ARTICLES

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*

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> *What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: 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.*
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> *—Justice Bushrod Washington, 1823*[1]

> *Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case.*
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> *—Justice Clarence Thomas, 1999*[2]

INTRODUCTION

The year is 2020. The Supreme Court now consists of Chief Justice John Roberts and Justices Clarence Thomas, Stephen Breyer, Samuel Alito, Sonia Sotomayor, at least two more justices appointed by President Obama, and the remainder by his successor. The Court has just overturned *The Slaughter-House Cases*. To replace *Slaughter-House*, the Court has proposed a new test to determine whether a right can be considered a Privilege or Immunity under the Fourteenth Amendment. This test differs from the existing framework used to ascertain unenumerated rights protected by substantive due process, as articulated in *Washington v. Glucksberg*.[3] Under the *Glucksberg* test, the Court looks at two things: whether the claimed right falls under the protection of our nation's historically rooted rights and liberties and, more broadly, whether it fits into a cautious definition of a due process liberty interest.

Instead, the Court proposes one of several possible tests for finding a constitutional right under the Privileges or Immunities Clause, largely informed

1. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).
2. Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting).
3. Wash. v. Glucksberg, 521 U.S. 702 (1997).

by a body of scholarship originating in *The Constitution in 2020* project.[4] The test considers constitutional rights to be part of a fluid jurisprudential dynamic rather than a finite list of historical absolutes. A privilege or immunity can be formed when a national—or perhaps international—consensus exists that some positive right becomes a constitutional right; or when "the time is right"; or during a "constitutional moment" as the result of "landmark legislation"; or as a result of a powerful social movement. Applying one of these tests, the Court recognizes that the Privileges or Immunities Clause protects a particular right. For argument's sake, pick a progressive cause célèbre: a right to health care, a right to a job, a right to housing, to education, to welfare, or, at its most expansive, a right to economic equality. What the Court could not achieve through Substantive Due Process, it now recognizes as a constitutional right under the Privileges or Immunities Clause.

This stark departure in constitutional jurisprudence can be traced back to one seminal case: 2010's blockbuster *McDonald v. Chicago*. *McDonald* asked whether the Second Amendment should be "incorporated" against the states using either the Due Process or the Privileges or Immunities Clause—and the Court's answer was "yes." Two justices signed onto a concurring opinion arguing that the Privileges or Immunities Clause was the way to go, and that *Slaughter-House* should be overturned. One wrote a concurring opinion contending that the Privileges or Immunities Clause does not so much incorporate the Second Amendment as guarantees certain pre-existing substantive rights—among which are the right to keep and bear arms—regardless of whether they appear in the Bill of Rights.

In 2010, these concurring opinions stood as a minor footnote in an important but expected decision that extended the individual Second Amendment rights to the people of the several states. But in the years following *McDonald*, litigants seized on those seemingly quixotic concurrences, arguing that the Privileges or Immunities Clause protects a variety of unenumerated rights. Following the trend in the law reviews, courts began to adopt these arguments. By 2020, with the High Court's composition radically changed from that of the early Roberts Court, the seminal moment for privileges or immunities arrived and the landscape of constitutional law would never be the same.

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Back in the present day, the year is 2010. The Court is about to hear argument in *McDonald*. Tellingly, the Court selected among several cert petitions presenting the Second Amendment incorporation issue the one that invoked the Privileges or Immunities Clause. To wit, the question presented in *McDonald v. Chicago* asks, "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or

4. THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009).

Immunities or Due Process Clauses."[5] The Court could have simply asked whether the Second Amendment should be incorporated—presumably through the Due Process Clause, as almost all other parts of the Bill of Rights have been. Instead, at least four justices decided to inquire into the Privileges or Immunities Clause. Recognizing this question, the Petitioners, represented by Alan Gura, spent almost all of their brief discussing the Privileges or Immunities Clause.[6] *McDonald* thus presents the strong possibility of restoring the lost Privileges or Immunities Clause—while also preventing *The Constitution in 2020*'s dystopia.[7]

In *Saenz v. Roe*, Justice Thomas expressed his willingness to revisit the original meaning of the Privileges or Immunities Clause in the "appropriate case." With the *McDonald* question presented, the Court has answered Justice Thomas's call in *Saenz*, as well as the requests for clarification from the Seventh[8] and Ninth Circuits,[9] and extended an invitation to reconsider the Fourteenth Amendment. We graciously accept that invitation. This article humbly submits that, in light of its question presented, *McDonald* is the perfect case to reverse the ignominious mistake of *The Slaughter-House Cases*, begin the journey towards rehabilitating the Privileges or Immunities Clause,[10] and thereby protect our most fundamental liberties.[11]

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5. Grant of Petition for Certiorari, McDonald v. Chicago, No. 08-1521 (Sep. 30, 2009).

6. *See* Lyle Denniston, *History Lesson on 2nd Amendment's Reach*, SCOTUSBlog.com, Nov. 16, 2009, http://www.scotusblog.com/wp/history-lesson-on-2nd-amendments-reach (noting that only seven of the petitioners' brief's 73 pages discuss incorporation via the Due Process Clause). We cite many blog posts and other less-than-traditional publications. This practice reflects the "moving target" nature of our subject and our attempt to stay as current with legal developments as possible.

7. For more on this point, *see* Josh Blackman, *Question Presented in 2nd Amendment Case Asks About Privileges or Immunities Clause!*, Josh Blackman's Blog, Sept. 30, 2009, http://joshblackman.com/blog/?p=115 (noting that Alan Gura, who successfully argued *District of Columbia v. Heller*, supported by several significant *amici curiae*—including the Cato Institute—requested the Court to look into the Privileges or Immunities issue—and that it was his petition that the Court granted). *See also* RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004). We cite Blackman's blog posts (and one of Shapiro's) not so much to support the points we make in this article, but as a signal of where the reader can go for an elaboration of those points.

8. National Rifle Assoc. v. Chicago, 567 F.3d 856, 860 (7th Cir. 2009) ("Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon. How arguments of this kind will affect proposals to 'incorporate' the second amendment are for the Justices rather than a court of appeals.").

9. Nordyke v. King, 563 F.3d 439, 446 (9th Cir. 2009) ("We are similarly barred from considering incorporation through the Privileges or Immunities Clause.").

10. RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004).

11. *See* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 48 ("It is not as if the principles underlying the framers' intent for the privileges or immunities clause are unfamiliar to the Court. In fact it would be impossible for the Court to be so unaware, for the clause itself is nothing more than the clearest, most direct and unadorned manifestation of the very core idea that radiates from the Declaration, the Constitution, and the concept of America itself: namely, Freedom. Freedom positively permeates the founding documents, and the Court could no more eliminate the idea of Freedom envisioned by the clause by closing the privileges or immunities window for 130 years than by scrapping America itself.").

The purpose of this article is to provide a roadmap to welcome the Privileges or Immunities Clause back into constitutional jurisprudence. *The Slaughter-House Cases* "sapped the [Privileges or Immunities Clause] of any meaning"[12] but the Supreme Court now has the opportunity to correct this mistake. Taking up Justice Thomas's gauntlet, we "endeavor to understand what the framers of the Fourteenth Amendment thought" the Privileges or Immunities Clause meant, and seek to restore that original meaning. This framework ensures that the Privileges or Immunities Clause is not manipulated to constitutionalize certain modern "rights" that lack deep roots in our nation's history and traditions.[13] No, the Constitution cannot be properly read to protect positive rights. Pandora's box will thus remain sealed.

This article proceeds as follows: In Part I, we discuss the history of the Privileges or Immunities Clause starting with the Articles of Confederation and continuing through the Clause's untimely demise with *The Slaughter-House Cases*, its re-emergence in legal scholarship, and its potential rebirth in Supreme Court jurisprudence. In Part II, we discuss the meaning of the Second Amendment as it relates to the states by considering *District of Columbia v. Heller* and subsequent litigation, including briefs filed in *McDonald*.

In Part III, we explore the progressive vision of the Privileges or Immunities Clause as it fits into the "Constitution in 2020" paradigm. This model recognizes rights according to national and international consensus, evolving standards, and the enactment of so-called landmark legislation. We show why the Privileges or Immunities Clause serves as the desired weapon of choice to achieve the "Constitution in 2020" by way of its superiority over substantive due process and equal protection. By invoking privileges or immunities, progressives seek to reconceptualize the provision of education, health care, welfare, and other positive entitlements as inviolable constitutional rights. Thus, Pandora's Box is cracked ajar, with all manner of governmental guarantees and policy preferences spewing forth.

In Part IV, we contend that the Second Amendment could be incorporated through the Due Process Clause, though this approach is historically deficient. In light of Justice Antonin Scalia's opinion in *Heller*, and applying modern selective incorporation jurisprudence, the Court is likely to find that the Second Amendment is "necessary to an Anglo-American regime of ordered liberty" and should thus be extend to the states.

In Part V, we show that, instead of dutifully treating the Second Amendment as it has almost all the other parts of the Bill of Rights, the Court should find the underlying rights to be among the privileges and immunities directly protected by the Fourteenth Amendment. Accordingly, this article is not so much con-

12. Saenz v. Roe, 526 U.S. 489 (1999) (Thomas, J., dissenting).

13. *Id.* at 528 (Thomas, J., dissenting) (citing Moore v. East Cleveland, 431 U.S. 494, 502 (1977)) ("Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'").

cerned with why the Second Amendment should be incorporated but instead provides the Court a roadmap to protecting the right to keep and bear arms for defense of person and property through the Privileges or Immunities Clause. Indeed, "incorporation" is a misnomer, a constitutional malapropism. The concept of "incorporation" was anachronistically inserted into our constitutional jurisprudence decades after the ratification of the Fourteenth Amendment. Historical accounts of the ratification debates reveal that the Privileges or Immunities Clause was meant to protect both more and less than the Bill of Rights—but in any event not the eight particular amendments as such. Thus reconceptualized, the clause should be viewed not as a mechanical incorporator of the first eight amendments, but rather as a limitation of the power of the states to infringe certain liberties. In 1868, these liberties were referred to as privileges or immunities.

What are these privileges or immunities, and what relationship do they have to the Second Amendment? To resolve this query we heed Justice Thomas's request in *Saenz*, and seek to "understand what the framers of the Fourteenth Amendment thought that it meant."[14] We propose extending the *Glucksberg* framework for recognizing substantive rights that are deeply rooted in our nation's history and traditions to understand how privileges or immunities were understood in 1868. By applying the *Glucksberg* test and adapting Judge Diarmuid O'Scannlain's opinion in *Nordyke v. King*,[15] we find that the right to bear arms for the defense of person and property—independent of its enumeration in the Second Amendment—was considered a privilege or immunity of national citizenship in 1868.

Part VI concludes by echoing Justice Thomas and implores originalists not to shy away from the Privileges or Immunities Clause for fear that it will become the camel's nose of positive rights into the constitutional tent. Instead, resurrecting the Privileges or Immunities Clause can continue the process of aligning the original meaning of the Constitution with the protection of our most sacred liberties. This process will also eliminate the "current [state of] disarray" of our Fourteenth Amendment jurisprudence.[16] Failing to take control of the Privileges or Immunities narrative invites an alternative vision of the Fourteenth Amendment that further departs from the original meaning of the Constitution. Now is the time, and *McDonald* is the case, to advance an originalist vision of the Privileges or Immunities Clause. Only by correcting the historical record can we keep Pandora's Box sealed.

I. THE HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE

The Fourteenth Amendment's Privileges or Immunities Clause traces its lineage to the Articles of Confederation, and later to the Privileges *and* Immuni-

14. *Id.*
15. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).
16. *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

ties clause in Article IV of the Constitution. The history, background, and case law regarding these earlier provisions informed the drafting of the Fourteenth Amendment's version of the clause.

A. Articles of Confederation

The Articles provided: "The free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to *all privileges or immunities of free citizens* in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."[17] This clause served as a means to unite the states under the Articles and to ensure the free flow of people between the separate sovereigns. It also served as a precursor to the Privileges and Immunities Clause of Article IV of the Constitution, which prevents states from discriminating against foreigners and abridging certain liberties (commonly known as privileges or immunities).

B. Article IV

The Philadelphia Convention in 1787 "recast the idea [from the Articles of Confederation] as follows: 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'"[18] According to Justice Washington's opinion in *Corfield v. Coryell*, the Article IV "privileges and immunities" are things that "are, in their nature, fundamental, which belong, of right, to citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union . . . [including] the following general heads: 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."[19] Washington added "the benefit of the writ of habeas corpus," the rights to "maintaining actions of any kinds in the courts," and to "Take, hold and dispose of property, either real or personal."[20]

Justice Washington's opinion served as an authoritative explication of the meaning of privileges or immunities, and the members of the 39th Congress heavily relied on this interpretation during the Fourteenth Amendment's ratification debates.[21] For example, Senator Jacob Howard—one of the Fourteenth Amendment's floor managers—recited the passage from *Corfield* in his "influen-

17. ART. IV, ARTICLES OF CONFEDERATION (Nov. 15, 1777) (emphasis added).

18. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 251 (2006).

19. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

20. *Id.*

21. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1269 (1992) ("Even more significant, members of the Thirty-ninth Congress regularly linked the Bill of Rights with the classic common-law rights of individuals exemplified in Blackstone, *Corfield,* and the Civil Rights Act of 1866.").

tial speech on section I, . . . invok[ing] both Washington's ode and the Bill of Rights as exemplifying 'privileges and immunities of citizens of the United States.'"[22] And during the debates over the Civil Rights Act of 1866, considered by many as a precursor to the Fourteenth Amendment, "Senator Lyman Trumbull and Representative James Wilson both quoted Washington's ode, Blackstone, and other broad common-law and natural-rights language."[23]

Professor Akhil Amar considers the privileges and immunities clause in Article IV of the Constitution as adding "several improvements upon the old."[24] First, "it pruned away the excess and confusing verbiage" from the version in the Articles of Confederation, and eliminated confusing references to "free inhabitants," "free citizens," and people, and unnecessarily included references to "trade and commerce."[25] Second, the Constitution's institution of uniform naturalization rules eliminated the need for states to recognize a naturalized citizen of another state.[26] Third and finally, by eliminating the exceptions for "paupers" and "vagabonds," the Constitution "implicitly extended the promise of interstate citizenship to *all* state citizens, rich and poor alike."[27] According to Professor Amar, privileges or immunities "had strongly implied a focus only on civil rights."[28]

C. The Fourteenth Amendment and the Privileges or Immunities Clause

At the Civil War's conclusion, Southern states enacted "Black Codes" that placed various restrictions on the recently freed slaves. These laws limited these citizens' rights in ways ranging from interference with the freedom of contract to limitations on property ownership. "In response, the Reconstruction Congress, which was imbued with natural-rights principles like no set of legislators since the Founders, enacted the Civil Rights Act of 1866."[29] This legislation led to the Fourteenth Amendment, protecting citizens' "privileges or immunities" as well as providing for equal protection and due process of law. In relevant part, the Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Unfortunately, the Privileges or Immunities Clause met its untimely demise in *The Slaughter-House Cases*. *Slaughter-House* held that the Clause protected only the privileges or immunities of federal citizenship and not those incident to citizenship of a state. Nearly all "[l]eading constitutional scholars . . . agree that

22. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 178 (2000).
23. *Id*. at 178.
24. *Id*. at 251.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id*. at 391; *see also id*. at 254 ("As the idea would come to be phrased in the nineteenth century, Article IV privileges and immunities encompassed fundamental 'civil rights' but not 'political rights.'").
29. CLINT BOLICK, DAVID'S HAMMER 99 (2007).

[the] Slaughter-House interpretation of the Fourteenth Amendment's Privileges or Immunities Clause is wrong as a matter of text and history."[30] Harvard law professor Laurence Tribe writes that "the *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause." Professor Akhil Amar agrees: "Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment."[31]

Following *Slaughter-House*, the Privileges or Immunities Clause lay dormant for decades until Justice Hugo Black's 1947 dissent in *Adamson v. California.* In *Adamson*, the Supreme Court held that the Fifth Amendment protection against self-incrimination did not apply in state court when the jury was allowed to infer guilt from a defendant's refusal to testify.[32] Justice Black's dissent argued strongly for incorporation of the Bill of Rights against the states via the Fourteenth Amendment.[33]

Following the rejection of Justice Black's total incorporation model, the Privileges or Immunities Clause resumed its constitutional slumber—aside from a brief mention in *Shapiro v. Thompson*[34]—until a curious dissent in *Saenz v. Roe*. In *Saenz*, the Court held that a statute discriminated against newly arriving residents of California by imposing residency requirements for certain welfare benefits, in violation of the Privileges or Immunities Clause.[35] Like the prince who revived Sleeping Beauty, Justice Thomas signaled his willingness to reanimate the Privileges or Immunities Clause, in the right case:

> As [Chief Justice Rehnquist] points out . . . it comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because, as I have explained . . . The *Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. *Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the*

30. Brief of Constitutional Accountability Center in Support of Certiorari, McDonald v. Chicago, No. 08-1521 (June 11, 2009); *see also* JOHN ELY, DEMOCRACY AND DISTRUST 22–30 (1980); AMAR, *supra* note 22, at 163–230; LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1320–31 (3d ed. 2000); RANDY BARNETT, RESTORING THE LOST CONSTITUTION 191–203 (2004); Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313–18 (2007).

31. Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 n.327 (2000).

32. 332 U.S. 46 (1947).

33. *Id*. at 71–73 (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.").

34. Shapiro v. Thompson, 394 U.S. 618 (1969).

35. 526 U.S. 489 (1999).

> *current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case*. Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.' Moore v. East Cleveland, 431 U.S. 494, 502, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977)."[36]

With that dissent, Justice Thomas breathed life into a comatose clause. As Professor Erwin Chemerinsky wrote, "'for essentially the first time in American history, [in *Saenz*] the [Supreme] Court used the Privileges or Immunities Clause to invalidate a state law,' so it is at least possible that the tiny pebble of *Saenz* could portend a sea change in how the Court henceforth may view the long-dormant Privileges or Immunities Clause.'"[37] Ten years later, *McDonald* is just that "appropriate case."

II. INCORPORATION AND THE SECOND AMENDMENT

Although the Supreme Court found in *District of Columbia v. Heller* that the Second Amendment protects an individual right to keep and bear arms, this right only applied against the federal government (which maintains legislative control over the nation's capital). Justice Scalia's nebulous footnote in *Heller* regarding application of the Second Amendment against the states left the inferior courts uncertain how to proceed, and indeed the question caused a circuit split.[38] The Court granted certiorari to resolve this issue in *McDonald v. Chicago.*

A. District of Columbia v. Heller

In *Heller*, the Supreme Court struck down the District's gun control ordinance, finding that the Second Amendment protects a pre-existing individual right to keep and bear arms for purposes of self-defense.[39] But the story of how the Court came to adjudicate this issue is more complicated than a simple

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36. 526 U.S. 489, 527–28 (1999) (Thomas, J. dissenting) (emphasis added).

37. *See* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 48 (2008).

38. As we describe below, the Second and Seventh Circuits found against incorporation—because they felt bound by old Supreme Court precedent (from a time before *any part* of the Bill of Rights had been incorporated)—while the Ninth Circuit produced a fascinating opinion finding the right incorporated but ultimately ruling against those asserting it in the particular case. The Ninth Circuit opinion was subsequently vacated when the case went *en banc*—and the *en banc* decision is being held pending resolution of *McDonald*.

39. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

challenge to a restrictive law.

1. Genesis of *Heller*

The first chapter in modern Second Amendment jurisprudence was *United States v. Miller*.[40] In *Miller*, the appellants were arrested for transporting an untaxed sawed-off shotgun across state lines in violation of the National Firearms Act of 1934.[41] A federal district judge quashed the indictment on the grounds that the NFA violated the Second Amendment.[42] On direct appeal, the Supreme Court reversed the lower court and declared the NFA constitutionally sound. The case was then remanded because the Supreme Court lacked evidence as to whether a sawed-off shotgun was a weapon traditionally used in the common defense.[43] Contrary to how *Miller* was often later described, the Court did not hold that the Second Amendment only protects a collective right to bear arms tied to militia service.[44] But the scholarship and cases that followed tended to favor the collective right approach.[45]

As time passed and scholars began to look more closely at the Second Amendment, the prevailing views began to shift: scholars across the ideological spectrum began to recognize that the Second Amendment protects an individual right.[46] The Fifth Circuit was the first of the federal appellate courts to consider the new scholarship about the Second Amendment. In *United States v. Emerson*, that court decided that the Second Amendment protected an individual right.[47] The *Emerson* court stated explicitly, though in dicta,[48] that the Second Amendment "protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training."[49] *Emerson* not only created a circuit split, but also

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40. 307 U.S. 174 (1939).

41. *Id.*

42. *Id.*

43. *Id.*

44. Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back Baby*, 2007–2008 CATO SUP. CT. REV. 127 (2008).

45. *Id.* at 130 n.9. ("Cases v. United States, 131 F.2d 916, 921–23 (1st Cir. 1942); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999); United States v. Hale, 978 F.2d 1016, 1019–20 (8th Cir. 1992); Silveira v. Lockyer, 312 F.3d 1052, 1086 (9th Cir. 2003); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Wright, 117 F.3d 1265, 1273–74 (11th Cir. 1997). The Second Circuit declined to address the collective-rights versus individual-rights dispute and instead held that whatever its content, the right may not be invoked against state governments. Bach v. Pataki, 408 F.3d 75, 84–85 (2d Cir. 2005). As discussed below, the Fifth Circuit was the first to adopt the individual rights view. United States v. Emerson, 270 F.3d 203 (5th Cir. 2001)").

46. *Id.* (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 902 n. 211 (3d ed. 2000)).

47. 270 F.3d 203 (5th Cir. 2001).

48. For a discussion of the distinction between holding and dictum, *see* Josh Blackman, *Much Ado About Dictum; or, How to Evade Precedent Without Really Trying: The Distinction between Holding and Dictum* (Dec. 19, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1318389.

49. *Emerson*, 270 F.3d at 260.

resulted in a dramatic increase in criminal defendants asserting Second Amendment defenses to gun charges.[50]

Following *Emerson*, a group of lawyers, led by Clark Neily of the Institute for Justice, Bob Levy of the Cato Institute, and civil rights litigator Alan Gura, began strategizing on how best to challenge unduly burdensome gun control laws.[51] They settled on a challenge to the D.C. gun control laws, "the most draconian gun laws in the nation."[52] Besides banning handguns outright, D.C. law required even lawfully owned shotguns and rifles to be unloaded and either bound by a trigger lock or disassembled at all times. Moreover, the District's status as a federal enclave obviated the incorporation issue, and the D.C. Circuit was one of the few federal appellate courts that had not yet taken up the Second Amendment.[53]

The attorneys also found an all-star cast of sympathetic clients: Shelly Parker, an African-American woman targeted by drug dealers because of her attempts to organize her community against them; Dick Heller, a security guard at the Federal Judiciary Center who carried a gun at work but was not allowed to keep one at home; Tom Palmer, a Cato Institute scholar who had once saved his own life by brandishing a pistol at a gang of homophobes; Tracey Ambeau and Gillian St. Lawrence, women who wanted access to a functional firearm to protect themselves when their husbands were away (St. Lawrence actually owned a shotgun for that purpose but D.C. law prohibited her from ever loading it); and George Lyon, a lawyer who wanted to keep a handgun at home to defend his family.[54] The plaintiffs brought a single claim, that D.C.'s gun ban violated their Second Amendment right to keep functional firearms in their homes.[55]

The first stage of litigation, at the D.C. district court, was unsuccessful: the court ruled that the Second Amendment does not protect an individual right to keep and bear arms.[56] On appeal, the D.C. Circuit threw out all but one plaintiff on standing grounds—Heller, who applied for and was denied a permit to possess a gun in D.C. that he had purchased when he lived in another city, and still kept there. The other plaintiffs could not prove ownership of a gun and could not, therefore, apply for a permit. Of course, they were legally barred from acquiring a gun in D.C.—that was the law they were challenging—and under federal law they could not purchase a gun outside their state of residence. Catch-22: No standing without a denied permit application; no permit application without proof of gun ownership; no ability to acquire a gun either inside or

50. Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back Baby*, 2007–2008 CATO SUP. CT. REV. 127, 134 (2008).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 135–36.
55. *Id.*
56. Parker v. District of Columbia, 311 F. Supp.2d 103 (D.D.C. 2004).

outside D.C.

Judge Laurence Silberman then engaged in a thorough analysis of the text and history of the Second Amendment and concluded that the provision protects an individual's right to keep and bear arms independent of militia membership—thus invalidating D.C.'s gun ban.[57] Against the advice of some in the gun control lobby, who wanted to limit this pro-Second Amendment ruling to D.C., Washington Mayor Adrian Fenty sought Supreme Court review, which the Supreme Court granted.

2. *Heller*'s Holding

The Supreme Court upheld Judge Silberman's opinion on a narrow 5-4 vote. Justice Scalia wrote for a majority that included Chief Justice Roberts and Justices Thomas, Alito and Kennedy. The Court thus struck down the District's ban on handgun possession and the requirement that handguns in the home be unloaded and either disassembled or trigger-locked at all times and held that the Second Amendment protects an individual right to possess firearms for self-defense purposes unconnected to service in a militia.[58] The *Heller* decision was "everything a Second Amendment supporter could realistically have hoped for."[59] Justice Scalia detailed the wealth of historical evidence showing that, at the time the Second Amendment was ratified, it was understood to protect an individual right to bear arms. He also explained why the dissent and others who subscribed to the militia interpretation are incorrect in their reading of *Miller*.

But the Court did not address whether this right is applied against the states as well as the federal government.[60] Justice Scalia's opinion also conceded that the government possesses fairly wide authority to regulate gun ownership, particularly in so-called "sensitive places."[61]

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57. Parker v. District of Columbia, 478 F.3d 370, 376 (D.C. Cir. 2007).

58. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

59. Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back Baby*, 2007–2008 CATO SUP. CT. REV. 127, 147 (2008).

60. *Id.*

61. *Heller*, 128 S. Ct. at 2816–17 ("Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the nineteenth-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. *See*, *e.g.*, Sheldon, in 5 Blume 346; Rawle 123; Pomeroy 152–53; Abbott 333. For example, the majority of the nineteenth-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. *See*, *e.g.*, State v. Chandler, 5 La. Ann., at 489–90; Nunn v. State, 1 Ga., at 251; see generally 2 Kent *340, n 2; The American Students' Blackstone 84, n 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."). For a criticism of this limiting dicta, *see* Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence,* UCLA L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1324757.

3. Justice Scalia Left Incorporation Unresolved

As mentioned above, *Heller* did not address the issue of incorporation. Justice Scalia did drop a curious footnote, however, that "[w]ith respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U. S. 252, 265 (1886) and *Miller v. Texas*, 153 U. S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the federal government."[62] That is, *Cruikshank* and *Presser*, which found that the Bill of Rights did not apply to the states, were issued prior to the advent of modern incorporation doctrine. So when the Court was deciding those cases, states were free to restrict freedom of speech irrespective of the Constitution, for example.

Would the Second Amendment follow the same path, marking merely the latest step in the long piecemeal incorporation process? Ninth Circuit Judge Diarmuid O'Scannlain recognized the potentially pro-incorporation signal of Justice Scalia's footnote in *Nordyke v. King*.[63] However the Supreme Court ultimately interprets this telling footnote, Justice Scalia, ever the opera fan, set the stage for a constitutional crescendo.

