framers signed the first seven articles. But that date isn’t quite right, as the document didn’t take effect until New Hampshire’s ratification in June 1788. Even then, the framing wasn’t complete: ten amendments, now known as the Bill of Rights, would be ratified in December 1791. As a general matter, both the sesquicentennial and bicentennial treated these formative dates as the republic’s origin story. Yet the period between 1787 and 1791 only recounts our first Founding.

The second Founding emerged after the conclusion of the Civil War, with the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. Unfortunately, this rebalancing of our separation of powers is often ignored. Indeed, Congress has done nothing to celebrate the sesquicentennial of this critical transformation. Fortunately, the Institute for Justice and the Liberty & Law Center at the Antonin Scalia Law School hosted a symposium to honor the 150th anniversary of the Fourteenth Amendment. Our contribution focuses on how the courts have interpreted this amendment’s legal fountainhead—the Privileges or Immunities Clause—over the past 150 years.

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”³ These twenty-one simple words, comprising the Fourteenth Amendment’s Privileges or

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¹ See R. N. ELLIOTT, GEN. ACCOUNTING OFFICE, 16 DECISIONS OF THE ACTING COMPTROLLER GENERAL OF THE UNITED STATES 1076–77 (1937).

² See John Edward Sexton, Tribute, in *A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 979, 981 (1987).

³ U.S. CONST. amend. XIV, § 1.

Immunities Clause, were designed to revolutionize the relationship between states and individuals. States could no longer enact laws that violate certain rights—and Congress gained a new enumerated power to ensure their protection. At least that was the plan.

In 1873, five short years after the Fourteenth Amendment was ratified, the Supreme Court eviscerated the Privileges or Immunities Clause. The *Slaughter-House Cases*⁴ held that the provision protects only a fairly narrow subset of federal rights.⁵ Two years later, in *United States v. Cruikshank*,⁶ the Court rejected the argument that the right to keep and bear arms, expressly recognized in the Second Amendment, was one of the privileges or immunities of citizenship.⁷ With this one-two punch, the cornerstone of the Fourteenth Amendment was forgotten. The Supreme Court would not revisit these decisions until 2010, in *McDonald v. City of Chicago*.⁸ There, only Justice Clarence Thomas was willing to restore the Privilege or Immunities Clause's original meaning.

On the eve of oral argument in *McDonald*, we urged the Supreme Court to apply the right to arms against the states through the Privileges or Immunities Clause.⁹ And, we explained, the Court could do so without setting out aimlessly into the undiscovered country of untethered and unbounded unenumerated rights—by adapting the principles of *Washington v. Glucksberg*.¹⁰ By only considering rights that are “deeply rooted” in our nation's traditions, the Court could have cabined the Privileges or Immunities Clause within the appropriate scope of historical practice without the floodwaters rushing in. Alas, the Court didn't take our bait—though curiously neither the majority nor dissenting opinions grappled with the privileges-or-immunities dimension.

This follow-up Article takes stock of the last decade. First, what is the status of the ongoing restoration of what was lost in *Slaughter-House*? Second, has *McDonald* changed anything? Third, how should this project more effectively advance?

Part I charts the birth and premature demise of the Privilege or Immunities Clause following the *Slaughter-House Cases*. Part II explores how *McDonald v. Chicago* had the potential to revive the Clause, but failed—or only succeeded in a necessary, but solo, concurring vote. Part III surveys how the lower courts have considered the Clause in the wake of *McDonald*: the courts continue to provide some judicial protection for the “right to travel,” but all other rights—including the liberty of contract—continue to be

⁴ 83 U.S. (16 Wall.) 36 (1873).

⁵ See *id.* at 74.

⁶ 92 U.S. 542 (1875).

⁷ *Id.* at 553.

⁸ 561 U.S. 742 (2010).

⁹ Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 89–90 (2010).

¹⁰ 521 U.S. 702 (1997); Blackman & Shapiro, *supra* note 9, at 75.

disregarded. Part IV forecasts a possible future for the Privileges or Immunities Clause in light of the Supreme Court's recent decision in *Timbs v. Indiana*.¹¹

I. THE BIRTH AND PREMATURE DEMISE OF THE PRIVILEGES OR IMMUNITIES CLAUSE

The origin of the Fourteenth Amendment's Privileges or Immunities Clause stretches back to the nation's beginnings.¹² Article IV of the Articles of Confederation provided that "free inhabitants of each of these States . . . [were] entitled to all privileges and immunities of free citizens in the several States."¹³

Nearly a decade later, the Privileges or Immunities Clause continued to take shape at the Philadelphia Convention. There, the Framers set forth that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."¹⁴ Justice Bushrod Washington elaborated on the Framers' words in *Corfield v. Coryell*.¹⁵ He described "privileges and immunities" as "fundamental."¹⁶ They include: "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;" "the writ of habeas corpus;" the right to "maintain actions of any kind in the courts;" and the right to "take, hold and dispose of property."¹⁷

During Reconstruction, freed slaves continued to face deprivation of their rights. In response, Congress passed the Civil Rights Act of 1866 to protect citizens' "privileges or immunities."¹⁸ Yet, there were doubts about whether that law could be supported solely on the basis of the Thirteenth Amendment.¹⁹ The Reconstruction Congress proposed a new Fourteenth Amendment to provide a solid basis to ensure the protection of these rights. The cornerstone of this Amendment would be the Privileges or Immunities Clause. It provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." During

¹¹ 139 S. Ct. 682 (2019).

¹² For a full discussion of the history of the Privileges or Immunities Clause, see Blackman & Shapiro, *supra* note 9, at 8–12.

¹³ ARTICLES OF CONFEDERATION of 1777, art. IV. para. 1.

¹⁴ AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 251 (2005) (quoting U.S. CONST. art. IV, § 2, cl. 1).

¹⁵ 6 F. Cas 546 (No. 3230) (C.C.E.D. Pa. 1823).

¹⁶ *Id.* at 551.

¹⁷ *Id.* at 551–52.

¹⁸ CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY 99 (2007).

¹⁹ See RANDY E. BARNETT & JOSH BLACKMAN, AN INTRODUCTION TO CONSTITUTIONAL LAW: 100 SUPREME COURT CASES EVERYONE SHOULD KNOW 118–19 (2019).

ratification debates over this provision, Senators relied on Justice Washington's interpretation of the antecedent provision.²⁰

However, the Supreme Court would soon reject any broad reading of "privileges or immunities" in the *Slaughter-House Cases*. Constitutional scholars from across the spectrum, including Professors Laurence Tribe and Akhil Amar, agree that the Supreme Court misinterpreted the Fourteenth Amendment in *Slaughter-House*.²¹ With few exceptions, the Supreme Court has completely overlooked the Clause.

Justice Black attempted to revive the Clause in his dissent in *Adamson v. California*.²² He argued that provisions of the Bill of Rights should be incorporated against the states through the Fourteenth Amendment's Privileges or Immunities Clause, rather than the Due Process Clause.²³ The Court also briefly referenced the Clause in *Shapiro v. Thompson*.²⁴

In recent years, the Privileges or Immunities Clause has once again garnered attention. In *Saenz v. Roe*,²⁵ decided over a century after *Slaughter-House*, the Court seemingly revived the Clause. In that case, the Court held that the Clause protects the "right to travel" between states.²⁶ Although Justice Thomas dissented, he reasoned that the Privileges or Immunities Clause should be reconsidered "in an appropriate case."²⁷ *McDonald v. City of Chicago* presented the perfect case to breathe new life into the Privileges or Immunities Clause.

²⁰ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 177–78 (1998).

²¹ Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 10, *McDonald v. Chicago*, 561 U.S. 742 (2010) (No. 08-1521); AMAR, *supra* note 20, at 163–206; Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 n.327 (2000); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1298 n.247 (1995); see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 192–203 (2004); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22–30 (1980); LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* 1320–31 (3d ed. 2000); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313–18 (2007).

²² 332 U.S. 46 (1947).

²³ *Id.* at 71–72 (Black, J., dissenting) ("My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment." (footnote omitted)).

²⁴ 394 U.S. 618 (1969); see also *id.* at 667–69 (Harlan, J., dissenting).

²⁵ 526 U.S. 489 (1999).

²⁶ *Id.* at 502–03.

²⁷ *Id.* at 527–28 (Thomas, J., dissenting).

