

GETTING BEYOND GUNS: CONTEXT FOR THE COMING DEBATE  
OVER PRIVILEGES OR IMMUNITIES

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## I. ABSTRACT

The Fourteenth Amendment represents a deliberate decision by the people of this nation to make the U.S. Constitution—not state constitutions and not state officials—the primary guardian of liberty in America. The purpose of the amendment was to secure the basic civil rights of all citizens, regardless of race, and to give federal judges both the power and the duty to protect those rights from infringement by state and local governments.

Notwithstanding the misinformed claims of those who prefer a more limited role for courts in protecting constitutional rights, the history, text, and purpose of the Fourteenth Amendment are clear. And while some may find the sweep of the amendment's commands unsettling or uncongenial, that is no warrant to ignore them.

Simply put, the Fourteenth Amendment is about the right to be free—free from the oppressive, arbitrary, and self-aggrandizing abuses of authority that have plagued mankind since the advent of government itself, whether perpetrated by a monarch, a mayor, or a majority. The Fourteenth Amendment speaks broadly because the evils it addressed were broad. At the root of those evils was the illegitimate exercise of government power. At the heart of the Fourteenth Amendment lies its antidote: liberty.

The Fourteenth Amendment was enacted specifically to end a culture of lawless oppression in which the rights of newly free slaves (“freedmen”) and their white supporters were trampled by state and local governments.<sup>1</sup> That culture featured the use of legal and extralegal authority to keep these freedmen and antislavery whites in a state of penury and terror.<sup>2</sup> Speech promoting equality for blacks was viciously suppressed, just as abolitionist sentiments had been before the Civil War; freedmen and even discharged Union soldiers were forcibly disarmed to make them more vulnerable to intimidation and reprisals; and economic

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1. *See infra* note 66 (describing the proposal of the Fourteenth Amendment).

2. *See infra* Part III.B.

liberties were systematically denied in order to keep the freedmen in a state of constructive servitude.<sup>3</sup>

Against this backdrop, the Fourteenth Amendment was meant to address three distinct evils. First, it was meant to prevent states from locking freedmen out of *political* society—an end accomplished by guaranteeing “citizenship” to anyone born within the United States.<sup>4</sup> Second, it was meant to prevent states from discriminating against freedmen or Union sympathizers, which it did by requiring equal protection of the laws.<sup>5</sup> And finally, it was meant to prevent states from locking freedmen and others out of *civil* society by stripping them of certain rights—including particularly free speech, armed self-defense, and the ability to work, contract, and hold property—that were for Reconstruction-era Americans and their forebears the very essence of liberty.<sup>6</sup>

This last goal was accomplished through the Fourteenth Amendment’s Privileges or Immunities Clause, the avowed purpose of which was to protect substantive rights from infringement by state and local authorities.<sup>7</sup> If the Thirteenth Amendment was meant to make all people *legally* free, then the Fourteenth, and particularly its Privileges or Immunities Clause, was meant to make that freedom *matter*.

But the Supreme Court quickly repudiated that purpose in the *Slaughter-House Cases*.<sup>8</sup> Despite unambiguous evidence that Congress and the state ratifying conventions understood and intended for the Fourteenth Amendment to protect a wide range of substantive rights against state infringement, in the *Slaughter-House Cases* a five-Justice majority interpreted the Privileges or Immunities Clause as protecting only a starkly limited set of rights of “national” citizenship, including access to government subtreasuries and navigable waterways.<sup>9</sup> But those were obviously not the rights over which the Civil War was fought, nor were they the rights whose flagrant violation

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3. *Id.*

4. *See infra* note 67 and accompanying text.

5. *See infra* note 68 (examining the states lack of enforcing early laws meant to protect freedmen).

6. *See infra* note 69 (discussing how Reconstruction Era Republicans thought about civil rights).

7. *See infra* notes 61–63 and accompanying text.

8. *Slaughter-House Cases*, 83 U.S. 36 (1873).

9. *Id.* at 78–79.

prompted the Fourteenth Amendment in the first place. The Privileges or Immunities Clause was very carefully, very deliberately crafted to make clear that citizens hold basic civil rights—some specifically enumerated in the Constitution and some not—that state and local governments must respect.<sup>10</sup> The *Slaughter-House* majority’s repudiation of that design remains among the most glaring examples of judicial activism in American history.<sup>11</sup>

*Slaughter-House* was recognized immediately for the activist decision that it was. Nineteenth-century legal scholar Christopher Tiedeman, for example, lauded the decision for having “dared to withstand the popular will as expressed in the letter of the [Fourteenth A]mendment.”<sup>12</sup> In his dissenting opinion, Justice Stephen Field chastised the majority for having reduced the Fourteenth Amendment, including specifically the Privileges or Immunities Clause, to “a vain and idle enactment, which accomplished nothing.”<sup>13</sup> Modern scholars are essentially unanimous in their agreement that the *Slaughter-House* majority’s interpretation of the Privileges or Immunities Clause is intellectually indefensible.<sup>14</sup>

Over time and in the face of subsequent outrages like Jim Crow, the notion that state and local governments would be the chief protectors—rather than the chief violators—of civil rights became increasingly untenable.<sup>15</sup> Again, the driving force behind those outrages was southern states’ attempt to keep blacks in what amounted to a state of servitude, the Civil War notwithstanding.<sup>16</sup> Of course, the most basic way to do that was to give whites unfettered power over freedmen’s

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10. See *infra* Part III.C.

11. *Slaughter-House*, 83 U.S. at 77.

12. David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 121 (1990) (quoting CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 102–03 (1890)).

13. *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

14. E.g., Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994).

15. See generally Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 347 (2003) (citing William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. Hist. 31, 55–57 (1976) (discussing the purpose and effects of Jim Crow)).

16. *Id.*

livelihoods, which is precisely what the Black Codes did.<sup>17</sup> And it was but a small step from there to marginalizing other “out” groups, such as women and immigrants, whose attempts, along with emancipated blacks, to enter the labor market in the late Nineteenth century produced intense competitive pressures and a predictable backlash from entrenched interests.<sup>18</sup>

Having incorrectly held that the Privileges or Immunities Clause did not protect a citizen’s right to earn an honest living and then faced with increasingly blatant legislative abuses, the Supreme Court occasionally protected that right through the doctrines of equal protection and substantive due process in cases such as *Yick Wo v. Hopkins* and *Lochner v. New York*.<sup>19</sup> Even some state courts recognized the importance of occupational freedom and its particular vulnerability to interest group politics. As the Michigan Supreme Court observed in 1889:

It is quite common in these later days for certain classes of citizens . . . to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted . . . . This kind of legislation should receive no encouragement at the hands of the courts . . . .<sup>20</sup>

However, the era of judicial concern for occupational freedom was swept away in the New Deal revolution that ushered in another breathtaking era of activism in which the clear commands of the Constitution—a federal government

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17. *Id.*

18. See generally Bina Kalola, *Immigration Laws and the Immigrant Woman: 1885–1924*, 11 GEO. IMMIGR. L.J. 553, 566–67 (1997) (discussing the effect of severely low wages on immigrant women in the late nineteenth century and early twentieth century).

19. *Lochner v. New York*, 198 U.S. 45, 53–54 (1905) (holding that New York’s regulation of the working hours of bakers was not a justifiable restriction of the right to contract freely under the Due Process Clause of the Fourteenth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356, 369–71 (1886) (holding that a law which is race neutral on its face but as applied is discriminatory against Chinese laundry business owners is a violation of the Equal Protection Clause).

20. *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889).

of limited powers and state respect for the obligations of contracts, for example—were ignored in favor of politically popular, but plainly illegal, economic policies.

