The Once and Future Privileges or Immunities Clause

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In 1935, Congress created the U.S. Constitution Sesquicentennial Commission to "prepare a plan or plans, and a program for the adequate celebration of" the Constitution's 150th birthday. Five decades later, Chief Justice Warren Burger chaired the Constitution's Bicentennial Commission. Both of these commemorations traced the charter's origin to September 17, 1787, when the Framers signed the first seven articles. But that date isn't quite right, as the document didn't take effect until New Hampshire's ratification in June 1788. Even then, the framing wasn't complete: 10 amendments—the Bill of Rights—would be ratified in December 1791. As a general matter, both the sesquicentennial and bicentennial treated these formative dates as the republic's origin story. Yet the period between 1787 and 1791 only recounts our first Founding.

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

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." These 21 simple words were designed to revolutionize the

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

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

On the eve of oral arguments in *McDonald*, we urged the Supreme Court to apply the right to arms against the states through the Privileges or Immunities Clause.[1] And, we explained, the Court could do so without setting out aimlessly into the undiscovered country of untethered and unbounded unenumerated rights—by adapting the principles of *Washington v. Glucksberg* (1997). By only considering rights that are "deeply rooted" in our nation's traditions, the Privileges or Immunities Clause could be cabined within the appropriate scope of historical practice without the flood waters rushing in. Alas, the Court didn't take our bait—though curiously neither the majority nor dissenting opinions grappled with the privileges-or-immunities dimension.

[1] Josh Blackman and Ilya Shapiro, *Keeping Pandora's Box Sealed*, 8 Geo. J.L. & Pub. Pol'y 1 (2010).

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

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

I. The Birth and Premature Demise 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* Immunities 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.

The Articles of Confederation 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."[2] This clause ensured the free flow of people between the separate sovereigns as a means to unite the states under the Articles. It also served as a precursor to the Privileges *and*

[2] ART. IV, ARTICLES OF CONFEDERATION (Nov. 15, 1777).

Immunities Clause of Article IV, which prevents states from discriminating against foreigners and abridging certain liberties (commonly known as privileges or immunities).

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.'"[3] According to Justice Bushrod 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."[4] Washington added to this list "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."[5]

Justice Washington's opinion served as an authoritative explication of the meaning of privileges or immunities. Six decades later, during the Fourteenth Amendment's ratification debates, members of the 39th Congress repeatedly cited *Corfield*.[6] For example, Senator Jacob Howard—one of the Fourteenth Amendment's floor managers—recited a passage from *Corfield* in his "influential speech on section I [of the Fourteenth Amendment] . . . invok[ing] both Washington's ode and the Bill of Rights as exemplifying 'privileges and immunities of citizens of the United States.'"[7] And during the debates over the Civil Rights Act of 1866, considered by

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[3] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 251 (2006).
[4] Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).
[5] *Id.*
[6] 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.").
[7] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 178 (2000).

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."[8]

Professor Akhil Amar considers Article IV's Privileges and Immunities Clause to add "several improvements upon the old."[9] 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."[10] Second, the Constitution's institution of uniform naturalization rules eliminated the need for states to recognize a naturalized citizen of another state.[11] 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."[12] According to Professor Amar, privileges or immunities "had strongly implied a focus only on civil rights."[13]

Following the Civil War, Southern states enacted "Black Codes" that placed various restrictions on the recently-freed slaves. Such laws limited these citizens' rights: they interfered with the freedom of contract, limited property ownership, and restricted the right to bear arms. "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."[14] This legislation led to the Fourteenth Amendment's protection of citizens' "privileges or immunities" as well as providing for equal protection and due process of law.

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[8] *Id*. at 178.
[9] *Id*. at 251.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *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.'").
[14] CLINT BOLICK, DAVID'S HAMMER 99 (2007).