II. *MCDONALD V. CHICAGO* REVIVES THE PRIVILEGES OR IMMUNITIES CLAUSE

In its landmark 2008 opinion, *District of Columbia v. Heller*,²⁸ the Supreme Court found that the Second Amendment protects “an individual right to keep and bear arms.”²⁹ The Court accordingly declared unconstitutional the D.C. laws banning the private ownership of handguns, and the keeping of all functional firearms within the home.³⁰ *Heller* was “everything a Second Amendment supporter could realistically have hoped for,”³¹ but for one inherent limitation: The case arose as a challenge to the law of the federal capital. Therefore, the Court had no occasion to resolve whether, and to what extent, the right to keep and bear arms applies to states and localities. Justice Scalia’s majority opinion did, however, observe that its nineteenth-century precedent declining to apply the Second Amendment right against the states, *United States v. Cruikshank*, “also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”³² Notwithstanding *Cruikshank*, the First Amendment had long since been incorporated.³³ Would the same fate await the Second Amendment?

Within minutes of the Supreme Court’s decision in *Heller*, attorneys for Otis McDonald and other Chicago residents filed a lawsuit challenging the city’s handgun ban and several burdensome features of its gun registration system.³⁴ That case came to be known as *McDonald v. City of Chicago*. The following day, the National Rifle Association (“NRA”) also brought a legal challenge against the Chicago ordinances, as well as ordinances in the suburb of Oak Park. This second case came to be known as *NRA v. City of Chicago*.³⁵ At the time, Chicago residents faced one of the highest murder rates in the United States, with rates of violent crime far exceeding the average for comparably sized cities.³⁶ Yet since 1982, Chicago’s firearm laws effectively

²⁸ 554 U.S. 570 (2008).

²⁹ *Id.* at 595. For a thorough and insightful background into the history and story behind *District of Columbia v. Heller*, see Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2008 CATO SUP. CT. REV. 127.

³⁰ *Heller*, 554 U.S. at 635.

³¹ Neily, *supra* note 29, at 147.

³² *Heller*, 554 U.S. at 620 n.23.

³³ See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (“The First Amendment, which the Fourteenth makes applicable to the states . . .”).

³⁴ Lyle Denniston, *Second Amendment Drama: Act II*, SCOTUSBLOG (Feb. 25, 2010, 4:17 PM), <https://www.scotusblog.com/2010/02/second-amendment-drama-act-ii/>.

³⁵ *Nat’l Rifle Assoc. of Am., Inc. v. Village of Oak Park*, 617 F. Supp. 2d 752 (N.D. Ill. 2008), *aff’d sub nom.* *Nat’l Rifle Assoc. of Am., Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *rev’d sub nom.* *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (plurality opinion).

³⁶ *McDonald*, 561 U.S. at 751.

banned the possession of handguns by almost all city residents.³⁷ Despite enactment of the handgun ban, the murder rate in Chicago had increased.³⁸ Several of the plaintiffs had been the targets of violence. McDonald, a retiree from a rough neighborhood in Chicago, had been threatened by drug dealers. Two other plaintiffs, Colleen and David Lawson, had been targeted by armed burglars in their home.

McDonald took a curious path to the Supreme Court. The Seventh Circuit had consolidated the *NRA* and *McDonald* appeals, but the Supreme Court only granted review of McDonald's petition. As petitioners, McDonald and company got the first crack at framing the "question presented." They posed the following question: "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's *Privileges or Immunities or Due Process Clauses*."³⁹ As a result, the Court would not only consider "incorporation" via the Fourteenth Amendment, but would also address the *manner* of incorporation. Of course, the Supreme Court was not required to accept the *McDonald* petitioners' formulation. Had the Seventh Circuit incorporated the Second Amendment through the Due Process Clause—as did the Ninth Circuit in *Nordyke v. King*⁴⁰—the validity of that analysis would have likely been the primary question on review. But the Seventh Circuit rejected incorporation altogether.⁴¹ Accordingly, the *McDonald* petitioners had a blank slate on which to make their case. And, logically, the full weight of constitutional text, structure, and history called for application of the Privileges or Immunities Clause. Ultimately, the Court accepted McDonald's formulation of the question; the Justices would decide *both* whether and how to incorporate.

Recall that two years earlier in *Heller*, the Court had decided the basic Second Amendment issue on originalist grounds: "[W]e are guided by the principle that [t]he Constitution was written to be understood by the voters," Justice Scalia explained, and "its words and phrases were used in their normal and ordinary as distinguished from technical meaning."⁴² Even the *Heller* dissenters adopted a version of originalism that focused more on the Second Amendment's drafting history.⁴³ Following either approach, the *McDonald*

³⁷ The ordinance provided that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm." *Id.* at 750 (quoting CHI., ILL., MUNICIPAL CODE § 8-20-040(a) (2009)). Chicago, Ill., Municipal Code section 8-20-050(c) barred the registration of handguns. *See id.* Justice Alito cited these statutes in the Court's opinion. *Id.*

³⁸ *Id.* at 751.

³⁹ Petition for Writ of Certiorari at i, *McDonald*, 561 U.S. 742 (No. 08-1521) (emphasis added).

⁴⁰ 563 F.3d 439 (9th Cir. 2009), *vacated*, 611 F.3d 1015 (9th Cir. 2010).

⁴¹ Nat'l Rifle Assoc. of Am., Inc. v. City of Chicago, 567 F.3d 856, 857–58 (7th Cir. 2009), *rev'd sub nom.* McDonald v. City of Chicago, 561 U.S. 742 (2010) (plurality opinion).

⁴² District of Columbia v. Heller, 554 U.S. 570, 576 (2007) (citations and internal quotation marks omitted).

⁴³ *See id.* at 652–62 (Stevens, J., dissenting); *see also* Josh Blackman, *Originalism for Dummies, Pragmatic Unoriginalism, and Passive Liberty: An Originalist Critique of the Heller Dissents and Judges*

Court should have relied on the Privileges or Immunities Clause—which was widely understood and intended to bind the states to national civil rights standards—to extend the Second Amendment to the states.

In recent years, scholars have advanced originalist accounts of “substantive” due process—that is, rights derived from the Fifth and the Fourteenth Amendment—with a particular focus on the due process *of law*.⁴⁴ Notwithstanding this novel research, the Privileges or Immunities Clause has long been understood to operate as the principal substantive limitation on a state’s lawmaking powers. This history—which was well known when *McDonald* was argued—should have mattered to the Court and, therefore, to the litigants.

Indeed, urging the Court to rely on due process also posed an additional difficulty: several of the conservative members, including *Heller*’s author, were intractable opponents of substantive due process. In the previous major civil rights case reaching the Court from Chicago, Justice Scalia famously derided substantive due process as an “atrocity” and an act of “judicial usurpation.”⁴⁵ It would have been folly to assume that this Court had five votes for substantive due process incorporation. Indeed, in the end, as we all now know, there were not five votes.

Whatever its merits or ultimate level of acceptance among the Justices, substantive due process incorporation had one unique feature: it was familiar. The Court had been down this well-worn path many times before. The question of whether to incorporate the Second Amendment as a “liberty” interest protected by the Due Process Clause would merely be a test of the Justices’ commitment to longstanding doctrine.⁴⁶ They either believed in it, or they didn’t; they would either apply the familiar standards to the Second Amendment, or alter those familiar standards to make an anti-gun exception. Either way, it would be a poor use of litigation resources to beat the drum on a theory where every Justice’s vote, whatever it might be, was a foregone conclusion.

Or was it? Maybe those Justices unwilling to carry originalism to its obvious end result—defining the right to bear arms as one of the privileges or immunities of citizenship—would nonetheless utilize originalist grounds in an exercise of substantive due process nose-holding. That is, some faint-

Posner’s and Wilkinson’s Unoriginalist Assault on the Liberty to Keep and Bear Arms 1 (Dec. 19, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1318387> (“Rather than ascertaining the original public meaning, [Justice Stevens] focuses almost exclusively on the drafting history, and improperly attempts to guess the intentions of our framers.”).

⁴⁴ See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408 (2010); Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law* (Mar. 26, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3149590>.

⁴⁵ *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting); see also *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 723–24 (2010) (Opinion of Scalia, J.) (attacking as vague and undefined Justice Anthony Kennedy’s use of substantive due process to protect against judicial takings).