Historically, in many cases the Supreme Court has shown a tendency to construe power-granting provisions of the Constitution quite broadly<sup>21</sup> and power-constraining provisions more narrowly.<sup>22</sup> From the standpoint of the Framers and originalism, this gets it exactly backwards.<sup>23</sup> Revisiting *Slaughter-House* in order to finally engage the Privileges or Immunities Clause would be an important step towards correcting that imbalance, and the Court now has a perfect vehicle to undertake that effort: post-*Heller* gun litigation.<sup>24</sup>

In *District of Columbia v. Heller*, the Supreme Court held for the first time that the Second Amendment protects an individual's right to keep and bear arms.<sup>25</sup> But because Washington, D.C., is a federal enclave, the decision left open the question whether the federal Constitution protects the right to keep and bear arms against infringement by state and local governments as well.<sup>26</sup> Given the history of the Fourteenth Amendment,<sup>27</sup> there can be no doubt that it does. The key question is how—through the Privileges or Immunities Clause, as the Framers and ratifiers of the Fourteenth Amendment intended, or through substantive due process, a doctrine Supreme Court seized on in an attempt ameliorate its mistake in *Slaughter-House*?<sup>28</sup>

21. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 422–25 (1819) (interpreting the Necessary and Proper Clause to hold that Congress has the power to incorporate a national bank notwithstanding the lack of a constitutionally enumerated power to do so).

22. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 3.3.2 (3rd ed. 2006) (citing *Gibbons v. Ogden*, 22 U.S. 1, 196–97 (1824) (holding that the Tenth Amendment did not restrict Congress's power to regulate commerce)).

23. See generally Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL'Y 391, 394–95 (Winter 1996) (discussing the Framers' choice to use the enumerated powers doctrine "both for creating and for limiting governmental power").

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

25. *Heller*, 128 S. Ct. at 2799.

26. *Infra* note 162.

27. See *infra* Part III.C (discussing the context and framing of the Fourteenth Amendment).

28. See generally *infra* note 143 (explaining Substantive Due Process' relationship to *Slaughter-House*).

The Supreme Court effectively wrote the Privileges or Immunities Clause out of the Constitution in 1873. The time has come to put it back.

## II. INTRODUCTION

As it struggled to cope with the aftermath of the Civil War and to dismantle the system of human slavery that had both dominated and disgraced its early history, the United States adopted a trio of amendments designed to fulfill the promise of America as originally expressed in our founding documents, the Constitution and the Declaration of Independence.<sup>29</sup> These Reconstruction Amendments were specifically intended to reshape the relationship between government—federal, state, and local—and the people.<sup>30</sup> While an immediate goal of the amendments was to confer full and equal citizenship on the freedmen, they also had a deeper, more profound purpose: to stamp out a culture of lawlessness and oppression that had grown up around the issue of slavery and the attempts to abolish it. This culture had grown like a cancer until it menaced the freedom of all citizens and the very notion of liberty upon which this country was founded.<sup>31</sup>

While the Reconstruction Amendments were a tremendous victory, they were not a final victory. The same debates over the scope of state power and states' relationships to the federal government that had raged before Reconstruction continued after the Amendments' ratification.<sup>32</sup> In some cases, such as the Thirteenth Amendment's ban on slavery, the Reconstruction Republicans' goals were met with unqualified success.<sup>33</sup> In other cases, success was grossly delayed: the Supreme Court, for example, found that the

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29. See U.S. CONST. amend. XIII, § 1 (prohibiting slavery and involuntary servitude); U.S. CONST. amend. XIV, §1 (guaranteeing equal protection of the laws); U.S. CONST. amend. XV, §1 (prohibiting states from denying the right to vote "on account of race, color, or previous condition of servitude").

30. DONALD P. KOMMERS ET AL., *AMERICAN LAW: ESSAYS, CASES, AND COMPARATIVE NOTES* 436 (Rowman & Littlefield 2d ed. 2004).

31. W.E.B DUBOIS, *BLACK RECONSTRUCTION IN AMERICA 1860–1880* at 674 (THE FREE PRESS 1998) (1935).

32. NIGEL BOWELS, *THE GOVERNMENT AND POLITICS OF THE UNITED STATES* 170 (St. Martin's Press, Inc. 2d ed. 1993).

33. SUSAN-MARY GRANT & PETER J. PARISH, *LEGACY OF DISUNION: THE ENDURING SIGNIFICANCE OF THE AMERICAN CIVIL WAR* 92 (Louisiana State University Press 2003).

Equal Protection Clause of the Fourteenth Amendment presented no obstacle to legal segregation.<sup>34</sup> This misreading of the Amendment allowed a system of de jure segregation to persist for decades until the Supreme Court's error was corrected in 1954.<sup>35</sup>

In still other cases, though, the Reconstruction Amendments' purposes were stymied. The Fourteenth Amendment's Privileges or Immunities Clause, meant to stand as a bulwark against state interference with individual liberties, was almost immediately gutted by the Supreme Court,<sup>36</sup> but unlike equal protection, the Privileges or Immunities Clause is *still* waiting for its *Brown v. Board* to correct the Supreme Court's activism in *Slaughter-House*.<sup>37</sup>

Notwithstanding the imprecision with which it is frequently used, the term "judicial activism" does have a fixed meaning, namely, the substitution by a judge of his or her personal preferences for law.<sup>38</sup> That is precisely what happened in the *Slaughter-House Cases*, where a bare majority essentially announced that it considered unwise the Nation's decision to empower the federal government to enforce basic civil rights and would refuse to apply the Amendment insofar as it did so.<sup>39</sup> That display of activism has deprived Americans of a properly engaged federal judiciary for more than a century.

This paper tells the story of the Privileges or Immunities Clause—its original purpose, its redaction by the Supreme Court, and its prospects for revival. The Supreme Court would do well to prepare for the challenges of the twenty-first century by correcting a particularly glaring mistake from the nineteenth. Properly understood, the Privileges or Immunities Clause speaks to a wide range of modern concerns—from gun control to property rights to occupational freedom—and provides a coherent framework

34. *E.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

35. *E.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

36. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1532 (2008) (citing *Slaughter-House*, 83 U.S. 36).

37. *Brown*, 347 U.S. 483; *Slaughter-House*, 83 U.S. 36.

38. See Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1765–66 (2007).

39. *Slaughter-House*, 83 U.S. at 78. ("[T]he privileges and immunities relied on . . . are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and *not by this article placed under the special care of the Federal government . . .*") (emphasis added).

for engaging those issues that is based on the text and history of the Constitution.

### III. SLAVERY, ABOLITION, AND THE SHIFTING BALANCE OF POWER BETWEEN THE FEDS, THE STATES, AND THE PEOPLE.

The Fourteenth Amendment represented a capstone—not just of the Civil War, but of a decades-long political struggle that sought to redeem the spirit of liberty from the crucible of slavery and its incidents. The Amendment can be neither understood nor interpreted without a proper appreciation of the historical dynamics that produced it, particularly the specific evils the Amendment was designed to cure.

A proper understanding of the meaning of the Privileges or Immunities Clause has three basic components. First is the context in which the debates over the Fourteenth Amendment took place—the continuing struggle, dating back to the framing of the Constitution, over the relationship between the federal government, the states, and the people, who understood themselves to be *sovereign*.<sup>40</sup> Second, one must understand what abolitionists and congressional Republicans were trying to accomplish, that is, the specific issues that gave rise to the Fourteenth Amendment. Finally, one must look at what they actually produced—the Amendment’s text and how it was crafted.

#### *A. Pre-Civil War Debates*

The U.S. Constitution was adopted as a significant change in its own right—a change meant to centralize more power in the federal government after the failure of the feeble authority created by the Articles of Confederation.<sup>41</sup>

In striking a new balance between federal power and state power, one question loomed large: slavery.<sup>42</sup> In the original Constitution, the Framers largely punted on this question—while there were some implicit references to slavery, such as

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40. U.S. CONST. pmb.; U.S. CONST. art. I, § 2, cl. 1.