B. Incorporation Split in the Circuits

The day after the *Heller* opinion came down, plaintiffs filed federal challenges to gun control ordinances in Illinois, and shortly thereafter in California. In New York, a plaintiff had earlier challenged a ban on nunchaku, a martial arts weapon consisting of two sticks held together with a metal chain. These three cases were appealed to the Seventh, Ninth, and Second Circuits, respectively. In *Maloney v. Cuomo*, a Second Circuit panel that included then-Judge Sonia Sotomayor decided that it was bound by its own precedent not to incorporate the Second Amendment.[64] In *NRA v. Chicago*, Judge Frank Easterbrook similarly found that in light of nineteenth-century Supreme Court precedents, the Second Amendment could not be incorporated.[65] In contrast, Judge Diarmuid O'Scannlain found that the Second Amendment was a fundamental right and therefore should be incorporated through the Due Process Clause.[66]

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62. *Heller*, 128 S. Ct. at 2783 n.23.

63. Nordyke v. King, 563 F.3d 439, 495 n. 16 (9th Cir. 2009) ("Because, as *Heller* itself points out, 128 S. Ct. at 2813 n.23, *Cruikshank* and *Presser* did not discuss selective incorporation through the Due Process Clause, there is no Supreme Court precedent directly on point that bars us from heeding *Heller*'s suggestions. *Cf.* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls."). *But see* Maloney v. Cuomo, 554 F.3d 56, 58–59 (2nd Cir. 2009) (per curiam) (concluding that *Presser* forecloses application of the Second Amendment to the states).").

64. *Maloney*, 554 F.3d at 59.

65. National Rifle Assoc. v. Chicago, 567 F.3d 856 (7th Cir. 2009).

66. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

1. *McDonald v. Chicago*

In *NRA v. Chicago*, the Seventh Circuit consolidated appeals in the cases of *National Rifle Association v. Chicago* and *McDonald v. Chicago*.[67] Affirming the district court's judgment in both cases, the appellate court decided against Second Amendment incorporation because of three precedents: *Cruikshank, Presser,* and *Miller*.[68] Judge Easterbrook concluded that these three cases controlled even though their reasoning was ostensibly obsolete.[69] The court reiterated the longstanding practice of adhering to Supreme Court precedent from cases having direct application to the circuit case.[70] Although the *Heller* Court seemed to open the door for a reexamination of *Cruikshank*, the Court had yet to undertake such a review.[71] Judge Easterbrook noted that the lack of examination by the High Court "does not license the inferior courts to go their own ways."[72]

The Seventh Circuit also refused plaintiffs' invitation to use the doctrine of selective incorporation to bind the Second Amendment against the states. Judge Easterbrook noted that neither the Third nor the Seventh Amendments had yet been applied to the states, and stated that determining how the Second Amendment would fare under the Supreme Court's selective approach to incorporation is "hard to predict."[73] Suggesting that "selective incorporation" could not be reduced to a formula, he noted that civil jury trials have deep roots but have not been incorporated by the Supreme Court, while the doctrine of double-jeopardy is not "so rooted in the traditions and conscience . . . to be ranked as fundamental" and yet has been incorporated.[74]

2. *Maloney v. Cuomo*

In *Maloney v. Cuomo*, the Second Circuit panel (including then-Judge Sotomayor) held that New York's ban on in-home possession of nunchaku violated neither the Second Amendment nor—because it was supported by a rational basis—the Fourteenth Amendment.[75] It acknowledged *Heller* but reiterated that the Supreme Court had not held that the Second Amendment was incorporated against the states.[76] Unlike Judge Easterbrook, the Second Circuit made no

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67. 567 F.3d 856 (7th Cir. 2009) (Easterbrook, J.).
68. *Id*. at 857.
69. *Id*.
70. *Id*. at 857–58.
71. *Id.* (citing *Heller*, 128 S.Ct. at 2813 n. 23 (*"Cruikshank*'s continued validity on incorporation" is "a question not presented by this case.")).
72. *Id.*
73. *Id*. at 858–59.
74. *Id*.
75. Maloney v. Cuomo, 554 F.3d 56, 59 (2009) ("[L]egislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality, and must be upheld if 'rationally related to a legitimate state interest.'").
76. *Id.* (citing Presser v. Illinois, 116 U.S. 252, 265 (1886) (stating that the Second Amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state")).

reference to the potential Supreme Court review of *Cruikshank*.[77]

3. *Nordyke v. King*

In *Nordyke*, certain gun show promoters challenged a county ordinance that prohibited possession of firearms on county property and thus prevented them from holding future gun shows—apparently out of little more than anti-gun animus.[78]

The court noted three doctrinal avenues by which the Second Amendment might be applied to the states: (1) direct application, (2) incorporation by the Privileges or Immunities Clause, or (3) incorporation by the Due Process Clause.[79] Judge O'Scannlain concluded that Supreme Court precedent barred the court from considering incorporation through the Privileges or Immunities Clause because *Slaughter-House* foreclosed protections of rights other than those that derive from U.S. citizenship.[80] He suggested that the substantive due process doctrine could reach results similar to those attained by using the Privileges or Immunities Clause to extend the Second Amendment right to the states.[81]

The court next asked if selective incorporation through the Due Process Clause could bind the states with respect to the Second Amendment.[82] The initial hurdle rested in a previous Ninth Circuit decision where the court ruled against incorporation.[83] The Nordykes argued that this precedent, *Fresno Rifle & Pistol Club*, only precluded direct application of the Second Amendment and incorporation through the Privileges or Immunities Clause, but was silent with respect to the Due Process Clause. The court agreed.[84]

The court decided that the Due Process Clause indeed incorporates the Second Amendment to the states.[85] Citing *Washington v. Glucksberg*, Judge O'Scannlain determined that because a right to keep and bear arms is a fundamental right, "meaning, 'necessary to an Anglo-American regime of ordered liberty'" and "deeply rooted in this Nation's history and tradition," the Fourteenth Amendment incorporates the Second Amendment.[86] Although the court applied the Second Amendment to state and local governments, it went on to uphold the challenged law on the ground that the Second Amendment does not contain an entitlement to bring guns onto government property.[87]

Most significant for purposes of this article is the *Nordyke* court's discussion of the

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77. Sotomayor's analysis has been criticized for avoiding the standard due process incorporation discussion, as she "dispensed with a major constitutional issue in a short, cursory opinion . . . consistent with her actions in *Didden v. Village of Port Chester* and *Ricci v. DeStefano*." Posting of Ilya Somin to Volokh Conspiracy, http://volokh.com/posts/1247512370.shtml (July 13, 2009 at 3:12 pm).

78. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) (O'Scannlain, J.).

79. *Id.* at 446.

80. *Id*. at 446–47.

81. *Id.*

82. *Id.*

83. *See* Fresno Rifle & Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 729–31 (9th Cir. 1992).

84. *Nordyke*, 563 F.3d. at 447.

85. *Id*.

86. *Id*. at 451.

87. *Id*. at 460.

right as fundamental within the context of Anglo-American ordered liberty and America's history. This language tracks the Privileges or Immunities Clause analysis we propose below. Although Judge O'Scannlain foreclosed incorporation through the Privileges or Immunities Clause due to *Slaughter-House*, he inserted an insightful footnote discussing the tension between the historical understanding of privileges or immunities and how the Court considered it in *Slaughter-House*:

> We are aware that judges and academics have criticized *Slaughter-House's* reading of the Privileges or Immunities Clause. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) ("Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of [the Supreme Court's] Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case."); *id.* at 522 n.1 (collecting academic sources); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 12–35 (2007); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS 163–230 (1998) (arguing that the Privileges or Immunities Clause applies against the states all "personal privileges" of individual citizens, whether enumerated in the Bill of Rights or not, but not the rights of the states or the general public). Nevertheless, *Slaughter-House* remains good law. We note, however, that the substantive due process doctrine, which we discuss *infra* pp. 4481–83, appears to arrive at a result similar to that urged by the dissenters from the Supreme Court's opinion in *Slaughter-House*. *Compare* Washington v. Glucksberg, 521 U.S. 702, 719–721 (1997) ("[T]he Due Process Clause [of the Fourteenth Amendment] specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . ." (internal quotation marks and citation omitted)), *with Slaughter-House*, 83 U.S. at 122 (Bradley, J., dissenting) ("In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.[88]

Citing Justice Thomas's dissent in *Saenz*, Judge O'Scannlain acknowledged the growing consensus that *Slaughter-House* was wrongly decided. He further discussed the fact that substantive due process, in many respects, has carried the mantle that Privileges or Immunities was meant to accomplish. A circuit court cannot overturn *Slaughter-House*; we hope the Supreme Court will take up this gauntlet in *McDonald*.[89]

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88. *Id.* at 448 n.6.

89. *Nordkye* was scheduled for en banc rehearing, but was then stayed pending the Supreme Court's resolution of Maloney v. Rice, No. 08-1592, McDonald v. City of Chicago, No. 08-1521, and National Rifle Ass'n of Am., Inc. v. City of Chicago, No. 08-1497. Nordyke v. King, 575 F.3d 890 (9th Cir. 2009) (mandate vacated, rehearing *en banc* ordered). It is also worth noting at this point an important distinction between the approaches taken by the circuit courts in their respective opinions. The Second Circuit panel found that New York's weapons law did not interfere with a fundamental right—at least as it was applied to nunchuks. O'Scannlain, meanwhile, found that the right to bear arms

C. Certiorari Granted in McDonald v. Chicago

The Supreme Court granted certiorari in *McDonald v. Chicago*. The question presented was "[w]hether 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*."[90] The petitioners' brief asks the Supreme Court to overrule *Slaughter-House*, *Cruikshank*, and *Presser*, and strike down Chicago's handgun ban.[91] Recognizing the significance of the Court's acceptance of their question presented, the petitioners spent only seven pages of their 73-page-brief covering incorporation through the Due Process Clause, with most of the brief discussing the Privileges or Immunities Clause. Due to its curious procedural status—having had its appeal considered jointly with *McDonald* below but not having had its cert petition granted—the National Rifle Association filed a brief as "respondent in support of petitioners."[92] The NRA would prefer to incorporate the Second Amendment through the Due Process Clause, rather than finding a guarantee for the right to keep and bear arms in the Privileges or Immunities Clause.

In the respondents' brief, the City of Chicago argued that the Due Process Clause does not incorporate the Second Amendment or the self-standing individual right to keep and bear arms.[93] In response to the petitioners' analysis of the Privileges or Immunities Clause, the respondents contended that Court should adhere to *Slaughter-House* and reject "incorporation" under the Privileges or Immunities Clause.[94]

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is a fundamental one deeply rooted in this nation's history and tradition. Easterbrook did not address the question at all.

90. Grant of Petition for Certiorari, McDonald v. Chicago, No. 08-1521 (Sep. 30, 2009) (emphasis added). For discussions on the significance of the question presented in *McDonald*, compare Orin Kerr, *Does the Cert Grant in McDonald Suggest the Court Will Rethink Slaughterhouse?*, Post to Volokh Conspiracy (December 6, 2009), *available at* http://volokh.com/2009/12/06/does-the-cert-grant-in-mcdonald-suggest-the-court-would-rethink-slaughterhouse/ with Josh Blackman's Blog, Kerr on Cert Grant in McDonald: Privileges or Immunities Question Presented Does Not Reveal Intent to Overrule Slaughterhouse. Or Does It?, http://joshblackman.com/blog/?p=2918 (last visited Jan. 2, 2010).

91. Petitioner's Brief at 42, McDonald v. Chicago, No. 08-1521 (noting that "Faced with a clear conflict between precedent and the Constitution, this Court should uphold the Constitution" and remarking that the *Slaughterhouse* precedent, "and its unavoidable progency, Cruikshank and Presser," the brief said, "established that the States could continue to violate virtually all privileges and immunities of American citizens, including those codified in the Bill of Rights, notwithstanding that [the Fourteenth Amendment] Section One's clear textual command to the contrary.").

92. Brief for Respondents The National Rifle Association of America, Inc. et al. in Support of Petitioners, McDonald v. Chicago, No. 08-1521.

93. Brief of Respondents City of Chicago and Village of Oak Park at 8–42, McDonald v. Chicago, No. 08-1521. For a slightly expanded critique of the respondents' brief, see Post of Josh Blackman to Josh Blackman's Blog, http://joshblackman.com/blog/?p=3469 (Dec. 31, 2009, 1:47 EST) (noting that the respondents' brief: a) fails to address the near-universal consensus that *Slaughter-House* was incorrectly decided, and b) improperly considers the history of the right to keep and bear arms in 1791, as opposed to 1868). *See also* http://joshblackman.com/blog/?p=3572 (Jan. 7, 2010, 1:44 EST) (noting that the respondents' brief fails to address the *Washington v. Glucksberg* test for recognizing unenumerated rights).

94. Respondents' Brief at 42–80, McDonald v. Chicago, No. 08-1521.

More than 30 amici filed briefs supporting the petitioners, including the Cato Institute and Pacific Legal Foundation,[95] Institute for Justice,[96] Constitutional Accountability Center,[97] and Center for Constitutional Jurispru-

95. Brief of the Cato Institute and Pacific Legal Foundation as Amici Curiae in Support of Petitioners at 3, McDonald v. Chicago, No. 08-1521:

> It is true that *Slaughter-House*'s virtual negation of the Privileges or Immunities Clause contributed to the subsequent rise of the theory of substantive due process. But restoring the Privileges or Immunities Clause to its original scope would not result in the demise of substantive due process. The idea at the core of that doctrine—that the Due Process Clause imposes more than merely procedural limits on government power—was widely accepted when the Fourteenth Amendment was enacted.

We note that one of us (Shapiro) is a signatory to Cato's brief.

96. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners at 7, McDonald v. Chicago, No. 08-1521:

> [*Heller* confirmed] that the Second Amendment did not grant but instead "codified a preexisting right" to keep and bear arms. The same is true of the Fourteenth Amendment right to arms: It is not in any way "dependent upon" the Second Amendment for its existence. Instead, the Fourteenth Amendment protects from state interference the same pre-existing right to arms that the Second Amendment "codified" against the federal government. Thus, in seeking to understand the Fourteenth Amendment right to arms, one looks not to the Second Amendment, but to the exact same right noted in Cruikshank and Heller—as it was understood by the Reconstruction-era ratifying public. While the doctrine of substantive due process has a more substantial pedigree than most of its critics recognize (tracing its roots to "law of the land" provisions that date back to the Magna Carta and are found in many state constitutions today), it is nevertheless perfectly clear that substantive due process is doing a great deal of work today that the Privileges or Immunities Clause was meant to do. Among the results of that mistake has been to expose the Court's individual rights jurisprudence to substantial criticism, particularly from people who—unlike those who wrote and ratified the Fourteenth Amendment—would prefer a more limited role for the federal courts in protecting individual liberty. That redundancy notwithstanding, precision and fidelity to constitutional text require a careful reexamination of the Fourteenth Amendment in order to determine which provision most plausibly protects the "pre-existing" right to keep and bear arms. A candid review of the relevant history leaves no room for doubt—it is the Privileges or Immunities Clause.

97. Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, McDonald v. Chicago, No. 08-1521:

> The Privileges or Immunities Clause was written and ratified to secure the substantive liberties protected by the Bill of Rights, as well as other fundamental rights. By 1866, the words 'privileges' and 'immunities' were commonly used to refer to core, inalienable rights, including those set out in the Bill of Rights. History shows that leading proponents and opponents alike of the Fourteenth Amendment understood the words of the Clause to protect substantive fundamental rights, including the rights enumerated in the Constitution and Bill of Rights.

Contrast the views expressed in the Constitution Accountability Center brief with the views expressed in David H. Gans and Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause of the Fourteenth Amendment*, Constitutional Accountability Center (2008), http://www.theusconstitution.org/upload/filelists/241_Gem_of_the_Constitution.pdf. *See infra* note 426.

dence.[98] These amici included high-profile scholars spanning the ideological spectrum, from Jack Balkin to Randy Barnett to former Attorney General Edwin Meese, all urging the Court to extend the right to keep and bear arms to the states through the Privileges or Immunities Clause. Among the respondents' amici were anti-gun-violence groups,[99] public health organizations,[100] and others arguing from a policy perspective about the utility of and need for strict gun regulations.[101] Of the slew of historians' briefs, only one even alludes to the Reconstruction period as the relevant time for discerning the meaning of the Privileges or Immunities Clause.[102] Another attacks the straw man that a victory for the Petitioners would strike down all state and local gun or weapon laws.[103] Curiously, the Brady Center to Prevent Gun Violence (as well as the NAACP Legal Fund) filed briefs supporting neither party.

Oral arguments were scheduled for March 2, 2010.

III. THE PRIVILEGES OR IMMUNITIES CLAUSE AND *THE CONSTITUTION IN 2020*

McDonald is one of those exceedingly rare cases wherein the Privileges or Immunities Clause piqued the Supreme Court's interest enough to make a cameo

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98. Brief of the Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners, McDonald v. Chicago, No. 08-1521:

> A careful consideration of ""the historical events that culminated in the Fourteenth Amendment" reveals that the "privileges or immunities" clause of the Fourteenth Amendment protects against state infringement on the individual right of citizens to keep and bear arms. The terms "privileges" and "immunities" have held a constant meaning from the Founding era through the debates and ratification of the Fourteenth Amendment and the Civil Rights Act of 1866. Indeed, a review of the writings of the political and legal thinkers who inspired our republic reveals an understanding that the terms "privileges" and "immunities" refer to fundamental, natural entitlements or rights essential to the preservation of life, liberty, and other necessary aspects of existence—political or individual.

99. *See*, *e.g.*, Brief of the Educational Fun to Stop Gun Violence as Amicus Curiae in Support of Respondents, McDonald v. Chicago, No. 08-1521, and Brief of the Chicago Board of Education of the City of Chicago et al. as Amicus Curiae in Support of Respondents, McDonald v. Chicago, No. 08-1521.

100. Brief of Organizations Committed to Protecting the Public's Health, Safety, and Well-Being as Amici Curiae in Support of Respondents, McDonald v. Chicago, No. 08-1521.

101. *See*, *e.g.*, Brief of Criminal Justice Professors as Amici Curiae in Support of Respondents at i–ii, McDonald v. Chicago, No. 08-1521 ("A. The Chicago Handgun Ban Has Reduced Handgun Violence . . . B. Chicago's Handgun Ban Reduces the Supply and Increases the Cost of Handguns . . . C. *Amici* in Support of Petitioners Misconstrue the Statistical Data Concerning the Impacts of the Chicago Handgun Ban"); Brief of Anti-Defamation League as Amicus Curiae in Support of Respondents at 8–13, McDonald v. Chicago, No. 08-1521 (naming James Von Brunn, the Holocaust Museum shooter—among other "violent extremists"—as reason enough not to incorporate the right to keep and bear arms, and otherwise to enforce strict gun bans). For a brief argument summary of each of respondents' amici, *see* Josh Blackman, "Overview of Amici Supporting the City of Chicago," Jan. 7, 2010, http://joshblackman.com/blog/?p=3567.

102. Brief of Historians and Legal Scholars as Amici Curiae in Support of Respondents at 23–31, McDonald v. Chicago, No. 08-1521 (arguing that the "framing-era public" did not understand the Clause to "incorporate the Bill of Rights").

103. Brief of 34 Historians and Legal Historians as Amici Curiae in Support of Respondents, McDonald v. Chicago, No. 08-1521

appearance in the question presented. Even as the Court has largely ignored the clause, however, the legal academy has not. While libertarian scholars have long called for a restoration of the "lost Constitution"[104]—which would include overruling *Slaughter-House*—academic attention has come increasingly from the progressive voices who seek to infuse the Privileges or Immunities Clause with a host of positive rights. To satisfy ourselves that reinvigorating Privileges or Immunities will not in the long run effect a *sub rosa* constitutional rewrite, we must first understand what that purported Pandora's Box contains.

Progressives seek to shift the source of protection of substantive unenumerated rights away from the Due Process and Equal Protection Clauses to the Privileges or Immunities Clause. This way, rights recognized under the progressives' Fourteenth Amendment can be based on history and tradition—so far so good—but also include those recognized by popular consensus, evolving rights, rights created through "landmark legislation," and rights established by social movements. The seminal tome presenting the vision of a progressive constitutional jurisprudence is *The Constitution in 2020*, a collection of essays edited by Professors Jack Balkin and Reva Siegel. This book provides a coherent blueprint of how progressives can transform Supreme Court jurisprudence and ultimately change the meaning of the rule of law. To date, no one has dissected in long form the progressive view of the Privileges or Immunities Clause, as discussed in *The Constitution in 2020* and other works. This part of our article does just that.

A. The Constitution in 2020

The Constitution in 2020 represents an important effort by progressive scholars, under the auspices of the American Constitution Society, to set out a vision of how to transform our founding document over the next decade to achieve certain policy results. Professors Eric Posner and Adrian Vermeule wrote a stinging critique of this collection in *The New Republic*, sorting the authors into three coherent yet conflicting categories.[105] The main groups are the "minimalists," the "redemptive constitutionalists," and the "internationalists." Although they share a common vision about the types of policies they want, each uses a different legal theory to approach the role of the judiciary. Some authors borrow tools from each group, but the end result is still the advancement of a progressive agenda in the context of expanded unenumerated rights.

The first group, the minimalists, include scholars such as Cass Sunstein who emphasize a restrained judicial philosophy as a means to achieve their agenda, incrementally but securely. Rather than actively pursuing progressive goals, the minimalists want the Supreme Court to avoid controversial rulings and defer to the other branches. They criticize both *Heller* and *Roe v. Wade* as sweeping

104. RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004).

105. Eric A. Posner & Adrian Vermeule, *Outcomes, Outcomes*, THE NEW REPUBLIC, Aug. 12, 2009, at 43.

decisions that the court should avoid.[106] Others also take a minimalist approach in order to circumvent conservative leanings in the judiciary and instead focus on legislation or social movements as the means to achieve progressive goals. Sunstein admits that his approach is neither conservative nor liberal, but minimalism is the closest progressive theory to originalism.[107] Minimalists would not advocate the overruling of *Slaughter-House* because such a move would require the Supreme Court to overstep its role as a restrained institution that refrains from introducing radical changes into existing jurisprudence. They would, however, be open to using the Privileges and Immunities Clause—in modest, incremental ways that advance the progressive agenda—were that to become an option.

The second group, "redemptive constitutionalists"—among other labels—advocate a substantive constitutional vision as opposed to a legal theory. That is, instead of presenting a theoretical framework, redemptive constitutionalists merely use the courts and constitutional interpretation as a political tool to achieve their agenda. Professor Balkin's version of originalism is based on "text and principles," as opposed to Justice Scalia's original expected application.[108] Instead of advising courts on appropriate judicial means to plausibly reach desired ends, they start with the ends and assume that courts will correspondingly uphold progressive laws and strike down non-progressive ones. Judges are thus to use their magisterial powers to advance a constitutional vision that inspires Americans and achieves certain preordained results. Most of the scholars who hold this view advocate an à la carte approach to legal theory, using different interpretive methods in different policy areas. It is no surprise, then, that redemptive constitutionalists want to use the Privileges or Immunities Clause to advance the (progressive) causes they champion.

The third group, the internationalists—or "transnational progressives"[109]—such as Vicki Jackson, Harold Koh, and Frank Michelman, advocate the use of foreign law to help interpret the Constitution, as well as ascribing to so-called customary international law the same authority as federal statutes, the Constitution, and duly ratified treaties. Their approach—which the Supreme Court has begun using in limited circumstances[110]—is dangerous not just for the substantive rights it hopes to constitutionalize but for the problems of legitimacy it introduces into the judicial process.[111] A broader discussion of transnational

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106. *See*, *e.g.*, Cass Sunstein, Op-Ed, *Staring Down the Barrel*, BOSTON GLOBE, Dec. 2, 2007, at E9.

107. *Id.*

108. Balkin, *supra* note 30, at 293. In future works, the authors will contend that this form of "originalism" is nothing more than "Living Constitutionalism 2.0."

109. John Fonte, *Global Governance vs. the Liberal Democratic Nation-State: What Is the Best Regime?*, 2008 BRADLEY SYMPOSIUM, *available at* http://pcr.hudson.org/files/publications/2008_Bradley_Symposium_Fonte_Essay.pdf.

110. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003) (Ginsburg, J., concurring); Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting).

111. Ilya Somin & John McGinnis, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007).

progressivism is beyond the scope of this paper, but the main problems with applying foreign and international law (judicial, customary, or otherwise) are that these sources of support: 1) present promiscuous opportunities to cite selectively, cherry-picking whatever materials support a desired result; 2) emerge from different social, historical, political, and institutional backgrounds—quite literally "foreign" contexts; 3) are undemocratic in the sense that the foreign judges, legislators, and legal elites are in no way accountable to the American people and political system; and 4) provide and excuse for judicial "fig-leafing," shoring up pre-determined rulings based on personal values.[112]

Koh even admits that not all international law should be applied to constitutional interpretation, but only that which accords with the authors' specific policy desires.[113] While one of Professor Balkin's methods for ascertaining the meaning of the Privileges or Immunities Clause looks to national consensus among the States,[114] Koh's transnationalism could easily extend this technique to search for consensuses among nations.

While these three groups have different approaches to the Privileges or Immunities Clause, they all wish to use it as a vessel for justifying the same kind of progressive policy prescriptions—and even constitutionalizing those policies as entrenched positive rights that no legislature can later abrogate.

B. Privileges or Immunities as Superior Alternative to Substantive Due Process and Equal Protection

Another common theme in *The Constitution in 2020* is the move to shift the protection of substantive rights away from Due Process and Equal Protection to the Privileges or Immunities Clause—because this is a superior vessel into which to pour the progressive agenda. Not only has the expansive reading given both "substantive" and "procedural" due process by the Warren and Burger Courts been reined in by the Rehnquist and now Roberts Courts, but substantive due process stands as an inherent contradiction. The Equal Protection Clause has also been a relative non-starter in protecting new substantive rights, as opposed to extending existing ones. The Privileges or Immunities Clause thus stands as the last best hope for creating and protecting positive rights.

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112. Richard Posner, *"No Thanks, We Already Have Our Own Laws*," LEGAL AFFAIRS 40 (July–Aug. 2004), *available at* http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp. *See also* U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer, "A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer" (January 13, 2005) (transcript available at http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument); *see generally* Symposium, "International Law and the State of the Constitution," 30 HARV. J. L. & PUB. POL'Y 3 (Fall 2006).

113. *See* Harold Hongju Koh, *America and the World, 2020*, THE CONSTITUTION IN 2020 313 (Jack M. Balkin & Reva B. Siegel eds., 2009).

114. *See infra* Part III, C.2.

1. The Disadvantages of Relying on Substantive Due Process

Some may argue that substantive due process, and, to a lesser degree, equal protection, already give the Court plenary power to recognize new rights, so progressives do not need to rely on the Privileges or Immunities Clause. This argument fails to consider the ebb and flow of recent jurisprudence. Although the Warren and Burger Courts read due process and equal protection broadly, the Rehnquist and Roberts Courts have taken steps to reign in these doctrines as they apply to substantive rights—which jurisprudence is in a "current [state of] disarray."[115] In the context of reproductive rights, the march of *Griswold* and *Roe* was transformed by *Casey* and halted by *Carhart*. While the Court recognized a right to sexual autonomy in *Lawrence*, it would not recognize a right to assisted suicide in *Washington v. Glucksberg*.[116] A litigant attempting to advocate for new rights under substantive due process would need to contend with all of these messy precedents and the accompanying balancing tests considering undue burdens and other nebulous factors. Finally, many on the left concede that substantive due process is an inferior provision on which to base certain rights. Most famously, Justice Ginsburg seeks to ground reproductive rights in the Equal Protection Clause as a protection against gender discrimination, rather than in the right to privacy under the Due Process Clause.[117]

According to Professor Balkin, co-editor of *The Constitution in 2020*, the Court's recognition of the Due Process Clause as the source of protection for fundamental rights "created considerable resistance over the years because the Due Process Clause by its terms seems to refer to fair processes (and, as we have seen, historically, the protection of vested rights)."[118] Coincidentally, Justice Scalia agrees with Balkin on this point and considers the Due Process Clause to be a mere guarantee of procedure rather than of additional liberties.[119]

Professor Randy Barnett argues that the term substantive due process is not contradictory, largely because "the judicial assessment of the necessity and propriety of state laws is entirely consistent with the original meaning of the Privileges or Immunities Clause," and "substantive due process restores rather than violates the original historical meaning of Section 1 of the Fourteenth Amendment *taken as a whole* from the damage done by *Slaughter-House*."[120]

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115. Saenz v. Roe, 526 U.S. 489, 527 (1999) (Thomas, J., dissenting).