⁴⁶ See *McDonald*, 561 U.S. at 767 (plurality opinion).

hearted originalist Justices generally hostile to substantive due process might vote for due process incorporation if they could be convinced the outcome were historically correct. There is strong evidence that this reasoning prevailed among the *McDonald* plurality.⁴⁷

Accordingly, the failure to make a strong originalist case could have seriously jeopardized the outcome. Justices unrepentantly hostile to substantive due process might not have forged their own originalist path unless meaningfully asked to do so by the petitioners. In the end, none of the Court's more "liberal" Justices voted in *McDonald*'s favor. Still, the case's reception among self-described progressives and others normally unenthusiastic about gun rights was quite positive. At the petition stage, liberal academic luminaries including Yale Professor Jack Balkin and UCLA Professor Adam Winkler joined a brief by the Constitutional Accountability Center endorsing the originalist arguments for incorporation via the Privileges or Immunities Clause.⁴⁸ On the eve of argument, even the *New York Times* editorial page, no friend of the Second Amendment, opined that *McDonald* should prevail on that same basis.⁴⁹

Chicago's attorneys understood at least some, if not all, of this dynamic. They had reason to believe they might prevail on the substantive due process question, but wished to avoid arguing their case on originalist grounds.⁵⁰ And so, in opposition to *McDonald*'s petition for certiorari, the City offered: "If the Court believes the time is right to address whether the Second Amendment restrains state and local governments under the Due Process Clause, the petitions should be granted to address this issue only [but the] Court should decline to address whether the Second Amendment is incorporated under the Privileges or Immunities Clause."⁵¹

The Supreme Court only accepted *McDonald*, and not *NRA*. And, over Chicago's objections, the Court accepted *McDonald*'s framing of the question presented. Anyone surprised by the subsequent emphasis on Privileges or Immunities Clause arguments was not paying attention to the petition process.

Ultimately, the Supreme Court reversed the Seventh Circuit with a 4–1–4 split. Five Justices agreed that the Constitution guarantees the right to keep and bear arms for all individuals, regardless of where in the country

⁴⁷ *Id.* at 762 n.9 (referencing Privileges or Immunities sources); *see also id.* at 792–93 (Scalia, J., concurring).

⁴⁸ Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 2, *McDonald*, 561 U.S. 742 (No. 08-1521).

⁴⁹ *See* Editorial, *The Second Amendment's Reach*, N.Y. TIMES, Mar. 2, 2010, at A22.

⁵⁰ On the merits, Chicago indeed offered argument as to why it believed the Due Process Clause does not incorporate the Second Amendment. *See* Brief for Respondents in Opposition at 7–18, *McDonald*, 561 U.S. 742 (No 08-1521). But as for the originalist Privileges or Immunities argument, Chicago offered only that the Privileges or Immunities Clause is indeterminate or duplicative of equal protection guarantees, and should not be revisited. *See id.* at 18–31.

⁵¹ *Id.* at 6.

they live.⁵² How the Court got there is a little more complicated. Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Kennedy, held that the Second Amendment is incorporated through the Fourteenth Amendment's Due Process Clause.⁵³ Justice Thomas joined only part of Justice Alito's opinion but concurred in the judgment, thereby providing the all-important fifth vote for incorporation.⁵⁴ While Justice Thomas agreed that the right to keep and bear arms should be applied to the states, he thought that this "fundamental" right was properly extended to the states by the Privileges or Immunities Clause.⁵⁵ The dissenters, in opinions by Justices Stevens and Stephen Breyer, respectively, made various points that ignored the Privileges or Immunities Clause.⁵⁶

Justice Thomas found *McDonald*, unlike *Saenz*, to be the appropriate case that "presented an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it."⁵⁷ With these words, Justice Thomas broke with the plurality. He turned to face the stark reality of the Fourteenth Amendment's central text. His concurrence aimed to fundamentally restore the proper relationship between Americans and their state governments.

Justice Thomas "agree[d] with the Court that the Fourteenth Amendment makes the right to keep and bear arms . . . applicable to the States," but "wr[ote] separately because [he] believe[d] there is a more straightforward path to this conclusion, one that is more *faithful to the Fourteenth Amendment's text and history*."⁵⁸ Although Thomas concurred with the result reached by the plurality, he argued that the right to keep and bear arms cannot be enforceable against the states through a clause that "speaks only to 'process.'"⁵⁹ "Instead," he opined, "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."⁶⁰

Justice Thomas's opinion explored the right to keep and bear arms through the prism of the expansive notions of freedom, liberty, and equality. These notions were vindicated by the Reconstruction amendments, which "were adopted to repair the Nation from the damage slavery had caused."⁶¹ Justice Thomas noted that the Supreme Court's "marginalization" of the Privileges or Immunities Clause in the *Slaughterhouse Cases*, and the

⁵² See *McDonald*, 561 U.S. at 791 (plurality opinion); *id.* at 858 (Thomas, J., concurring in part and in judgment).

⁵³ *Id.* at 791 (plurality opinion).

⁵⁴ *Id.* at 805–06 (Thomas, J., concurring in part and in judgment).

⁵⁵ *Id.* at 835, 858.

⁵⁶ See, e.g., *id.* at 861 (Stevens, J., dissenting); *id.* at 912–13 (Breyer, J., dissenting).

⁵⁷ *Id.* at 813 (Thomas, J., concurring in part and in judgment).

⁵⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 805–06 (2010) (Thomas, J., concurring in part and in judgment) (emphasis added) (citations and internal quotation marks omitted).

⁵⁹ *Id.* at 806.

⁶⁰ *Id.*

⁶¹ *Id.* at 807.

“circular reasoning” in *Cruikshank*, constituted the “Court’s last word” on the Privileges or Immunities Clause for over a century.⁶² And “in the intervening years” the Court held that the Clause protected “only a handful of rights . . . that are not readily described as essential to liberty.”⁶³ Following these flawed precedents, “litigants seeking federal protection of fundamental rights turned to” the Due Process Clause—a “most curious place,” according to Justice Thomas—in order to find “an alternative fount of such rights.”⁶⁴ Over time, he explained, the Court had “conclude[d] that certain Bill of Rights guarantees,” both substantive and procedural rights, were “sufficiently *fundamental* to fall within § 1’s guarantee of ‘due process’”—though the Court “has long struggled to define” fundamental.⁶⁵ Justice Thomas further criticized the disparate standard the Court has used to recognize “fundamental” rights. The Court’s precedents spanned from the *Glucksberg* “deeply rooted” test to the “less measurable range of criteria” of *Lawrence v. Texas*⁶⁶ that recognized the nebulous protection of “liberty of the person both in its spatial and in its more transcendent dimensions.”⁶⁷

Justice Thomas adopted an intrinsically originalist perspective. He noted that neither the plurality nor the dissenters even bothered “arguing that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification.”⁶⁸ Furthermore, Justice Thomas refused to “accept a theory of constitutional interpretation that rests on such tenuous footing.”⁶⁹ He opined that “the original meaning of the . . . [Privileges or Immunities Clause] offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.”⁷⁰

Justice Thomas premised his inquiry with a basic presumption: no clause in the Constitution was “intended to be without effect.”⁷¹ Therefore, the relevant question is what “‘ordinary citizens’ at the time of ratification would have understood the Privileges or Immunities Clause to mean.”⁷² Justice Thomas made three observations about the Privileges or Immunities Clause based on contemporary historical sources. First, the term “privileges

⁶² *Id.* at 808–09.

⁶³ *Id.* at 809 (“In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution’s adoption—was the very reason citizens could not enforce it against States through the Fourteenth.”); *see also* *Saenz v. Roe*, 526 U.S. 489, 503 (1999).

⁶⁴ *McDonald*, 561 U.S. at 809 (Thomas, J., concurring in part and in judgment).

⁶⁵ *Id.* at 810 (emphasis added).

⁶⁶ 539 U.S. 558 (2003).

⁶⁷ *McDonald*, 561 U.S. at 811 (quoting *Lawrence*, 539 U.S. at 562).

⁶⁸ *Id.* at 811.

⁶⁹ *Id.* at 812.