41. See THE FEDERALIST NO. 11 (Alexander Hamilton) (describing the need for greater unity in the new government).

42. See LARRY SCHWEIKART & MICHAEL ALLEN, A PATRIOT’S HISTORY OF THE UNITED STATES 114–16, Penguin Group 2007 (2004) (stating that disagreements between the Framers over slavery were an “even more important . . . difference” than arguments over counting representatives.).

the notorious “three-fifths compromise” of Article I, sec. 2, the terms “slave,” “slavery,” “human bondage” and the like do not appear anywhere in the document.<sup>43</sup>

The issue of slavery arose again when the first Congress introduced the proposed amendments that became the Bill of Rights. James Madison’s initial draft amendments included provisions that would clearly protect individual rights from infringement by the states—but those provisions were stripped from the final version.<sup>44</sup> As was the case throughout the framing of the Constitution, any provisions that might have threatened the institution of slavery were scrupulously avoided.<sup>45</sup>

The Framers’ failure to address slavery or to delineate the balance of power between the federal and state governments on that issue created a void in the Constitution with far-reaching implications. While everyone recognized that the new Constitution had created a stronger central government, there was much uncertainty about just how strong that government would be and the precise bounds of its power vis-à-vis the states and the people.<sup>46</sup> One school of thought held that state governments retained the power to nullify federal laws they did not like.<sup>47</sup> Another, in part motivated by the Constitution’s failure to grapple with the slavery problem, held that the Constitution itself was illegitimate.<sup>48</sup>

A third school of thought—of particular importance because it became the dominant view among many of the Reconstruction Republicans who would control Congress and propose the Fourteenth Amendment—held that the Constitution as drafted imposed substantive limitations on

43. Roy L. Brooks, *Ancient Slavery Versus American Slavery: A Distinction With a Difference*, 33 U. MEM. L. REV. 265, 270 (2003) (“The words slave and slavery . . . do not appear in the [Constitution]; euphemistic terminology is used in the sections dealing with slavery.”).

44. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 22 (Yale University Press 1998).

45. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 19 (Duke University Press 1986).

46. U.S. CONST. amend. X.

47. E.g., John C. Calhoun, *Speech on the Force Bill* (1833), in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 401, 428–29 (Ross M. Lence ed., Liberty Fund 1992).

48. See Lysander Spooner, *No Treason, No. VI: The Constitution of No Authority* (1870), in *THE COLLECTED WORKS OF LYSANDER SPOONER* (Charles Shively ed., 1971).

the states.<sup>49</sup> While this is a surprising and certainly difficult argument to accept through modern eyes—particularly given Madison’s unsuccessful amendments—there can be no doubt that it was sincerely held at the time.<sup>50</sup> Though mistaken, the view that the Bill of Rights applied directly to the states was apparently fairly common,<sup>51</sup> while a more sophisticated view held that Article IV’s Privileges *and* Immunities Clause protected substantive rights from state incursion.<sup>52</sup>

However sincerely held, those views had already been rejected by the Supreme Court. In *Barron v. Baltimore*, the Court held that the Constitution posed no barrier to a city’s appropriation of private property because the Fifth Amendment’s takings provision (along with the rest of the Bill of Rights) had no application to the states.<sup>53</sup> Further, in *Dred Scott*, the Court adopted a narrow reading of Article IV’s Privileges and Immunities Clause, finding that it only restrained states’ ability to treat temporary visitors differently from residents, but imposed no requirements on what rights the states denied to different classes of citizens.<sup>54</sup>

But those precedents did not discourage antislavery advocates from believing in, and clamoring for their rights-protecting vision of the Constitution. Contemporary antislavery legal theorists, such as Joel Tiffany, continued to insist, notwithstanding the court decisions in opposition, that the Constitution provided a meaningful check on state actions.<sup>55</sup> In his 1849 *Treatise on the Unconstitutionality of Slavery*, Tiffany made an impassioned defense of his vision of the Constitution that would protect “all the rights privileges, and immunities, granted by the Constitution of the United States” from encroachment by state governments by “the force of the whole Union.”<sup>56</sup> This protection flowed from

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49. See CURTIS, *supra* note 45, at 43–56.

50. *Id.* at 54.

51. The seemingly frustrated Bingham attempted to persuade some of his recalcitrant colleagues that “the power of the Federal Government to enforce in the United States courts the bill of rights . . . had been denied.” CONG. GLOBE, 39th Cong., 1st Sess. 1089–90 (1866).

52. CURTIS, *supra* note 45, at 47–48.

53. *Barron v. Baltimore*, 32 U.S. 243, 248 (1833).

54. *Dred Scott v. Sanford*, 60 U.S. 393, 422–23 (1856).

55. CURTIS, *supra* note 45, at 42–43.

56. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 56 (1849).

one's national citizenship for, on Tiffany's reading, being a citizen of the United States was to be "*invested with a title to life, liberty, and the pursuit of happiness,*" with United States citizenship providing "a panoply of defense equal, at least, to the ancient cry '*I am a Roman citizen*'" standing as a barrier to oppression by *any* government, including that of a state.<sup>57</sup>

It is worth noting that while Tiffany's theory of the scope of constitutional protection was a minority view, his use of the term "privileges" to describe substantive rights like freedom of speech was not unusual.<sup>58</sup> As Michael Kent Curtis notes, this usage "had a long and distinguished heritage," appearing in Blackstone's landmark *Commentaries on the Laws of England* even prior to the American Revolution.<sup>59</sup> Even the reviled *Dred Scott* decision referred to the Bill of Rights as the "rights and *privileges* of the citizen."<sup>60</sup>

The view of many antislavery advocates that the Bill of Rights should be understood as binding state governments may have been wrong—that is, the *Barron* court may have been entirely correct in its interpretation of the Constitution—but it profoundly influenced later debates over the scope and significance of the Fourteenth Amendment nevertheless. As Yale professor Akhil Reed Amar notes, the very phrase "Bill of Rights" became commensurate with the view that the first ten amendments to the Constitution were binding on the states—because, as declarations of *rights* (meaning *natural rights*), they could necessarily be asserted against any government.<sup>61</sup>

New York Republican John Bingham also shared the Republican understanding of Article IV's Privileges and Immunities Clause: that it protected substantive rights against state infringement, not simply discrimination against nonresidents. In 1859, speaking out against the provisions in the proposed Oregon state constitution that would forbid free blacks from entering the new state, Bingham disputed the validity (or perhaps legitimacy) of both *Dred Scott* and

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57. *Id.*

58. AMAR, *supra* note 44, at 166–69.

59. CURTIS, *supra* note 45, at 64.

60. *Dred Scott v. Sanford*, 60 U.S. 393, 449 (1856) (emphasis added).

61. AMAR, *supra* note 44, at 286–87 (noting that the phrase "Bill of Rights" hardly ever appeared in antebellum congressional debates, and was the exclusive domain of Republicans in the debates over the Fourteenth Amendment).