116. Wash. v. Glucksberg, 521 U.S. 702 (1997).

117. Gonzales v. Carhart, 550 U.S. 124 (2007) (Ginsburg, J., dissenting).

118. Balkin, *supra* note 30, at 317.

119. ANTONIN SCALIA, A MATTER OF INTERPRETATION 24–25 (1998) ("Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process . . . To say otherwise is to abandon textualism and to render democratically adopted texts mere springboards for judicial lawmaking."). *See also, e.g.*, Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C. (March 14, 2005), *available at* http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm) ("If you referred to substantive process or procedural substance at a cocktail party, people would look at you funny.").

120. RANDY BARNETT, RESTORING THE LOST CONSTITUTION 207–08 (2004) (emphasis added).

While the Due Process Clause contains a substantive component dating to the "law of the land" clause of Magna Carta,[121] Barnett's attempt to aggregate the Fourteenth Amendment's clauses only serves as an emergency workaround—a tourniquet for liberty, if you will—subject to jurists' whims.[122] Because *Slaughter-House* eviscerated the Privileges or Immunities Clause, those who seek to protect those substantive liberties originally falling under its purvey reluctantly shift their focus to the Due Process Clause.

Barnett's argument is thus difficult to accept. Merging different constitutional provisions is contrary to the doctrines of textualism and originalism. Professor Barnett likely would not care to merge the Second Amendment's prefatory militia clause with its operative rights clause, for example, because that would transform the individual right to keep and bear arms for self-defense into a collective right to bear arms in service of a militia. But this is exactly what he does by subsuming all of Section I of the Fourteenth Amendment into a general license to protect liberty. And Barnett would be the first to admit that his workaround just makes the best of a bad situation, that *Slaughter-House* forced scholars into such constitutional contortions in order to protect the Amendment's libertarian guarantees.

But a commitment to textualism and originalism should not falter when the Supreme Court woefully misreads a clause. Just because the Supreme Court does not protect liberties under the Privileges or Immunities Clause does not mean it should attempt to protect those same liberties under the Due Process Clause—or that it will given a new composition of the Court's membership. This unsettling realization highlights the monumental importance of *McDonald*. By restoring the Privileges or Immunities Clause to its original public meaning, no longer will scholars have to shoehorn rights and liberties into the Due Process Clause. As Justice Thomas wrote, the Privileges or Immunities Clause may be used to "displace, rather than augment, portions of our equal protection and substantive due process jurisprudence," as "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence."[123]

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121. *See* Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1516667.

122. *But cf.* Richard Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 354 (2005) ("And therein lies both the beauty and frustration of constitutional law. It seems to be driven by some internal gyroscope that shapes the raw text into a comprehensive scheme that bears only imperfect resemblance to its textual starting place. We can argue endlessly about the legitimacy of these various moves, but it is hard to deny that they took place. In the end, I think that we should largely *welcome the wrong turn* that was taken in the *Slaughter-House Cases* on the ground that it *opened the door to a more consistent and comprehensive protection of individual liberties*. Yet, by the same token, we should never forget our tenuous hold on basic constitutional protections.") (emphasis added).

123. Saenz v. Roe, 526 U.S. 489, 527 (1999); *see also* Nordyke v. King, 563 F.3d 439, 440 n.6 (9th Cir. 2009) ("We note, however, that the substantive due process doctrine, which we discuss infra pp. 4481–83, appears to arrive at a result similar to that urged by the dissenters from the Supreme Court's opinion in *Slaughter-House*.").

2. The Disadvantages of Relying on Equal Protection

Litigants have also attempted to employ the Equal Protection Clause to secure unenumerated rights, with limited success.[124] One of the great successes in this jurisprudence was *Shapiro v. Thompson*, which recognized a "fundamental right of interstate movement."[125] This case represents an outlier, however, and in subsequent cases the Court has found the Equal Protection Clause not to protect substantive rights.[126] For example, Justice Ginsburg's view that reproductive rights should be grounded in the Equal Protection Clause, referenced above, has never commanded a majority of votes on the Court.[127]

3. Benefits of Privileges or Immunities

While the Due Process Clause is too broad, protecting a panoply of processes, and the Equal Protection Clause is too narrow, protecting against state-imposed class legislation, the Privileges or Immunities Clause is just right.

(i) Superior to Substantive Due Process and Equal Protection.

After the *Slaughter-House Cases*, judges and scholars looking to protect substantive rights turned, perhaps unnaturally but not unexpectedly, to the Due Process Clause.[128] As Professor Barnett wrote, "although the *Slaughter-House Cases* left the Privileges or Immunities Clause to wither on the vine, it did not repeal the rest of the text . . . [as l]itigants shifted their focus to the Due Process Clause."[129] While the Privileges or Immunities Clause could have protected certain rights, "[t]he doctrinal structure bequeathed by the *Slaughter-House*

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124. Balkin, *supra* note 30, at 317 ("In the middle of the 20th century, the Supreme Court briefly flirted with protecting fundamental rights through the Equal Protection Clause.").

125. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to travel); *see also* Harper v. Virginia Bd. of Elections 383 U.S. 663, 668 (1966) (unconstitutionality of poll tax).

126. *See* U.S. v. Morrison, 529 U.S. 598 (2000) (equal protection does not protect against violence); Wash. v. Davis, 426 U.S. 229 (1976) (racially disproportionate impact is not per se unconstitutional); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (Congress can regulate state and local governments under commerce clause); Richard Epstein, *supra* note 122, at 353 ("But the more modern cases that deal with this issue take the right to travel under the Privileges or Immunities Clause of the Fourteenth Amendment to places where it never was meant to go, largely because they do not bother to distinguish between protection from government interference and creation of government support. One early case in this line, *Shapiro v. Thompson*, held that a state interfered with the right of travel when it refused to allow citizens of other states to receive welfare benefits on the same level as its own citizens . . . But no matter where the case finds a home, the critical point was that the decision switches the entire understanding of the privileges and immunities into a claim for positive rights that was, without question, inconsistent with the original tenor of both provisions . . . Rather, the entire episode shows just how easy it is to transform, without real argument, a protection of negative liberties into a right to state support.").

127. *See* Gonzales v. Carhart, 550 U.S. 124 (2007).

128. Balkin, *supra* note 30, at 313 ("Because the Privileges or Immunities Clause was effectively read out of the Constitution [by the *Slaughter-House Cases*], litigators and courts turned instead to the Due Process Clause (and still later to the fundamental rights doctrines arising out of the Equal Protection Clause) to do much of the work that the Privileges or Immunities Clause should have performed.").

129. RANDY BARNETT, RESTORING THE LOST CONSTITUTION 206 (2004).

Cases made the process of constitutional interpretation far more counterproductive than it should have been."[130]

In *The Constitution in 2020*, progressives seek to relocate the source of substantive rights to the Privileges or Immunities Clause. A prime example of this suggested shift is Professor Balkin's noted yet controversial article, "Abortion and Original Meaning."[131] Balkin contends that reproductive rights should not be grounded in the "liberty interests" protected by the Due Process Clause. "*Discovering* fundamental rights in the Due Process Clause made far less sense than asking whether such rights were privileges or immunities of national citizenship. This is especially so given that the text of the Privileges or Immunities Clause clearly seems to refer to a series of unspecified substantive rights against government."[132] Balkin proceeds to cite the Citizenship Clause, the Equal Protection Clause, and the Privilege or Immunities Clause as possible homes for reproductive rights.[133]

Balkin seems ambivalent, if not agnostic, about which portion of the Constitution provides this right.[134] This ambivalence can be attributed to judicial pragmatism, or to "redemptive constitutionalism"—he may be more concerned with locating the principles supporting that right than finding the correct clause, if any, that protects it. Alternatively, the views Professors Balkin and Siegel express in their chapter in *The Constitution in 2020* may better explain this tack.[135] The duo views the Equal Protection and Privileges or Immunities Clauses as mutually reinforcing: "The [Fourteenth Amendment framers] hoped to secure equality of freed slaves not only through an Equal Protection Clause but also by guaranteeing the privileges and immunities of national citizenship. A guarantee of freedom can secure equality, just as a guarantee of equality can secure freedom."[136] Liberty and equality thus work together to ensure freedom. In the context of reproductive rights, "equality doctrines protect woman's choices in their life pursuits, while liberty doctrines promote woman's equality in making those choices."[137]

This view echoes Professor Ely: "The purpose of the Citizenship, Privileges or Immunities and Equal Protection Clauses, and indeed of the entire Fourteenth Amendment, was to secure equal citizenship, equal civil rights, and civil equality for all citizens of the United States."[138] Putting aside the equal protec-

130. Balkin, *supra* note 30, at 318.

131. *Id.*

132. *Id.* at 317.

133. *Id.* at 319 ("It is likely, however, that the real source of th[e] right [to abortion] lies" outside the Due Process Clause").

134. *Id.* at 312 ("The source of the right [to abortion] is the Fourteenth Amendment, but not necessarily the Due Process Clause. In fact, the other parts of the first section of the Fourteenth Amendment are far more relevant to this question.").

135. Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, THE CONSTITUTION IN 2020 99 (Jack M. Balkin & Reva B. Siegel eds., 2009).

136. *Id.*

137. *Id.* at 100.

138. JOHN ELY, DEMOCRACY AND DISTRUST 27 (1980).

tion argument for the moment, Balkin proceeds to make the case as to why the Privileges or Immunities Clause should protect reproductive rights: "The language of and principles underlying the Privileges or Immunities Clause are a far better source of the right to abortion (and other fundamental rights) than the Due Process Clause (where courts currently locate them), and for a fairly simple reason: The Privileges or Immunities Clause was intended to serve precisely that function."[139]

(ii) Privileges or Immunities Jurisprudence Will Be Written on Clean Slate.

Implicit in the progressive desire to revive the Privileges or Immunities Clause is the knowledge that the jurisprudence in this area will be written on a blank slate. There are no limiting dicta. There are no formulas, balancing tests, or standards of review. There are no emanations, penumbras, or undue burdens. There are no "myster[ies] of human life" or "jurisprudence[s] of doubt."[140] There will be nothing, but what the Supreme Court, and its leftward-shifting majorities, will write. Depending on the composition of the Court when it addresses the substance of the Privileges or Immunities Clause—as opposed to a mere overruling of *Slaughter-House*, as is possible in *McDonald*—the scope of its protected rights may be narrower or broader than that of Substantive Due Process. Progressives would of course like to see a wider reading of positive rights and an even narrower one (if that is possible) of economic, contract, and property rights.

To avoid both the overbreadth and narrowness issues, the Supreme Court should adopt the same test it uses to consider liberties protected by Due Process Clause when considering rights protected by the Privileges or Immunities Clause. This is the test from *Washington v. Glucksberg*, as we describe in Part V below.[141] The *Glucksberg* test has been widely recognized and accepted across the ideological spectrum and, after a decade of use, has developed a significant body of case law, as well as an accompanying framework to aid the lower courts to effectively resolve these issues. There is no need to write on a blank slate. Instead, in classic common-law fashion, the Court should merely transfer its existing unenumerated-rights jurisprudence to the Privileges or Immunities Clause.

The Court rarely has an opportunity to weigh in on an area of constitutional law with so little precedent. *Heller* was of course another recent example of this—and that was a 5-4 split in which the original meaning of the ancient liberty to self-defense was nearly ignored. Rather than leaving the Privileges or Immunities Clause to the future, the Court should consider this matter now. While a narrow majority of the justices still proclaim at least faint-hearted

139. Balkin, *supra* note 30, at 328.

140. Lawrence v. Texas, 539 U.S. 558, 574 (2003); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 843 (1992).

141. Wash. v. Glucksberg, 521 U.S. 702 (1997).

fidelity to an originalist view of the Constitution, the Court should advance a Privileges or Immunities framework consonant with the Clause's original public meaning.

C. How the Progressive "Privileges or Immunities Clause in 2020" Recognizes Rights

How are rights under the progressive Privileges or Immunities Clause defined? Professor Balkin rejects extending substantive due process analysis to the Privileges or Immunities Clause. "Instead of asking whether an interest is a fundamental right or protected liberty under the Due Process Clause, the more natural and sensible question is whether it is a privilege or immunity that all citizens enjoy."[142] What is implicit in this proposal is the driving force behind the progressive vision: In order to assess whether a liberty interest is "fundamental" or "protected liberty" under the Due Process Clause, the Court applies a century's worth of jurisprudential baggage—including the various tests and qualifiers from controversial cases like *Griswold*, *Roe*, *Casey*, and *Glucksberg*. Transferring that line of precedent to the Privileges or Immunities Clause would not advance the progressive agenda.

Instead, Balkin proposes a test that is devilish in its simplicity: Merely *identifying* a right as a "privilege or immunity that all citizens enjoy" instantly elevates that right to an untouchable level of constitutional protection, without the requisite individual rights analysis courts currently employ in Fourteenth Amendment cases.[143] But what is a "privilege or immunity that all citizens enjoy"? Balkin offers five criteria, all of which reflect the fear that Justice Thomas sketched in *Saenz*: If courts depart from the original meaning of Privileges or Immunities, the Clause "will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'"[144]

1. Rights Recognized by Reference to History and Tradition

First, Balkin concedes that "look[ing] at the kinds of rights that have historically or traditionally been protected by states" is "one way" to establish that a right "already exists and deserves judicial protection."[145] Balkin views the recognition of rights with a declaratory lens, and finds that a "declaratory conception of rights is almost always a *dynamic* conception which uses history and tradition as a powerful justificatory rhetoric."[146] Thus, while history is a starting point, it is merely an ingredient of "justificatory rhetoric" and thus not

142. Balkin, *supra* note 30, at 328.

143. For that reason, adapting the *Glucksberg* test for determining whether a right falls within the Privileges or Immunities Clause would help cabin the unlimited realm Balkin dreams of in order to "discover" rights. See *infra* Part V.

144. Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (citing Moore v. East Cleveland, 431 U.S. 494, 502 (1977)).

145. Balkin, *supra* note 30, at 330.

146. *Id.* at 331.

dispositive on this issue.

But what rights have historically received this treatment? To use one example, Professor Goodwin Liu argues that the sweep of American history has shown that the privileges of national citizenship include a right to public education.[147] We will return to this discussion later, but as Professor Balkin notes, historical methodology is "not the only way" to find protected rights.[148]

2. Rights Recognized by Consensuses

A second method Professor Balkin proposes to determine the privileges or immunities of national citizenship looks at whether "almost all of the states have recognized or protected a right," reasoning that when "lots of different majorities agree that these rights deserve protection, they are more likely to be rights with special constitutional value that all governments are supposed to protect."[149]

> This approach to privileges or immunities sees the scope of the Privileges or Immunities Clause as dynamic, depending on the emerging customs, expectations, and traditions of the American people as a whole. The clause's 'declaratory' nature invites individuals throughout the country to press for reforms at the state, local, and national levels to protect rights that they believe are due to them as citizens and to explain to and convince their fellow citizens why these rights are so important. When enough people around the country have been convinced, and enough legal protections have spread throughout the country, federal courts are *entitled* to pronounce that these rights have *become expected and customary rights of American citizens, and therefore should be binding on the small remainder of states that have become outliers*.[150]

Aside from giving short shrift to federalism concerns, this framework grants almost immeasurable subjective authority to courts to "pronounce" rights and "bind" the rest of the country, ignoring state sovereignty and imposing national mandates, all without a constitutional convention.

Balkin remarks that when particular rights are recognized by large majorities, "they *become* the (expected) privileges or immunities of citizens of the United States"[151]—as a sort of *customary* constitutional law. We emphasize the word *becomes* because it denotes an evolving standards of rights, as opposed to static

147. Goodwin Liu, *National Citizenship and the Promise of Equal Education Opportunity*, THE CONSTITUTION IN 2020 120 (Jack M. Balkin & Reva B. Siegel eds., 2009) ("Wide interstate disparities in educational opportunity stand in tension with the guarantee of national citizenship, and ameliorating those disparities is a constitutional duty of the federal government. This constitutional vision, rooted in the Citizenship Clause, animated legislative efforts to establish a robust federal role in public education soon after the Fourteenth Amendment was adopted.").

148. Balkin, *supra* note 30, at 330.

149. *Id.*

150. *Id*. at 331.

151. *Id*. at 330.

natural rights that preexisted the Constitution. Balkin concedes that "at the time the 14th amendment was ratified" these rights included "basic rights to make contracts and own property."[152] These are the rights usually associated with the natural law tradition Justice Washington invoked in *Corfield*. But, according to Balkin's dynamic and declarative framework, "as times change, and through sustained contestation by social and political movements and their opponents, new privileges or immunities can enter the Parthenon of American citizenship."[153] Thus, rather than a judicially declared bifurcation or prioritization of rights à la *Carolene Products* footnote 4, rights are constantly evolving concepts.

Indeed, implicit in Balkin's test is the understanding that when the new positive rights cum privileges or immunities emerge—education, health care, welfare, etc.—they replace certain antiquated ones (mainly property and contract). This mechanism is not the result of there being a finite space for rights, with a judicial bouncer guarding a velvet rope on a one-in-one-out principle. No, the reason for the apparent exclusivity is the nature of the rights at issue: Modern progressive rights are by necessity at odds with common-law rights. A right to a minimum wage conflicts with liberty of contract, as does mandating that an employer recognize organized unions. A right to public housing conflicts with landlords' property rights. And so on. Balkin contends that the Privileges or Immunities Clause "protects unenumerated rights whose pedigree is established elsewhere in the political system-through sustained argument, debate, and political activity."[154] If liberty of contract is politically disfavored, as it has become since the original Progressive era, then so too is it as a matter of constitutional interpretation.

This process of *instantiation* of privileges or immunities—customary constitutional law—is similar to the modern process of creating customary international law. Historically, international law—"the law of nations"[155]—was recognized as customary only when it was firmly rooted in long standing traditions and understood by many, if not most nations. Under (post-)modern international "law," however, as soon as the United Nations adopts a convention—or a large number of nations sign a treaty—it automatically becomes customary international law. And this is so regardless of whether the particular nation whose domestic law is implicated in a given case—for our purposes, of course, that would be the United States—has itself ratified the particular agreement or passed legislation giving it domestic effect (as is necessary for non-self-executing treaties).[156] But this consensus model assumes that a court can in fact

152. *Id*. at 331–32.

153. Balkin, *supra* note 30, at 330.

154. *Id.*

155. *See, e.g.,* U.S. CONST. art. VI, § 2.

156. *See, e.g*., Medellin v. Texas, 128 S. Ct. 1346 (2008). For further discussion of these issues, see Ilya Shapiro, Medellín v. Texas *and the Ultimate Law School Exam*, 2007–2008 CATO SUP. CT. REV. 63 (2008).

discern a consensus.

The fallacy of recognizing national consensuses is highlighted by the aftermath of *Kennedy v. Louisiana*.[157] In March of 1998, a jury convicted Patrick Kennedy of aggravated rape of a child and sentenced him to death after he raped his eight-year-old stepdaughter, causing severe physical damage.[158] The Louisiana Supreme Court denied Kennedy's appeal, holding that sentencing a child rapist to death is not "cruel and unusual" under the Eighth Amendment.[159] Justice Kennedy, writing for a five-member majority, found a "national consensus" against the execution of child rapists, however—because few states provided for the death penalty in such cases[160]—and thus striking down the Louisiana law.

Following the ruling, a letter signed by eighty-five members of Congress brought to the Court's attention a 2006 federal statute that permitted the death sentence for rape of a minor under the Uniform Code of Military Justice.[161] In finding a "national consensus," Justice Kennedy, writing for the majority, overlooked this recently enacted statute. Nevertheless, the Court declined to rehear the case.[162]

Justice Scalia's statement respecting the denial of rehearing is telling:

> I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case. The majority opinion, after an unpersuasive attempt to show that a consensus against the penalty existed, in the end came down to this: "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Ante, at ___ (slip op., at 24). Of course the Constitution contemplates no such thing; the proposed Eighth Amendment would have been laughed to scorn if it had read "no

157. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008). In the criminal procedure context, the *Katz* test has been understood as recognizing consensuses. *See The Fourth Amendment's Third Way*, 120 HARV. L. REV. 1627, n.16 (2007) (In this sense, the *Katz* model represents a particular application of the "consensus" approach to constitutional law, which rests on "[t]he idea that society's 'widely shared values' should give content to the Constitution's open-ended provisions—that 'constitutional law must now be understood as expressing contemporary norms.'" JOHN HART ELY, DEMOCRACY AND DISTRUST 63 (1980) (quoting Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162,1193 (1977)).

158. Kennedy v. Louisiana, 128 S. Ct. at 2641–42.

159. *Id.* at 2645–46.

160. Justice Kennedy did not differentiate between states that have no capital punishment at all—who would obviously then not make it available for child rape—and those that do. He also made no reference to the effect that Coker v. Georgia, 433 U.S. 584 (1977) (holding that the Eight Amendment forbade capital punishment for the rape of an adult woman), may have had on state sentencing legislation in the area of child rape. *See* Kennedy v. Louisiana, 128 S. Ct. at 2657–58 (Scalia, J., dissenting).

161. Statement Denying Rehearing, Kennedy v. Louisiana, 129 S. Ct. 1, 3 (2008) (Scalia, J., concurring).

162. *Id.* at 1 (Kennedy, J.). The Court's amended opinion references the statute in a footnote.

> criminal penalty shall be imposed which the Supreme Court deems unacceptable." But that is what the majority opinion said, and there is no reason to believe that absence of a national consensus would provoke second thoughts. While the new evidence of American opinion is ultimately irrelevant to the majority's decision, let there be no doubt that it utterly destroys the majority's claim to be discerning a national consensus and not just giving effect to the majority's own preference.[163]

If the Supreme Court could not properly analyze the extent of the consensus among state laws governing the sentencing of child rapists, an area that any first-year law student could understand with the proper Lexis search, how can we expect judges to understand consensuses on nebulous and polarizing social issues—on which public opinion ebbs and flows—such as the right to health care,[164] the right to education, or reproductive rights?

Balkin himself acknowledges that "[i]n 1973, when *Roe* was decided, the right to abortion was not a privilege or immunity of national citizenship" because only four states had adopted the rules *Roe* laid down.[165] He counters, however, that "most of the public now regards a basic abortion right as among the guarantees of citizenship"[166] and, in the long run, "it should eventually be protected under the declaratory model of the Privileges or Immunities Clause."[167] But how is the Court to determine society's views to a point that gives them constitutional authority?—particularly in light of the complications in as comparatively simple a task as surveying state laws regarding capital punishment for child rapists. *Kennedy v. Louisiana* thus belies Balkin's attempt to portray the right to abortion as a privilege or immunity of national citizenship by virtue of a national consensus.

Moreover, what constitutes a national consensus? Half the population? Two thirds? Ninety percent? To paraphrase Justice Brennan's quip, why not whatever five duly confirmed justices think?[168] Should the Court commission its own Gallup Poll? What standard should the consensus be based on? How long should it exist? These are inherently subjective determinations, not reducible to judicially or legislatively manageable standards.

Finally, and perhaps most significantly from a constitutional perspective, for a court to determine that simply because "most of the public" considers some

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163. *Id.* at 3 (Scalia, J., concurring).

164. *See, e.g.*, Frank Newport, *More in U.S. Say Health Coverage is Not Gov't Responsibility*, GALLUP, November 13, 2009, *available at* http://www.gallup.com/poll/124253/Say-Health-Coverage-Not-Gov-Responsibility.aspx?CSTS=tagrss (showing that, unlike in similar polls of the previous decade, people do not think that the federal government must ensure health care coverage for all Americans).

165. Balkin, *supra* note 30, at 334.

166. *Id*. at 334–35.

167. *Id*. at 336.

168. JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 54 (1999) ("Raising his hand, Brennan would wiggle five fingers and say, 'Five Votes. Five votes can do anything around here.'").

right to be among the privileges or immunities of citizenship—not that the public thinks in terms of "privileges or immunities" or any other constitutional terms of art—ignores the rights of minorities. That is, the Constitution is countermajoritarian in many ways—as would be expected from a charter that establishes a republic, not a pure democracy. The Constitution provides for the indirect election of the president through an electoral college and, before the Seventeenth Amendment, for state legislatures to select senators. Impeachment requires super-majorities, as does the constitutional amendment process—which is why Balkin, Ackerman, and others propose constructive amendment theories. All these provisions reflect a fear of oppressive majority rule and aim to prevent factions from seeking economic advantage and overwhelming our system of liberty.[169]

Wrote Publius in *Federalist* 63, "The true distinction between [ancient democracies] and the American governments, lies in the total exclusion of the people, in their collective capacity, from any share in the latter . . . The distinction . . . must be admitted to leave a most advantageous superiority in favor of the United States."[170] Allowing constitutional lawmaking by majority rule runs counter to this proud tradition. As Publius proclaimed in *Federalist* 55, "all very numerous assemblies, of whatever character[s] composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."[171]

Finally, why limit this analysis to consensus among states? Why not consider consensuses among nations? For example, Justice Kennedy has looked to foreign and international law to establish norms with respect to executing minors—and thus confirm his understanding of the Eighth Amendment.[172] Why then not look to European conventions and treaties to recognize consensuses on rights among modern, progressive peoples to confirm our understanding of the Fourteenth Amendment? These are such divisive and controversial issues that, ultimately, a consensus model would "just [be] giving effect to the [Court's] own preferences."[173]

3. Rights Evolve When the "Time is Right"

A third methodology, even more nebulous than the previous two, establishes that "[r]ights become fundamental and timeless . . . when the time is right for them."[174] A problem with such an evolving understanding of rights is that what is considered "fundamental" to one generation may no longer be such to the next. What the living Constitution giveth, the living Constitution taketh away.

This flaw is particularly visible in the context of the right to keep and bear

169. *See* THE FEDERALIST NO. 10 (James Madison).
170. THE FEDERALIST NO. 63 (James Madison).
171. THE FEDERALIST NO. 55 (James Madison).
172. Roper v. Simmons, 543 U.S. 551 (2005).
173. Statement Denying Rehearing, Kennedy v. Louisiana, 129 S. Ct. 1, 3 (Scalia, J., concurring).
174. Balkin, *supra* note 30, at 334.

arms. For example, Professor Amar describes the nature of the Second Amendment as evolving. Hewing to the collective model of the Amendment—which the Court rejected in *Heller*—Amar notes that "[a]t the Founding, the Second Amendment's affirmation of the people's right to bear arms intertwined with a strong commitment to local militias."[175] "Four score years later[, however, during Reconstruction], this original vision had dissolved."[176] In 1866, whites terrorizing black families "made an individual right to keep a gun in his-or her-home a core civil right deserving federal affirmation."[177] Presumably in 2010, when we have neither a commitment to local militias nor Ku Klux Klan-style terrorism, that right is much weaker, if it exists at all. Indeed, no right based on evolving societal standards is permanently secure—and all rights can fade and reemerge based on judges' perceptions of their existential merit. Is that any way to protect rights of any stripe?