⁷⁰ *Id.*

⁷¹ *Id.* at 813 (quotation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

⁷² *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 577 (2007)).

or immunities” was a term of art employed to refer to the “inalienable rights of individuals,” or in the words of William Blackstone, the “*residuum* of natural liberty, . . . which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.”⁷³ Second, “both the States and the Federal Government had long recognized the *inalienable rights* of their citizens.”⁷⁴ Third, “the public’s understanding of the [Clause] was informed by its understanding of the [Privileges and Immunities Clause in Article IV],” as “famously” articulated by Justice Washington in *Corfield v. Coryell*.⁷⁵

Justice Thomas considered a comprehensive array of historical sources, including popular and widely disseminated speeches by amendment sponsors Representative John Bingham⁷⁶ and Senator Jacob Howard,⁷⁷ as well as the Civil Rights Act of 1866⁷⁸ and the Freedmen’s Bureau Act.⁷⁹ These sources supported the conclusion that the “right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.”⁸⁰ The Clause is not a mere anti-discrimination principle, but instead “establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them.”⁸¹

As to *Slaughter-House*, Justice Thomas criticized the case for “interpret[ing] the rights of state and federal citizenship as mutually exclusive.”⁸² The *Slaughter-House* majority limited federal rights to a “handful” of rights that excluded rights of state citizenship.⁸³ But those latter, broader rights “‘embrac[ed] nearly every civil right for the establishment and protection of which organized government is instituted’—that is, all those rights listed in

⁷³ *McDonald*, 561 U.S. at 814 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *129).

⁷⁴ *Id.* at 822 (emphasis added).

⁷⁵ *Id.* at 819 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230) (finding that the Privileges and Immunities Clause protects those rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.”)).

⁷⁶ *Id.* at 829 (“Bingham emphasized that §1 was designed ‘to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It ‘hath that extent—no more.’” (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866))).

⁷⁷ *Id.* at 831–33. See also Senator Jacob Howard’s speech introducing the new draft on the floor of the Senate. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (explaining that the Constitution recognized “a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution,” and that “there is no power given in the Constitution to enforce and to carry out any of these guarantees” against the states).

⁷⁸ *McDonald*, 561 U.S. at 833 (“Both proponents and opponents of this Act described it as providing the ‘privileges’ of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms.”).

⁷⁹ *Id.* at 834 (“[T]he Freedmen’s Bureau Act, which also entitled all citizens to the ‘full and equal benefit of all laws and proceedings concerning personal liberty’ and ‘personal security.’ The Act stated expressly that the rights of personal liberty and security protected by the Act ‘includ[ed] the constitutional right to bear arms.’” (citation omitted) (quoting Act of July 16, 1866, ch. 200, § 14, 14 Stat. 176)).

⁸⁰ *Id.* at 838.

⁸¹ *Id.* at 850.

⁸² *Id.* at 852.

⁸³ *Id.*

Corfield.⁸⁴ The artificial distinction between federal and state rights “led the Court in future cases to conclude that constitutionally enumerated rights were excluded from the Privileges or Immunities Clause’s scope”—an understanding Justice Thomas rejected.⁸⁵ The Privileges or Immunities Clause was not meant “to protect every conceivable civil right from state abridgement,” but “the privileges and immunities of state and federal citizenship overlap.”⁸⁶ Justice Thomas also found that “*Cruikshank* is not a precedent entitled to any respect” because it relied on the discredited *Slaughter-House*.⁸⁷

Does the Privileges or Immunities Clause protect certain rights beyond those enumerated in the Constitution—that is, unenumerated rights? Recall that the butchers in *Slaughter-House* sought protection of their right to “exercise their trade”—that is, the liberty of contract.⁸⁸ Justice Thomas noted that the four *Slaughter-House* dissenters—whose view he generally supports—held that the Clause protects the right to earn an honest living.⁸⁹ Of course, the right to earn a living was not at issue in *McDonald*, but Thomas was aware that his opinion would have broader application.⁹⁰ “The mere fact that the Clause does not expressly list the rights it protects,” he wrote, “does not render it incapable of principled judicial application.”⁹¹ Justice Thomas admitted that fears about “the risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts” apply equally whether those rights are recognized under the substantive due process doctrine or the Privileges or Immunities Clause.⁹² Still, he was not troubled by employing an originalist framework that seeks to learn “what the ratifying era understood the Privileges or Immunities Clause to mean.”⁹³ The interpretation of unenumerated rights, he wrote, “should be no more ‘hazardous’ than interpreting” other ambiguous clauses, such as the Necessary and Proper Clause.⁹⁴

The most common question about the state of the legal world after *McDonald* has related to “gun rights.” That is, what does this “application of the Second Amendment to the states” mean in practice, and what kind of lawsuits will be successful? We are both, for example, regularly asked by friends, colleagues, media, and other public interlocutors to explain the scope

⁸⁴ *McDonald*, 561 U.S. at 852 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1873)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 852–53.

⁸⁷ *Id.* at 855.

⁸⁸ *Slaughter-House*, 83 U.S. (16 Wall.) at 60.

⁸⁹ *McDonald*, 561 U.S. at 854.

⁹⁰ *Id.* at 838 n.15 (“I address the coverage of the *Privileges or Immunities Clause* only as it applies to the *Second Amendment* right presented here, but I do so with the understanding that my conclusion may have implications for the broader argument.” (emphasis added)).

⁹¹ *Id.* at 854.

⁹² *Id.*

⁹³ *Id.* at 855.

⁹⁴ *Id.* at 854–55.

of this individual right to keep and bear arms.⁹⁵ But Second Amendment litigation is almost beside *McDonald*'s point. Yes, the right at issue there—the one triggering, as it were, the fascinating seminar on incorporation doctrine—involved guns. But *McDonald* did not discuss the constitutionality of licensing or registration requirements, concealed-carry regimes, firearm- or ammunition-purchasing limits, automatic-rifle or “assault-weapon” prohibitions, or any of the myriad other issues at the heart of the legal and political battles over the future of gun regulations. Much like *Heller*—which decided “only” that the Second Amendment protected an individual right not connected to militia service—*McDonald* “merely” said that this right, whatever its scope, offered protection against all levels of government, not just the federal government. In neither case did the Court even attempt to sketch the line between constitutional and unconstitutional gun laws—because it didn't have to.

What makes *McDonald* significant, therefore, is not what it said about the right to keep and bear arms or the “incorporation” of that right against the states, but what it said about rights generally. What rights do we have and how did we come to have them? Which constitutional provisions protect these rights? If we accept the premise that the Constitution protects rights that are not explicitly enumerated therein—as we must if we are to give effect to the Ninth Amendment⁹⁶—then what is the scope of these unenumerated rights? Most immediately, which state laws are now in jeopardy for violating the Fourteenth Amendment's substantive protections? These questions are *McDonald*'s progeny.

Most of these questions were provoked not by the plurality opinion, however, or even by the debate between the plurality and the dissents. And they do not flow from the simple fact that the Court incorporated the Second Amendment. Instead, Justice Thomas's concurrence reanimated the Privileges or Immunities Clause. That opinion started a jurisprudential discourse on the clause's meaning, and resurrected the old idea that we possess certain “unalienable rights.”⁹⁷ Justice Thomas wrote stirring passages that detailed the state oppressions rampant before and after the Civil War. This history explains why Congress proposed both the Civil Rights Act of 1866 and the Fourteenth Amendment. Freed slaves needed guns to defend themselves against pervasive threats to life and liberty. This necessity for self-defense helps to explain, at least in part, why extending the right to keep and bear arms was vitally important.⁹⁸ But the freed slaves needed other rights: the

⁹⁵ See, e.g., *The Colbert Report: Automatics for the People – Ilya Shapiro & Jackie Hilly* (Comedy Central television broadcast July 8, 2010), <http://www.cc.com/video-clips/zjdl0i/the-colbert-report-automatics-for-the-people---ilya-shapiro---jackie-hilly> (replying “no personal rocket launchers” when asked by the host to name one acceptable firearm regulation).

⁹⁶ See, e.g., Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 CATO SUP. CT. REV. 13, 17.

⁹⁷ *McDonald*, 561 U.S. at 842.