Unfortunately, the Privileges or Immunities Clause met its untimely demise in the *Slaughter-House Cases*. This 1873 decision held that the Privileges or Immunities Clause protected only a narrow set of rights incident to federal citizenship and not those rights incident to state citizenship. Nearly all "[l]eading constitutional scholars . . . agree that [the] Slaughter-House interpretation of the Fourteenth Amendment's Privileges or Immunities Clause is wrong as a matter of text and history."[15] Harvard law professor Laurence Tribe writes that "the *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause." Professor Amar agrees: "Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment."[16]

Following *Slaughter-House*, the Privileges or Immunities Clause would lay dormant for decades until Justice Hugo Black's 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.[17] Justice Black's dissent argued strongly for incorporation of the Bill of Rights against the states via the Fourteenth Amendment.[18]

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.*

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[15] 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 __, 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).

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

[17] 332 U.S. 46 (1947).

[18] *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.").

Thompson[19]—until a curious dissent in *Saenz v. Roe*. In *Saenz*, the Court considered a statute that discriminated against newly arriving residents of California by imposing residency requirements for certain welfare benefits.[20] Justice John Paul Stevens, writing for seven members of the Court, concluded that the law violated the "right to travel," which is protected by the Privileges or Immunities Clause of Fourteenth Amendment.[21] Justice Thomas dissented from this holding and 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 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.'"[22]

With that dissent, Justice Thomas breathed life into the comatose clause. Professor Erwin Chemerinsky observed that, "'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

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[19] *Shapiro v. Thompson*, 394 U.S. 618 (1969).
[20] 526 U.S. 489 (1999).
[21] *Id.* at 501-504.
[22] *Id*. at 527–28 (1999) (Thomas, J. dissenting) (emphasis added) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

henceforth may view the long-dormant Privileges or Immunities Clause.'"[23] Ten years later, *McDonald v. Chicago* had the potential to become that "appropriate case."

II. *McDonald v. Chicago* Revives the Privileges or Immunities Clause

In its landmark 2008 opinion, *District of Columbia v. Heller*, the Supreme Court found that the Second Amendment protects an individual right to keep and bear arms.[24] The Court accordingly struck down D.C. laws banning the private ownership of handguns, and the keeping of all functional firearms within the home. *Heller* was "everything a Second Amendment supporter could realistically have hoped for,"[25] but for one inherent limitation. The case arose as a challenge to the law of the federal capital. Therefore Court had no occasion to resolve whether, and to what extent, the right to keep and bear arms applies to states and localities. Justice Scalia's opinion for the Court did, however, observe that its 19th-century precedent declining to apply the Second Amendment right against the states, *United States v. Cruikshank*, "also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."[26] Notwithstanding *Cruikshank*, the First Amendment had long since been incorporated. Would the same fate await the Second Amendment?

Within minutes of the Supreme Court's decision in *Heller*, attorneys for Otis McDonald and other Chicago residents filed a lawsuit challenging the city's handgun ban and several burdensome features of its gun registration system. The following day, the National Rifle

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[23] *See* Erwin Chemerinsky, CONSTITUTIONAL LAW 1486 (2d ed. 2005).
[24] *Heller*, 128 S. Ct. at 2821-22. For a thorough and insightful background into the history and story behind *District of Columbia v. Heller*, see Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby!*, 2007–2008 Cato Sup. Ct. Rev. 127 (2008).
[25] Neily, *The Second Amendment is Back, Baby!*, *supra* note __, at 147.
[26] *Heller*, 128 S. Ct. at 2783 n.23.

Association also brought a legal challenger against the Chicago ordinances, as well as ordinances in the suburb of Oak Park. Chicago residents faced one of the highest murder rates in the United States, and rates of violent crime far exceeding the average for comparably sized cities.[27] Yet since 1982, Chicago's firearm laws effectively banned the possession of handguns by almost all city residents.[28] Despite enactment of the handgun ban, the murder rate in Chicago had increased.[29] Several of the plaintiffs had been the targets of violence. McDonald, a retiree from a rough neighborhood in Chicago, had been threatened by drug dealers. Two other plaintiffs, Colleen and David Lawson, had been targeted by burglars in their home.