*Barron*, arguing that free blacks were citizens of the United States and therefore held substantive rights protected by Article IV. His explanation of the Clause gives tremendous insight into the language that eventually made its way into the Fourteenth Amendment:

The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to “all privileges and immunities of citizens in the several States.” Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation but to “all privileges and immunities” of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is “the privileges and immunities of citizens of the United States in the several States” that it guaranties.<sup>62</sup>

These are not simply the views of an ordinary Republican Congressman. While Bingham was active in the pre-Civil War debates over the constitutional relationship between the states and the federal government, he truly found fame several years later as the chief architect of the Fourteenth Amendment. Bingham then took the opportunity to correct the perceived “ellipsis” in Article IV’s Privileges and Immunities Clause by “filling in” the missing text in the Fourteenth Amendment’s Privileges *or* Immunities Clause.<sup>63</sup>

*B. The Abuse, Redemption, and Surrender of Civil Rights in the Reconstruction Era South.*

As with any constitutional provision, the interpretation of the Fourteenth Amendment should be guided by a clear understanding of the specific evils the provision was meant to address.<sup>64</sup> In the case of the Fourteenth Amendment, the “mischief” that concerned Congress is easy to identify: state

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62. CONG. GLOBE, 35th Cong., 2d Sess., 984 (1859).

63. See *infra* Part III.C and notes 83–86.

64. *Cf.* *Rhode Island v. Massachusetts*, 37 U.S. 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.”).

and local authorities throughout the South were systematically violating individual rights of emancipated blacks and their white supporters in open defiance of federal demands for full and equal citizenship for all.<sup>65</sup> In 1866, Reconstruction Republicans undertook to set things straight.<sup>66</sup>

The Fourteenth Amendment struck at three distinct “evils.” First, it was meant to prevent the states from locking newly freed slaves out of *political* society—an end accomplished by incorporating the Republican view that all people born within the United States were citizens of the United States, effectively overruling the *Dred Scott* decision.<sup>67</sup> Second, the Fourteenth Amendment was meant to prevent states from discriminating against newly freed slaves, for example, by refusing to provide black citizens with police protection—a problem addressed by the requirement that no state shall deny any person within its jurisdiction the equal protection of the laws.<sup>68</sup> Third, it was meant to prevent states from locking freedmen and others out of *civil* society by stripping them of certain rights—like the rights to speak freely, to defend themselves, and to earn a livelihood in the field and on the terms of their choosing—that Reconstruction Republicans (and presumably most Americans) viewed as inherent in the definition of what it meant to be free.<sup>69</sup>

Republican concern for violations of civil liberties and natural rights did not start with the Reconstruction Congress.<sup>70</sup> Indeed, the heated atmosphere of pre-Civil War

65. See Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 680–90 (2003) (discussing John Bingham’s response to the racial climate in the South before the Fourteenth Amendment’s passage).

66. CONG. GLOBE, 39th Cong., 1st Sess. 3148-49 (1866) (describing the proposal of the Fourteenth Amendment).

67. The integration of freedmen into *political* society was, of course, not complete until the introduction of the Fifteenth Amendment two years after the introduction of the Fourteenth Amendment. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 579–81 (1978).

68. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888* at 349 (University of Chicago Press 1985) (describing how laws meant for the protection of blacks were not being enforced).

69. Cf. Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 25–26 (1998) (describing Reconstruction Era Republican thought about protecting rights of both blacks and whites).

70. See, e.g., *State v. Worth*, 52 N.C. 488, 492 (1860) (involving an abolitionist Republican campaign document); CLEMENT EATON, *FREEDOM OF THOUGHT IN THE OLD*

debates over slavery and abolition effectively fused opposition to slavery with staunch support for civil liberties, as Southern states made clear that no individual right was sacred when it came to propping up the ‘peculiar institution.’<sup>71</sup> In North Carolina, for example, an abolitionist named Daniel Worth was indicted and sentenced to twelve months in prison in 1858 for circulating *The Impending Crisis of the South* by Hinton Rowan Helper of North Carolina, an antislavery tract that doubled as a Republican campaign document.<sup>72</sup> In Virginia, the act of outsiders “advocat[ing] or advis[ing] the abolition of slavery” was criminalized.<sup>73</sup> And, of course, the abuse of individual rights did not stop with the end of the Civil War or with the adoption of the Thirteenth Amendment.<sup>74</sup> To the contrary, legislative testimony and newspaper accounts provide compelling evidence concerning the scope and intensity of the assault on civil liberties during Reconstruction.<sup>75</sup>

The stories are legion. Discharged Union soldiers were forcibly stripped of their weapons; South Carolina law prescribed flogging for any black man who broke a labor contract; other laws prevented blacks from practicing trades or even leaving their employer’s land without permission; minors in Mississippi were “taken from their parents and bound out to the planters”; white Union sympathizers often had their property seized or found themselves banished from a state outright.<sup>76</sup> In one Kentucky town, it was reported that the “marshall [took] all arms from returned colored soldiers and [was] very prompt in shooting the blacks whenever an opportunity occur[red],” while outlaws made “brutal attacks and raids upon the freedmen, who [were] defenseless, for the civil law-offices disarm the colored man and hand him over to

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SOUTH 245 (Duke University Press 1940) (detailing an indictment in Virginia for distribution of the same book).

71. *Id.*

72. *Id.*

73. EATON, *supra* note 70, at 127.

74. STEPHEN HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–76 at 1–5 (Praeger Publishers 1998).

75. See, e.g., David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–68*, 30 WHITTIER L. REV. 695, 703–07 (listing newspaper articles that describe Reconstruction Era assaults on civil liberties).

76. *Id.*

armed marauders.”<sup>77</sup> These acts were widely reported, fostering outrage not just in Congress, but throughout the popular press.<sup>78</sup> For many, if not most freedmen, being “free” could not have seemed much better than life as a slave.<sup>79</sup>

While it may be tempting to see these outrages as an ugly but isolated moment in our nation’s history, they are not. To the contrary, in America as everywhere else, those with power have always abused it, and the simple freedom to go about one’s business unmolested and enjoy the fruits of one’s labor is perpetually insecure. The Fourteenth Amendment, referred to by Justice Swayne in his *Slaughter-House* dissent as part of America’s “new Magna Carta,”<sup>80</sup> was a deliberate attempt to secure that freedom.

### C. Framing the Fourteenth Amendment

Congress in 1866 was considering several concurrent measures to address the twin problems of Reconstruction and the re-admittance of Southern states to the Union.<sup>81</sup> Those measures included the bill that became the Civil Rights Act of 1866 and the various drafts of what would eventually become the Fourteenth Amendment.<sup>82</sup> Given the overlapping character of and motivations behind these measures, the debates over them can generally be treated as a single coherent conversation over the central question of how to secure individual rights in the former Confederacy.

The Fourteenth Amendment was largely drafted and guided by John Bingham, a New York congressman and moderate Republican whom the “*New York Times* described as ‘one of the most learned and talented members of the House.’”<sup>83</sup> Bingham’s leadership is important for several

77. H.R. REP. No. 30, at 32 (1866).

78. Halbrook, *supra* note 74, at 7, 19, 31, 37.

79. Cf. Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 72 (1996) (noting the Reconstruction South’s additional abuse of the right to “free speech, the right to hold religious meetings[,] and the right to bear arms”).

80. *Slaughter-House*, 83 U.S. at 125 (Swayne, J., dissenting).

81. Cf. WILLIAM H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 33–34 (Harper and Brothers Publishers 1868) (discussing Congressional focus on secessionist states in 1866).

82. CURTIS, *supra* note 45, at 57–58.

83. *Id.* at 58.

reasons, not least of which because his views explain why the debates over the Civil Rights Act are every bit as relevant to the proper interpretation of the Fourteenth Amendment as are the debates over the Amendment itself. Many Congressional Republicans, given their unorthodox theory of the Constitution, believed (mistakenly) that the federal government already had all the power it needed to protect rights in the states.<sup>84</sup> But Bingham understood that was not so, and he also recognized that without some sort of enabling amendment to the Constitution, the Supreme Court might well invalidate the Civil Rights Act as well.<sup>85</sup>

While many members of Congress appeared unaware (or unwilling to acknowledge) that the Supreme Court had long ago rejected their theory of constitutional interpretation, Bingham was all too aware of these decisions, and deliberately framed the Fourteenth Amendment as a response to *Barron*.<sup>86</sup> As he explained several years after the adoption of the Amendment:

I noted and apprehended . . . certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the State [sic] governments they would have imitated the framers of the original Constitution and have expressed that intention." *Barron vs. The Mayor, &c.*, Peters, 250.