⁹⁸ *Id.* at 857–58.

freedoms to secure employment in a variety of professions, to keep the fruits of their labors, to engage in economic transactions, and a host of other rights that in the parlance of the day were called privileges or immunities.⁹⁹ These sorts of rights don't appear explicitly in the text of the Fourteenth Amendment. Still, those unenumerated rights were very much understood to be constitutionally protected. Look no further than speeches of the amendment's framers and ratifiers, and sources such as *Corfield v. Coryell*.

Justice Thomas's forceful and scholarly opinion should have influenced future litigation, even though—especially because—it had nothing to do with guns or the Second Amendment. Rather, it addressed unenumerated rights, including the economic liberties that *Slaughter-House* disparaged and that were subverted by *Carolene Products*' infamous Footnote Four.¹⁰⁰ Every complaint challenging the host of capricious laws impeding the fundamental right to earn an honest living should cite Thomas's *McDonald* concurrence. For example, challenges to occupational licensing restrictions, typically sought by the very industry the law is supposed to be regulating, as well as other irrational barriers to entry. His opinion should have strengthened challenges to the pervasive regulatory state that has exploded in recent years. Did it? In a word, no.

III. THE PRIVILEGES OR IMMUNITIES CLAUSE SINCE *MCDONALD*

Since *McDonald* was decided in 2010, the Privileges or Immunities Clause has made only the slightest impact on federal litigation. Over the past nine years, the Supreme Court has cited the Clause only three times—all in separate writings by Justice Thomas.¹⁰¹ In the same period, two federal

⁹⁹ See *id.* at 849–50.

¹⁰⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (subjecting to higher scrutiny legislative actions relating to “specific prohibition[s] of the Constitution, such as those of the first ten amendments,” as well as those affecting “discrete and insular minorities”). Ironically, Chicago's handgun ban implicated just such a specific constitutional prohibition—the Second Amendment. Inexplicably, both dissenting opinions missed this fact in arguing that gun-control regulations do not demand a searching judicial inquiry. See, e.g., *McDonald*, 561 U.S. at 905 (Stevens, J., dissenting) (“This is not a case, then, that involves a ‘special condition’ that ‘may call for a correspondingly more searching judicial inquiry.’” (quoting *Carolene Prods.*, 304 U.S. at 153 n.4.)); *id.* at 921 (Breyer, J., dissenting) (“We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting ‘discrete and insular minorities.’” (quoting *Carolene Prods.*, 304 U.S. at 153 n.4)).

¹⁰¹ See *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Thomas, J., concurring in judgment) (“I would hold that the right to be free from excessive fines is one of the ‘privileges or immunities of citizens of the United States’ protected by the Fourteenth Amendment.”); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) (“In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.”); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 836 (2011) (Thomas, J., dissenting) (noting that the *Slaughter-House Cases* were “inconsistent with the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment”).

appellate judges have written separately to express sympathy with Justice Thomas's view.¹⁰²

We were able to locate roughly 100 decisions in which a federal court discussed claims that were litigated under the Privileges or Immunities Clause. Obtaining a precise number is difficult for at least four reasons. First, courts do not always address all of plaintiffs' submitted claims. We only searched decisions reported on Westlaw and Lexis and did not survey all filed complaints. Second, many litigants and courts alike fail to state, with precision, whether they are applying Article IV's Privileges *and* Immunities Clause or the Fourteenth Amendment's Privileges *or* Immunities Clause.¹⁰³ Third, many litigants rely on the entirety of Section 1 of the Fourteenth Amendment—privileges or immunities, due process, and equal protection—and courts often fail to distinguish the precise basis of their ruling.¹⁰⁴ In each case we identified, the plaintiffs unequivocally raised a claim under the Privileges or Immunities Clause, and the federal court resolved that precise claim—dismissing it in virtually every case. Fourth, prisoners and other *pro se* litigants often file “kitchen sink” complaints that include a litany of unsubstantiated allegations against the government, including frivolous Privileges or Immunities claims.¹⁰⁵ Other cases involved idiosyncratic claims that had no discernible relationship to the Privileges or Immunities Clause as originally understood, or as the courts have interpreted it.¹⁰⁶ Accordingly, we excluded such outliers. Given these criteria, we identified roughly 100 cases with Privileges or Immunities claims that fall into three broad categories:

¹⁰² See *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 686 (7th Cir. 2017) (Easterbrook, J., concurring) (“A bare majority of the Court in *Slaughter-House* drained that clause of force, but calls to overrule *Slaughter-House* have not succeeded.”); *Korab v. Fink*, 797 F.3d 572, 598 n.8 (9th Cir. 2014) (Bybee, J., concurring) (blaming “the Court’s disastrous decision in [t]he *Slaughter-House Cases*” for the “current confusion” of modern constitutional doctrine).

¹⁰³ See, e.g., *Hlinak v. Chi. Transit Auth.*, No. 13-C-9314, 2015 WL 361626, at *4 (N.D. Ill. Jan. 28, 2015) (“Plaintiffs’ response does not differentiate between the two counts based on the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment. The Court notes that the scopes of the rights under these provisions are different, but reads the Amended Complaint to allege violations of the constitutional right to travel regardless of the source of the right.”).

¹⁰⁴ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015).

¹⁰⁵ See, e.g., *El Bey v. Armstrong*, No. 16-38-GFVT, 2016 WL 4573926, at *1 (E.D. Ky. Aug. 31, 2016) (“Plaintiff El Bey filed the instant *pro se* civil rights action asserting various claims that Defendants had violated his rights under ‘the Due Process, Equal Protection, and Privileges or Immunities Clauses,’ of the United States Constitution, ‘as well as the privileges or immunities clause of the Kentucky Constitution’ . . . by failing to provide him with medical relief and ‘deliberately ignore[d] plaintiff[s] health’ during his incarceration at United States Penitentiary (USP) McCreary.”); *Otompke v. Hill*, 28 F. Supp. 3d 772, 780 (N.D. Ill. 2014) (“[Pro se plaintiff’s] reliance on *McDonald* appears to be based on the U.S. Supreme Court’s summary of . . . Justice Field’s dissenting opinion. . . . The *Slaughter-House Cases*, of course, held the opposite . . .”).

¹⁰⁶ For example, Michigan Corrections Officers argued that “federal statutory rights—minimum wages and overtime pay—amount to fundamental rights of national citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment.” *Mich. Corr. Org. v. Mich. Dep’t of Corr.*, 774 F.3d 895, 901 (6th Cir. 2014). The Court of Appeals rejected this claim because “[e]ver since the *Slaughter-House Cases* . . . the Clause protects only ‘fundamental’ rights of national citizenship.” *Id.* at 901–02.

economic rights, the right to travel, and challenges to lethal injection protocols.

A. *Economic Rights*

The Supreme Court's major decisions concerning the Privileges or Immunities Clause were arguably decided out of order. In 1873, the *Slaughter-House* Court rejected the argument that the clause protected an *unenumerated* right of the butchers to "exercise their trade"—that is, a liberty of contract.¹⁰⁷ And in *Bradwell v. Illinois*,¹⁰⁸ a companion case decided the following day, the Court rejected the right of a woman to practice as an attorney.¹⁰⁹ In 1875, the *Cruikshank* Court rejected the argument that the Privileges or Immunities Clause protected an *enumerated* right to keep and bear arms.¹¹⁰ As a general matter, courts are far more willing to protect rights that are written down than unwritten rights; there is less guesswork and a greater likelihood that judges stay within the bounds of propriety. Perhaps the fate of the Privileges or Immunities Clause would have been different if the Court was first asked to secure a familiar right—the Second Amendment—rather than to rescue a "new" freedom of contract from the constitutional ether. Because of *Slaughter-House*'s original sin, the Court eventually turned to the Due Process Clause to protect liberties from state infringement. Yet, even more paradoxically, the Supreme Court began that process by protecting the very *unenumerated* right that was rejected in *Slaughter-House*: the liberty of contract in cases like *Lochner v. New York*.¹¹¹ Only later, and after vigorous debate, did the Supreme Court turn to incorporating *enumerated* provisions of the Bill of Rights.