Moreover, if rights are valid only as long as "the time is right"—again, according to whom?—those opposed to a particular right will declare "open season" on it (pun intended in the Second Amendment context), proclaiming that the time is no longer "right" and thus extinguishing the right.[178] This may be a desirable outcome to those who wish to eschew liberties deeply rooted in the Anglo-American tradition to replace them with modern "rights." But such a philosophy finds no basis in our written Constitution and our larger philosophical understandings of rights. "Liberty finds no refuge in a jurisprudence of doubt."[179]

4. Rights Instantiated by the Enactment of "Landmark Legislation"

Under Balkin's model, a right can also be covered by—*instantiated* into—the Privileges or Immunities Clause when Congress passes certain laws of monumental importance. "When Congress passes legislation to protect the privileges or immunities of national citizenship, it can announce that, in its view, these rights belong to all citizens."[180] Congress is of course permitted within its enumerated power to grant certain positive rights, but these rights are not constitutionally protected under current jurisprudence. If Congress can constitutionalize positive rights simply by passing legislation, however, these rights will become permanently entrenched.

This instantiation process comports with Professor Ackerman's notions of "constitutional moments" and "landmark legislation." Ackerman advances that certain "constitutional moments" allow popular opinion to influence the "higher

175. AMAR, *supra* note 22, at 390.

176. *Id.*

177. *Id.* at 390–91.

178. Recently Justice Ginsburg hinted that the 5-4 holding in *District of Columbia v. Heller* is not secure. Perhaps this approach could by a used by a "future, wiser court" to relegate the Second Amendment back to a collective right. *See* Posting of Dave Kopel to Volokh Conspiracy, Justice Ginsburg: Supreme Court may eventually overrule Heller, http://volokh.com/2009/12/20/justice-ginsburg-supreme-court-may-eventually-overrule-heller/ (Dec. 20, 2009, 12:58 EST).

179. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

180. Balkin, *supra* note 30, at 329–30.

law" of constitutional politics.[181] A "constitutional moment" occurred in the past when "the judges recognized that a new constitutional principle had indeed been ratified by the People, and that the time had come for the serious work of judicial interpretation and implementation to begin."[182] This would mean that the populace effectively amends the Constitution *de facto*, without going through the formal amendment process *de jure*. Ackerman argues that, in times of judicial resistance to change, the people can pressure the Court to change its interpretive theories.

Under Professor Ackerman's analysis, the formal amendment process is still being followed, albeit in a nontraditional manner. For example, during a "constitutional moment", Congress may pass a series of laws that the Supreme Court finds unconstitutional. The Court's resistance to these changes performs a "signaling function," just as, Ackerman says, "under Article V, the affirmative vote of two-thirds of Congress signals the rise of new constitutional proposal."[183] Such resistance also serves as a "translation function—one that may be *analogized* by Article V's requirement of a formal written text for a constitutional amendment."[184] By rejecting a proposal in legal terms, the Court forces society to recast its "political rhetoric" into legal language.[185] Finally, the legislature, executive branch, or populace will react, as in the 1936 election, and pressure the Court to change its ways. In these ways, the formal requirements of the amendment process are *functionally* met.

Needless to say, there are multiple problems with Professor Ackerman's analysis. First, how do we spot constitutional moments, other than in retrospect? Hindsight is 20/20, but is it possible to know that we are in a *constitutional* moment, at the *current* moment? Curiously, several progressive scholars have already presaged a constitutional moment in the event the Supreme Court accepts a challenge to the constitutionality of the current health care reform bill.[186] Auguring a constitutional moment before it happens makes the entire process seem rather pre-ordained. Indeed, foresight can be 20/20.

Next, there is a problem of description: does the New Deal era constitute one

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181. Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1056–57 (1984).

182. *Id.* at 1056.

183. *Id*. at 1054.

184. *Id.* (emphasis added).

185. *Id.*

186. One of the authors predicted that the progressives would herald a constitutional moment in the event that the Supreme Court accepted a challenge to the constitutionality of the health care reform, and recent online postings suggest this prediction will be accurate. *Compare* Posting of Josh Blackman to Josh Blackman's Blog, http://joshblackman.com/blog/?p=3393 (Dec. 23, 2009, 2:06 EST), *with* Posting of Mark Tushnet to the Balkinization blog, http://balkin.blogspot.com/2009/12/what-if-nebraska-compromise-is_24.html (Dec. 24, 2009, 2:02 EST), *and* Posting of Sandy Levinson to the Balkinization blog, http://balkin.blogspot.com/2010/01/day-after-barnette-v-sibelius.html (Jan. 3, 2010, 12:36 EST). Tushnet and Levinson have both drawn parallels between the recalcitrant Supreme Court of 1936 and the potentiality of the Roberts Court challenging this landmark legislation. These posts set the stage for a future declaration of a constitutional moment.

moment or several? Some of what FDR proposed was unpopular, but was it still constitutionalized as part of one big constructive amendment? Does the process for determining constitutional moments not just collapse into the "national consensus" theory—or, if we can only determine such moments (and the resulting rights) in hindsight, by ascertaining the consensus of historians? In any event, several of the *Federalist* papers express fears of mob rule—reflecting Plato's fears of democracy descending into ochlocracy—so why should the popular opinion of this or any era trump established constitutional processes? According to Ackerman:

> With a progressive president and Senate sending a new generation of justices onto the bench, the notion that citizenship has its privileges [or immunities] will no longer be derided in Borkish terms, as constitutional nonsense. The unfulfilled promise of the Fourteenth Amendment will instead be viewed as a central challenge for interpenetration of the twenty-first century, the "citizenship agenda" enacted by Congress may, over time, be understood as part of every American's constitutional birthright.[187]

Ackerman believes that many "old progressive ideas," including "public education, progressive taxation, Social Security, Medicare, civil rights and environmental problems, union rights and workplace safety"—FDR's Second Bill of Rights, more or less—will all be redefined as rights of national citizenship protected by the Privileges or Immunities Clause.[188] Statutes of great significance, such as the Social Security Act, Americans with Disabilities Act, or the Civil Rights Act of 1964, stand as "landmark legislation," and serve as surrogate constitutional conventions, and constructively amend the Constitution.[189] This shift to a legislative conception of rights comports with the progressive move away from a reliance on courts to protect rights.[190] The onus is now on the Congress to advance the progressive agenda.[191] It is no longer jurisprudence, but *legisprudence*.[192]

In contrast to the historical approach that this article advances, the landmark legislation/constitutional moment theory no longer restricts the Court to canoni-

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187. Bruce Ackerman, *The Citizenship Agenda*, THE CONSTITUTION IN 2020 118 (Jack M. Balkin & Reva B. Siegel eds., 2009).

188. *Id.* at 111.

189. The concept of "constructive amendments" falls into a common category of "constructive" legal constructs, which are a form of legal fictions. *See* Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 22 St. THOMAS L. R. (forthcoming 2010), *available at* http://works.bepress.com/nancy_knauer/5.

190. Bruce Ackerman, *The Citizenship Agenda*, THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009) ("Despite professions of originalism, our right-wing judiciary will be in no rush to vindicate the privileges [or immunities] of citizenship against the economic forces threatening their effective exercise. In the run-up to 2020, the greatest legal contribution lies outside the courts.").

191. *Id.* at 111. ("Despite centuries of silence, American lawyers may yet reclaim the lost promise of national citizenship for the twenty-first century.").

192. Posting of Daniel Winik & Jeremy Kessler, The Constitution in 2020 Blog, http://www.constitution2020.org/taxonomy/term/73 (last visited June 23, 2009).

cal texts like the Declaration of Independence or Blackstone's Commentaries, but leads it to consider acts Congress passes to establish new privileges or immunities. Would there be a constitutional right to Social Security, to food stamps, to subsidized housing, to Medicaid—to health insurance (whether or not a "public option" ever passes)? Professor Balkin would say yes—and even considers the potential passing of President Obama's health care bill, over the opposition of stalwart moderate Democrats and virtually all Republicans, a "constitutional moment" forcing the president and the Senate to engage in an "unconventional adaptation of American politics."[193] Health care reform is precisely the type of landmark legislation that would create constitutional rights under *The Constitution in 2020*.

5. Rights Recognized Through Social Movements

The fifth model discernible from Balkin's vision of the Privileges or Immunities Clause focuses on a topic of great import in the zeitgeist: community organizers and social movements. This declarative model does not recognize fixed, natural, or objective rights. Rather, "the list of such rights might change over time as social and political movements mobilize to protect rights and convince their fellow citizens that these rights are indeed important, even if previous generations had not felt particularly endangered or upset by their lack of protection."[194] Balkin's approach thus permits citizens and social movements to yield new privileges or immunities.[195] "And when individuals or social movements interpret the Constitution in pressing for social change, they can make arguments that certain rights heretofore unrecognized or insufficiently protected are fundamental guarantees of citizenship that deserve special protection."[196]

Balkin does "not claim that all social mobilizations that produce changes in doctrine are equally legitimate or equally admirable" but "some are both legitimate and admirable, and a theory of constitutional interpretation . . . must account for them."[197] Elsewhere, Balkin remarks that "successful social and political mobilization changes political culture, which changes constitutional

193. Jack Balkin, Barack Obama's Constitutional Moment, http://balkin.blogspot.com/2009/12/barack-obamas-constitutional-moment.html (last visited December 17, 2009).

194. Balkin, *supra* note 30, at 330. (discussing how social movements draw on existing materials to fashion a rights claim).

195. For more on Balkin's views of social movements affecting Constitutional Law, *see* Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK UNIV. L. R. 27 (2005). *See also* John McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMM. 371, 381 (2007) ("it is a little difficult to see what is left of a recognizable originalism, not to mention the amendment process, if social movements have such substantial discretion to apply constitutional provisions as they see fit."); Steven Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 687 (2009) (claiming that Balkin's originalism "substitutes the rule of engaged social movements for the rule of law").

196. *Id.* at 334.

197. Balkin, *supra* note 30, at 310.

culture, which, in turn, changes constitutional practices outside of the courts and constitutional doctrine within them."[198]

Balkin proffers the right to contraception to illustrate this dynamic. He contends that the social movement behind the right serves as an example of how a privilege or immunity can be recognized through popular support. "A social movement for contraceptive rights had been ongoing throughout most of the country, as evidenced by almost universal decriminalization. By 1965 when *Griswold* was decided, only one state, Connecticut, still outlawed the use of contraceptives, and the law was only fitfully enforced." Whenever a social movement backs a cause, that cause's object can obtain the force of constitutional right.[199]

According to Balkin, the mere fact that grassroots activists engage in direct action elevates the rights they seek to the constitutional Pantheon. "Organized communities" equate to constitutional conventions. But should social movements be able to influence constitutional interpretation?[200] "Today, community organizing is hot,"[201] and as we move closer to 2020, progressives will use these groups to advance their constitutional agenda.[202] Through this process, an acorn falling from the tree of community organizers grows into a mighty oak in the forest of constitutional rights.

D. What are the Privileges or Immunities of National Citizenship in 2020?

Having presented the various methodologies progressives will use to discern the privileges or immunities of national citizenship, we turn to the question of what those privileges and immunities actually are. We have, of course, speculated about various positive rights, but more concretely, Bruce Ackerman and Anne Alstot's essay in *The Constitution in 2020* calls for "expanding social

198. *Id.* at 309.

199. *Id.* ("In fact, when social movements initially offer their constitutional claims, many people regard them as quite radical or 'off the wall' . . . Yet it is from these protestant interpretations of the Constitution that later constitutional doctrines emerge. Many of our proudest achievements of our constitutional tradition came from constitutional interpretations that were at one point regarded as crackpot or 'off the wall.'").

200. *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 999–1000 (1992) (Scalia, J., dissenting) ("In truth, I am as distressed as the Court is about the 'political pressure' directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.").

201. Barbara L. Bezdek, *Alinsky's Prescription: Democracy Alongside Law*, 42 JOHN MARSHALL L. REV. 723, 723 (2009) ("Not only did [community organizing] find unprecedented attention during the 2008 presidential election, the New York Times recently carried two stories about organizers and organizing in the same week. In fact, two of the most famous organizers known today are also among the world's most popular figures: Gandhi and Barack Obama.").

202. *See* Josh Blackman, *Constitution in 2020 Liveblog Panel 7—Mobilization*, Oct. 4, 2009, http://joshblackman.com/blog/?p=195 (noting that at the Constitution in 2020 Conference held at Yale Law School, the organizers devoted an entire panel to social movements and mobilization). *See also*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 404–18 (1998). David A. Super, *Laboratories of Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 553–59 (2008).

welfare benefits based on a principle of national citizenship."[203] Under this plan, the authors "hope to counteract the corrosive effects of class inequality on U.S. democracy by creating a stakeholder society" wherein the "federal government would pay $80,000 to any native-born or naturalized citizen at the age of twenty-one, so long as he or she had resided in the United States for at least eleven years."[204] This argument is not rooted in any historical notion of privileges or immunities, but rather is based on evolving notions of social equality.

One specific application of the Privileges or Immunities Clause to the protection of substantive rights is Professor Goodwin Liu's article, which focuses on education. Liu frames education as a constitutional right that the government is obligated to provide in order to ensure equality. "Because of the errors of the *Slaughter-House* cases, we have grown used to treating the Fourteenth Amendment as a vehicle for judicial enforcement of negative rights against governmental denial of formal equality (the classic example is *Brown*) and not for legislative enforcement of positive rights to governmental provision of what is necessary for equal citizenship."[205] Liu's understanding of national citizenship does not merely require the government to ensure that nobody is denied the equal protection of the laws—a principle at the heart of Athenian democracy, where it was known as *isonomia*—but rather demands "appropriate legislation" to ensure that citizens stand as equals.

That is, unlike the traditional "negative" view of equality, whereby the state applies the law equally to all—which would still presumably be covered by the Equal Protection Clause—progressives would have the state take affirmative actions (by unspecified means) to elevate certain people to a certain (undefined) position of equality. Thus, the Privileges or Immunities Clause in 2020 would guarantee redistributive largesse to help people enjoy a certain equal citizenship. Liu sees this "positive" conception of rights "as an important foundation of post-Civil War efforts to establish a federal role in public education."[206]

To support the view that the Reconstruction Congress sought to protect equal education as a privilege of national citizenship,[207] Liu cites statements from sponsors of bills never enacted,[208] bills introduced but never voted on,[209] bills

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203. Rachel F. Moran, *Terms of Belonging*, *in* THE CONSTITUTION IN 2020 138 (Jack M. Balkin & Reva B. Siegel eds., 2009). *See* Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

204. Ackerman, *supra* note 190.

205. Liu, *supra* note 147, at 127.

206. *Id.* at 127–28. Liu considers that during Reconstruction, "Congress understood national citizenship as a guarantee that it had the power and duty to enforce," and thus today Congress should "see the task of narrowing educational inequality between states as a constitutional imperative."

207. This approach would be akin to original intent originalism, or in the lexicon of Professor Balkin, "original expected application" originalism, both methodologies criticized by Balkin. *See* Balkin, *supra* note 30, at 292.

208. *Id*. at 128 (discussing statement of Representative Hoar of Massachusetts who proposed a bill to create federal schools—a bill that was never voted on. It is noteworthy that Hoar merely cited

passed in one house but killed in another,[210] and bills passed only after having been stripped of their most ambitious provisions.[211] Indeed, the only substantive bills Liu can cite that were enacted were the controversial "Blaine amendments" to various state constitutions—which arose out of anti-Catholic animus to ban public funding of parochial schools—though the proposed Blaine amendment to the U.S. Constitution failed in the Senate.[212] That a bill was never acted on or was rejected—in the Reconstruction Congresses that were hotbeds of radical change, no less—indicates that Congress rejected the policy proposals those bills were meant to enact. Rather than a "signal for an emerging responsibility for" a right to education or anything else,[213] it is evidence of nothing if not that that the people's representatives—presumably acting in the spirit of a fluid and dynamic age—did not want to constitutionalize the privileges or immunities they declined to create!

More generally, "motivated by concerns about the detrimental impact of material insecurity and inequality, Professor Forbath calls for social citizenship, which would include rights to education, training, and decent work."[214] Forbath recites that "as far back as the mid-nineteenth century, Abraham Lincoln and the other founders of the Republican Party held that equal rights demanded not only equal legal rights to contract and own property, but a fair distribution of initial endowments, and therefore free homesteads and federally funded public state universities alongside free elementary and secondary education."[215] Forbath's "social citizenship," a variation of national citizenship, thus reflects a commitment "to enabling every American to participate in the common world of

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"logical necessity," and did not appeal to any common law or natural law right, as other privileges or immunities were based on.

209. *Id.* (discussing an introduced bill for the first ever federal proposal for a public elementary education school system–a bill for "national schools" run by federal officials, which also never reached a vote).

210. *Id*. at 129 (1876 proposal to fund education with revenue from public lands; the bill passed the House but died in the Senate).

211. *Id*. at 128 (discussing efforts to establish a federal Department of Education, but Congress merely created an agency "limited to data collection and reporting").

212. *See The Next Step for School Choice: Removing State Constitutional Obstacles*, Litigation Backgrounder, INSTITUTE FOR JUSTICE, *available at* http://www.ij.org/index.php?option=com_content&task=view&id=1216&Itemid=165.

213. Liu, *supra* note 147, at 128.

214. Moran, *supra* note 203. *See* William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, *in* THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009) ("Certain basic social goods must be available to every member of the national community; the market must not govern who enjoys them; no one can justly be excluded. Every American is entitled to a decent education. Every American has a *right* to health care.").

215. Forbath, *supra* note 214, at 59. Assuming that this is a correct reading of the Homestead Act of 1862 and Morrill Land-Grant Act of 1862, providing grants of property the government already owns does not require burdening anyone to take that land. There is a fundamental difference between the government distributing unowned property, and taxing one person to pay for another person's needs. Further, while the government certainly did fund educational expenses, it did not do so as a condition of national citizenship, largely because Congress passed these acts before the enactment of the Fourteenth Amendment.

citizenship, work, and opportunity," and guarantees "work for the willing, a decent income for those who work, and opportunity to rise above the minimum by making full use of one's talents and abilities."[216] The progressive notion of the Privileges and Immunities Clause would therefore put the final nail in the coffin of the doctrine of enumerated powers. If Congress can—and even must—equalize the privileges or immunities *qua* entitlements of national citizenship, Article I, Section 8 has no meaning. Such a reading is, of course, difficult to square with any method of interpretation that takes constitutional text seriously.

E. The Perils of Opening Pandora's Box

While everyone favors protecting liberty, not everyone agrees on what liberty is. To many, liberty is defined as the autonomy necessary for a person to pursue his own vision of happiness.[217] To the authors of *The Constitution in 2020* and their progressive acolytes, however, true liberty requires that the government provide citizens with the goods and services they may need in order to equalize them with others in society, to enable them to pursue the same kinds of happiness. While the former conception of liberty is consonant with the natural rights philosophy pervading the drafting of the Fourteenth Amendment—as evidenced in such contemporary legislation as the Civil Rights Act of 1866, the Freedman Bureau's Act, and other Reconstruction-era laws—the latter is the result of twentieth-century ideas about redistribution and social justice. After all, the Declaration of Independence, the embodiment of Enlightenment-era political philosophy, speaks of the *pursuit* of happiness as an inalienable right and not the *guarantee* of happiness. Regardless of the merits of the modern conception of liberty as a normative matter—we leave that to a different article—this philosophy cannot descriptively be reconciled with the original public meaning of the Fourteenth Amendment.

That is, even if a scholar seeking to imbue constitutional provisions with a modern sense of justice acts with strong philosophical and empirical grounding—again a proposition we leave for another day—his efforts cannot be labeled constitutional law (in the sense of interpreting the document under glass at the National Archives). Instead, this is a form of social engineering, using the Constitution to gain legitimacy—or in the words of Professor Balkin, to transform an "off the wall" idea into "on the wall" accepted doctrines[218]—for political theories that are otherwise not tethered to constitutional text. Reciting phrases such as "equal protection" or "due process of law" does not work as a talismanic incantation that magically transforms the Constitution into a tool of

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216. *Id.*

217. THE DECLARATION OF INDEPENDENCE (1776) ("Life, Liberty and the *Pursuit* of happiness.") (emphasis added)

218. Josh Blackman, *Constitution in 2020 Liveblog Panel 2—Roundtable: About the Constitution in 2020*, Oct. 2, 2009, http://joshblackman.com/blog/?p=178.

social justice.[219] Indeed, the last three Supreme Court confirmation hearings have shown fidelity to the law's written word to be the true talisman of judicial integrity.

Which is to say that the Constitution should not exploited as a means to an end—of whatever ideological stripe that end might be—but should be the end itself, the end of applying a written document that legitimizes government while limiting its powers and preserving individual rights.[220] Returning to the three camps of *The Constitution in 2020*, however, we see that the Privileges and Immunities Clause could be used to wreak havoc with our republican system of government. While the minimalist approach may in the best circumstances constitute merely the progressive version of originalism—akin to Justice Stevens's dissent in *Heller*—the other two approaches would disconnect constitutional law from the Constitution by allowing standards to evolve and rejecting cohesive interpretive theories. Combined with an unprincipled Privileges or Immunities jurisprudence—constitutional moments, landmark legislation, etc.—progressive scholars could use the judiciary to elevate their preferred policies to the level of constitutional rights and thus achieve what they never could through political channels.

Such a development would be dangerous because imposing rights based on manufactured national consensuses distorts federalism and eliminates the ability of the states to function as laboratories.[221] Moreover, incorporating international standards would further exacerbate cultural conflict, especially in areas like free speech and gun rights—in which America remains by far the most "liberal" nation on earth. While the progressives may be well-intentioned, altruism does not create constitutional rights or excuse underdeveloped interpretive methodologies.

This danger of result-oriented jurisprudence is why the Court's consideration of the Privileges or Immunities Clause in *McDonald* is so important. The Court

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219. Josh Blackman, *Constitution in 2020: Response to Professor Horwitz*, Oct. 6, 2009, http://joshblackman.com/blog/?p=617.

220. Eric A. Posner & Adrian Vermeule, *Outcomes, Outcomes*, THE NEW REPUBLIC, Aug. 12, 2009, at 43. *Cf.* Randy Barnett, *Is the Constitution Libertarian?*, 2008–2009 CATO SUP. CT. REV. 9 (2009). *See also* THE FEDERALIST NO. 51 ("[I]f men were angels, no government would be necessary").

221. Although federalism, as Justice Brandeis observed New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), permits the states to act as laboratories of democracy, the Constitution limits that experimentation. Contrary to respondents' assertions, the dangerous conditions of urban life do not permit Chicago to interpret the right more strictly. A right to be free from unreasonable search and seizure means the same thing in Chicago as it does in Sheboygan. A right to trial by jury for criminal cases provides the same protection to a defendant in Manhattan, New York, as to a defendant in Manhattan, Kansas. The parade of horribles the respondents' brief discusses about gun violence—for good or ill—does not give the government a license to further infringe on the rights of its citizens through onerous and otherwise unconstitutional legislation. The Constitution does not have a geography clause. *See* Damon W. Root, *Laboratories of Repression*, THE WALL ST. J., Jan. 4, 2010 ("And since the Supreme Court would never let Chicago ban free speech, establish an official religion, or conduct other 'experiments' on the First Amendment, why should the Second Amendment receive any less respect?"). *See also* Josh Blackman, "Instant Analysis of the Respondent Brief of the City of Chicago in *McDonald v. Chicago*," Dec. 30, 2009, http://joshblackman.com/blog/?p=3469.

can use several approaches to extend the right to keep and bear arms to the states, but the Privileges or Immunities Clause is superior both for maintaining constitutional fidelity and for keeping Pandora's Box sealed.

IV. THE SECOND AMENDMENT COULD BE INCORPORATED THROUGH THE DUE PROCESS CLAUSE, BUT THIS APPROACH IS HISTORICALLY DEFICIENT

With the exception of the Third Amendment right not to be forced to quarter troops, the Fifth Amendment right to indictment by grand jury, the Seventh Amendment right to juries for civil trials, the Eighth Amendment protection against excessive bail and excessive fines—and, of course, the Second Amendment—all of the provisions of the Bill of Rights have been incorporated so as to provide protection against infringement by state and local governments. Incorporating the right to keep and bear arms will thus do little to upset the constitutional landscape, and few doubt that the Court will allow the Second Amendment to join its brethren in their incorporated glory.

McDonald presents the question of whether the Second Amendment right should be protected by the Due Process Clause and thus made applicable to the states. While this article focuses on the Privileges or Immunities Clause, we also contend that Supreme Court's incorporation precedent, coupled with Justice Scalia's description of the root of the right to keep and bear arms in *District of Columbia v. Heller*, dictates incorporation via the substantive due process incorporation doctrine. Still, the original public meaning of the Privileges or Immunities Clause reveals an alternative and historically more accurate vehicle for applying to the states the right to keep and bear arms.[222]

"The debates over the framing and ratification of the Fourteenth Amendment make clear that the Privileges or Immunities Clause was meant to correct . . . an 'ellipsis' in the Constitution by providing for substantive federal protection of certain rights inherent in the Framers' understanding of what it meant to be a citizen and a free person."[223] Because *Slaughter-House* prevented this clause from taking its proper role within constitutional jurisprudence, the Supreme Court has defined unenumerated rights almost exclusively through its substantive due process doctrine—but substantive due process was never meant to do that.

Restoring the Privileges or Immunities Clause to its proper place in the constitutional structure would ground the Supreme Court's rights-protecting jurisprudence in a textually and historically sound foundation without rejecting

222. Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 12–35 (2007) ("Jurists and legal theorists claiming the importance of fidelity to a 'written Constitution must, if they are to retain intellectual credibility, sooner or later give effect to the privileges or immunities clause . . . . The Constitution is a package deal; one cannot pick and choose from among its provisions.").

223. Brief of the Institute for Justice and the Cato Institute as Amici Curiae Supporting Petitioners, National Rifle Association v. City of Chicago, No. 08-1497 (2009), McDonald v. City of Chicago No. 08-1521 (2009).

the doctrine of substantive due process.[224] Indeed, substantive rights would instead be properly rooted in the text, history, and original public meaning of the Constitution. This would provide greater clarity and credibility in the context of rights jurisprudence.[225] The contemporaneous public documents and debates contain many references to specific cases that Congress and the ratifying states sought to overturn and specific evils they sought to prevent; the rights protected by the Privileges or Immunities Clause can be found in that history.[226]

By relying on the Privileges or Immunities Clause as an alternate ground for extending the Second Amendment right, the Court can breathe life into and thereby revive the original meaning of the Fourteenth Amendment without engaging in "doctrinal contortions."[227] According to the petition for certiorari, when, "as here, substantive due process incorporation would lead to the same result as under a more straightforward, correct reading of the Privileges or Immunities Clause, the latter approach is preferable."[228]

A. Historical Development of "Incorporation"

Following the ratification of the Fourteenth Amendment, several justices, mostly in dissents, flirted with the idea of protecting certain substantive and procedural rights against infringement by the states. Three different positions have been advanced regarding the extent to which the Fourteenth Amendment imposes upon the states prohibitions identical or similar to those imposed on the federal government by the Bill of Rights. First, the "total incorporation" test, most strongly advocated by Justice Black, failed ever to garner more than four votes in any one case. The second approach considered whether a right constituted "fundamental fairness." The Supreme Court endorsed this view until the 1960s. However, the third approach, the "selective incorporation" doctrine has

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224. *See, e.g.,* Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) ("We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence."); Brennan v. Stewart, 834 F.2d 1248, 1256 (5th Cir. 1988) ("[I]t would be more conceptually elegant to think of these substantive rights as 'privileges or immunities of citizens of the United States'. . . .").