Acting upon this suggestion I did imitate the Framers of the original Constitution. As they had said "no State shall emit bills of credit [etc.] . . . imitating their example and imitating it to the letter, I prepared

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84. For example, Senator Richard Yates from Illinois presumably spoke for many of his colleagues when he expressed surprise (perhaps feigned) that the question of federal power to protect individuals from state governments was even being debated: "I had," he said, "in the simplicity of my heart, supposed that 'State rights,' being the issue of the war, had been decided." CONG. GLOBE, 39th Cong., 1st Session 99 appendix (1866).

85. See CURTIS, *supra* note 45, at 80–81.

86. See notes 62–63 and accompanying text.

the provision of the first section of the fourteenth amendment as it stands in the Constitution . . . .<sup>87</sup>

Debates over what became the Fourteenth Amendment are replete with the natural-rights language that Republicans had used for decades in arguing against slavery.<sup>88</sup> Having been unable to respond effectively to state predations against natural rights before the Civil War, Reconstruction Republicans were intent on remedying what they considered a flawed constitutional rule that rendered the federal government powerless to stop those abuses as they continued after the war.

Throughout the 1866 debates, congressmen drew clear distinctions between their concern about *equality*—a concern that state laws be even-handed—and their concern about protections of *substantive rights*.<sup>89</sup> Representative Thayer, for example, praised the Fourteenth Amendment as “so necessary for the equal administration of the law” and as “so necessary for the protection of the fundamental rights of citizenship.”<sup>90</sup>

That distinction is essential to a proper understanding of the Privileges or Immunities Clause.<sup>91</sup> After all, as Michael Kent Curtis has observed, “[I]n the South, the ideal solution to the problem of speech about slavery was compelled silence”—fully and equally applicable to blacks and whites.<sup>92</sup> Thus, far from being concerned only with equality, congressional Republicans wanted to prevent states from violating “guaranteed [sic] privileges” like the right to speak out against slavery or cruel or unusual punishment,<sup>93</sup> and to reaffirm and protect certain “inalienable rights, pertaining to

87. AMAR *supra* note 44, at 164–65 (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871) (emphasis altered)).

88. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Frederick Woodbridge) (stating that the proposal would give the federal government the power to “give to a citizen of the United States the natural rights which necessarily pertain to citizenship”).

89. CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866).

90. *Id.*

91. Some academics have argued that the Clause was meant only to require *equality* of rights, rather than to protect individual rights from infringement. *E.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385, 1392–93 (1992).

92. CURTIS, *supra* note 45, at 47.

93. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

every citizen, which cannot be abolished or abridged by State constitutions or laws.”<sup>94</sup>

It was also very much the Framers’ intent to ensure that *federal courts* would actively restrain state action. Representative Bingham discussed at length the Supreme Court’s decision in *Barron*, citing it as evidence that “the power of the Federal Government to enforce in the *United States* courts the bill of rights under the articles of amendment to the Constitution had been denied.”<sup>95</sup> Bingham’s position was hotly disputed by Robert Hale, who insisted that the Bill of Rights already restrained state legislation but who acknowledged, in response to Bingham’s challenge to name any court decision protecting liberty from state encroachment under the Bill of Rights, that he had “somehow or other” gotten that idea but could not identify any cases supporting it.<sup>96</sup>

The intended meaning of the Privileges or Immunities Clause was perhaps most succinctly summarized by Representative Bingham himself:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply . . . . It is the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.<sup>97</sup>

These sentiments were echoed in the Senate. In introducing the Amendment, Senator Jacob Howard relied extensively on Justice Bushrod Washington’s opinion in *Corfield v. Coryell*, to illustrate the natural rights or “fundamental guarantees” that were encompassed in the term “privileges and immunities.”<sup>98</sup> Senator Howard was as clear

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94. *Id.* at 1832 (statement of Rep. Lawrence); *See also* CURTIS, *supra* note 45, at 44–65 (describing and debunking what Curtis calls the “equality only” view of the Privileges or Immunities Clause).

95. CONG. GLOBE, 39th Cong., 1st Sess. 1089–90 (1866) (emphasis added).

96. *Id.* at 1066.

97. *Id.* at 2542.

98. *Id.* at 2765.

about the source of protection for these rights as he was about the rights themselves: “That is [the Amendment’s] first clause,” he said, “and I regard it as very important.”<sup>99</sup> Senator Howard’s sentiments, including his explicit invocation of *Corfield*, were repeated by others throughout the debates.<sup>100</sup>

This understanding of privileges or immunities was equally pervasive in the debates over the Amendment’s ratification. Historian Michael Kent Curtis quotes Congressman Columbus Delano during the Ohio ratification debates:

I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of Southern slaveholders . . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected.<sup>101</sup>

Delano’s views are consistent with those expressed in newspaper articles and editorials concerning the Fourteenth Amendment’s ratification.<sup>102</sup> David Hardy, for example, quotes a lengthy pseudonymous essay in the *New York Times* (credited only to “Madison”), which argued the “rights and privileges of a citizen of the United States . . . [including] the rights to possess and acquire property of every kind, and to pursue . . . happiness and safety . . . are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.”<sup>103</sup> Even those who opposed the amendment did so precisely because they believed it would allow for federal protection of individual rights.<sup>104</sup>

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99. *Id.*

100. BERNARD SIEGAN, *THE SUPREME COURT’S CONSTITUTION* 55–65 (Transaction Books 1987).

101. CURTIS, *supra* note 45, at 138–39.

102. See Hardy, *supra* note 75 at 710–18 (listing Reconstruction Era articles about civil liberties violations).

103. *Id.* at 718 (quoting “Madison,” *The National Question: The Constitutional Amendments—National Citizenship*, *The New York Times*, Nov. 10, 1866, at 2, col. 2–3).

104. *Id.* at 23.

Legal scholars took the same view.<sup>105</sup> Three significant legal treatises were published between the proposal of the Fourteenth Amendment and its ratification, each of which took the position that the Privileges or Immunities Clause would protect the substantive rights of American citizens.<sup>106</sup>

In short, the congressional leadership intended to bring the Constitution in line with longstanding Republican ideology about national citizenship and natural rights, and to protect those rights from further violation at the hands of state and local officials.<sup>107</sup> And the public appears by all accounts to have understood the proposed Fourteenth Amendment that way as well—if there is a credible historical counter-narrative, it has yet to be offered. Thus, the notion that we lack the means to properly understand the Privileges or Immunities Clause of the Fourteenth Amendment is a fiction, and a rather shabby one at that.

#### IV. THE BRIEF ROAD TO EVISCERATION BY THE SUPREME COURT

The initial battles over the Privileges or Immunities Clause—during its drafting and ratification—were clear victories for proponents of federal protection for natural rights. But just five years later, that vision was dealt a shocking blow by a narrow majority of the Supreme Court determined to substitute its preference for what we today would call minimalism for the expressed will of the people.<sup>108</sup>

That blow, of course, was delivered by the Court in the infamous *Slaughter-House Cases*.<sup>109</sup> At issue in *Slaughter-House* was the constitutionality of a Louisiana law granting an exclusive monopoly on the right to sell and slaughter animals in New Orleans to a single politically connected company.<sup>110</sup> Local butchers could continue to practice their trade under the law, but they could do so only in facilities operated by, and upon payment to, the government-favored monopolist.<sup>111</sup>

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105. Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *Yale L.J.* 57, 83–94 (1993).