McDonald took a curious path to the Supreme Court. The Seventh Circuit had consolidated the *NRA* and *McDonald* appeals, but the Supreme Court granted only *McDonald*'s petition. As petitioners, McDonald and company got the first crack at framing the "question presented." They posed the following question: "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's *Privileges or Immunities or Due Process Clauses*."[30] As a result, the Court would not only consider "incorporation" via the Fourteenth Amendment, but would also address the *manner* of incorporation. Of course, the Supreme Court was not required to accept the *McDonald* petitioners' formulation. Had the Seventh Circuit incorporated the Second Amendment through the Due Process Clause—as did the Ninth Circuit in *Nordyke*,[31] the validity of that analysis would have likely been the primary question on review. But the Seventh Circuit rejected incorporation altogether. Accordingly, the *McDonald* petitioners had a blank slate on which to

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[27] *Id.* at 3026.
[28] The ordinance provided that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm." Chicago, Ill., Municipal Code § 8-20-040(a) (2009). Chicago, Ill., Municipal Code § 8-20-050(c) barred the registration of handguns.
[29] *McDonald*, 130 S. Ct. at 3026.
[30] Petition for Writ of Certiorari, McDonald, 130 S. Ct. 3020 (No. 08-1521) (emphasis added).
[31]

make their case. And, logically, the full weight of constitutional text, structure and history called for application of the Privileges of Immunities Clause. Ultimately, the Court accepted McDonald's formulation of the question. The justices would decide *both* whether and how to incorporate.

Recall that two years earlier, *Heller* had decided the basic Second Amendment issue on originalist grounds: "We are guided by the principle that the Constitution was written to be understood by the voters," Justice Scalia explained, and "its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[32] Even the *Heller* dissenters adopted a version of originalism that focused more on legislative intent.[33] Following either approach, *McDonald* should have relied on the Privileges or Immunities Clause—which was widely understood and intended to bind the states to national civil rights standards—to extend the Second Amendment to the states.

In recent years, scholars have advanced originalist accounts of "substantive" due process, that is derived from the Fifth and the Fourteenth Amendment, with a particular focus on the due process *of law*.[34] Notwithstanding this novel research, the Privileges or Immunities Clause has long been understood to operate as the principal substantive limitation on a state's lawmaking powers. This history—which was well known when *McDonald* was argued—should have mattered to the Court and, therefore, to the litigants.

Indeed, urging the Court to rely on due process also posed an additional difficulty: several of the conservative members, including *Hellers*'s author, were intractable opponents of

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[32] *Heller*, 128 S. Ct. at 2788 (citations and internal quotation marks omitted).
[33] *Id.* at 2822 (Stevens, J., dissenting). *See also* Josh Blackman, *Originalism for Dummies, Pragmatic Unoriginalism, and Passive Liberty*, available at http://ssrn.com/abstract=1318387 ("Rather than ascertaining the original public meaning, [Justice Stevens] focuses almost exclusively on the drafting history, and improperly attempts to guess the intentions of our framers.").
[34] *See, e.g.*, Ryan C Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408 (2010); Randy E. Barnett and Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law* (March 26, 2018) https://ssrn.com/abstract=3149590.

substantive due process. In the previous major civil rights case reaching the Court from Chicago, Justice Scalia famously derided substantive due process as an "atrocity" and an act of "judicial usurpation."[35] It would have been folly to assume that this Court had on it five votes for substantive due process incorporation. Indeed, in the end, as we all now know, there were not five votes.

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

Or was it? Maybe those justices unwilling to carry originalism to its obvious end result—defining the right to bear arms as one of the privileges or immunities of citizenship—would nonetheless utilize originalist grounds in an exercise of substantive due process nose-holding. That is, some faint-hearted originalist justices generally hostile to substantive due process might vote for due process incorporation if they could be convinced the outcome were historically correct. There is strong evidence that this occurred among the *McDonald* plurality.[36]

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[35] *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting). See also *Stop the Beach Renourishment v. Fla. Dep't. of Envtl. Prot.*, 130 S. Ct. 2592, 2607-08 (2010) (Scalia, J., plurality opinion) (attacking as vague and undefined Justice Anthony Kennedy's use of substantive due process to protect against judicial takings).