225. *See, e.g.,* RANDY BARNETT, RESTORING THE LOST CONSTITUTION 207–08 (2004). James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process,* 16 CONST. COMMENT. 315 (1999).

226. *Cf.* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must . . . examine the state of things existing when it was framed and adopted . . . to ascertain the old law, the mischief and the remedy") (internal citation omitted). Brief of the Cato Institute and Pacific Legal Foundation as Amici Curiae Supporting Petitioners, McDonald v. City of Chicago (No. 08-1521).

227. Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 49 n.210 (2007) ("The point is, on one hand it would not be a stretch for the Court to hold similarly in future cases, but then to place its reasoning squarely within the privileges or immunities clause instead of the due process and Equal Protection Clauses . . . To so allow the privileges or immunities clause to do the heavy lifting for which it was originally designed would have the added benefit of resolving more than a century of doctrinal contortions.").

228. Petition for Certiorari at 27, McDonald v. City of Chicago No. 08-1521 (2009).

prevailed since the mid-1960s.

1. Total Incorporation

The total incorporation theory is self-defining; the Fourteenth Amendment makes all of the provisions in the Bill of Rights applicable to the states *in toto*.[229] Justice Black described this theory in no uncertain terms: "My view has been and is that the Fourteenth Amendment, as a whole, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause."[230] The Court explicitly rejected the total incorporation argument in *Palko v. Connecticut*.[231] Instead, the *Palko* Court adopted what came to be known as the "absorption" process, whereby certain guarantees were taken from the Bill of Rights and "brought within the Fourteenth Amendment."[232]

2. Fundamental Fairness

The fundamental fairness doctrine, which the Court used until the mid-1960s, reads the Due Process Clause as encompassing rights deemed fundamental to ordered liberty, including both substantive and procedural rights. It is an expansive view inasmuch as it accepts the encompassing protections in the Bill of Rights, as well as unenumerated rights. The fundamental fairness approach was case specific, however, looking only to the "right" allegedly violated. If, under the doctrine, such a right was guaranteed under the Due Process Clause, the ruling would go no further than establishing protections for it commensurate with those for the guarantees listed in the Bill of Rights.

3. Selective Incorporation

The standard test for incorporation through the Due Process Clause, established in *Palko*, asks whether a right is "implicit in the concept of ordered liberty."[233] Until it was overruled by *Benton v. Maryland*,[234] *Palko* "invited an exercise in speculative political philosophy" by suggesting that rights "not of the very essence of a scheme of ordered liberty" are excluded from incorporation.[235] In keeping with this interpretation, excluded rights include those whose abolition would not "violate a 'principle of justice so rooted in the traditions and

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229. *See* Duncan v. Louisiana, 391 U.S. 145, 165 (1968) (Black, J. concurring) ("'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States").

230. *Id*. at 166.

231. 302 U.S. 319, 323 (1937) ("Whatever would be a violation of the original bill of rights if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.").

232. *Id.* at 326.

233. *Palko*, 302 U.S. at 325.

234. 395 U.S. 784 (1969).

235. Nordyke v. King, 563 F.3d 439, 449 (9th Cir. 2009).

conscience of our people as to be ranked as fundamental.'"[236] "We reach a different plane of social and moral values," the *Palko* Court opined, "when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption."[237] The Court added that if "the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."[238]

The *Palko* approach calls for a strange epistemological ranking of rights, one which the Court rejected in *Duncan*—which instead called for a formulation based on "actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country."[239] The determinative issue, according to this formulation, is "whether, given this kind of system, a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."[240] *Duncan* faintly echoed *Palko* in this respect, except that it noted how each American state "uses the jury extensively and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict."[241]

Selective incorporation bears many similarities to the fundamental fairness doctrine in that it uses an ordered liberty standard to determine fundamental rights, including both substantive and procedural rights. Selective incorporation, however, produces a ruling that encompasses the full scope of the guarantee. Thus, when a guarantee is deemed "fundamental," due process in effect "incorporates" it and carries over to the states precisely the same prohibitions as apply to the federal government.[242]

The term "incorporation" found its most illuminating expression in Justice Brennan's dissent in *Cohen v. Hurley*.[243] "Many have had difficulty in seeing what justifies the incorporation into the Fourteenth Amendment of the First and Fourth Amendments," Brennan observed, "which would not similarly justify the incorporation of the other six [amendments in the Bill of Rights]."[244] Notwithstanding which amendments are or are not incorporated, Brennan employed the term "incorporation" in a way that is consistent with its present meaning and suggestive of its currently accepted etymology.[245]

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236. *Palko*, 302 U.S. at 325.
237. *Id.* at 326.
238. *Id.*
239. 391 U.S. at 149 n.14.
240. *Id.*
241. *Id.*
242. *See* Malloy v. Hogan, 378 U.S. 1, 10 (1964).
243. 366 U.S. 117, 154–60 (1961).
244. *Id.* at 157.
245. Brennan more thoroughly articulates his theory in two lectures given twenty-five years apart. The first lecture is available at *The Bill of Rights and the States,* 36 N.Y.U. L. REV. 761 (1961); the second lecture is available at *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

As Professor Jerold Israel explains, "Justice Brennan's opinions were not the first to suggest the selective incorporation doctrine, but they were the first both to articulate it clearly and to advance it as a preferred position."[246] Three years after Brennan's dissent in *Cohen*, Justice Black solidified the significance of "incorporation" by hashing out a broad theory of total incorporation in his dissenting opinion in *Adamson v. California.*[247] Black argued that the doctrine of selective incorporation was preferable to due process applications because adhering to the Constitution's "original purpose" would "extend to all the people of the nation the complete protection of the Bill of Rights."[248] From this moment on, the doctrine of incorporation congealed into a more commonly intelligible label.

This "wholesale" incorporation of a particular guarantee was often challenged by Justice Harlan. Harlan argued that not all phrases of any given right listed in the Bill of Rights are necessarily fundamental.[249] In his view, the process of selective incorporation or absorption was "little more than a diluted form of the [rejected] total incorporation theory.[250] In response to Justice Harlan's argument, Justice Goldberg suggested that anything short of full incorporation for a provision held applicable to the states by the Fourteenth Amendment was "only a watered-down, subjective version of the individual guarantees of Bill of Rights."[251] Although pivoting on the same issue—whether rights are so fundamental that the Due Process Clause guarantees them—selective incorporation and substantive due process involve different *classifications* of rights: the former applies to *enumerated* rights, while the latter considers *unenumerated* rights.

B. Selectively Incorporate the Second Amendment Through the Due Process Clause

In light of these precedents, the argument for incorporating the Second Amendment through the Due Process Clause is straightforward. As Professor Nelson Lund argues, the Second Amendment should be incorporated in light of the speculative *Palko* test, as well as the historical *Duncan* test.[252] The Second Amendment's prefatory clause "contains language whose meaning is virtually identical" to that of *Palko*'s incorporation language: the Supreme Court's reference to those rights that are "of the very essence of a scheme of ordered liberty" is nothing but a slightly reworded version of the Second Amendment's

246. Jerold H. Israel, *Selective Incorporation: Revisited,* 71 GEO. L.J. 253, 338 (1982).
247. 332 U.S. 46, 85–87, 89 (1964).
248. *Id.* at 89.
249. *See* Pointer v. Texas, 380 U.S. 400, 409 (1965).
250. *Id.*
251. *Id.* at 413 (citing Malloy v. Hogan, 378 U.S. at 10).
252. Nelson Lund, Symposium, *District of Columbia v. Heller: Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 195 (2008).

reference to what is "necessary to the security of a free State."[253] Further, if "the *Palko* test requires incorporation of the right of free speech, as *Palko* said it does, the text of the Second Amendment therefore requires that the right to keep and bear arms must be incorporated under the same test."[254]

Under *Duncan*, "The right to arms unquestionably meets this revised test."[255] "The right protected by the Second Amendment," Professor Lund remarks, "meets the Court's test of what is 'fundamental' far more easily than other rights that have already been incorporated, some of which were never even included in the fundamental documents of the English Constitution."[256] Finally, the way in which Justice Scalia described the right to keep and bear arms in *Heller* makes incorporation unavoidable.[257] Thus, adhering to modern doctrine, the Second Amendment could be incorporated through the Due Process Clause.

V. A ROADMAP TO PROTECT THE RIGHT TO KEEP AND BEAR ARMS FOR DEFENSE OF PERSON AND PROPERTY THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE

While incorporating the Second Amendment through the Due Process Clause is consonant with modern jurisprudence, the Privileges or Immunities Clause represents a superior road to protect the right of citizens to bear arms for self-defense against state infringement.[258] This article is not only concerned with *why* this right should be extended to the states through the Privileges or Immunities Clause, but also with *how* to extend this fundamental right. Our framework reflects existing scholarship on the original meaning of the Privileges or Immunities Clause and also empowers the Reconstruction-era understanding of the right to keep and bear arms.

A. Originalism at the Right Time

Originalism demands that the interpreter select the proper temporal location in which to seek the text's original public meaning. For example, interpreting the Civil Rights Act of 1964 based on how the public understands civil rights law in 2010 would be anachronistic and thus not originalist. Interpreting the Second Amendment based on how people understood its text in any year other than 1791—the year of its ratification—would be similarly unhelpful. The Supreme Court faithfully executed this strategy in *Heller*. But what about the

253. *Id*. at 194.
254. *Id.*
255. *Id.* at 195.
256. *Id.*
257. *Id.* at 195–96. ("Finally, *Heller* itself comes very close to characterizing the right to arms as a fundamental right in the *Duncan* sense of the term. In the course of arguing that the right to arms in the English Bill of Rights was "an individual right protecting against both public and private violence," *Heller* emphasizes that this was "one of the fundamental rights of Englishmen.")
258. *But see* Nelson Lund, *The Second Amendment and Original Meaning Jurisprudence*, 8 PREVIEW U.S. SUP. CT. CAS. 392 (2008) ("The outcome [of analyzing the right to keep and bear arms under the Privileges or Immunities Clause] might be the same as that derived by substantive due process analysis . . . .").

right to keep and bear arms as applied to the states? Federal protection against state encroachments on individual liberty began with the ratification of the Fourteenth Amendment. 1868 is thus the proper temporal location for applying a whole host of rights to the states, including the right that had earlier been codified as the Second Amendment as applied against the federal government.[259] Interpreting the right to keep and bear arms as instantiated by the Fourteenth Amendment—based on the original public meaning in 1791—thus yields an inaccurate analysis. The respondents make this mistake in their *McDonald* brief, however, recounting the history of the Second Amendment in 1791 as dispositive of the meaning of the right to keep and bear arms in 1868.[260]

According to a theory advanced by Professor David Bernstein, in several cases the Supreme Court has failed to conduct originalist inquiries at the right time.[261] Bernstein criticizes Justice Scalia's opinions in the *Crawford* line of cases, which interpret the original meaning of the Sixth Amendment's Confrontation Clause as applied to the states. Instead of looking at the original public meaning of the Confrontation Clause in 1868, when the right was extended to the states by virtue of the Fourteenth Amendment, Scalia erroneously and repeatedly focuses on the meaning in 1791. Justice Stevens properly chastises Justice Scalia in *Heller* for considering "postenactment commentary on the Second Amendment . . . and post-Civil War legislative history" to ascertain the meaning of the Second Amendment in 1791. Justice Stevens notes that "the Court's fixation on the last two types of sources is particularly puzzling, since both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining the intent of any provision's drafters."[262] Such an approach is historically flawed, as it considers originalism at the wrong time.

This flawed perspective should have an important impact on *McDonald*. Analyzing the meaning of the right to keep and bear arms in 1791 was proper in *Heller*, because the Second Amendment in that case only applied to the federal government. In *McDonald*, however, the key year is 1868, and the Court should look at evidence from the time of Reconstruction, not the time of the Revolu-

259. Brief of Amicus Curiae Institute for Justice in Support of Petitioners at 7–8, McDonald v. Chicago, No. 08-1521 ("Thus, in seeking to understand the Fourteenth Amendment right to arms, one looks not to the Second Amendment, but to the exact same right noted in *Cruikshank* and *Heller*—as it was under-stood by the Reconstruction-era ratifying public.").

260. Respondents' Brief at 31–37.

261. David Bernstein, *Incorporation, Originalism, and the Confrontation Clause,* July 6, 2009, http://volokh.com/posts/1246932856.shtml http://volokh.com/posts/1246932856.shtml ("When a right protected by the Bill of Rights is applied to the states via the 14th Amendment, it has to be the 1868 understanding of that right, not the 1791 understanding that governs. (This likely has implications for other rights as well, including freedom of expression, *the right to bear arms*, and the right to not have private property taken for public use without just compensation.)") (emphasis added).

262. District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (Stevens, J., dissenting) (citing Sullivan v. Finkelstein, 496 U. S. 617, 631–632 (1990) (Scalia, J., concurring in part)). The irony of Justice Stevens citing a Justice Scalia concurrence to support this proposition is not lost on the authors.

tion. To the extent that the common-law right of self defense existed from time immemorial, through the Revolutionary era, earlier evidence is relevant only to the extent it affected mid-nineteenth-century understandings. To put it another way, *McDonald* asks not so much whether the Second Amendment applies to the states, but whether the right to keep and bear arms—independent of its codification in the Bill of Rights and as understood in 1868—is protected against state infringement by the Fourteenth Amendment.

B. The Right To Keep and Bear Arms in 1868, not in 1791

Professor Akhil Amar notes the "analytic difficulties posed by incorporation" of the right to keep and bear arms.[263] While the "1789 instantiation of the right was intimately connected with federalism concerns about a federally controlled standing army that might seek to overawe state-organized militias," the 1868 version was substantially different, as the drafters "wanted to use precisely such an army to reconstruct recalcitrant southern states."[264] Amar stresses that the right to keep and bear arms was considered at the Founding to be a "political" right, whereas by the end of the Civil War it had become a "civil" right.[265]

Professor Amar contends that the right to keep and bear arms is a "paradigmatic 'privilege' of 'citizens of the United States'" but considers the right in 1791 and the right in 1868 as meaning different things.[266] He writes that "at the Founding, the Second Amendment sounded in federalism . . . [but] the world looked differently to Reconstruction Republicans" after the Civil War."[267] While political rights would include such rights as the franchise, office holding, and jury service, Amar views the Founding-Era right to keep and bear arms as categorically different than the right of free speech and free exercise of religion.[268] He supports his theory on the collective model account of the Second Amendment, which is based on the premise that the right to keep and bear arms is tied to militia service.[269]

In 2008, Justice Scalia's *Heller* opinion forcefully rejected Amar's historical account. After poring through numerous historical sources, Justice Scalia concluded that the right to keep and bear arms is an individual right, firmly rooted in the "pre-existing right of self defense."[270] While Amar considers "the musketed Minutemen [standing] at center stage, pushing Blackstone [and his notion

263. AMAR, *supra* note 22, at 216.

264. *Id.*

265. *Id.*

266. *Id.* at 257. *See also id*. at 266 ("In short, between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman.").

267. *Id.* at 258.

268. *Id.*

269. *Id.* at 259 ("Creation-era arms bearing was collective, exercised in a well-regulated militia, embodying a republican right of the people, collectively understood. Reconstruction gun-toting was individualistic, accentuating not group rights of the citizenry but self-regarding 'privileges' of discrete 'citizens' to individual self-protection.").

270. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

of the common law individual right to bear arms] to the wings,"[271] *Heller* held that the Founding Fathers clearly adopted the individualistic pre-existing right to self-defense.

Amar contends that after Reconstruction, the Republicans "recast arms-bearing as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities."[272] At this time, "everyone—even nonvoting, nonmilitia-serving women—had a right to a gun for self protection."[273] "Once we remember that, strictly speaking, 1860s Republicans sought not to incorporate clauses but to apply (refined) rights against the states, it seems rather naturally textually that Reconstructors . . . invoked the *operative* rights clause of the Second Amendment while utterly ignoring its preambulatory ode to the militia."[274] After Reconstruction, it was now "less of a right of the people, and more of an individualistic privilege of persons."[275]

While the *Heller* Court rejected Amar's vision of the right to keep and bear arms, we find Amar's indivdiualized conception of the right in 1868 instructive in answering the relevant inquiry: what did this right mean when the Fourteenth Amendment aimed to protect all sorts of rights against state tyranny?[276]

Applying Professor Bernstein's theory and our notion of "originalism at the right time" to Professor Amar's historical narrative strengthens the case for extending the right to bear arms for self-defense to the states and resolves any remaining tension between the collective and individual models of that right. While it was perhaps debatable whether the right in 1791 was individual, by 1868 the understanding of the right was clearly individualized. And if history shows that the right to keep and bear arms was in fact considered an individual right during Reconstruction—and moreover that it was considered to be a "privilege or immunity of national citizenship"—then application to the states should be a *fait accompli*.

C. Reconceptualizing the Privileges or Immunities Clause

Rather than adhering to the conventional incorporative route, *McDonald* presents a unique opportunity to evaluate an alternative method of applying rights to the states that is consistent with originalism. In many respects, locating the right in the Privileges or Immunities Clause is a more compelling approach than incorporation through the Due Process Clause.[277] By thinking of the right

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271. AMAR, *supra* note 22, at 162.

272. *Id.* at 258.

273. *Id*. at 259.

274. *Id*. It is worth noting that in *Heller*, the Supreme Court held that the prefatory clause did not impact the operative clause. *Heller*, 128 S. Ct. at 2789 (2008).

275. AMAR, *supra* note 22, at 259.

276. Nordyke v. King, 563 F.3d 439, 486 (9th Cir. 2009) ("We must trace this right, as thus described, through our history from the Founding until the enactment of the Fourteenth Amendment").

277. Brief of Constitutional Accountability Center in Support of Certiorari at 14–15 n.7, McDonald v. Chicago, No. 08-1521 (June 11, 2009) ("One preeminent constitutional scholar has suggested that the individual right to keep and bear arms, unconnected to militia service at issue in both *Heller* and this

in 1868, rather than its 1791 codification, the interpreter is being faithful to the original meaning of the Privileges or Immunities Clause. An originalist jurisprudence on the federal defense of rights against state usurpations would therefore not mechanically "incorporate" a right simply because it was listed in the Bill of Rights. Instead, what it must incorporate is the *understanding* of the right in 1868, not the 1791 amendment itself.

In other words, the Bill of Rights as drafted was a mere enumeration of *some* of the pre-existing liberties "We the People" possessed.[278] In the context of applying a right through the Privileges or Immunities Clause in 1868, the Second Amendment thus serves as little more than a short-hand reference for the natural right of bearing arms for defense of person and property.[279] To paraphrase Justice Harlan's dissent in *Poe v. Ullman*, "For it is the purposes of those guarantees [in the Bill of Rights] and not their text, the reasons for their statement by the Framers and not the statement itself which have led to their present status in the compendious notion of [privileges or immunities] embraced in the Fourteenth Amendment."[280]

This right was the pre-existing right Justice Scalia recognized in *Heller* as having been preserved by the Second Amendment. In the context of applying the right to the states, however, the relevant inquiry is the understanding of 1868, not the understanding in 1791—and "incorporation" is a misleading term. As Professor Amar writes, through the Fourteenth Amendment, the "1860s Republicans sought not to incorporate *clauses* but to apply (refined) *rights* against the states."[281] Liberty, and not clauses, is what the Fourteenth Amendment extends to the states. So what are these refined rights that are synonymous with liberty? They are not the Bill of Rights amendments, but rather the *privileges or immunities* that no state shall abridge.

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case may have more to do with the Ninth and Fourteenth Amendment than the words of the Second Amendment. *See* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 174–77 (2008). Regardless of whether the individual right to bear arms is protected against state infringement by incorporating the Second Amendment through the Fourteenth Amendment, or by looking to an unenumerated right to defend person and property protected by the Ninth and Fourteenth Amendments, the textual home for the guaranteed protection of that substantive right is the Privileges or Immunities Clause.").

278. The Ninth Amendment explains that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

279. *See* Brief of Amicus Curiae Institute for Justice in Support of Petitioners at 7, McDonald v. Chicago, No. 08-1521 ("The same is true of the Fourteenth Amendment right to arms: It is not in any way 'dependent upon' the Second Amendment for its existence. Instead, the Fourteenth Amendment protects from state interference the same pre-existing right to arms that the Second Amendment 'codified' against the federal government.").

280. Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting) (citing Palko v. State of Connecticut, 302 U.S. 319, 324–27 (1937); United States v. Carolene Products Co., 304 U.S. 144, 152–53 (1938)).

281. AMAR, *supra* note 22, at 259. It is worth noting that in *Heller*, the Supreme Court held that the prefatory clause did not impact the operative clause.

1. Reconstruction Radically Transformed the Relationship between the States and the Federal Government

When considering the rights in 1868, it is important to place the ratification process in the proper historical and political context. "In 1866, the prevalence in the South of marauding bands of white thugs, terrorizing black families whom state governments were failing to safeguard via genuinely 'equal protection' of criminal laws, made an individual right to keep a gun in his—or her—home a core civil right deserving federal affirmation."[282] The Fourteenth Amendment was "intended to be a revolutionary enactment, securing to citizens the rights protected by federal law against violations by their own state governments and placing the federal government in a position of primacy in protecting those rights."[283] This transformation "of a Foundation-era political right into a Reconstruction-era civil right was exemplified by a key congressional enactment in 1866, which declared that 'laws . . . concerning *personal* liberty and *personal* security . . . *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens.'"[284]

Following Reconstruction, the fear that animated the Second Amendment—the potential tyranny of the federal government—was no longer primary. Instead, the right to keep and bear arms morphed into a safeguard for freed slaves against state-supported militias cum lynch mobs. This liberty, a privilege or immunity in the parlance of the day, was essential to preserve the individual right of self-defense. The fear that animated this amendment was thus a fear of the states, not a fear of the federal government.

No longer could the states infringe certain privileges or immunities—or liberties, or rights, for they were all synonymous at the time. But what rights could the states no longer abridge? Before the modern incorporation doctrines, several justices issued a series of influential dissents, explaining how the Fourteenth Amendment transformed the relationship between the federal government and the states, and elucidating what these rights were. These jurists understood that the Reconstruction amendments—and especially the Fourteenth Amendment—were a guarantor of liberty against the states, even though "incorporation" was not part of their jurisprudence as either terminology or concept.

2. In 1868, the Fourteenth Amendment Protected Certain Rights Against the States, But Not Because It "Incorporated" Them

"Incorporation" is a term of art not utilized during the ratification debates of the Fourteenth Amendment. Although the term was used in several Court opinions, mostly dissents, following Reconstruction, the term entered the Supreme Court's lexicon over several decades in the early twentieth century. In

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282. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 390–91 (2006).

283. CLINT BOLICK, DAVID'S HAMMER 99 (2007).

284. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 391 (2006) (citing Act of July 16, 1866, 14 Stat. 173, 176) (emphasis added).

1868, when the Fourteenth Amendment was ratified, the term "incorporation" as we know it today would have been seen as a misnomer, a constitutional malapropism, a misunderstanding of how the Fourteenth Amendment protected against state oppressions. Indeed, the concept of "incorporation" was anachronistically inserted into our Constitutional jurisprudence decades after the ratification of the Fourteenth Amendment. To the extent the Reconstruction Congress sought to limit the power of the states to infringe certain rights, the Fourteenth Amendment did not merely copy the 1791 understanding of the first eight amendments in the Bill of Rights. Instead, it sought to protect certain liberties held by the people, the privileges or immunities, from being infringed by the states. In the words of Professor Amar, "Section I [of the Fourteenth Amendment] means not just more than mechanical incorporation but also less."[285]

The earliest reference to "*selective* incorporation" appears vaguely in Justice John Marshall Harlan's dissent in *Hurtado v. California*, nearly two decades after the ratification of the Fourteenth Amendment.[286] According to Professor Jerold Israel, "Justice Harlan's dissent . . . arguably also may be viewed as based on a selective incorporation theory, but his analysis is ambiguous and the opinion might be urging total incorporation."[287] Israel claims that "Justice Harlan's dissent, although focusing on the history and importance of the grand jury, suggested at one point that a right might be established as an essential element of due process solely by virtue of its inclusion in the Bill of Rights."[288] He adds that the "reasoning, of course, would have led to incorporation of all of the Bill of Rights as part of due process."[289]

Harlan's dissent implied an incorporation doctrine without explicitly naming one or agreeing with it. In fact, Harlan employed the term "incorporation" just twice. The first reference has to do with the colonists' incorporation of English common law: "These declarations were susequently [*sic*] emphasized in the most imposing manner, when the doctrines of the common law respecting the protection of the people in their lives, liberties, and property were *incorporated* into the earlier constitutions of the original states."[290]

The manner in which Harlan employed "incorporation" here might contextualize his use of the term in the second instance, when it follows a list of various declarations in the constitutions of the young states.[291] Although Harlan gener-

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285. AMAR, *supra* note 22, at 179. *Cf.* Nordyke v. King, 563 F.3d 439, 495 n. 16 (9th Cir. 2009) ("Substantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights.").

286. Hurtado v. People of State of California*,* 110 U.S. 516, 540 (1884) (emphasis added).

287. Jerold H. Israel, *Selective Incorporation: Revisited,* 71 GEO. L.J. 253, 338 n.1 (1982).

288. *Id.* at n.188.

289. *Id*.

290. Hurtado v. People of State of California*,* 110 U.S. 516, 540 (1884) (emphasis added).

291. *Id.* at 540–41. ("Massachusetts in its constitution of 1780, and New Hampshire in 1784, declared in the same language that 'no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate but by the judgment of his peers or the law of the land;' Maryland and North

ally spoke of incorporation and anticipated its current conception,[292] he does not use the term to refer to an application of the Bill of Rights to individual states by way of the Fourteenth Amendment.

Israel provides another account of the term "*total* incorporation."[293] It bears noting that Justice Harlan, who may have advanced the doctrine of incorporation some eight years earlier in *Hurtado*, agrees with Justice Field in *O'Neil v. Vermont*.[294] In that case, Harlan spelled out the basic concept of incorporation—again without actually using the term. Earlier in the decision, however, Field

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Carolina in 1776, and South Carolina in 1778, that 'no freeman of this state be taken or imprisoned, or disseized of his freehold, liberties, or privileges, outlawed, exiled, or in any manner destroyed or deprived of his life, liberty, or property but by the judgment of his peers or the law of the land;' Virginia, in 1776, that 'no man be deprived of his liberty except by the law of the land or the judgment of his peers;' and Delaware, in 1792, that no person 'shall be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land.' In the ordinance of 1789 for the government of the Northwestern territory, it was made one of the articles of compact between the original states and the people and states to be formed out of that territory—''to remain forever unalterable unless by common consent'—that 'no man shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land.' These fundamental doctrines were subsequently *incorporated* into the constitution of the United States") "(emphasis added).

292. He says,

> "Due process of law," within the meaning of the national constitution, does not import one thing with reference to the powers of the states and another with reference to the powers of the general government. If particular proceedings, conducted under the authority of the general government, and involving life, are prohibited because not constituting that due process of law required by the fifth amendment of the constitution of the United States, similar proceedings, conducted under the authority of a state, must be deemed illegal, as not being due process of law within the meaning of the fourteenth amendment. The words 'due process of law,' in the latter amendment, must receive the same interpretation they had at the common law from which they were derived, and which was given to them at the formation of the general government. What was that interpretation? In seeking that meaning we are, fortunately, not left without authoritative directions as to the source, and the only source, from which the necessary information is to be obtained.

Id. at 541–42.

293. Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L. J. 253, 257–58 (1982) ("Total incorporation was first suggested in Justice Bradley's dissent in the *Slaughter-House Cases*, the first fourteenth amendment case to come before the Court. It was not advanced in a clear-cut fashion, however, until Justice Field did so in 1892 in his dissent in *O'Neil v. Vermont*. Although Justice Douglas once counted ten justices who supported the total incorporation position, others view the correct number as six or seven. The important count, in any event, is the number of Justices sitting at one time who supported the position, and that count never rose above four. Thus, total incorporation was always a minority position. It was, however, an exceptionally influential minority position and significantly contributed to the Court's eventual adoption of the selective incorporation position.").

294. O'Neil v. State of Vermont, 144 U.S. 323, 370 (1892) (Harland, J., concurring) ("I fully concur with Mr. Justice Field that, since the adoption of the fourteenth amendment, no one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the constitution of the United States, can be denied or abridged by a state in respect to any person within its jurisdiction. These rights are principally enumerated in the earlier amendments of the constitution. They were deemed so vital to the safety and security of the people that the absence from the constitution, adopted by the convention of 1787, of express guaranties of them, came very near defeating the acceptance of that instrument by the requisite number of states. The constitution was ratified in the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the government of the Union, articles of amendment would be submitted to the people recognizing those essential rights of

uses the term twice to refer to property transported by commerce that gets "incorporated" into the mass property of a state or nation.[295] The *O'Neil* opinion, backed by Harlan's concurrence as well as Harlan's *Hurtado* dissent, lay the foundation for incorporation as currently understood. Still, these early notions of "incorporation" do not mirror modern doctrine. We thus contend, from an originalist perspective, that "incorporation" as we know it today was not what constitutional drafters, judges, and lawyers had in mind in 1868. A substantially different means to protect citizens from state action prevailed.[296]

3. Ratification History Reveals That "Privileges or Immunities" Are Not Limited to the First Eight Amendments

While the Privileges or Immunities Clause countenances the protection of provisions in the Bill of Rights, it also prevents the states from infringing certain other liberties.[297] Recall Professor Amar's admonition that the Fourteenth Amendment "means not just more than mechanical incorporation but also less."[298] Specifically, "the Fourteenth Amendment aimed to incorporate various rights and freedoms in a subtle way that meant both *more* and *less* than the

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life, liberty, and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country.").

295. *See id.* at 353, 355.

296. According to Professor Magliocca, *Slaughter-House* did not foreclose the possibility that the Fourteenth Amendment extended protections of protections in the Bill of Rights to the states. Rather, this jurisprudential precedent was not set until 1902 in the case of Maxwell v. Dow, 110 U.S. 516 (1884). In other words, *Maxwell* was the first case to interpret *Slaughter-House* as expressly rejecting the concept that Justices Harlan and Field discussed in *Hurtado* and *O'Neill*, now known as incorporation. Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth-Century?,* 94 MINN. L REV 102, 112 (2009). Under this theory, Harlan's opinion can be read to suggest that rights could be bifurcated between rights of process, and those that are privileges or immunities of citizenship. Rights of process, including the right to trial by jury, the right to grand jury indictment, or the right to confrontation, were rights a person would need when engaging with the government. By contrast, the privileges or immunities of citizenship, including the right of free speech and exercise, the right to keep and bear arms, and the right to use and dispose of property, were rights a person would need to exist in civil society.

297. AMAR, *supra* note 22, at 178 ("Section 1 [of the Fourteenth Amendment] is not limited to privileges or immunities specified in the pre-1866 Constitution. Other common-law rights were also included, though there remain questions about the precise kind of protection intended."). Liu, *supra* note 147, at 126–27 ("The grant of citizenship was meant to secure not only legal status but also substantive rights; thus the Fourteenth Amendment refers to the 'privileges or immunities of citizens of the United States.' Although the framers did not say what those rights were, they understood citizenship to mean, at a minimum, equal standing in the national political community. The citizenship guarantee thus encompasses substantive rights essential to realizing this equality.").

298. AMAR, *supra* note 22, at 179. *See also id.* at 175 ("Clearly the privileges-or-immunities clause encompasses more than the federal Bill as such."); Brief of Constitutional Accountability Center in Support of Certiorari at 12, McDonald v. Chicago, No. 08-1521 (June 11, 2009) ("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."); Brief of Constitutional Accountability Center in Support of Certiorari, McDonald v. Chicago, No. 08-1521 (June 11, 2009) (citing Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990)) ("In addition to providing the textual basis for protection of the liberties in the Bill of Rights, the Clause is 'the natural textual home for . . . unenumerated fundamental rights.'")

original understanding of the Bill of Rights."[299] Professor Randy Barnett similarly notes that the Privileges or Immunities Clause "mimics the Ninth Amendment, which provides that there are rights protected by the Constitution not spelled out in the text."[300] Amar further contends that "English common law offers a crude but helpful test to sort out which aspects of the pre-1866 Constitution were indeed privileges of individuals (for example, habeas) and which were structural provisions unique to the federal government and inappropriate for imposition on states (for example, capitation and bicameralism)."[301]

When discussing Justice Bradley's enumerations of "privileges or immunities of citizenship" in *Slaughter-House*, Professor Amar recognizes an implicit filter, "influenced by common-law categories of personal liberty and security."[302] As Amar wrote, "These English documents were the *fountainhead* of the common law and the acknowledged forbears of many particular rights that later appeared in the federal Bill, sometimes in identical language."[303] In these common-law sources, "the words privileges or immunities used to describe various entitlements embodied in the landmark English charters of liberty of Magna Carta, the Petition of Rights, the Habeas Corpus Act, the English Bill of Rights of 1689, and the Act of Settlement of 1701."[304] Using privileges or immunities interchangeably with rights and liberties was common in the nineteenth century.[305] This common-law filter includes personal rights within the privileges or immunities of citizenship, but excludes rights pertaining to federalism. Thus, the "personal privileges and immunities of citizens" protected against state action "seem much more closely connected with class common-law rights of the

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299. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 390–91 (2006).

300. Brief of Constitutional Accountability Center in Support of Certiorari at 13, McDonald v. Chicago, No. 08-1521 (June 11, 2009). S*ee also* Cong. Globe, 39th Congress, 1st Sess. 1072 (1866) (Sen. Nye) ("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 the press,' 'freedom in the exercise of religion,' 'security of person'; and then else 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.").

301. AMAR, *supra* note 22, at 225.

302. *Id.* at 227.

303. *Id.* at 169.

304. *Id. See* WILLIAM BLACKSTONE, COMMENTARIES 127–45, 164–65 (discussing "privileges of speech" and "freedom of speech" interchangeably and referring to "privilege" against "seizures").

305. In *Dred Scott*, an opinion of the highest level of ignominy, the Supreme Court referred to amendments in Bill of Rights as "rights and privileges of the citizen," and included "liberty of speech," the right "to hold public meetings upon political affairs," and the freedom "to keep and carry arms" as privileges or immunities of citizens." Dred Scott v. Sanford, 60 U.S. 393, 449–50, 416–17 (1857). *See also* Strauder v. West Virginia, 100 U.S. 303, 307–08, 310 (1880) (equating "rights" and "immunities" in Fourteenth Amendment analysis); *Ex Parte* Virginia, 100 U.S. 337, 345 (1880) (same); Boyd v. United States, 116 U.S. 616, 618 (1886) (discussing "privileges and immunities of the citizen" such as Fourth and Fifth Amendment rights); Downes v. Bidwell, 182 U.S. 244, 282 (1901) (referring to "immunities from unreasonable searches and seizures, as well as cruel and unusual punishments"); AMAR, *supra* note 22, at 169.

individual to liberty and property."[306]

According to Amar's framework, the key distinction is between the right of the individual and limitations on the powers of the state. Individual liberties, as recognized by the common-law tradition, were privileges or immunities, while the structural protections of liberty—not giving the government the power to violate rights in the first place—were not privileges or immunities. This proposition is supported by Justice Field's dissent in *O'Neil*, joined by Justices Harlan and Brewer.[307] Justice Field, who also dissented in *Slaughter-House*, distinguished between aspects of the Bill of Rights that were mere "limitations on power" and those rights that "declare or recognize the rights of persons."[308] Field adopted the views of John Randolph Tucker, who argued that "in so far as [the first Ten Amendments] secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as citizens of the United States, and [those privileges] cannot now be abridged by a State under the Fourteenth Amendment."[309]

Although "'privileges or immunities' of citizens paradigmatically included the rights and freedoms in the federal Bill, these were not the *only* fundamental rights that henceforth no state could abridge."[310] Among these additional rights, Professor Amar mentions that the "civil-rights pantheon included fundamental freedoms affirmed by canonical legal texts." What are these canonical texts? Amar includes the Habeas Corpus Act, the Declaration of Independence, English Bill of Rights, and landmark civil-rights legislation like the Civil Rights Act of 1866.

To the framers of the Fourteenth Amendment, the meaning of privileges or immunities was clear: they included not only the Bill of Rights but also the rights protected under common law, such as those set out in the Declaration of Independence. This included the right "to work in an honest calling and contribute by your toil in some sort to yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[311] And one of the most fundamental rights found in these texts is the right to self-defense.[312]

The "Privileges or Immunities Clause [is] the textual hook in the Fourteenth Amendment for protection of unenumerated fundamental rights, as well [as] those substantive fundamental rights articulated in the Bill of Rights, including

306. AMAR, *supra* note 22, at 227.

307. O'Neil v. Vermont, 144 U.S. 323, 361 (1892) (Field, J., dissenting).

308. *Id*.

309. *Id*.

310. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 389–90 (2006).

311. *Id*. (quoting Representative John Bingham).

312. Brief of Constitutional Accountability Center in Support of Certiorari at 13, McDonald v. Chicago, No. 08-1521 (June 11, 2009) ("Amici submit this brief to bring to the foreground of this case a remarkably scholarly consensus and well-documented history that shows that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights, including the individual right to keep and bear arms at issue in this case."); *see also* Brief of Constitutional Accountability Center in Support of Certiorari at 3, McDonald v. Chicago, No. 08-1521 (June 11, 2009) ("Reviving the Privileges or Immunities Clause and limiting *Slaughter-House* and its progeny would bring this Court's jurisprudence in line with constitutional text and a *near-unanimous scholarly* consensus on the history and meaning of the Clause.").

the Second Amendment right to keep and bear arms."[313] "The debates in Congress confirm what the text of the Fourteenth Amendment provides: the Privileges or Immunities Clause secures substantive fundamental constitutional rights."[314] Senator Jacob Howard articulated that the clause "encompass[ed] 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 protect 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."[315] The speakers during the drafting and ratification process agreed: "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."[316]

In light of Professor Amar's conception of the Privileges or Immunities Clause as applying "both more and less" of the freedoms in the Bill of Rights to the states, it is misleading to view the Privileges or Immunities Clause as a mechanical device that *injects* federal constitutional provisions into state law. Instead, the Privileges or Immunities Clause places a limitation on what liberties the states could infringe.[317] Simply put, the Clause may indirectly "incorporate" rights, but its actual, uncontroverted purpose is to prevent states from abridging privileges or immunities. While these privileges or immunities include most of the rights in the first eight amendments, there are certain rights beyond the printed page of the Constitution—those deeply rooted in the Anglo-American tradition—that also deserve protection.

4. An Originalist Vision of the Privileges or Immunities Clause as a Limitation on State Abridgement of Liberty

The Privileges or Immunities Clause is not a magic box. An amendment, applying only to the federal government, does not enter through one side and then exit through the other side, applying to the states in the same fashion. Incorporation as we know it today would have seemed a quixotic and clumsy

313. Brief of Constitutional Accountability Center in Support of Certiorari at 15–16, McDonald v. Chicago, No. 08-1521 (June 11, 2009) ("Senator Howard also made clear that these substantive 'privileges or immunities' included those liberties protected by the Bill of Rights.") (citing Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1562–63 (2007); Brief of Constitutional Accountability Center in Support of Certiorari at 15, McDonald v. Chicago, No. 08-1521 (June 11, 2009) ("Accordingly, the most influential and knowledgeable members of the Reconstruction Congress went on the record with their express belief that the Privileges or Immunities Clause of the Fourteenth Amendment protected against state infringement [of] substantive, fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights.").

314. Brief of Constitutional Accountability Center in Support of Certiorari at 15, McDonald v. Chicago, No. 08-1521 (June 11, 2009).

315. *Id*. at 16 (quoting Cong. Globe 39th Congr. 1st Sess. 2765 (1866)).

316. *Id*. at 19.

317. RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004).

concept to the framers of the Fourteenth Amendment. In 1868, the Privileges or Immunities Clause meant what it said: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The plain language mentions nothing about incorporation or anything else to do with the Bill of Rights. What it *does* mention, however, is vital: States can no longer infringe certain rights.[318]

The Privileges or Immunities Clause on its face prevents the states from making laws abridging the privileges or immunities of citizens of the United States. The question of how these rights are to be protected from infringement by the federal government remains unresolved for another day.[319] The term privileges or immunities, however, was synonymous with certain liberties, both more and less than those included in the Bill of Rights.

Rather than viewing the Privileges or Immunities Clause as an incorporator, we should thus see it as a check on the power of the states.[320] That was Reconstruction's primary goal—to prevent states from infringing on individual liberties. According to

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318. Richard Epstein, *Further Thoughts On The Privileges Or Immunities Clause Of The Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 1096, 1097 (2005) ("The Privileges or Immunities Clause of the Fourteenth Amendment offers deep protection against state action to a narrow class of individuals, namely those who enjoyed the status of citizenship, as defined in the first sentence of Section 1.")

319. What remains to be seen is how revisiting *Slaughter-House* would place any additional limitations on the federal government's ability to abridge certain rights, largely because the Fifth Amendment does not contain a privileges or immunities clause. A similar dilemma lies in the Ninth Amendment, as the clause textually only applies to the states. In *Bolling v. Sharpe*, the Supreme Court held that Equal Protection Clause prohibited the District of Columbia, a federal enclave, from segregating schools, even though the Fifth Amendment does not contain an Equal Protection Clause. The court reasoned that the Due Process Clause implies a right of equal protection. Similarly, although the contracts clause only applies to the states, the Court has held that a weakened form of the contracts clause is implied through the Due Process Clause of the Fifth Amendment against the Federal government. *See* Pension Benefit Guaranty Corp. v. R.A. Gray & Co. 467 U.S. 717, 733 (1984); Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 14–20 (1976). Therefore, it is not beyond the realm of possibility, though totally antagonistic to the original meaning of the Privileges or Immunities and Due Process Clauses, to protect these common law rights from abridgment by the federal government.

320. *See* Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 12–35 (2007) ("Interpreting the privileges or immunities clause according to its originally-intended expansive terms would force a radical change in American conceptions of the proper role of government vis-à-vis the individual. The American people and the federal, state, and local governments that are supposed to serve them have long-since forgotten that the core Enlightenment-inspired freedom-principles embraced in the founding documents lay in protecting the people from overbearing government. Simply put, if the privileges or immunities clause were given its intended effect, no longer would government be allowed to control private individual behavior causing no harm to others. Courts would necessarily be forced to curtail government power by reining in both the expansive 'police' powers currently exercised by States and 'necessary and proper' powers exercised by the feds, to the extent either one of them abridges citizens' privileges or immunities, expansively defined. In short, a '*presumption of liberty*' would be reinstated. If this sounds crazy, it is so only because we have become so accustomed over time to a status quo of governmental paternalism that we are anesthetized to other possibilities. In fact, the founding documents promise a nation where all citizens are truly free to live in a way as closely approximating a state of nature (that is, free of government interference) as they might desire, understanding all the while the vital, though, subservient, role of a limited government. In sum, the mold is cast, the stage is set, and the planets are aligned. It is up to the Supreme Court now to take the next step to re-invigorate the privileges and immunities clause to its intended civil libertarian glory.")

Professor Amar, "1860s Republicans sought not to incorporate clauses but to apply (refined) rights against the states."[321] Before the Civil War, states could operate virtually unfettered within their sovereign domain. Not so after Reconstruction.

And so we turn to the question presented in *McDonald*: "Whether the Second Amendment is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home." This question is inartfully drafted. The Second Amendment simply cannot be incorporated into the Privileges or Immunities Clause. This approach is akin to trying to "incorporate" a VHS videocassette into a DVD Player. The two recordings have similarities, and accomplish similar ends, but work differently.

That is, prohibiting the states from infringing the privileges or immunities of citizens is conceptually different from the incorporation of rights as against state infringement through the Due Process Clause. If a right listed in the Bill of Rights is a privilege or immunity, the state cannot abridge it. But this process does not "incorporate" the amendment into the clause. Instead, the personal right, the liberty derived from the common-law tradition—and not the amendment as ratified in 1791—is protected against infringement. The Privileges or Immunities Clause is about individual liberty, not a jot-for-jot incorporation as Justice Black's rejected jurisprudence would have had it.

The Second Amendment, like the VHS cassette, represents an older expression and codification of the right to keep and bear arms, reflecting a different time and a different concern. In contrast, the right of self-defense as understood during Reconstruction, like the DVD, is a more recent articulation of the liberty to defend one's person and property.[322] What should be applied to the states is the common-law notion of the right of self defense and the right to bear arms as it existed in 1868. This vision of the Privileges or Immunities Clause reflects the original understanding of the Fourteenth Amendment, and is faithful to the liberties the 39th Congress sought to protect.

The First Amendment provides a helpful illustration of this dynamic. Professor Amar notes that the Establishment Clause resists incorporation because it is

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321. AMAR, *supra* note 22, at 259. It is worth noting that in *Heller*, the Supreme Court held that the prefatory clause did not impact the operative clause.

322. *See* Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) ("We also note that the target of the right to keep and bear arms shifted in the period leading up to the Civil War. While the generation of 1789 envisioned the right as a component of local resistance to centralized tyranny, whether British or federal, the generation of 1868 envisioned the right as safeguard to protect individuals from oppressive or indifferent local governments. *See* AMAR, *supra* note 22, at 257–66. But though the source of the threat may have migrated, the antidote remained the same: the individual right to keep and bear arms, a recourse for "when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 WILLIAM BLACKSTONE, COMMENTARIES at *144.").

a federalism provision, and not an individual liberty.[323] Justice Thomas made a similar point in *Elk Grove v. Newdow*.[324] In contrast, the Free Exercise Clause is an individual liberty in the common-law tradition. Instead of conceptualizing the Due Process Clause as somehow incorporating some aspects of the First Amendment but not others, it makes more sense to consider the Privilege or Immunities Clause as protecting only individual rights. Thus, the individual right to free exercise would be incorporated, while the prohibition on the government's establishing a religion, a federalism provision and not an individual liberty, would resist incorporation. In *Elk Grove*, Justice Thomas "welcome[d] the opportunity to consider more fully the difficult questions whether and how the Establishment Clause applies against the States."[325] By considering the Establishment Clause through the lens of the Privileges or Immunities Clause, perhaps the Court can reconcile the disjointed jurisprudence the incorporation doctrine has created from the First Amendment's religion clauses.

D. Washington v. Glucksberg*: A Framework for Recognizing Liberties Protected by the Privileges or Immunities Clause*

Adhering to a reconceptualized notion of the Privileges or Immunities Clause, our inquiry continues, to resolve *how* liberties under this clause should be recognized. How do we determine whether a substantive right should be protected? To accomplish this end, we start with the closest analogue in modern constitutional jurisprudence: the doctrine of selective incorporation.

1. *Washington v. Glucksberg* Serves as a Rule of Exclusion and Inclusion to Recognize Privileges and Immunities

Rather than adopting Justice Black's total incorporation approach, or Justice Brennan's selective incorporation approach, Professor Amar advances an alternative test for incorporation. This test relies not on the Due Process Clause but on the Privileges or Immunities Clause. "We must ask whether it is a personal privilege—that is, a private right—of individual citizens, rather than a right of states or the public at large."[326] This method "combines the respective strength of Black's and Brennan's model of incorporation . . . and preserve[s] the textual and historical support for Black's insistence that all the Bill's privileges or immunities are indeed incorporated while accommodating Brennan's intuition that perhaps not every provision of the first eight amendments sensibly incorpo-

323. AMAR, *supra* note 22, at 227 ("This implicit filter might also explain the omission of the establishment clause, which, unlike its First Amendment companions, does not so obviously resonate with common-law rights of personal property, personal security, and bodily liberty.").

324. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) ("Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.").

325. *Id.* at 51 (Thomas, J., concurring).

326. AMAR, *supra* note 22, at 221.

rates."[327]

The test Amar proposes is "whether a given provision of the Constitution or the Bill really does declare a privilege or immunity of citizens rather than, for example, a right of states."[328] Specifically, are we treating an individual right, such as the right of free exercise or the right to keep and bear arms, or a limitation on government powers, such as the Establishment Clause? Though consonant with the original meaning of the Privileges or Immunities Clause, this approach leaves much to be desired. While it is useful as a rule of exclusion—the rights of states can easily be picked out—it is difficult to use to determine what individual rights beyond those explicitly stated in the Bill of Rights should be included.

Modern due process jurisprudence offers two possible rules of inclusion to recognize rights as applied to the states. The first is the test from *Duncan v. Louisiana*, which is used to determine whether to selectively incorporate a right enumerated in the Bill of Rights. The second is the test from *Washington v. Glucksberg*, which is used to determine whether an unenumerated right should be protected against state infringement.[329] If Amar is correct, and the Privileges or Immunities Clause protects "not just more than mechanical incorporation but also less," the *Duncan* test would be insufficient because it is limited to those rights listed in the Bill of Rights. If the Privileges or Immunities Clause includes certain *unenumerated* rights, the preferred approach would be that of *Glucksberg*, which recognizes both kinds of rights.

Glucksberg was a declaratory judgment action seeking to overturn Washington's ban on physician-assisted suicide.[330] The Supreme Court unanimously ruled that the right to physician-assisted suicide is not protected by the Due Process Clause, and that the state ban is grounded in appropriate government interests.[331] The Court devised a two-part test for determining whether a liberty interest is constitutionally protected. First, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[332] Second, the Court requires in "substantive due process cases a 'careful description' of the asserted fundamental liberty interest."[333] Applying the *Glucksberg* test will actualize the full protections of the Privileges or Immunities Clause. This framework provides for

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327. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1265 (1992).

328. AMAR, *supra* note 22, at 180.

329. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) ("Substantive due process addresses unenumerated rights; selective incorporation, by contrast, addresses enumerated rights.").

330. Wash. v. Glucksberg, 521 U.S. 702, 705–08 (1997).

331. *Id.* at 732–35.

332. *Id*. (citation omitted); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) ("Implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed.").

333. *Glucksberg*, 521 U.S. at 705–08 (citation omitted).

the inclusion of enumerated and unenumerated rights that are privileges or immunities, as well as the exclusion of federalism rights that are not privileges or immunities.

In *Saenz*, Justice Thomas chastised the majority for "fail[ing] to address [the Privileges or Immunities Clause's] historical underpinnings or its place in our constitutional jurisprudence."[334] "Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant."[335] The *Glucksberg* framework sets out to do just that; focus on the "historical underpinnings" of the Clause and "understand what the framers of the Fourteenth Amendment thought it meant." The *Glucksberg* test considers both of these factors, and yields an interpretation of the privileges and immunities protected by the Privileges or Immunities Clause that coincides with the original meaning of the Fourteenth Amendment.

2. The Benefits of Adopting *Glucksberg*

Fears of expanding the scope of unenumerated substantive rights are well known. Justice Thomas recognized this 20 years ago, writing, "The expression of unenumerated rights today makes conservatives nervous, while at the same time gladdening the hearts of liberals."[336] As Professor Ely noted, "The Court hasn't moved an inch on privileges or immunities. The reason has to be that the invitation extended by the language of the clause is so frightening."[337] Justice Black shunned Justice Washington's ode to natural law and unenumerated rights in *Corfield*, as these words "conjured up the specter of judges invalidating statutes by invoking nontextually specified fundamental rights and by giving constitutional status to common-law rights like freedom of contract." Similarly, Ely wrote that Black's limitation to incorporation "must . . . depend on his discomfort with the discretion the clause on its face gave judges."[338] Ely contends that Black's position "cannot rely on the text or its intended purpose." Judge Robert Bork famously remarked about using the Ninth Amendment to identify unenumerated rights that "if anybody shows me historical evidence about what they meant, I would be delighted to do it. I just do not know."[339]

The Rehnquist Court, seeming to follow Judge Bork's views—even if their expositor was denied the opportunity to join that Court—approached the task of defining unenumerated rights with utmost caution. It began by looking to

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334. Saenz v. Roe, 526 U.S. 489 (1999) (Thomas, J., dissenting).

335. *Id.*

336. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989). See also RANDY BARNETT, RESTORING THE LOST CONSTITUTION 255 (2004) ("But many also fear that opening the door to protecting unenumerated rights will empower courts to protect spurious along with valid rights claims. Rather than risk this, they would prefer judges to protect no unenumerated rights at all.").

337. JOHN HART ELY, DEMOCRACY AND DISTRUST 23 (1980).

338. *Id.* at 28.

339. Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. On the Judiciary (1989) (testimony of Robert Bork).

historical evidence.[340] *Washington v. Glucksberg* represents the seminal case in which the Court reached a delicate balance on the issue in the context of substantive due process. In *Glucksberg*, Chief Justice Rehnquist observed that we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open ended."[341] Conservatives prefer rights being recognized in the "the arena of public debate and legislative action," and when the Court recognizes a new liberty interest outside these democratic spheres, it treads lightly and "exercises the utmost care whenever we are asked to break new ground in this field."[342]

The *Glucksberg* test yields several benefits that are absent from the nebulous *Duncan, Palko*, and related substantive due process selective-incorporation tests. First, this rubric "tends to rein in the subjective elements that are necessarily present in due process judicial review."[343] The *Glucksberg* majority contrasted its "restrained methodology" with Justice Souter's more open-ended test, derived from Justice Harlan's dissenting opinion in *Poe v. Ullman*. Justice Souter's test would inquire "whether [Washington's] statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment."[344] The Court rejected this broad notion—which mirrored *Duncan* and *Palko*—insisting that substantive unenumerated rights be "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[345] Rather than broad invocations of "ordered liberty," this test requires a referent to a specific historical period and an inquiry into the conception of rights during that time. Thus, the Supreme Court recognizes the concept of "originalism at the right time."[346]

Second, "by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for

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340. *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION 255 (2004) ("One way to identify unenumerated rights [protected by the Ninth Amendment] that merit legal protection is suggested by Robert Bork's call for historical evidence. Originalists no more need to discern the content of actual or real rights then they need to discern activity that is 'really' commerce [as they did in *Lopez and Morrison*]. Instead, they can seek either the original intent of the framers or the original meaning of the text.").

341. Wash. v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

342. *Id*. *See also* Troxel v. Granville, 530 U.S. 57 (2000) (Scalia, J., dissenting) ("Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.").

343. *Glucksberg*, 521 U.S. at 722.

344. *Id.* at 752 (Souter, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

345. *Id.* at 705.

346. *See supra* Part V.A.

complex balancing of competing interests in every case."[347] This approach forecloses the multi-factor balancing tests all too common in constitutional jurisprudence. Rather than arbitrarily weighing various competing interests and allowing vast amounts of subjectivity to permeate the decision-making process, the *Glucksberg* test limits the Court's consideration to only those rights with ties to our nation's history.

Third, though not stated but implicit in *Glucksberg* and the jurisprudence of the Rehnquist (and now Roberts) Court generally is the commitment to originalism.[348] In order to understand concepts such as "due process," "equal protection," or "privileges or immunities," originalism instructs the court to consider the original public meaning of these terms. How would these concepts have been understood in 1868 when the Fourteenth Amendment was ratified?[349] *Glucksberg* is well suited to an original public meaning inquiry.