106. *Id.* at 83.

107. *Id.* at 83–94.

108. *See Slaughter-House*, 83 U.S. 36.

109. *Id.*

110. *Id.* at 59–60.

111. *Id.* at 61, 63.

Plainly, this was not an ideal test case for outlining the bounds of the Fourteenth Amendment. For one thing, as the Louisiana Supreme Court made clear in initially upholding the law, the state was responding to a legitimate public health concern. There is a long and understandable history of cities restricting the slaughter of animals for sanitary reasons, and in New Orleans, the lack of regulation had resulted in pestilent waste being dumped in the river and even occasional stampedes, as cattle would “break[] loose and rush[] wildly and madly through the streets, endangering the limbs and the lives of men, women, and children.”<sup>112</sup> While the government’s response to those health concerns—creating a single monopolist rather than restricting the areas in which animals could be slaughtered or imposing waste-disposal regulations—was surely objectionable, it is difficult to dispute the evidence of a genuine problem with the preexisting laws governing slaughterhouses.

To the butchers, though, the creation of a state-sanctioned monopoly seemed an obvious violation of the Privileges or Immunities Clause, which they understood as protecting their right to earn a living free from unreasonable—obviously including corrupt—government interference.<sup>113</sup> Just as the Black Codes had bound freedmen to an employer’s land, imposed onerous contractual terms on their labor, and even barred them from participating in particular trades,<sup>114</sup> the butchers viewed this challenged law as a direct affront to their livelihoods.<sup>115</sup> The Supreme Court disagreed with that premise as a factual matter; as Justice Miller explained, “a critical examination of the act hardly justifies [the butcher’s] assertions.”<sup>116</sup> But instead of stopping there, the majority went on to construe the Privileges or Immunities Clause as an essentially meaningless provision.<sup>117</sup>

In Justice Miller’s opinion for the 5–4 majority, the Court posits a dichotomy of rights—those that are held by virtue of one’s state citizenship on the one hand, and those that are

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112. *Id.* at 62; State *ex rel.* Belden v. Fagan, 22 La. Ann. 545, 551–52 (La. 1870).

113. *Slaughter-House*, 83 U.S. at 60, 66.

114. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 200–04 (Henry Steele Commager & Richard B. Morris eds., Harper & Row 1988).

115. *Slaughter-House Cases*, 83 U.S. at 60–66.

116. *Id.* at 60.

117. *Id.* at 77.

held by virtue of one's national citizenship on the other.<sup>118</sup> The rather obvious purpose of this is to disclaim any responsibility—or even authority—on the part of the federal government to protect precisely those rights whose wanton violation by state governments was the driving force behind the enactment of the Fourteenth Amendment generally and the Privileges or Immunities Clause in particular.<sup>119</sup>

The tenor of the opinion is striking, as it makes clear that its crabbed interpretation rests on a basic disapproval of the amendment's purpose; that is, the Court effectively read the Privileges or Immunities Clause out of the Constitution because the “consequences” of reading the Clause properly would be “so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions.”<sup>120</sup> The opinion's hostility to the Reconstruction Congress and its aims is barely masked as Justice Miller only briefly notes the exploitative economic restrictions imposed on freedmen before suggesting that the congressional hearings were tainted with “falsehood or misconception . . . [in] their presentation.”<sup>121</sup>

Rather than read the Privileges or Immunities Clause to work a significant change in the constitutional order—which it was explicitly intended and understood to have done by those who drafted and ratified it—the Court viewed the Clause as protecting only a narrow set of rights of “national citizenship,” including “the right to use the navigable waters of the United States” and “the right of free access to . . . the subtreasuries, land offices, and courts of justice in the several States.”<sup>122</sup> While some modern advocates have attempted to rehabilitate *Slaughter-House*, arguing that Justice Miller's opinion does not foreclose reading the Privileges or Immunities Clause to protect certain additional rights,<sup>123</sup> the

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118. *Id.* at 74–82.

119. *See supra* text accompanying note 46–47.

120. *Slaughter-House*, 83 U.S. at 77–78.

121. *Id.* at 70.

122. *Id.* at 79.

123. Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1100–01 (2000) (arguing that Justice Miller's opinion did not necessarily reject incorporation and gut the Fourteenth Amendment since the total incorporation via the Privileges or Immunities Clause may have been a minimum view accepted by all the Justices).

opinion itself is clear on this point: it draws a distinction between rights whose very existence depends on the federal government—like access to its subtreasuries—and rights that had hitherto been the responsibility of the states, making clear that the latter were “not intended to have any additional protection by this paragraph of the amendment.”<sup>124</sup> In short, *Slaughter-House* rendered the Privileges or Immunities Clause an essentially dead letter though of course the possibility remained that it might one day be pressed into service by someone who is seeking access to a seaport or navigable waterway.<sup>125</sup>

Justice Stephen Field wrote a powerful dissent in which he chided the majority for rendering the Privileges or Immunities Clause “a vain and idle enactment, which accomplished nothing.”<sup>126</sup> Field acknowledged the state’s interest in public health, but unlike the majority, recognized that there was a difference between the proper exercise of the state’s police power to control where and how animals were slaughtered and the grant of an exclusive monopoly to one corporation. Noting that the law contained provisions prohibiting slaughtering animals in certain areas and requiring inspection of all animals to be slaughtered, Justice Field correctly observed that there was no *additional* public-health concern that would justify the creation of the slaughter-house monopoly.<sup>127</sup>

Having dispensed with the portions of the law that were unquestionably legitimate, Justice Field turned to the Privileges or Immunities Clause itself.<sup>128</sup> In a thorough study of the context in which the Clause was adopted and the history upon which it drew—a history the majority utterly ignored—Justice Field noted the obvious linguistic similarity to the Privileges *and* Immunities Clause of Article IV, and,

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124. *Slaughter-House*, 83 U.S. at 74.

125. In fact, the Privileges or Immunities Clause has been invoked for precisely that purpose by Institute for Justice client Erroll Tyler, a Boston entrepreneur seeking to launch a nautical tour company in Cambridge, Massachusetts. See Institute for Justice, Massachusetts Nautical Tours: Government Regulators Block New Transportation Alternatives, [http://www.ij.org/index.php?option=com\\_content&task=view&id=676&Itemid=165](http://www.ij.org/index.php?option=com_content&task=view&id=676&Itemid=165) (last visited Dec. 16, 2009).

126. *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

127. *Id.* at 87–88.

128. *Id.* at 95.

relying—as did Congress in framing the Amendment—on Justice Bushrod Washington’s explanation of privileges and immunities in *Corfield v. Coryell*, concluded that the new Privileges or Immunities Clause prevented states from violating the same basic rights identified in *Corfield*.<sup>129</sup> This, of course, included the traditional common law abhorrence of monopolies as a violation of the right of all citizens to the “pursuit of the ordinary avocations of life.”<sup>130</sup>

Despite compelling dissents by Justices Field, Miller, and Swayne that utterly demolished the majority’s reasoning, *Slaughter-House* effectively eliminated the Privileges or Immunities Clause as a source of meaningful protection for individual rights.<sup>131</sup> Of course, this was warmly received by opponents of the Fourteenth Amendment, many of whom applauded the Court for undoing what they viewed as a national mistake in empowering the federal courts to strike down state laws that interfered with citizens’ basic civil rights.<sup>132</sup>

The Clause essentially lay dormant until 1947 when Justice Hugo Black came within a single vote of reviving it as a means of incorporating against the states the Fifth Amendment’s guarantee against self-incrimination.<sup>133</sup> The debate between Justices Black and Frankfurter—who wrote a concurring opinion criticizing Black’s proposed use of Privileges or Immunities to protect substantive rights—prefigured an academic debate that would stretch over the ensuing decades.<sup>134</sup>

Justice Frankfurter’s position was taken up by his protégé, Charles Fairman, who argued that the Privileges or Immunities Clause should not be read to protect substantive

129. *Id.* at 98 (citing Justice Washington’s majority opinion in *Corfield v. Coryell*, 6 F.Cas. 546, 551–52 (C.C.E.D. Pa. 1823); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866)).