There would be one more paradoxical shift. Because of *Carolene Products*' bifurcation of rights, the freedom of contract—the original right rejected in *Slaughter-House* but later embraced in *Lochner*—was relegated to second-class status. At the same time, certain modern liberty interests were protected if they were deemed "fundamental." Where do these paradoxes leave us? The Fourteenth Amendment's Due Process Clause, under the modern substantive due process doctrine, provides rigorous protection of the enumerated rights in the Bill of Rights, as well as rights that have no grounding whatsoever in the text and history of the Fourteenth Amendment. Meanwhile, the original right at issue in *Slaughter-House* and its companion case *Bradwell*—a liberty of contract that would have been most familiar as a "privilege or immunity" of citizenship in the antebellum era—receives no judicial protection whatsoever.

¹⁰⁷ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 60 (1873).

¹⁰⁸ 83 (16 Wall.) U.S. 130 (1873).

¹⁰⁹ *Id.* at 139.

¹¹⁰ *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

¹¹¹ 198 U.S. 45 (1905).

In the wake of *McDonald*, litigants continue to seek judicial protection of the right to earn a living.¹¹² Yet, unsurprisingly, the federal courts have shown no willingness to revisit these paradoxes with respect to economic liberty.¹¹³ Many of the litigants admit that their economic liberty claims are precluded by binding precedent. For example, an African hair-braider challenged Utah's cosmetology licensing scheme.¹¹⁴ She "concede[d] that her Privileges or Immunities Clause argument [was] foreclosed by the U.S. Supreme Court's decision in the *Slaughter-House Cases*, and that only the Supreme Court can overturn the *Slaughter-House Cases*."¹¹⁵ Still, the stylist "preserve[d the issue] for possible Supreme Court review."¹¹⁶ In other cases,

¹¹² See, e.g., *Young v. Ricketts*, 825 F.3d 487, 495 (8th Cir. 2016) ("Young argues that the License Act infringes on her right to practice her chosen profession, as that right is constitutionally protected by the Privileges or Immunities Clause."); *Collins v. Battle*, No. 1:14-CV-03824-LMM, 2015 WL 10550927, at *1 (N.D. Ga. July 28, 2015) ("Plaintiff seeks a declaratory judgment that the application of [Georgia law and regulations], which purport to prohibit non-dentists from providing teeth-whitening services like those provided by Plaintiff, violate the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution."); *Bruner v. Zawacki*, No. 3:12-57-DCR, 2013 WL 684177, at *1 (E.D. Ky. Feb. 25, 2013) (arguing that Kentucky's occupational licensing law for movers "unreasonably interferes with [plaintiff's] constitutional right to earn a living in violation of the Privileges or Immunities Clause").

¹¹³ See, e.g., *Wilson-Perlman v. MacKay*, No. 2:15-CV-285-JCM (VCF), 2016 WL 1170990, at *9 (D. Nev. Mar. 23, 2016) ("[T]he right to pursue one's chosen occupation is not of a federal character and is therefore not protected by the Privileges or Immunities Clause of the Fourteenth Amendment.").

¹¹⁴ See *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1213 (D. Utah 2012).

¹¹⁵ *Id.* (footnote omitted).

¹¹⁶ *Id.*; see also *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 548 (4th Cir. 2013) ("Finally, appellants contend that the certificate-of-need program contravenes the 'right to earn an honest living' embodied in the Fourteenth Amendment's Privileges or Immunities Clause, which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' They concede, however, that this particular claim is foreclosed . . ." (quoting U.S. CONST. amend. XIV, § 1)); *Niang v. Carroll*, No. 4:14-CV-1100-JMB, 2016 WL 5076170, at *9 (E.D. Mo. Sept. 20, 2016), *aff'd*, 879 F.3d 870 (8th Cir. 2018), *vacated and remanded sub nom.* *Niang v. Tomblinson*, 139 S. Ct. 319 (2018) ("Plaintiffs allege that application of the licensing regime to them violates the Privileges or Immunities Clause of the Fourteenth Amendment, because it 'unreasonably' restricts their 'right to earn a living in the occupation of [their] choice subject only to reasonable government regulation.' . . . Plaintiffs acknowledge, however, that this claim is foreclosed . . ."); *Roman Catholic Archdiocese of Newark v. Christie*, No. 15-5647 (MAS) (LHG), 2016 WL 1718676, at *1 n.1 (D.N.J. Apr. 29, 2016) ("Plaintiffs concede, and the Court agrees, that the Privileges or Immunities Claim should be dismissed under the *Slaughter-House Cases*. Plaintiffs assert this claim to preserve it for appeal." (citation omitted)); *Waugh v. Nev. State Bd. of Cosmetology*, 36 F. Supp. 3d 991, 1025 (D. Nev. 2014), *vacated and remanded*, No. 14-16674, 2016 WL 8844242 (9th Cir. Jan. 27, 2016) ("As Plaintiffs concede, I am constrained by the Supreme Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases*. Relief cannot be had under this clause 'unless the claim depends on the right to travel.' I thus grant summary judgment on this claim in the Board's favor, but preserve the claim for possible Supreme Court review." (footnotes omitted)); *Eck v. Battle*, No. 1:14-CV-962-MHS, 2014 WL 11199420, at *7 (N.D. Ga. July 28, 2014) ("Plaintiff concedes that under the current state of the law she cannot state a claim under the Privileges or Immunities Clause. Accordingly, the Court grants defendants' motion to dismiss that claim."); *Brantley v. Kuntz*, No. A-13-CA-872-SS, 2013 WL 6667709, at *3 (W.D.

even as the Privileges or Immunities Clause was raised in the district court, plaintiffs abandoned this claim on appeal—perhaps to save pages and focus on arguments that were more likely to prevail.¹¹⁷ The future of this right, which has a far stronger historical pedigree than other rights that the Court has held to be protected by the Fourteenth Amendment, continues to look bleak.

B. *The Right to Travel*

In *Saenz v. Roe*, the Supreme Court recognized that the Privileges or Immunities Clause, even as interpreted by the *Slaughter-House Cases*, still provides protection of a right to travel.¹¹⁸ It held that California could not discriminate against newly arriving residents with residency requirements for certain welfare benefits.¹¹⁹ Accordingly, it is unsurprising that a large share of privileges-or-immunities litigation concerns allegations that a state violated the right to travel. These cases arise in a wide range of contexts. In *Fish v. Kobach*,¹²⁰ plaintiffs contended that a Kansas voter registration law violated their “right to travel,” a claim the district court dismissed.¹²¹ Another case considered the application of the “right to travel” to Nebraska’s Sex Offender Registry Act.¹²² The law discriminated against newly-arrived citizens and “prevent[s] migration into the state of undesirable citizens.”¹²³ Yet another case rejected the argument that a school district’s failure to credit a teacher’s out-of-state experience did not violate his “right to travel.”¹²⁴ John Sturgeon, whose case ultimately made it to the Supreme Court twice, asserted that his “inability to use his hovercraft for moose-hunting purposes arguably implicates his right under the Privileges or Immunities Clause of the Fourteenth Amendment ‘to use the navigable waters of the United States, however

Tex. Dec. 16, 2013) (“[Plaintiff] concedes her challenge based on the Privileges or Immunities Clause is foreclosed by the United States Supreme Court’s holding in the *Slaughter-House Cases*. [Plaintiff] merely seeks to preserve the issue for appellate review.” (citation omitted)).

¹¹⁷ See, e.g., *Locke v. Shore*, 634 F.3d 1185, 1189 n.1 (11th Cir. 2011) (“Before the district court, Appellants also unsuccessfully challenged the licensing requirement under the Fourteenth Amendment’s Privileges or Immunities Clause. On appeal, Appellants have abandoned this claim.”).

¹¹⁸ 526 U.S. 489, 503 (1999).

¹¹⁹ *Id.* at 506–07.

¹²⁰ 304 F. Supp. 3d 1027 (D. Kan. 2018).

¹²¹ *Id.* at 1049–50.

¹²² *A.W. v. Nebraska*, 865 F.3d 1014, 1020–21 n.3 (8th Cir. 2017).