3. The Scope of the Privileges or Immunities Clause is Bounded and Finite

In discussing the relationship between the Framers' reference to Justice Washington's exegesis from *Corfield* and the doctrine of unenumerated rights, Professor Ely claims that Washington "purported to place limits but ended up with a virtually infinite reference."[350] Similarly, Professor Amar notes "*Corfield*'s nonexhaustive list of fundamental rights *radiated* well beyond those enumerated in the federal Bill; and this open-ended list received considerable attention in the Thirty-ninth Congress."[351] While Washington's ode to liberty can surely be seen as infinite, we would argue that it is infinite within a certain context—the context of nineteenth-century natural law. Within this framework, both *Corfield* and the Privileges or Immunities Clause can stand to support a host of natural rights, derivable through the common law, to protect life, property, and security.[352] Thus, the corpus of rights protected by the Privileges

347. *Glucksberg*, 521 U.S. at 705.

348. *See* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (all nine justices signed onto originalist opinions).

349. It is important to note that the relevant inquiry is not how the right to keep and bear arms was understood in 1789, as this was the inquiry in *D.C. v. Heller*. Rather, the inquiry is how this right was understood in 1868. The Supreme Court is not always so careful. See *supra* discussion of *Melendez-Diaz* and Professor Bernstein's theory.

350. JOHN ELY, DEMOCRACY AND DISTRUST 28 (1980).

351. AMAR, *supra* note 22, at 177. One can't help but notice the allusion to "radiations" "of emanations and penumbras, the canonical formulation of substantive due process rights from Griswold v. Connecticut, 381 U.S. 479 (1965).

352. The Privileges or Immunities Clause, like the Ninth Amendment, "refers to a broad range of rights believed naturally inherent in human beings and secured by any free government." Brief of Petitioners, McDonald v. Chicago, No. 08-1251. The difference is that the Ninth Amendment protects those unenumerated, natural rights as against the federal government, while the Fourteenth Amendment protects them as against states (and also that the Ninth does not protect the enumerated rights codified in the first eight amendments, while the Fourteenth does, at least with respect to those considered to be "due process of law" or "privileges or immunities"). That is, just as the Framers ratified the Ninth Amendment to ensure that the first eight amendments would not be seen as an exclusive list—recall the famous debate on the merits of the Bill of Rights—the Fourteenth Amendment framers used the term

or Immunities Clause, while vast, is not infinite. "Properly understood, the Privileges or Immunities Clause is neither a bottomless font of unenumerated rights nor an incomprehensible inkblot. Instead, it had a specific and well-documented purpose—one that remains equally relevant today."[353]

The test we propose, modeled on *Glucksberg*, is a rule of both inclusion and exclusion. By defining the outer bounds of protected liberties, this test ensures that rights compatible with our Anglo-American notion of freedom are firmly ensconced in the Privileges or Immunities Clause. At the same time, it prevents rights outside this tradition from being elevated to the constitutional order. By setting these outer bounds, our methodology will keep Pandora's Box sealed.

4. *Glucksberg* and *Carolene Products* Footnote Four

Carolene Products' fourth footnote is the most famous footnote in the history of the Supreme Court.[354] While Footnote Four has been criticized by Justice Frankfurter[355] and Justice Rehnquist,[356] today's conventional wisdom dictates that it has been accepted, in its entirety, as valid law. But have the Supreme Court's cases confirmed this conventional wisdom?

Footnote Four made two primary contributions to constitutional law. First, it provided for more exacting scrutiny of laws that touch "discrete and insular

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"privileges or immunities" to protect unenumerated rights. One does not therefore need to "incorporate" the Ninth Amendment itself—via the Privileges or Immunities Clause or otherwise—to protect unenumerated rights.

353. Brief of Amicus Curiae Institute for Justice in Support of Petitioners at 19, McDonald v. Chicago, No. 08-1521 ("The Privileges or Immunities Clause is neither a meaningless nullity nor a freewheeling source of rights pulled from thin air.") *see also* Christopher R. Green, *McDonald v. Chicago, the Meaning-Application Distinction, and "Of" in the Privileges or Immunities Clause*, 11 ENGAGE 1 (forthcoming Feb. 2010), *available at* http://ssrn.com/abstract=1523920 (noting that the understanding of the Fourteenth Amendment we advocate in this Article would "freeze the privileges of citizens of the United States in 1868 amber").

354. Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277 (1995).

355. Kovacs v. Cooper, 336 U.S. 77, 90–91 (1949) (Frankfurter, J., concurring) ("A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine; incidentally, it did not have the concurrence of a majority of the Court. It merely rephrased and expanded what was said in *Herndon v. Lowry*, *supra*, and elsewhere. It certainly did not assert a presumption of invalidity against all legislation touching matters related to liberties protected by the Bill of Rights and the Fourteenth Amendment. It merely stirred inquiry whether as to such matters there may be 'narrower scope for operation of the presumption of constitutionality' and legislation regarding them is therefore 'to be subjected to more exacting judicial scrutiny.'"). *But see* Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 298 (1995) ("First, of all, the *Carolene Products* footnote did indeed have a majority. As Lusky explains, there were only seven Justices sitting on the case, because Cardozo was ill, and the newly-appointed Stanley Reed had recused himself. McReynolds dissented, Butler concurred in result only, and Hugo Black disassociated himself from the entire section of the opinion in which the footnote appeared. That left Stone, Hughes, Brandeis and Roberts, making a majority of four out of seven.").

356. Sugarman v. Dougall, 413 U.S. 634, 656 (1973) (Rehnquist, J., dissenting) (citing Kovacs v. Cooper, 336 U.S. 77 (1949) (questioning why, even if the *Carolene* approach were accepted, "the Court is conspicuously silent as to why that 'doctrine' should apply to these cases.").

minorities."[357] This provision served to expand liberty, and reinforce the representation of those least able to engage in the political process.[358] Second, the footnote bifurcated constitutional rights. The first sentence reads: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[359] Implicit in this restriction on the presumption of constitutionality for legislation touching enumerated rights is a broadening of the presumption of constitutionality for legislation affecting unenumerated rights.

In modern Supreme Court jurisprudence, Footnote Four provides great protection to enumerated rights, as well as to "fundamental rights," and grants these rights the strong protection of strict scrutiny. Rights not listed in the Bill of Rights are not granted any meaningful protection, and are afforded mere rational basis review. Footnote Four thus renounces the liberties protected by the Ninth and Fourteenth Amendments as inferior and not deserving of protection.[360] In contrast to the previous component of Footnote Four, this provision restricts liberty in that unenumerated rights receive virtually no protection from the courts.

Nevertheless, a close inspection of the Supreme Court's use of Footnote Four over the last seven decades suggests that it is the footnote itself that has been bifurcated, not the rights it comprehends. A search of every citation to Footnote Four over the last 72 years reveals that the former provision, regarding minority rights, has been cited by the Supreme Court at least 23 times. These citations have primarily been used in cases dealing with race-based classifications,[361]

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357. United States v. Carolene Products Company, 304 U.S. 144, 153 n.4 (1938) ("[n]or need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

358. *See generally*, JOHN ELY, DEMOCRACY AND DISTRUST 30 (1980).

359. *Carolene Products*, 304 U.S. at 153 n.4.

360. *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION 254 (2004) ("Far more importantly, the pure Footnote Four approach is undercut by the original meaning of both the Ninth and Fourteenth Amendments. The Ninth Amendment mandates that unenumerated natural rights be treated the same as those that were enumerated. The Privileges or Immunities Clause mandates that no state shall abridge the unenumerated retained rights that happened to be enumerated in the Constitution. Also inconsistent with the Ninth Amendment is the third and current Footnote Four approach that elevates some unenumerated rights to the exalted status of 'fundamental' while disparaging the other liberties of the people as mere 'liberty interests.'"); RANDY BARNETT, RESTORING THE LOST CONSTITUTION 254 N.12 (2004) ("To avoid confusion, let me emphasize that my argument against the approach of Footnote Four is based on the mandate of the Ninth Amendment as well as the meaning of the Privileges or Immunities Clause – not on the existence of Supreme Court cases that protected various unenumerated rights. That the Supreme Court has recognized these rights should, however, give pause to anyone who would accept an unqualified Footnote Four approach.")

361. *See*, *e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (noting the argument that racial classifications that disadvantage the majority for the benefit of the minority should be subject

sex-based classifications,[362] alienage classifications,[363] age-based classifications,[364] voting rights cases,[365] and discrete and insular groups in need of assistance with the political process.[366]

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to a less exacting standard than other racial classifications) (citing *Carolene Products*, 304 U.S. at 153 n.4); Wash. v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 (1982) (noting that when the State's allocation of power places unusual burdens on racial groups' abilities to enact legislation to overcome prejudice, the governmental action hinders the operation of the political process that ordinarily protects minorities) (citing *Carolene Products*, 304 U.S. at 153 n.4).

362. *See*, *e.g.*, U.S. v. Virginia, 518 U.S. 515, 575 (1996) (noting that rational basis review of sex-based classifications is in accord with precedent) (citing *Carolene Products*, 304 U.S. at 153 n.4).

363. *See*, *e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 468 (1991) (noting that aliens as a class are a discrete and insular minority whose classifications are subject to close judicial scrutiny) (citing *Carolene Products*, 304 U.S. at 153 n.4) (citing Graham v. Richardson, 403 U.S. 365, 372 (1971)); Foley v. Connelie, 435 U.S. 291, 294 (1978) (noting that the Court has treated certain restrictions on aliens with heightened judicial solicitude because aliens have no direct voice in the political process) (citing *Carolene Products*, 304 U.S. at 153 n.4); Nyquist v. Mauclet, 432 U.S. 1, 17 (1977) (noting that aliens as a class are a prime example of a discrete and insular minority for whom heightened judicial solicitude is appropriate) (citing *Carolene Products*, 304 U.S. at 153 n.4); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (noting that the Court has decided that aliens as a class are a discrete and insular minority and that classifications based on alienage are subject to close judicial scrutiny) (citing *Carolene Products*, 304 U.S. at 153 n.4); Dougall, 413 U.S. at 656–57 (Rehnquist, J., dissenting) (questioning the Court's reliance on *Carolene Products* footnote 4 and arguing that searching judicial inquiry should not be applied to laws related to alienage) (citing *Carolene Products*, 304 U.S. at 153 n.4);); *In re* Griffiths, 413 U.S. 717, 721 (1973) (noting that because aliens are a prime example of a discrete and insular minority, classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny) (citing *Carolene Products*, 304 U.S. at 153 n.4); Graham v. Richardson, 403 U.S. 365, 372 (1971) (noting that aliens as a class are a prime example of a discrete and insular minority for whom heightened judicial solicitude is appropriate, and the power of the state to apply laws to aliens as a class is confined within narrow limits) (citing *Carolene Products*, 304 U.S. at 153 n.4).

364. *See*, *e.g.*, O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 801, n.8 (1980) (noting that nursing home patients may be a minority group, but they are not discrete or insular minorities because they are not the victims of social prejudice and often have relatives who step forward to protect their interests) (citing *Carolene Products*, 304 U.S. at 153 n.4); Vance v. Bradley, 440 U.S. 93, 113–14 (1979) (noting that the elderly are not a discrete or insular minority, but acknowledging that mandatory retirement provisions warrant careful judicial attention because of the class on which the deprivation is imposed) (citing *Carolene Products*, 304 U.S. at 153 n.4); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976) (noting that old age does not define a discrete and insular minority and does not impose a distinction sufficiently similar to those classifications the Court has found suspect to call for strict scrutiny) (citing *Carolene Products*, 304 U.S. at 153 n.4).

365. *See*, *e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 311–12 (2004) (noting that the right to vote is a political process that ordinarily can be relied upon to protect minorities) (citing *Carolene Products*, 304 U.S. at 153 n.4).

366. *See*, *e.g.*, U.S. v. Munoz-Flores, 495 U.S. 385, 406 (1990) (Stevens, J., concurring) (explaining that unlike the Court's responsibility to scrutinize laws affecting groups in special need of protection, the Court ought not intervene on behalf of majorities that have ready political solutions to the grievances aired) (citing *Carolene Products*, 304 U.S. at 153 n.4); South Carolina v. Baker, 485 U.S. 505, 513 (1988) (noting that neither cases nor the Tenth Amendment authorizes the courts to second-guess the substantive basis for congressional legislation, especially where the complaining party, South Carolina, has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless) (citing *Carolene Products*, 304 U.S. at 153 n.4); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 317 (1986) (noting that the Court has called for strict scrutiny of classifications based on the notion that the disadvantaged class is one that has not been able to enjoy full procedural participation) (citing *Carolene Products*, 304 U.S.

The second provision, however, bifurcating our rights, has been cited sparingly by the Supreme Court. While cases from the 1930s through the 1970s routinely recognized the bifurcation of rights,[367] during the last three decades, only Justice Stevens has used Footnote Four to recognize this constitutional distinction.[368] Other modern justices have seldom if ever discussed the bifurca-

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at 153 n.4); City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 471 (1985) (noting that a more searching inquiry is required for laws in areas where the constraints of the Fourteenth Amendment historically have been ignored—areas where the affected group is discrete or insular from a social, political or cultural perspective) (citing *Carolene Products*, 304 U.S. at 153 n.4); Anderson v. Celebrezze, 460 U.S. 780, 793 n.14 (1983) (noting that more careful judicial scrutiny may be warranted when considering the interests of minor parties and independent candidates because their interests are not well represented in state legislatures) (citing *Carolene Products*, 304 U.S. at 153 n.4); Crawford v. Bd. of Educ. of City of Los Angeles, 458 U.S. 527, 547 (1982) (noting that the repeal of a state-created right does not curtail the operation of the political process upon which minorities can ordinarily rely) (citing *Carolene Products*, 304 U.S. at 153 n.4); Plyler v. Doe, 457 U.S. 202, 218 n.14 (1982) (noting that certain groups have been historically left politically powerless such that they demand protection from the majoritarian political process) (citing *Carolene Products*, 304 U.S. at 153 n.4); Harris v. McRae, 448 U.S. 297, 343 (1980) (calling for searching judicial inquiry into a law restricting abortions because nonwhite women obtain abortions at nearly double the rate of whites and the burden of the law falls exclusively on financially destitute women; and suggesting that the law suggests a failure of the political process to protect minorities) (citing *Carolene Products*, 304 U.S. at 153 n.4; and Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 606 (1940) (noting that the Court has pointed to the importance of searching judicial inquiry into legislative action where prejudice against discrete and insular minorities may tend to curtail the operation of the political process that normally protects minorities) (citing *Carolene Products*, 304 U.S. at 153 n.4).

367. *See e.g,* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 23–24 (1976) (noting that Congress' choice of language is not sufficient to invalidate an economic regulation where its operation and effect are permissible) (citing Carolene Products, 304 U.S. at 154); Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 62 n.61 (1947) (noting that regulations in the area of religion will not be afforded the usual presumption of constitutionality) (citing *Carolene Products*, 304 U.S. at 152); Prince v. Mass., 321 U.S. 158, 173 (1944) (noting that religious freedom or other freedoms enumerated in the First Amendment are carried over into the Fourteenth Amendment and presumed to be inviolable, and the government bears the burden of proving that regulations infringing on these freedoms are reasonable and necessary) (citing *Carolene Products*, 304 U.S. at 152 n.4); W. Va. St. Bd. of Ed. v. Barnette, 319 U.S. 624, 489–49 (1943) (noting that the Court has recognized that all provisions of the first ten Amendments are specific prohibitions and each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected) (citing *Carolene Products*, 304 U.S. at 152 n.4); Skinner v. State of Okl. *ex rel*. Williamson, 316 U.S. 535, 544 (1942) (noting that the presumption of constitutionality has limits where the liberty of the person is concerned and requiring hearing and opportunity for a petitioner to challenge the state's decision that he be sterilized) (citing *Carolene Products*, 304 U.S. at 152 n.4); American Fed. of Labor v. Swing, 312 U.S. 321, 325 (1941) (noting that the right to free speech should be guarded jealously and regulations that infringe it must be reviewed carefully) (citing *Carolene Products*, 304 U.S. at 152 n.4); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (noting that freedom of speech and press are fundamental to the public education that is required for effective political processes) (citing *Carolene Products*, 304 U.S. at 152 n.4).

368. *See e.g.,* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1045 (1992) (Stevens, J.) (noting that the state supreme court's decision to defer to legislative judgments in the absence of a challenge from petitioner is in accord with the Court's view that it should be presumed that facts exist to support a legislative judgment) (citing *Carolene Products*, 304 U.S. at 152); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 125 (1978) (Stevens, J., dissenting) (noting that although the Court has distinguished between economic and other rights in giving scope to the substantive requirements of the Due Process Clause, it has avoided applying that distinction to the procedural requirements and assuming that the Court would still offer economic rights the procedural protection of the Fourteenth Amendment) (citing *Carolene Products*, 304 U.S. at 152–53 n.4);

tion of rights and broad presumption of legislative constitutionality to the degree Justice Stone did.[369]

The Supreme Court's growing preference for the first part of Footnote Four and the weakening of the second reflects an inherent tension in Stone's classic formulation.[370] That is, the Court has narrowly construed the power-granting portion of Footnote Four, while broadly construing the liberty-granting portion. It is thus Footnote Four itself that has been bifurcated, rather than the rights it discusses. The provisions that enhance liberty have been dutifully cited, while those restricting liberty have been minimized.

What brings this departure from Footnote Four into focus are the Supreme Court's recent cases dealing with the recognition of unenumerated rights.[371] The Court has considered these freedoms in the broader sense of "liberty" rather than through the Footnote Four parlance of fundamental or non-fundamental rights.[372] Despite the fact that they were construing unenumerated rights not to be "within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth,"[373] the Court failed to discuss the non-exacting judicial scrutiny unenumerated rights receive. The Court's failure to cite *Carolene*

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369. *See*, *e.g.*, Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2836 n.27 (2008) (noting that rational basis review cannot be used to evaluate regulations on specific, enumerated rights) (citing *Carolene Products*, 304 U.S. at 153 n.4); Wash. v. Glucksberg, 521 U.S. 702, 766 (1997) (Souter, J., concurring) (noting that an enforceable concept of liberty bars statutory impositions even at relatively trivial levels when they are undeniably irrational as unsupported by any imaginable rationale) (citing Carolene Products, 304 U.S. at 152); *See*, *e.g.*, U.S. v. Lopez, 514 U.S. 549, 604 (1995) (discussing judicial review under the commerce clause and explaining that the Court's respect for Congress' legitimacy in this area of regulation is reflected in the Court's rational basis review) (citing *Carolene Products*, 304 U.S. at 147–48).

370. *See e.g.,* Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277 (Summer 1995) ("Since its appearance in Justice Harlan Fiske Stone's 1938 opinion for the Supreme Court, its meaning has been much debated. Early on, it was interpreted to mean that 'personal' rights were to be preferred to economic rights, but in recent years, largely through the efforts of Louis Lusky and John Hart Ely, it has been interpreted more narrowly, justifying judicial activism only when the majoritarian democracy does not work: Ely describes it as 'representation-reinforcement,' a process-based notion that the courts should use judicial review aggressively only when the electoral process has broken down or is tampered with or when litigants are deemed not to have a fair chance to achieve change at the ballot box, either because of hostile laws or because of prejudice against them.").

371. *See*, *e.g.*, Wash. v. Glucksberg, 521 U.S. 702 (1997); Lawrence v. Texas, 539 U.S. 558 (2003); Troxel v. Granville, 530 U.S. 57 (2000).

372. *See*, *e.g.*, *Lawrence*, 539 U.S. at 564. ("Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: 'Proscriptions against that conduct have ancient roots.' [Bowers v. Hardwick, 478 U.S. 186, 192 (1986).] In academic writings, and in many of the scholarly amicus briefs filed to assist the Court in *Lawrence*, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. Brief for Cato Institute as Amicus Curiae 16–17; Brief for American Civil Liberties Union et al. as Amici Curiae 15–21; Brief for Professors of History et al. as Amici Curiae 3–10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.").

373. *Carolene Products*, 304 U.S. at 153 n.4.

Products in *Glucksberg* reinforces this hypothesis. Liberty was to be protected regardless of whether it is "fundamental" or "non-fundamental." What mattered instead was that the protected liberty be deeply rooted in our nation's history and traditions.[374] A right deemed non-fundamental under Foonote Four can thus still be a protected liberty under *Glucksberg*.[375]

In light of the Court's post-*Glucksberg* practice in considering unenumerated rights,[376] we contend that the modern *Glucksberg* framework has repealed *sub silentio* Footnote Four's bifurcating principles. If an unenumerated right is in fact deeply rooted in our nation's history and traditions, it is protected under *Glucksberg*, irrespective of Footnote Four considerations. This is the test the Court adopted in *Glucksberg*, and the test the Court should adopt in *McDonald*.

E. The Glucksberg *Test Applied to the Right to Keep Arms for Self Defense*

The *Glucksberg* test recognizes the right to keep arms for defense of person and property as a privilege or immunity that cannot be abridged by the states. Indeed, the Second Amendment is largely unnecessary for applying this right to the states through the Privileges or Immunities Clause. What the Privileges or Immunities Clause accomplishes is not mechanically injecting the amendment to the states, but rather preventing the states from abridging the pre-existing liberty.

1. *Glucksberg* Step 1: The Right to Keep and Bear Arms in Defense of Person and Property Is Deeply Rooted in our Nation's History and Tradition

The first element of *Glucksberg* asks whether "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[377] How can we determine

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374. *See Glucksberg*, 530 U.S. at 74 ("We now inquire whether this asserted right has any place in our Nation's traditions. Here, as discussed above, *supra*, at 4–15, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.").

375. For more thoughts on rethinking Footnote Four for the 21st Century, see Josh Blackman*, Equal Protection from Eminent Domain. Protecting the Home of Olech's Class of One,* 56 LOYOLA L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329344.

376. While some contend that Footnote Four served as a limiting principle of the *Roe-Casey* line of cases, see Nelson Lund and John O. McGinnis, *Lawrence v. Texas And Judicial Hubris*, 102 MICH. L. REV. 1555, 1573 (2004) ("We think that "freezing' substantive due process would be a more tenable strategy if it meant returning to something like the Footnote 4 approach. In our view, the *Griswold-Roe* line of decisions was and is an insuperable obstacle to any lasting restraint on substantive due process"), our research reveals that even pre-*Glucksberg* precedents that consider unenumerated rights also do not cite or consider Footnote Four. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992), Roe v. Wade, 410 U.S. 113 (1973), Griswold v. Connecticut, 381 U.S. 479 (1965).

377. *Glucksberg*, 521 U.S. at 718 (citing Moore, 431 U.S. at 503 (plurality opinion)); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) ("Implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed.").

whether the right to keep and bear arms is a right firmly rooted in our Anglo-American tradition?

In many respects, Judge O'Scannlain's discussion of incorporation through the Due Process Clause emulates, if not articulates, the appropriate methodology to recognize substantive unenumerated rights under the Privileges or Immunities Clause. *Nordyke* extends the reasoning of *Duncan* to individual rights unconnected to criminal or trial procedures.[378] "Just as *Duncan* defined 'fundamental rights' as those necessary to an Anglo-American regime of ordered liberty," the court analogized, "so the Supreme Court has determined, outside the context of incorporation, that only those institutions and rights 'deeply rooted in this nation's history and tradition' can be fundamental rights protected by substantive due process."[379] O'Scannlain borrowed his language about history and tradition from the holding in *Moore v. City of E. Cleveland*, which acknowledged similarities between a general substantive due process inquiry and *Duncan*'s incorporation test.[380] He also cited *Glucksberg*, which declares, "Our Nation's history, legal traditions, and practices . . . provide the crucial guideposts for responsible decisionmaking [according to substantive due process]."[381] We adopt Judge O'Scannlain's methodology, but apply it to our reconceptualized understanding of the Privileges or Immunities Clause.

Judge O'Scannlain focused on the history of the right to keep and bear arms at three key times: the Founding Era; the Early Republic; and Reconstruction.[382] By touching all three bases, O'Scannlain considered "originalism at the right time" and found the right to keep and bear arms to be a fundamental right deeply rooted in our nation's history and traditions.

(i) The Right During the Revolutionary Era.

Heller provides a detailed historical account establishing that at the time of the Revolution and the ratification of the Constitution, the right to keep and bear arms was a liberty finely woven into the individualistic fiber of the thirteen colonies. *Nordkye* begins by analyzing the Founding, comparing the historical

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378. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

379. *Id.* The Court borrows its language about history and tradition from the holding in Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (acknowledging that "the similarity between this general substantive due process inquiry and the incorporation test stated in *Duncan*). The Court also cites *Glucksberg*, 521 U.S. at 721 ("Our Nation's history, legal traditions, and practices . . . provide the crucial guideposts for responsible decisionmaking [in the area of substantive due process]").

380. 431 U.S. 494, 503 (1977).

381. *Glucksberg*, 521 U.S. at 721.

382. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) ("Our task is to determine whether the right to keep and bear arms ranks as fundamental, meaning '"necessary to an Anglo-American regime of ordered liberty."' If it does, then the Fourteenth Amendment incorporates it. This culturally specific inquiry compels us to determine whether the right is '"deeply rooted in this Nation's history and tradition."' Guided by both Duncan and Glucksberg, we must canvass the attitudes and historical practices of the Founding era and the post-Civil War period, for those times produced the constitutional provisions before us.").

similarities between the right to bear arms and the right to a jury trial.[383] In *Duncan v. Louisiana*, the Supreme Court concluded that the Due Process Clause incorporated the right to a jury in criminal cases.[384] Building on that holding, Judge O'Scannlain pointed to the parallels between jury trials and the individual right to bear arms. Among the comparisons he highlighted were that both rights appeared in the 1689 English Declaration of Right.[385] The court thus found that the right to keep and bear arms shares ancestry with a right already deemed fundamental (and incorporated under the Due Process Clause.)[386]

Further comparisons considered the fact that the colonists themselves demonstrated the importance of the right to bear arms in the 1760s–70s, objecting strongly to the Crown's infringements on that right just as they objected to the same interference with jury trials.[387] The *Nordyke* court also relied on Blackstone's Commentaries as evidence of the right's fundamentality during the Revolutionary Era.[388] To the colonists, the natural right of resistance and self-preservation against their colonial master necessitated the rights to bear arms.[389] The freedom to bear arms thus represented a bulwark of the colonist's personal rights and closely followed from the absolute rights to personal security, liberty, and property.

As the Court highlighted, the experience of the colonial period ingrained the preservation of the right to bear arms as an appropriate way both to resist the evils of standing armies and to render the evil unnecessary.[390] After tracing throughout a chronology of the right to keep and bear arms at the time of the Revolution, Judge O'Scannlain concludes, "This brief survey of our history reveals a right indeed 'deeply rooted in this Nation's history and tradition.'"[391]

(ii) The Right in the Early Republic.

The right to bear arms during the post-revolutionary period was also considered a deeply rooted fundamental right. While Justice Stevens chastised Justice Scalia for considering post-enactment legislative history in the years following the ratification of the Bill of Rights in *Heller*[392]—for purposes of interpreting the Second Amendment—a consideration of this history is quite relevant to understanding the right leading up to the ratification of the *Fourteenth* Amendment. St. George Tucker famously referred to the right as the "true palladium of

383. *Id*. at 451–52.
384. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).
385. *Nordyke*, 563 F.3d at 451–52.
386. *Id.* at 452.
387. *Id*. at 452–53.
388. *Id*. at 452. Blackstone divided the rights of persons into absolute and relative rights. Personal security, personal liberty, and private property represented Blackstone's three absolute rights.
389. *Id.*
390. *Id*. at 453.
391. *Id.*
392. District of Columbia v. Heller, 128 S. Ct. 2783 n.28 (2008).

liberty."[393] O'Scannlain noted in *Nordyke* that early Americans found restrictions on the rights of individual to bear arms, whatever the pretext, deprived citizens of their strong moral check against the arbitrary powers of their rulers.[394]

Judge O'Scannlain found "compelling" the fact that 44 states protect the right to bear arms in their constitutions.[395] Continuing the historical inquiry through the early years of our Republic, O'Scannlain finds a "general consensus, in case law as well as commentary, on the importance of the right to keep and bear arms to American republicanism . . . They show the continued vitality of the right that the Englishmen of the Glorious Revolution declared, Blackstone lauded, and the American colonists depended upon."[396]

(iii) The Right during Reconstruction.