[36] *McDonald*, 130 S. Ct. at 3033 n.9 (Alito, J., plurality opinion) (referencing Privileges or Immunities sources); see also *id*. at 3050-51 (Scalia, J., concurring).

Accordingly, the failure to make a strong originalist case could have seriously jeopardized the outcome. Justices unrepentantly hostile to substantive due process might not have forged their own originalist path unless meaningfully asked to do so by the petitioners. In the end none of the Court's more "liberal" justices voted in McDonald's favor, but the case's reception among self-described progressives and others normally unenthusiastic about gun rights was quite positive. At the petition stage, liberal academic luminaries including Yale's Jack Balkin and UCLA's Adam Winkler joined a brief by the Constitutional Accountability Center endorsing the originalist arguments for incorporation via the Privileges or Immunities Clause.[37] On the eve of argument, even the *New York Times* editorial page, no friend of the Second Amendment, opined that McDonald should prevail on that same basis.[38]

Chicago's attorneys understood at least some if not all of this dynamic. The city's lawyers had reason to believe they might prevail on the substantive due process question, but wished to avoid arguing their case on originalist grounds.[39] And so, in opposition to McDonald's petition for certiorari, Chicago offered: "If the Court believes the time is right to address whether the Second Amendment restrains state and local governments under the Due Process Clause, the petitions should be granted to address this issue only [but t]his Court should decline to address whether the Second Amendment is incorporated under the Privileges or Immunities Clause."[40]

The Supreme Court accepted the *McDonald* case, only the *McDonald* case and—over Chicago's objection's—accepted McDonald's framing of the question presented. Anyone

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[37] See Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, McDonald, 130 S. Ct. 3020 (2010) (No. 08-1521).

[38] Editorial, *The Second Amendment's Reach*, N.Y. Times, March 1, 2010, at A22.

[39] On the merits, Chicago indeed offered argument as to why it believed the Due Process Clause does not incorporate the Second Amendment. But as for the originalist Privileges or Immunities argument, Chicago offered only that the Privileges or Immunities Clause is indeterminate or duplicative of equal protection guarantees, and should not be revisited.

[40] Brief for Respondents in Opposition to Petition for Writ of Certiorari at 6, *NRA of Am., Inc. v. City of Chicago & Oak Park*, 567 F.3d 856 (7th Cir. 2009), rev'd sub nom. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No 08-1521).

surprised by the subsequent emphasis on Privileges or Immunities Clause arguments was thus not paying attention to the petition process.

The Supreme Court reversed the Seventh Circuit and held in a 4-1-4 split that the Constitution guarantees the right to keep and bear arms for all individuals regardless of where in the country they live. How the Court got there is a little more complicated. Justice Samuel Alito, joined by Chief Justice John Roberts and Justices Scalia and Kennedy, held that the Second Amendment is incorporated through the Fourteenth Amendment's Due Process Clause. Justice Thomas did not join most of Justice Alito's opinion, but concurred in the judgment, thereby providing the all-important fifth vote for incorporation. While Thomas agreed that the right to keep and bear arms should be applied to the states, he found that this "fundamental" right was properly extended to the states by the Privileges or Immunities Clause. The dissenters, in opinions by Justices Stevens and Stephen Breyer, respectively, made various points that ignored the Privileges or Immunities Clause.

Justice Thomas found this case, unlike *Saenz*, the appropriate case that "presents an opportunity to re-examine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it."[41] With these words, Thomas broke with the plurality. He turned to face the stark reality of Fourteenth Amendment's central text, and launched an analysis that aimed to fundamentally restore the proper relationship between Americans and their state governments.

Justice Thomas "agree[d] with the Court that the Fourteenth Amendment makes the right to keep and bear arms" applicable to the states, but "wr[ote] separately because [he] believe[d] there is a more straightforward path to this conclusion, one that is more *faithful to the Fourteenth*

[41] *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring).