130. *Slaughter-House*, 83 U.S. at 105–06.

131. See Calabresi, *supra* note 36.

132. See generally Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvey Wilkinson*, 56 UCLA L. REV. 1127, 1167 (2009) (citing Michael Anthony Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 22–23 (2007)) (applauding the *Slaughter-House* Court’s interpretation of the Fourteenth Amendment).

133. *Adamson v. California*, 332 U.S. 46, 77–78 (1947) (Black, J., dissenting).

134. *Id.* at 59–67.

rights.<sup>135</sup> Professor Fairman's primary antagonist was William Crosskey, a University of Chicago law professor who sharply criticized Fairman's understanding of the legislative history, particularly his refusal to take seriously the statements of Representative Bingham, who, as described above, was the Fourteenth Amendment's primary author.<sup>136</sup> Fairman's arguments were further dismantled by Michael Kent Curtis's landmark book *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*—the single most comprehensive treatment of the history of the Fourteenth Amendment.<sup>137</sup> The book concludes that, from an originalist standpoint, the Privileges or Immunities Clause had been plainly and almost universally understood to protect substantive individual rights.<sup>138</sup>

What is striking, given the breadth and ideological diversity of the scholarship, is the consensus of opinion that has emerged: simply put, nearly “everyone” now agrees that *Slaughter-House* misinterpreted the Privileges or Immunities Clause.<sup>139</sup> As described by historian Eric Foner, the *Slaughter-House* majority's conclusions “should have been seriously doubted by anyone who read the Congressional debates of the 1860s.”<sup>140</sup> As Professor Thomas McAfee has observed, “this is one of the few important constitutional issues about which virtually every modern commentator is in agreement.”<sup>141</sup> Moreover, even the few scholars who defend *Slaughter-House* do so not on the merits, but rather on overtly

135. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

136. See, e.g., Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57, 59–74 (1993) (describing and supplementing Crosskey's arguments).

137. CURTIS, *supra* note 45, at 100–05.

138. *Id.*

139. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994); See also AMAR, *supra* note 44, at 213 (explaining “[t]he obvious inadequacy—on virtually any reading of the Fourteenth Amendment—powerfully reminds us that interpretations offered in 1873 can be highly unreliable evidence of what was in fact agreed to in 1866–68”); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7–6, at 1321 (3d ed., vol. 1 2000) (“The textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection and state rights-infringement is very powerful indeed.”).

140. FONER, *supra* note 114, at 530.

141. Thomas B. McAfee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986).

pragmatic grounds—i.e., that reinvigorating the Privileges or Immunities Clause would have undesirable consequences such as requiring judicial protection for currently disfavored rights like private property and occupational freedom—the very same grounds upon which the majority based its decision in the *Slaughter-House Cases*.<sup>142</sup>

*Slaughter-House* did more than just misinterpret the Privileges or Immunities Clause. It fundamentally warped the Supreme Court’s jurisprudence of rights in manner that persists to this day. Having defied the will of the people by draining the Fourteenth Amendment of any real force, the Court left itself in the untenable position of either standing by while state and local officials continued to trample basic civil rights, or figuring out some way to sidestep its original mistake. And that was how substantive due process was born, a doctrine the Court pressed into service in order to protect substantive rights without revisiting its interpretation of the Privileges or Immunities Clause in *Slaughter-House*.<sup>143</sup>

The Court’s reliance on substantive due process has had a number of negative consequences for individual-rights jurisprudence. First and foremost is the rather obvious textual problem. As John Hart Ely memorably quipped, the notion of “substantive due process” strikes some as being akin to “green pastel redness.”<sup>144</sup> By contrast, the term “privileges or immunities”—which 19th century Americans appear to have used interchangeably with “rights”—needs no gloss or embellishment to do its job.<sup>145</sup>

142. Jeffrey Rosen, *Textualism and the Civil War Amendment*, 66 GEO. WASH. L. REV. 1241, 1268 (1998):

[W]e can make a conscientious effort to resurrect the Privileges or Immunities Clause in its original context, but only if we are willing to look into the abyss and to acknowledge the fact that the practical consequences of a privileges or immunities revival would be, for nearly all of us, unacceptable.

143. See Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 734-35 (2000) (explaining the meaning and background of Substantive Due Process and how it allowed the court to protect substantive rights without overruling *Slaughter-House*).

144. *Id.* at 18. Of course, the fact that substantive due process has been subjected to criticism does not make that criticism correct or the doctrine wholly illegitimate. See, e.g., James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999).

145. Cf. *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting); *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988) (“[I]t would be more conceptually elegant to think of [protected] substantive rights as ‘privileges or immunities of citizens of the United States’ . . .”).

Strengthening the ties between the Court's jurisprudence and the Constitution's actual text and history would not only increase the perceived legitimacy of the Court's individual-rights jurisprudence, it would give *content* to that jurisprudence. Because the debates and contemporaneous public documents surrounding the Fourteenth Amendment are replete with references to specific doctrines and even court cases the Framers meant to overturn, along with the specific evils they meant to prevent, the rights protected by the Privileges or Immunities Clause can be rooted solidly in both text and history, as can their limits.<sup>146</sup> The Clause is neither a meaningless nullity nor a freewheeling source of rights pulled from thin air. Relying on the Privileges or Immunities Clause would both help the Court outline the contours of its role in protecting individuals from rights violations by state governments and make that role more stable and difficult to assail.

In short, the Supreme Court read the Privileges or Immunities Clause out of the Constitution, not because of any genuine lack of clarity about what the Clause was meant to do, but simply because the Court found the change in federal-state relations that the Clause enacted unsettling. But that is obviously not a solid basis for principled jurisprudence.

#### V. PROSPECTS FOR THE FUTURE

Why does any of this matter? The debates over the Fourteenth Amendment and the Supreme Court's evisceration of the Privileges or Immunities Clause came more than a century ago. The butchers who brought the *Slaughter-House Cases* are long dead. But the issue remains alive today—in large part because the Supreme Court's misreading of the Privileges or Immunities Clause continues to have a direct impact on people's lives. In the 1950s, only 4.5% of the workforce needed a government license in order to do their job—these were largely doctors, lawyers,

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146. *Cf.* Rhode Island v. Massachusetts, 37 U.S. 657, 658 (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).

architects, and similar professionals.<sup>147</sup> Today, nearly 30% of the workforce needs the government's permission in order to earn a living.<sup>148</sup> Rather than protecting public health or safety, these new licensing requirements often serve as nothing but naked economic protectionism for politically favored interest groups.<sup>149</sup> But many if not most of today's occupational licensing laws are just as plainly illegitimate as the nineteenth-century laws that were aimed at keeping freedmen in a state of constructive servitude by fencing around their livelihoods with arbitrary and oppressive restrictions.<sup>150</sup>

The abandonment of any meaningful judicial protection for economic liberty has yielded predictable and tragic results. For example:

- Louisiana requires florists to have a license from the state, for which they must pass an incredibly subjective practical exam that is graded by existing licensees.<sup>151</sup> Despite its obviously anti-competitive purpose and lack of genuine public purpose, the law was upheld by a federal district judge in 2005.<sup>152</sup>
- African hair braiders in many states have been shut down and harassed for not having a cosmetology license, a process that takes up to 1,600 hours of mostly irrelevant training.<sup>153</sup>

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147. Institute for Justice, *Grassroots Tyranny in the Cradle of the Constitution*, [http://www.ij.org/index.php?option=com\\_content&task=view&id=2185](http://www.ij.org/index.php?option=com_content&task=view&id=2185) (last visited Dec. 16, 2009) (citing MORRIS M. KLEINER, *LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION I* (Upjohn Institute 2006)).