¹²³ *Id.*

¹²⁴ *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 216 (3d Cir. 2013) (“In sum, because Connelly’s allegations cannot support an inference that Steel Valley penalized him for exercising his right to interstate travel, its salary classification does not implicate a fundamental right. Therefore, Steel Valley’s decision to provide Connelly with less than full credit for out-of-state teaching experience is subject to rational basis review.” (citation omitted)).

they may penetrate the territory of the several States.”¹²⁵ The Ninth Circuit rejected that claim.¹²⁶

Courts will often stress that the “right to travel” is the *only* right protected by the Privileges or Immunities Clause. Consider *Young v. Ricketts*,¹²⁷ in which a California real-estate broker challenged a Nebraska law requiring agents who advertise properties in the state to register with the state.¹²⁸ She claimed that the statute “infringe[d] on her right to practice her chosen profession.”¹²⁹ In light of *Slaughter-House*, the Eighth Circuit found that it could not “grant relief based upon that clause *unless the claim depend[ed] on the right to travel*.”¹³⁰ Likewise, in *Courtney v. Goltz*,¹³¹ the Ninth Circuit explained that “even if the Privileges or Immunities Clause recognizes a federal right ‘to use the navigable waters of the United States,’” that is, a right to travel, “the right does not extend to protect the [plaintiff’s intrastate] use of Lake Chelan to operate a commercial public ferry.”¹³² *Courtney* expressly concerned the right to use the navigable waters—a right that was protected by the *Slaughter-House* majority.

Another subset of the “right to travel” cases involve firearms restrictions for nonresidents. These cases meld the two different aspects of *McDonald* together: the right to bear arms and privileges or immunities. Courts are uniformly hostile to this synergy. In *Peterson v. Martinez*,¹³³ for instance, the Tenth Circuit held that Colorado could restrict gun permits to Colorado residents.¹³⁴ Such a law apparently did not violate the right to travel protected by Privileges or Immunities Clauses. The Eastern District of California reached a similar conclusion by rejecting “the right to possess a firearm for purposes of travel.”¹³⁵ We were not able to locate a successful privileges-or-immunities claim in a firearms-related case.

¹²⁵ *Sturgeon v. Masica*, 768 F.3d 1066, 1072 (9th Cir. 2014) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873)), *vacated and remanded sub nom. Sturgeon v. Frost*, 136 S. Ct. 1061 (2016); *see also* Docket Sheet, *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) (No. 17-949), <https://www.supremecourt.gov/docket/docketfiles/html/public/17-949.html>.

¹²⁶ *Sturgeon*, 768 F.3d at 1077–78.

¹²⁷ 825 F.3d 487 (8th Cir. 2016).

¹²⁸ *Id.* at 488–89, 491.

¹²⁹ *Id.* at 495.

¹³⁰ *Id.* (emphasis added) (quoting *Merrifield v. Lockyer*, 547 F.3d 978, 984 (9th Cir. 2008)).

¹³¹ 736 F.3d 1152 (9th Cir. 2013).

¹³² *Id.* at 1158.

¹³³ 707 F.3d 1197 (10th Cir. 2013).

¹³⁴ *Id.* at 1211–12.

¹³⁵ *Peterson v. Farrow*, No. 2:15-CV-00801-JAM-EFB, 2016 WL 3477238, at *5 (E.D. Cal. June 27, 2016).

C. *The Death Penalty*

Much to our surprise, the Privileges or Immunities Clause has been extensively litigated in the context of the death penalty. The *Slaughter-House Cases* provided a cramped listing of liberties that they deemed privileges or immunities of federal citizenship. One of privileges had a very international flavor: “All rights secured to our citizens by treaties with foreign nations.”¹³⁶ Ohio death row inmates challenged the state’s execution protocol as a violation of “their unenumerated right as American citizens not to be subjected to nonconsensual medical experimentation, allegedly protected from infringement by the Privileges or Immunities Clause of the Fourteenth Amendment.”¹³⁷ They asserted that “[t]he right against being subject to involuntary human experimentation is clear, established as it is in numerous international treaties to which the United States is a party.”¹³⁸ The court found that the “*Slaughter-House Cases* did recognize that a right accruing to national citizenship protected by the Privileges or Immunities Clause is any right secure to an American citizen by international treaty.”¹³⁹ However, because “none of the treaties cited . . . purports to prevent an American State from executing an American citizen by using lethal drugs ‘experimentally’ in the way alleged by Plaintiffs,” the claim was dismissed.¹⁴⁰ These claims, though creative and not infrequent, have been unsuccessful.

IV. WHERE DO WE GO FROM HERE?

Given the consensus regarding the original meaning of the Privileges or Immunities Clause—and its role as the protector of most substantive rights against state violation—one would think that it won’t be long until we see movement in the courts to shift Fourteenth Amendment jurisprudence in that direction. After all, it’s exceptionally rare for scholars and legal-policy types across the ideological spectrum to agree on anything. Even the age requirement for presidential eligibility can be plausibly (if facetiously) disputed in a way that the Privileges or Immunities Clause can’t.¹⁴¹ Despite the Supreme Court’s apparent openness to revisiting the Clause in *McDonald*, however, only Justice Thomas actually went there—adopting the originalist consensus.

¹³⁶ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79–80 (1873).

¹³⁷ *In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2017 WL 2964901, at *17 (S.D. Ohio July 12, 2017), *aff’d sub nom.* *Otte v. Kasich*, 709 F. App’x 779 (6th Cir. 2017).

¹³⁸ *Id.* at *18.

¹³⁹ *In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2018 WL 1033486, at *26 (S.D. Ohio Feb. 22, 2018).

¹⁴⁰ *Id.*

¹⁴¹ See Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 219–20 (1996).

And in the near-decade since, as our above research shows, there has been no movement in the lower courts.

Still, ours is not a counsel of despair. In June 2018, in the penultimate week of a fascinating term, the Supreme Court granted certiorari in another case about incorporation under the Fourteenth Amendment—in those precise terms. *Timbs v. Indiana*, a case implicating the national debate over civil-asset forfeiture, asked “[w]hether the Eighth Amendment’s Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment.”¹⁴² During oral argument, there seemed little doubt that the Court would indeed incorporate the Excessive Fines Clause.¹⁴³ The only question was whether anyone, other than Justice Thomas, would show interest in the Privileges or Immunities Clause.

The answer would come on February 20, 2019. All nine Justices agreed that the Eighth Amendment’s excessive fines clause applies to the states, limiting certain kinds of financial penalties. Seven Justices were content to rely solely on the Due Process Clause to incorporate the excessive fines clause. One Justice refused to rely on the Due Process Clause, and instead invoked the Privileges or Immunities Clause. And another Justice was somewhere in the middle. Let’s break it down.

Justice Ginsburg wrote the majority opinion in *Timbs*, joined in full by Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh.¹⁴⁴ This octet relied on the substantive due process framework employed in *McDonald*—sort of. Justice Ginsburg cited *McDonald* for the proposition that “[a] Bill of Rights protection is incorporated . . . if it is ‘fundamental to our scheme of ordered liberty,’ or ‘deeply rooted in this Nation’s history and tradition.’”¹⁴⁵ That is, a right can be incorporated if it is either (a) “fundamental” or (b) “deeply rooted.” Justice Ginsburg’s summary is a plausible reading of *McDonald*, but not the best reading. Consider Justice Alito’s test, in full:

With this framework in mind, we now turn directly to the question [of] whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, . . . we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, or as [the Court has] said in a related context, whether this right is “deeply rooted in this Nation’s history and tradition.”¹⁴⁶

¹⁴² 139 S. Ct. 682, 690 (2019).

¹⁴³ See, e.g., Transcript of Oral Argument at 32, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1091_1bn2.pdf. (“JUSTICE GORSUCH: Well, whatever the Excessive Fine Clause guarantees, we can argue, again, about its scope and in rem and in personam, but whatever it, in fact, is, it applies against the states, right?”).

¹⁴⁴ 139 S. Ct. at 683.

¹⁴⁵ *Id.* at 687 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (plurality opinion)).