Finally, the Ninth Circuit addressed the period immediately following the Civil War when congressional debate focused on how to secure the constitutional rights of newly freed slaves.[397] The framers of the Fourteenth Amendment sought to end the oppressive Black Codes, which prevented freed slaves from keeping or carrying firearms.[398] Legislators debating the Civil Rights Act and the Fourteenth Amendment listed among the "indispensable" "safeguards of liberty" the right to bear arms for the defense of one's family and home, as well as a right inherent to the republican form of government.[399] As Judge O'Scannlain points out, Representative John Bingham, a principal author of the Fourteenth Amendment, argued that the Bill of Rights should apply to the states because they "secured to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of persons—those dear to freemen and formidable only to tyrants."[400]

Furthermore, the court observed that congressional reports and testimony confirm that the framers of the Fourteenth Amendment considered the right to keep and bear arms a crucial safeguard against white oppression of the freedmen.[401] This recitation comports with the long history of the Second Amendment's protections: the right of the individual to be protected from the intrusiveness and overreaching arms of tyrants, whether in the form of the British Crown or the state-sponsored lynch mob. As the *Nordyke* opinion suggests, the individual right to keep and bear arms offers individuals a recourse for "when the sanctions of society and laws are found insufficient to restrain the

393. Nordyke v. King, 563 F.3d 439, 454 (9th Cir. 2009).
394. *Id.*
395. *Id*. at 455.
396. *Id.*
397. *Id*.
398. *Id*.
399. *Id.* at 455–56.
400. *Id*. at 455.
401. *Id*. at 456.

violence of oppression."[402]

In a different context, Professor Amar's discussion of whether the right to keep and bear arms should be considered a "privilege or immunity" focuses on the Blackstonian notion of the rights of the individual. Liberties held at common law that fell within this concept of individual right constituted privileges or immunities. According to Blackstone, "personal security, personal liberty, and personal property" were the individual rights. Blackstone considered the right of self-preservation to be essential to individual liberty and, as such, the ultimate right.[403] The individual right to "have arms" was essential to protect these rights.[404]

The notion of the individual right to keep arms for protection of person and property was critical in many Reconstruction-Era laws. "The sponsors of the sibling Civil Rights Bill in both House and Senate, James Wilson and Lyman Trumbull, explicitly quoted from Blackstone's chapter in support of their bill" to support the protection of the right to keep and bear arms.[405] The Freedman's Bureau Act, "a sister statute introduced the same day [as the Civil Rights Act of 1866] by the same sponsor and featuring key clauses in *pari materia*, affirmed that 'laws . . . concerning *personal* liberty, *personal* security, and the acquisition, enjoyment, and disposition of estate, real and *personal*, including the *constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens."[406] This "tripartite phraseology of the 1866 Freedman's Bureau statute—affirming rights of 'personal liberty,' 'personal security,' and 'property'-derived directly from Blackstone's influential chapter on the "Absolute Rights of Individuals."[407]

From an original public meaning inquiry, this legislative history is relevant because the provisions of the Civil Rights Act were "generally understood to be subsumed within the privileges-or-immunities clause of the subsequent Fourteenth Amendment."[408] These rights informed the drafting of the bill, and thus the Court today should consider them when construing the rights protected by the Privileges or Immunities Clause.[409] On the whole, the congressional records during Reconstruction "unequivocally demonstrate that an individual right to keep and bear arms was one of the rights to be protected by the Privileges or

402. *Id*. at 456 (citation omitted).

403. 1 WILLIAM BLACKSTONE, COMMENTARIES 141–44; AMAR, *supra* note 22, at 261–62.

404. 1 WILLIAM BLACKSTONE, COMMENTARIES 141–44; AMAR, *supra* note 22, at 261–62.

405. AMAR, *supra* note 22, at 261.

406. *Id.* at 260.

407. *Id.* at 261.

408. *Id.* at 178.

409. As I argue in *This Lemon Comes as a Lemon. The Lemon Test and the Pursuit of a Statute's Secular Purpose*, 20 GEORGE MASON CIV. RIGHTS L. J. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329343, legislative history of older vintage may be more reliable.

Immunities Clause."[410]

In sum, Judge O'Scannlain was "persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments."[411] Based on this thorough exegesis of the right to keep and bear arms in defense of person and property, we are convinced that *Glucksberg* Step 1 is satisfied, and this right is deeply rooted in our nation's history and traditions.

2. *Glucksberg* Step 2: Describing the Right to Keep and Bear Arms in Defense of Person and Property

The Supreme Court has taken several approaches to defining the level of generality of rights. In *Michael H.*, Justice Scalia explained his characterization of unenumerated rights thus: "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[412] In *Reno v. Flores*, presaging the eventual *Glucksberg* step 2, Justice Scalia wrote that "[s]ubstantive due process analysis must begin with a *careful description* of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'"[413]

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410. Brief of Constitutional Accountability Center in Support of Certiorari at 23–24, McDonald v. Chicago, No. 08-1521 (June 11, 2009).

411. Nordyke v. King, 563 F.3d 439, 454 (9th Cir. 2009) ("We therefore conclude that the right to keep and bear arms is '"deeply rooted in this Nation's history and tradition."' Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the '"true palladium of liberty."' Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited.")

412. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6. *But cf. Michael H.*, 491 U.S. at 113 (O'Connor, J., concurring) ("On occasion this Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available.") (citing Loving v. Virginia, 388 U.S. 1, 12 (1967); Turner v. Safley, 482 U.S. 78, 94 (1987); United States v. Stanley, 483 U.S. 669, 709 (1987)). For criticisms of Justice Scalia's footnote 6, see John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 FLOR. J. L. & PUB. POL. 401, 426–27 (2005) ("There are three primary ways in which footnote 6 does this. First, it requires judges to identify the most specific level of generality at which they can recognize a relevant tradition. This task is more easily done in theory than in practice . . . . Perhaps most problematic is the process of determining the most specific tradition. Since footnote 6's specificity has a logical stopping point, and does not require specificity beyond absurdity, it inevitably fails to escape a choice based on values. As footnote 6 explains, if there are no societal traditions either protecting or denying an asserted right, judges are asked to "consult, and (if possible) reason from," the traditions one increment more general than the one that did not yield a conclusive answer. In truth, there is no "most specific level." Paradoxically, footnote 6 refuses to decipher between the relevant and irrelevant facts of *Michael H.*, while at the same time it chooses not to include further specificity such as the plaintiff's job, his or her race, or his or her geographical region.").

413. Reno v. Flores, 507 U.S. 292, 302 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (citing Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986))) (emphasis added).

In *Glucksberg*, the Court settled on a test that required "a 'careful description' of the asserted fundamental liberty interest."[414] But carefully describing the right hinges upon the level of generality the Court employs. "If the court frames an asserted fundamental right with a highly specific level of generality so that only a handful of historically protected traditions are relevant, there is only a small likelihood that it will recognize a new right. If the court frames an asserted fundamental right more abstractly so that any number of historically protected traditions apply, its recognition of a new right is much more promising."[415] Under *Glucksberg*, and even under Justice Scalia's narrowly defined approach in *Michael H. v. Gerald D.*, the right to keep and bear arms can be "careful[ly] descri[bed]."

As Judge O'Scannlain noted in *Nordyke*, "we have before us a right both "careful[ly] descri[bed]," because it is listed in the Bill of Rights and associated with an understanding dating to the Founders, and, as the foregoing history reveals, "deeply rooted in this Nation's history and tradition."[416] The right to keep and bear arms for person and property can be succinctly described as such. When carefully defining the particular right, it is helpful to consider how the privileges or immunities were enumerated. References to the Civil Rights Act of 1866, the Freedmen Bureau Act, and several other bills specifically define the right to keep and bear arms for self-defense as such a right.[417]

3. The Chicago Ordinance Violates the Right to Keep and Bear Arms Protected by the Privileges or Immunities Clause

In the context of *McDonald*, Chicago passed a law abridging the right to keep and bear arms for self-defense. The Second Amendment notwithstanding, that right is a privilege or immunity that is deeply rooted in our Anglo-American common and natural law tradition. Thus, the Fourteenth Amendment prohibits Chicago from passing such a law. Instead of an incorporated Second Amend-

414. Wash. v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Reno v. Flores, 507 U.S. 292, 302 (1993), Collins v. City of Harker Heights, 501 U.S. 115, 125 (1992), Cruzan v. Miss. Dep't. of Health, 497 U.S. 261, 277–78 (1990)).

415. John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 FLOR. J. L. & PUB. POL. 401, 403 (2005). These competing visions can be seen by comparing the panel opinion and the en banc opinion of the D.C. Circuit Court of Appeals in Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach, 495 F.3d 95 (D.C. Cir. 2007). *See* Roger Pilon, *New Right to Life*, WALL ST. J., Aug. 10, 2007, at A11 ("In a long footnote, Judge Thomas Griffith, who had dissented in the earlier opinion but wrote now for the majority, recast the right at issue as '"the right to access experimental and unproven drugs in an attempt to save one's life."' Through such '"tragic wordplay,"' as the dissent put it, the right ceases to be '"fundamental,"' under Supreme Court precedents, because it is '"not deeply rooted in the Nation's history and traditions.'").

416. *Nordkye*, 563 F.3d at 447.

417. *See* The Freedmen's Bureau Act, 14 Stat. 173, 176 (July 16, 1866) ("the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate including the constitutional right to bear arms . . .").

ment, however, it is the Privileges or Immunities Clause that prevents a state or local government from passing a law that infringes those liberties. This holistic vision of the Clause reflects popularly held common-law notions of liberty and closely mirrors the views of its framers in the 39th Congress.

VI. ORIGINALISTS NEED TO HEED THE CLARION CALL AND RESTORE THE ORIGINAL MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE

Justice Thomas's opinion in *Saenz v. Roe* portends his readiness to reinvigorate the Privileges or Immunities Clause, and sounds the clarion call to other originalists to join his endeavor.[418] Justice Thomas wrote:

> As [Chief Justice Rehnquist] points out . . . it comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because, as I have explained . . . The *Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'[419]

This dissent reveals several important tenets. First, Justice Thomas is apprehensive about the Court's further perpetuation of the mistake that *Slaughter-House* began by further departing from the original meaning of the Privileges or Immunities Clause. Second, as a result of the mistaken *Slaughter-House* construction, he recognizes that the Court has erroneously over-relied on the Due Process Clause, resulting in the "current disarray" of Fourteenth Amendment jurisprudence. Third, Justice Thomas is willing to revisit the Privileges or Immunities Clause in the appropriate case. Fourth, to reconsider that clause and apply the framers' understanding of it, the Court must conduct an originalist analysis. Fifth, if the Privileges or Immunities Clause is restored, much of our modern substantive due process and

418. 526 U.S. 489 (1999) (Thomas, J. dissenting) (citing Moore v. East Cleveland, 431 U.S. 494, 502 (1977)).

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

equal protection jurisprudence can perhaps be "displaced" and shifted to the Privileges or Immunities Clause. Sixth, and perhaps most ominously, if the Court continues to ignore the Privileges or Immunities Clause, future cases may yet transform the clause into a tool to constitutionalize (and thus entrench) positive rights that find no basis in the history of the Fourteenth Amendment and our nation's traditions.[420]

These six propositions set the stage for *McDonald*, *The Constitution in 2020*, and the future of the Privileges or Immunities Clause. If the Court ignores Justice Thomas's admonition, its "failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'"[421] If the originalists on the Court fail to wrest back the wayward Fourteenth Amendment jurisprudence, Pandora's Box will not remain sealed for long.

Reviving the Privileges or Immunities Clause can begin the process of aligning the Constitution with notions of protecting our most sacred and fundamental liberties. Failing to do so now invites an alternative vision of the Constitution that further departs from the original meaning of the Fourteenth Amendment. Now is the time—and *McDonald* is the case—to advance an originalist framework that enforces the Privileges or Immunities Clause and keeps Pandora's Box closed.[422]

A. Establish an Originalist Framework For Applying Privileges or Immunities Jurisprudence

Our framework's most significant benefit may be to establish precedents that will signal to future courts how the Privileges or Immunities Clause should be interpreted. In *Saenz*, Justice Thomas cautions that "[b]efore invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant."[423] Advancing a framework for understanding rights prevalent during the history of our nation is critical to prevent the Fourteenth Amendment from evolving further away from its original meaning.

The *Washington v. Glucksberg* framework accomplishes this task. It focuses on the "historical underpinnings" of the clause and "understand[s] what the framers of the Fourteenth Amendment thought it meant."[424] If

420. *Id.*

421. *Id.*

422. For a succinct discussion of the doctrinal lines along which the individual justices could vote, *see* Ilya Shapiro, "Properly Extending the Right to Keep and Bear Arms to the States," Dec. 21, 2009, *available at* http://www.cato-at-liberty.org/2009/12/21/properly-extending-the-right-to-keep-and-bear-arms-to-the-states/.

423. *Id.*

424. *Id.*

originalists ignore this jurisprudence now, as the composition of the Court changes, future Courts may be able to define it in the image of *The Constitution in 2020*.

Progressives do not see the corpus of rights under the Privileges or Immunities Clause as limited to the common law understanding of rights prevalent in nineteenth-century thinking, but rather view the clause "as a delegation to future constitutional decision-makers to protect rights that are not listed either in the Fourteenth Amendment or elsewhere in the document."[425]

The progressive vision of a post-*McDonald* plan for the Privileges or Immunities is spelled out most succintly in the Constitutionality Accountability Center's *The Gem of the Constitution*.[426] If the Court overrules *Slaughter-House*, a historic debate over the meaning of the Privileges or Immunities Clause will ensue, one in which the *Gem* authors believe "progressives need to participate to ensure an appropriate construction of the Clause"[427] According to the Constitutional Accountability Center, progressives "cannot afford to absent themselves" from the debate regarding the proper scope of a revived Privileges or Immunities Clause "simply because the first beneficiary of the demise of *Slaughter-House* may be a conservative cause."[428]

The Gem of the Constitution aims to answer "how . . . should the Supreme Court give content to the Privileges or Immunities Clause."[429] To define the scope of the Privileges or Immunities Clause, David Gans and Douglas Kendall argue that progressives should first instruct the Court to rely heavily on its substantive due process precedents.[430] The report seeks to rely on these precedents "despite [their] lacking a strong textual foundation" because the "Court has devoted enormous energies over the past 135 years to identifying fundamental constitutional rights."[431]

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425. JOHN ELY, DEMOCRACY AND DISTRUST 30 (1980) ("Thus the most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives direction for finding.").

426. David H. Gans and Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause of the Fourteenth Amendment*, Constitutional Accountability Center (2008), http://www.theusconstitution.org/upload/filelists/241_Gem_of_the_Constitution.pdf. Compare the amicus brief filed by the Constitutional Accountability Center in *McDonald*—which united professors from across the ideological spectrum, including Professors Randy Barnett and Jack Balkin—with *The Gem of the Constitution*. While the brief's authors agree that *Slaughter-House* should be overruled and the Privileges or Immunities Clause revived, there is not much agreement beyond that. The brief is noticeably bereft of any definition of the substantive rights protected by the Privileges or Immunities Clause. Neither positive nor negative rights are discussed. But the rights advocated by Gans and Kendall speak directly to these rights, and advocate a plethora of positive rights not deeply rooted in our nation's history and traditions. This disparity between the brief and the report can only be explained by a compromise of necessity between the disparate amici joining the brief.

427. *Id.* at 30.

428. *Id.*

429. *Id.* at 31.

430. *Id.* at 31.

431. *Id.*

Second, Gans and Kendall argue that progressives should look to the debates over the Fourteenth Amendment to support the idea that the framers of the Privileges or Immunities Clause sought to protect substantive liberties, including both enumerated and unenumerated rights.[432] Among these rights are "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."[433] Elsewhere, Gans wrote that the Privileges or Immunities Clause should include the "right of protection,"[434] a right rejected in *Deshaney v. Winnebago County*[435] and *Castle Rock v. Gonzales*.[436] Lastly, the clause itself may guide the Court in defining constitutional liberties because it "instructs courts to protect the substantive liberty that inheres in the citizenship the Fourteenth Amendment creates and defines."[437] For example, Gans and Kendall contend that the Privileges or Immunities Clause protects women's control over their bodies, or "what the framers of the Fourteenth Amendment might have termed their right of personal security," and thus without such control women cannot "participate as equal citizens in their communities."[438]

Our framework foreceloses 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. The *Glucksberg* Court describes our "Nation's history, legal traditions, and practices" as providing the "guideposts for responsible decisionmaking" to cabin discretion when dealing with substantive unenumerated rights. History, tradition, and practices are hallmarks of originalism. The *Glucksberg* tests thus lends itself well to an originalist inquiry and is ideally suited to consider the rights protected under the Privileges or Immunities Clause.

Instead of asking what Professors Ackerman and Balkin think the Privileges or Immunities Clause *should* mean in 2020, the inquiry should focus on what Congressman Bingham and Senator Howard and the state ratifying conventions thought the Clause *meant* in 1868. What did the 39th Congress think of Privileges or Immunities? What did contemporary writings, both from parties

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432. *Id.* at 32–33.

433. *Id.* at 32.

434. Josh Blackman's Blog, http://joshblackman.com/blog/?p=2598 (November 24, 2009, 2:24 pm).

435. DeShaney v. Winnebago County, 489 U.S. 189 (1989).

436. Castle Rock v. Gonzales, 545 U.S. 748 (2005). For a discussion of Castle Rock and the right of protection under the Privileges or Immunities Clause, see Roger Pilon, *Town of Castle Rock v. Gonzales: Executive Indifference, Judicial Complicity,* Cato Institute, *available at* http://www.cato.org/pubs/scr/docs/2005/castlerock.pdf.

437. David H. Gans and Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause of the Fourteenth Amendment*, Constitutional Accountability Center (2008) at 33.

438. *Id.* (citing Ginsburg's dissent in *Carhart*).

inside and outside government, think about privileges or immunities?[439] These are the sorts of questions the Court should strive to answer in *McDonald*. In light of the reconceptualized notion of privileges or immunities we present in this article, the *Glucksberg* framework can extend not only to those rights listed in the Bill of Rights, but also to liberties implicit in our Anglo-American tradition.[440]

This approach kills two birds with one stone. It forces the Court to consider the legal traditions that brought us to the present, simultaneously requiring it to consider how the term was understood when drafted—exactly the query Justice Thomas posed in *Saenz v. Roe*. The *Glucksberg* test satisfies these aims and provides a pragmatic approach to recognizing fundamental liberties, yet cabins the discretion of jurists to recognize new rights lacking a place in the Pantheon of our Anglo-American liberties.

B. Without Privileges or Immunities, Originalists Are Stuck Between a Rock and a Substantively Hard Place

Originalists stand at a unique vantage point. Without the Privileges or Immunities Clause, they must continue extending the un-originalist notion of incorporation via substantive due process to protect the right to keep and bear arms. In other words, to give meaning to the original meaning of one constitutional provision, the Second Amendment, they must further warp the original meaning of another, the Fourteenth Amendment.

The Supreme Court last considered incorporation through substantive due process in 1982, four years before Justice Scalia joined the Court.[441] In *Murphy v. Hunt*, the Eighth Circuit held that "that the exclusion of violent sexual offenses from bail before trial violates the Excessive Bail Clause of the Eighth Amendment of the United States Constitution"[442] and the "Eighth Amendment of the United States Constitution [is] incorporated in the Fourteenth Amend-

439. *See* David Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 WHITTIER L. REV. 695 (2009).

440. With this historical understanding, the privileges or immunities clause may be seen as an alternate ground to protect other rights currently protected by substantive due process. Certain substantive due process cases protecting specific common law rights can perhaps be more easily recast as finding protection under the privileges or immunities clause. *See* Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) ("We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.").

441. In Palazzolo v. Rhode Island, 533 U.S. 606 (2001), the Supreme Court held that the "Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897), prohibits the government from taking private property for public use without just compensation." However, *Chicago*, an 1897 precedent predating the modern incorporation doctrine, did not incorporate the Fifth Amendment, but rather considered the taking as a violation of due process. Thus it is arguable that the Supreme Court, including Justice Scalia, incorporated the Takings Clause *sub silentio*.

442. Murphy v. Hunt, 455 U.S. 478, 480–81 (1982).

ment."[443] The Court did not decide the question of whether the Eighth Amendment prohibition on excessive bail was a fundamental right and dismissed the case as moot.[444] How would Justice Scalia have voted if confronted with this question? Would he have considered the tests for incorporation and found that the right did not apply? Or would he have rejected substantive due process incorporation outright as antithetical to the original meaning of the Due Process Clause? Originalists like Justice Scalia are loath to enlarge substantive due process. Stuck between a rock and a substantively hard place, what should they do?

But are they truly stuck, or is there an originally easy way out? We contend that restoring the Privileges or Immunities Clause solves this dilemma. As Justice Thomas recognized in *Saenz,* "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence."[445] By restoring the original meaning of the Privileges or Immunities Clause, "we should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence." Thus, if interpreted according to its original meaning, the Privileges or Immunities Clause can relieve the tension of relying on the warped-beyond-recognition substantive due process and, at the same time, protect those sacred liberties held fundamental in our nation's history and traditions. The road map we provide will allow originalists to extend the right to keep and bear arms to the states through the Privileges or Immunities Clause using the *Glucksberg* test without enlarging substantive due process and its controversial protections.

C. Originalists Have Already Laid the Groundwork For Implementing This Framework

The doctrine of unenumerated rights makes many uncomfortable. Rightfully so: it could open that Pandora's Box which animates this article. But that fear should not cause judges and scholars to ignore and abandon the original meaning of the clause. Being an originalist means taking the good with the murky so long as you stay true to constitutional text and history. The *Glucksberg* compromise reflects this tension. Justice Scalia's dissent in *Troxel v. Granville* illuminates traditional concerns about unenumerated rights yet provides a glimmer of hope for the protection of rights deeply rooted in our nation's history. Scalia wrote, "In my view, a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all Men . . . are

443. Murphy v. Hunt, 648 F.2d 1148, 1164–65 (8th Circ. 1982).
444. *Murphy*, 455 U.S. at 484.
445. Saenz v. Roe, 526 U.S. 489, 527 (1999) (Thomas, J., dissenting).

endowed by their Creator.' And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.'"[446]

Justice Scalia does not see the Declaration of Independence as "conferring powers upon the courts," however, and the Ninth Amendment does not "authoriz[e] judges to identify what" rights are. In short, Scalia concludes, a "legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context."[447]

The shortcomings Justice Scalia identifies in invoking the Declaration and the Ninth Amendment to protect unenumerated rights—which we will not debate here—are absent from the Privileges or Immunities Clause. First, as a historical term of art, "privileges or immunities" invites an originalist to ascertain the original public meaning of a concrete clause—a process different from grasping at emanations or engaging in abstruse queries about whether a right is "fundamental." Justice Scalia is not opposed, for example, to recognizing unenumerated rights in general; he adopted the framework in *Glucksberg* and in *Heller* referred to the right to keep and bear arms as a "pre-existing right." It seems that the hallmark of Justice Scalia recognizing such rights requires that they be deeply rooted in our history. From an originalist perspective, then, understanding the meaning of "privileges or immunities" in 1868 is a historical, rather than metaphysical inquiry.

Second, while the Declaration of Independence confers no powers on the judiciary to enforce those inalienable rights with which Men are endowed by their Creator, and the Ninth Amendment is ambiguous as to how it should be enforced, the Privileges or Immunities Clause is quite clear on this point. With its admonition to the states that they "shall not abridge," the clause provides a textual license to the courts to enforce these rights from state infringement. Thus a Justice Scalia should be able to both recognize such rights and enforce them.

Curiously, in dissenting from the 2009 voting rights case of *NAMUDNO v. Holder*, Justice Thomas included a citation to *Cruikshank*, which stands squarely in the way of incorporating (or extending) the right to keep and bear arms to the states—and which most predict will be set aside in *McDonald.*[448] *NAMUDNO* had little to do with *Cruikshank*, and Justice Thomas, who was writing for

446. Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting).

447. *Id.*

448. Northwest Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2519 (2009) (Thomas, J., dissenting) (citing United States v. Cruikshank, 92 U.S. 542, 551 (1876)) ("The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people.").

himself alone, surely could have found a more recent and relevant precedent than this one. (Shepardizing *Cruikshank* yields only 13 citations in the last century, none by the U.S. Supreme Court.) Reading the tealeaves, this citation reveals that incorporation of the right to keep and bear arms is likely on Justice Thomas's mind.

Examining together his opinions in *Saenz* and *Troxel*, Justice Thomas seems to be the justice most open to correcting the course of unenumerated rights protections by reinvigorating the Privileges or Immunities Clause. In *Saenz* he acknowledged that he would be open to considering this issue in the "appropriate case." While *Troxel* was not that case because it did not involve the Privileges or Immunities Clause, we submit that, in light of its question presented, *McDonald* is the perfect case to reverse the ignominious mistake of *Slaughter-House*,[449] begin a journey towards restoring the lost Constitution,[450] and protect our most fundamental liberties.[451]

CONCLUSION

Seldom does a case present itself to the Supreme Court so ideally suited to restore the original meaning of the Constitution. In 1988, before he was a judge of any kind, Clarence Thomas wrote, "the natural rights and higher law arguments [embodied in the Privileges or Immunities Clause] are the best defense of liberty and of limited government. Moreover, without recourse to higher law, we abandon our best defense of judicial review—a judiciary active in defending the Constitution, but judicious in its restraint and moderation."[452] *McDonald* gives the Court an opportunity to fulfill this higher calling and defend liberty for all.

And seldom does such a case draw support from across the ideological spectrum.[453] This consensus, backed by a near-universal academic agreement regarding the meaning of the Privileges or Immunities Clause, provides a

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449. CHARLES BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAKED & UNNAMED 55 (1997) (describing *Slaughter-House* as "probably he worst holding, in its effects on human rights, ever uttered by the Supreme Court.").

450. RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004).

451. *See* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 48 (2007) ("It is not as if the principles underlying the framers' intent for the privileges or immunities clause are unfamiliar to the Court. In fact it would be impossible for the Court to be so unaware, for the clause itself is nothing more than the clearest, most direct and unadorned manifestation of the very core idea that radiates from the Declaration, the Constitution, and the concept of America itself: namely, Freedom. Freedom positively permeates the founding documents, and the Court could no more eliminate the idea of Freedom envisioned by the clause by closing the privileges or immunities window for 130 years than by scrapping America itself.").

452. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63–64 (1989).

453. The Constitutional Accountability Center Amicus Brief, representing eight constitutional law professors, including Jack Balkin, Randy Barnett, and Steven Calabresi, signifies a remarkable confluence of thought among leading scholars with various takes on the debate over originalism. Brief of

unique opportunity to bring the clause back into the forefront of our constitutional jurisprudence. By extending the *Washington v. Glucksberg* framework to recognize rights deeply rooted in our Anglo-American traditions, the provisions of the Bill of Rights would be applied to the states in a way consistent with the original meaning of the Fourteenth Amendment. Through this approach, the Supreme Court can be faithful to the Constitution and thereby keep Pandora's Box sealed.

Constitutional Law Professors as Amici Curiae in Support of Petitioners, McDonald v. Chicago, No. 08-1521.