148. MORRIS M. KLEINER & ALAN B. KRUEGER, NATIONAL BUREAU OF ECONOMIC RESEARCH, *THE PREVALENCE AND EFFECTS OF OCCUPATIONAL LICENSING* 6 (2008), <http://www.nber.org/papers/w14308>.

149. See Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 25 (1976) (arguing that “[o]nly the credulous can conclude that licensure is in the main intended to protect the public rather than those who have been licensed or, perhaps in some instances, those who do the licensing”).

150. David E. Bernstein, *Licensing Law: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89–90 (1994).

151. *Meadows v. Odom*, 360 F. Supp. 2d 639, 639–640 (2005).

152. *Id.*

153. See *Cornwell v. Cal. Bd. of Barbering and Cosmetology*, 962 F. Supp. 1260, 1272 (S.D. Cal. 1997) (noting that only sixty-five hours of the required instruction covered health and safety matters).

- Several states allow only licensed funeral directors to sell caskets, which results in price markups of up to 600%.<sup>154</sup>
- Three states regulate who may practice interior design,<sup>155</sup> a harmless vocation that poses no bona fide threat to public health, safety, or welfare.

The Supreme Court's incentive to reconsider *Slaughter-House* is diminished by the fact that it has already incorporated most of the substantive protections of the Bill of Rights against the states using the doctrine of substantive due process.<sup>156</sup> The Court has also protected a number of unenumerated rights through that doctrine,<sup>157</sup> though many—including the right to earn a living—have been relegated to “nonfundamental” status, meaning they are recognized but not meaningfully protected. The ideal test case, then, is one presenting an indisputably fundamental, preferably enumerated right that has never been incorporated against the states:<sup>158</sup> The right to keep and bear arms fits that bill perfectly.<sup>159</sup>

In its 2008 landmark decision *District of Columbia v. Heller*, the Supreme Court held for the first time that the Second Amendment protects an individual right to keep and bear arms.<sup>160</sup> That decision resolved a longstanding and contentious constitutional debate,<sup>161</sup> but it left open up a pressing question—given that the Second Amendment protects a right to keep and bear arms against infringement

154. Brief for the Funeral Consumers Alliance as Amicus Curiae Supporting Petitioners, *Powers v. Harris*, 125 S. Ct. 1638 (2004) (No. 04-716), 2004 WL 3017734.

155. FLA. STAT. § 481.223 (2006); LA. REV. STAT. ANN. § 37:3176(A)(1) (2007); NEV. REV. STAT. § 623.360(1)(c) (1997).

156. *E.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

157. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (expressing the idea that the set of unenumerated rights protected through substantive due process does not overlap perfectly with the set of rights meant to be protected by the Privileges or Immunities Clause, with economic liberty being the most important omission).

158. *But see* *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (suggesting a willingness to reconsider the Privileges or Immunities Clause in an appropriate case).

159. U.S. CONST. amend. II.

160. 128 S. Ct. 2783, 2799 (2008).

161. *See generally* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000).

by the federal government,<sup>162</sup> does the Constitution prevent state and local governments from infringing upon the right to keep and bear arms, and, if so, how? The Supreme Court specifically avoided that question in *Heller*, but it has been squarely presented in several cases that have made, or are still making, their way to the Supreme Court one year later.<sup>163</sup>

Thus, immediately after the *Heller* decision came down, gun-rights advocates filed several lawsuits challenging various gun laws in Chicago and its surrounding suburbs.<sup>164</sup> Since then, the Second Circuit Court of Appeals has held that the federal Constitution does not protect the right to keep and bear arms from state infringement,<sup>165</sup> while the Ninth Circuit Court of Appeals has held that it does.<sup>166</sup>

The Supreme Court will likely resolve the question of whether the Fourteenth Amendment protects the right to keep and bear arms against infringement by state and local governments<sup>167</sup>, and in doing so, it will have an essentially clean slate upon which to write. The only Supreme Court opinions to even discuss the issue followed shortly after *Slaughter-House* and held, not only that the federal Constitution placed no limits on state gun laws, but also that it did not protect the rights of free speech or assembly.<sup>168</sup> Those cases are obviously outdated, and their underlying premise, that the Fourteenth Amendment does not protect

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162. Provisions of the federal Bill of Rights apply directly to the District of Columbia, which is a creature of the federal government. *E.g.* *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974).

163. *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2008); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009).

164. *E.g.*, *McDonald v. City of Chi.*, No. 08-C-3645, 2008 U.S. Dist. LEXIS 98133, at \*2 (N.D. Ill. Dec. 4, 2008).

165. *Maloney*, 554 F.3d at 58–59.

166. *Nordyke*, 563 F.3d at 464–65. The Ninth Circuit has ordered a rehearing en banc, and oral argument is set for September 23, 2009, which is theoretically enough time for the en banc panel to issue a decision before the Supreme Court resolving the pending cert petitions in the Second and Seventh Circuit cases. 2009 U.S. App. LEXIS 16908 (9th Cir.).

167. *McDonald v. City of Chi.*, 130 S. Ct. 48 (2009).

168. *See* *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886) (explaining that “[t]he only clause in the constitution which, upon any pretense, could be said to have any relation whatever to his right to associate with others as a military company, is found in the first amendment”); *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) (noting that “[the First Amendment], like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone”).

substantive rights against state infringement, has not simply been undermined but affirmatively disavowed.<sup>169</sup>

Any honest reexamination of the Supreme Court's jurisprudence will indicate that it has been protecting some rights, like free speech, incorrectly by incorporating them through the Due Process Clause rather than simply recognizing them as part of the inherent rights of citizenship protected under the Privileges or Immunities Clause. Other rights, like economic liberty, have been all but ignored, despite playing as important a role in the thinking of the framers of the Fourteenth Amendment as those enumerated in the Bill of Rights.<sup>170</sup> The country—and the Constitution—deserve nothing less than this level of honesty.

This means that what the Supreme Court does with the gun-control question has consequences that run far deeper than gun regulations. As demonstrated above, the record is abundantly clear that the Privileges or Immunities Clause was meant to protect a right to armed self-defense by preventing the forcible disarmament that became all too common in the Reconstruction South.<sup>171</sup> But it is equally clear that the clause is meant to protect other rights, like the right to work in the trade of one's choice, that the Supreme Court jurisprudence continues to give a short shrift.

## VI. CONCLUSION

The Fourteenth Amendment marked a revolution in American constitutional law and the jurisprudence of liberty. Unfortunately, the Supreme Court initially resisted that revolution because five Justices in *Slaughter-House* thought it would be improvident. The Court has yet to confront that mistake or fully acknowledge its refusal to implement the will of the people as expressed in their founding document. The Court has a unique opportunity to revisit *Slaughter-House* now and begin repairing the damage that decision did to the rule of law and the fundamental principles of liberty in America.

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169. *Heller*, 128 S. Ct. at 2813 n.23.

170. Wilson Pasley, *The Revival of "Privileges or Immunities" and the Controversy Over State Bar Admission Requirements: The Makings of a Future Constitutional Dilemma?* 11 WM. & MARY BILL RTS. J. 1239, 1266 (2003) (noting that some scholars assert that the Framers of the Fourteenth Amendment intended that the Privileges or Immunities Clause protect economic liberties).

171. AMAR, *supra* note 44, at 264.

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While we cannot know exactly where that path might lead, there has never been any reason in this country to fear fidelity to the Constitution.