¹⁴⁶ *McDonald*, 561 U.S. at 767 (plurality opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

McDonald is better read to require *both* factors: that the right is (a) “fundamental” and (b) “deeply rooted.” That is, asking if a right is “deeply rooted” is a way of determining whether that right is “fundamental.” The inquiries overlap. Under the new *Timbs* test, however, a modern—or even postmodern—right could still be deemed fundamental. Indeed, this novel approach echoes the framework Justice Breyer advanced in his *McDonald* dissent: “I thus think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently ‘fundamental’ to remove it from the political process in every State.”¹⁴⁷

Alas, because seven other Justices joined Justice Ginsburg in *Timbs*, the Court has now watered down the incorporation test. Ultimately, this distinction could make a practical difference in *Ramos v. Louisiana*,¹⁴⁸ which the Supreme Court has heard during the October 2019 Term and is, of this writing, pending.¹⁴⁹ This case presents the question whether the Sixth Amendment right to a jury trial requires a *unanimous* vote for a conviction.¹⁵⁰ Under the *Timbs* approach, this right could be incorporated even if it is not deeply rooted in our nation’s history and traditions. As a practical matter, we are convinced that the right would meet this more stringent test; but there is no guarantee of the Court’s applying the historical framework. The shift may also matter if the Court attempts to water down the *Washington v. Glucksberg* test in the future for other substantive due process rights—the unenumerated ones not specified in the Bill of Rights. If so, our warning from nearly a decade ago still holds: “Our framework forecloses the recognition of modern—or post-modern!—rights under the Privileges or Immunities Clause, such as the positive ‘right’ to health care, education, and welfare that the Fourteenth Amendment framers could never have fathomed.”¹⁵¹

The majority opinion faltered in another important regard: it did not discuss, let alone consider, that the Privileges or Immunities Clause provided an alternate route to incorporate the Excessive Fines Clause. In *McDonald*, Justice Alito’s plurality acknowledged the Privileges or Immunities Clause.¹⁵² In *Timbs*, however, Justice Ginsburg made no mention of this provision; her opinion relied exclusively on the Due Process Clause.¹⁵³

Justice Thomas wrote a solo concurring opinion.¹⁵⁴ It followed naturally from his *McDonald* concurrence, concluding that “[t]he historical record overwhelmingly demonstrates” that “the Eighth Amendment’s prohibition on excessive fines was considered” a “privilege or immunity.”¹⁵⁵ His analysis

¹⁴⁷ *Id.* at 918 (Breyer, J., dissenting).

¹⁴⁸ 231 So. 3d 44 (La. Ct. App. 2017), *cert. granted*, 139 S. Ct. 1318 (2019) (mem.).

¹⁴⁹ *October Term 2019: For the Session Beginning October 7, 2019*, SUP. CT. U.S. (July 1, 2019), https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalOctober2019.html.

¹⁵⁰ See Brief for Petitioner at 15, *Ramos v. Louisiana*, No. 18-5924 (June 11, 2019).

¹⁵¹ Blackman & Shapiro, *supra* note 9, at 85.

¹⁵² *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010) (plurality opinion).

¹⁵³ See *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

¹⁵⁴ *Id.* at 691 (Thomas, J., concurring in judgment).

¹⁵⁵ *Id.* at 693.

traced the Excessive Fines Clause from Magna Carta in 1215 to the English Bill of Rights of 1689 to Colonial America to the ratification of the Constitution. Justice Thomas also explained that “[t]he prohibition on excessive fines remained fundamental at the time of the Fourteenth Amendment.”¹⁵⁶ Here, Justice Thomas employed *originalism at the right time*: when considering rights as applied to the states, the correct temporal framework is 1868, not 1791.¹⁵⁷ He concluded:

The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment’s prohibition on excessive fines applies in full to the States.¹⁵⁸

We couldn’t agree more.

Justice Gorsuch also wrote a one-paragraph concurring opinion.¹⁵⁹ Unlike Justice Thomas, who only concurred in judgment, Justice Gorsuch concurred with the majority opinion’s analysis. That is, he accepted Justice Ginsburg’s substantive due process framework, at least as a matter of *stare decisis*. First, he admitted as much: “The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment’s Excessive Fines Clause against the States.”¹⁶⁰ Second, Justice Gorsuch wrote, “As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment’s Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause.”¹⁶¹ Here, Justice Gorsuch favorably cited the first three pages of Justice Thomas’s *Timbs* opinion, which merely recited the framework from *McDonald*.¹⁶² Justice Gorsuch did not favorably cite *any* of Justice Thomas’s new analysis about history of the prohibition against excessive fines. In other words, Justice Gorsuch agrees that the Privileges or Immunities Clause is the correct originalist framework for incorporation, but refuses to acknowledge that the Excessive Fines Clause is a candidate for incorporation in this manner.

Third, Justice Gorsuch wrote, “nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.”¹⁶³ He is wrong. The plaintiff, represented by the Institute for Justice, fairly raised the Privileges

¹⁵⁶ *Id.* at 697.

¹⁵⁷ *See id.*; Josh Blackman, *Originalism at the Right Time?*, 90 TEX. L. REV. 269, 275 (2012).

¹⁵⁸ *Timbs*, 139 S. Ct. at 698 (Thomas, J., concurring in judgment).

¹⁵⁹ *Id.* at 691 (Gorsuch, J., concurring).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

or Immunities Clause argument.¹⁶⁴ And the case *did* turn on the proper method for incorporation—which is why Justice Ginsburg had to explain why and how the Excessive Fines Clause was incorporated. It would have made far more sense for Justice Gorsuch simply to write that he agreed with Justice Thomas’s analysis, while maintaining that the case could also be resolved based on longstanding precedent. But he didn’t.

Ultimately, our criticism of Justice Gorsuch is mild and tempered. He at least had the conviction to acknowledge that Justice Thomas was correct and *Slaughter-House* was wrong. No one else on the Court, whether in *McDonald* or now in *Timbs* accepted that originalist conclusion—not even the newest member of the Court, Justice Kavanaugh.

In September 2018, then-Judge Kavanaugh proudly proclaimed during his confirmation hearing that he was an originalist.¹⁶⁵ Further, when asked by Senator Ted Cruz about unenumerated rights at his confirmation hearing, Judge Kavanaugh replied:

I think the Ninth Amendment and the privileges and immunities clause and the Supreme Court’s doctrine of substantive due process are three roads that someone might take that all really lead to the same destination . . . , which is that the Supreme Court precedent protects certain unenumerated rights so long as the rights are, as the Supreme Court said in the *Glucksberg* case, rooted in history and tradition.¹⁶⁶

Timbs presented Justice Kavanaugh with the opportunity to explain that the Privileges or Immunities Clause is another “road” that can “lead to the same destination.” He “flunked his first big test as an originalist on the Supreme Court.”¹⁶⁷ #ButGorsuch.¹⁶⁸ #ButNotKavanaugh?

CONCLUSION

In *McDonald*, one Justice was willing to recognize the original meaning of the Privileges or Immunities Clause. *Timbs* brought that count to two. But that means there are three more to go. Alas, that’s ultimately what it will take for a true rebirth of the Privileges or Immunities Clause: a Supreme Court

¹⁶⁴ See Petition for a Writ of Certiorari at 4–5, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

¹⁶⁵ Randy E. Barnett, *Kavanaugh Testimony, Part 1: On Originalism*, REASON: VOLOKH CONSPIRACY (Sept. 14, 2018, 5:00 PM), <https://reason.com/volokh/2018/09/14/kavanaugh-testimony-part-1-on-originalism>.

¹⁶⁶ Transcript, *Kavanaugh Supreme Court Hearing* (CNN aired Sept. 5, 2018), <http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.08.html>.

¹⁶⁷ Damon Root, *Brett Kavanaugh Flunks His First Test as an Originalist*, REASON (Feb. 25, 2019, 9:15 AM), <https://reason.com/blog/2019/02/25/brett-kavanaugh-flunks-his-first-test-as>.

¹⁶⁸ See, e.g., Hugh Hewitt, *Turns Out ‘But Gorsuch’ Was a Good Argument After All: It’s Impossible to Overstate What His Confirmation to the Supreme Court Has Meant*, WASH. POST (June 27, 2018, 12:57 PM), https://www.washingtonpost.com/opinions/turns-out-but-gorsuch-was-a-good-argument-after-all/2018/06/27/fc67bbbe-7a17-11e8-80be-6d32e182a3bc_story.html (arguing that Justice Gorsuch, in proving himself to be a true originalist, did indeed justify voting for Donald Trump).

majority willing to take the clause seriously, directing the lower courts to think anew about the Fourteenth Amendment. At worst, such a development would mean no practical difference from today's state of affairs under the Due Process Clause, but the upside—a constitutionally faithful approach to securing individual rights—is attractive indeed. Then we can all debate what rights are protected, with reference to the debates of the 39th Congress, the 1866 Civil Rights Act upon which the Fourteenth Amendment built, contemporary legal dictionaries, and the like. That would truly be a new breath of freedom.