Amendment's text and history."[42] Although Thomas concurred with the result reached by the plurality he argued that the right to keep and bear arms cannot be enforceable against the states through a clause that "speaks only to 'process.'"[43] Instead, "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."[44]

Justice Thomas's opinion explored the right to keep and bear arms through the prism of the expansive notions of freedom, liberty, and equality. These notions were vindicated by the Reconstruction amendments, "which were adopted to repair the Nation from the damage slavery had caused."[45] Thomas noted that the Supreme Court's "marginalization" of the Privileges or Immunities Clause in the *Slaughterhouse Cases*, and the "circular" reasoning in *Cruikshank*[46] constituted the "Court's last word" on the Privileges or Immunities Clause for over a century.[47] And "in the intervening years" the Court held that the Clause protected "only a handful of rights . . . that are not readily described as essential to liberty.[48] Following these flawed precedents, "litigants seeking federal protection of fundamental rights turned to" the Due Process Clause—a "most curious place"—in order to find "an alternative fount of such rights."[49] Over time, he explained, the Court "conclude[d] that certain Bill of Rights guarantees," both substantive and procedural rights, "were sufficiently *fundamental* to fall within § 1's guarantee of 'due process'"—though the Court "has long struggled to define" fundamental.[50] Justice Thomas

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[42] *Id*. at 3058-59 (emphasis added).
[43] *Id*. at 3059.
[44] *Id*.
[45] *Id*. at 3060.
[46] *United States v. Cruikshank*, 92 U.S. 542 (1876).
[47] *McDonald*, 130 S. Ct. at 3060-61 (Thomas, J., concurring).
[48] *Id*. (Thomas, J., concurring) ("In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption—was the very reason citizens could not enforce it against States through the Fourteenth."). See Saenz v. Roe , 526 U. S. 489, 503 (1999).
[49] *Id*. at 3061.
[50] *Id*. at 3061 (emphasis added).

further criticized the disparate standard the Court has used to recognize "fundamental" rights. The Court's precedents spanned from the *Glucksberg* "deeply rooted" test to the "less measurable range of criteria" of *Lawrence v. Texas* that recognized the nebulous protection of "liberty of the person both in its spatial and in its more transcendent dimensions."[51]

Justice Thomas adopted an intrinsically originalist perspective. He noted that neither the plurality nor the dissents even bother "argu[ing] the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification."[52] Furthermore, Justice Thomas refused to "accept a theory of constitutional interpretation that rests on such tenuous footing." He opined that the "original meaning of the . . . [Privileges or Immunities Clause] offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed."[53]

Justice Thomas premised his inquiry with a basic presumption: no clause in the Constitution could be "intended to be without effect."[54] Therefore, the relevant question is what "'ordinary citizens' at the time of ratification would have understood" the Privileges or Immunities Clause to mean.[55] Justice Thomas made three observations about the Privileges or Immunities Clause based on contemporary historical sources. First, the term "privileges or immunities" was a term of art, synonymous with "right[s]," "libert[ies]," or "freedom[s]," or in the words of William Blackstone, the "inalienable rights of individuals."[56] Second, "both the States and the Federal Government had long recognized the *inalienable rights* of their

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[51] *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring) (quoting *Lawrence v. Texas*, 539 U.S. 558, 562 (2003)).
[52] *Id*. at 3062.
[53] *Id*.
[54] *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C. J.)).
[55] *Id*. at 3063 (citing *Heller*, 128 S. Ct. at 2788).
[56] *Id*. at 3064 (citing 1 William Blackstone, Commentaries *129).

citizens."[57] Third, the "public's understanding of [the Clause] was informed by its understanding of the [Privileges *and* Immunities Clause in Article IV]," as "famously" articulated by Justice Washington in *Corfield v. Coryell*.[58]

Justice Thomas considered a comprehensive array of historical sources, including popular and widely disseminated speeches by amendment sponsors Representative John Bingham[59] and Senator Jacob Howard,[60] as well as the Civil Rights Act of 1866[61] and the Freedmen's Bureau Act.[62] These sources supported the conclusion that the "right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause."[63] The Clause is not a mere anti-discrimination principle, but instead "establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them."[64]

As to *Slaughterhouse*, Thomas criticized the case for "interpreting the rights of state and federal citizenship as mutually exclusive." The *Slaughterhouse* majority had limited federal

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[57] *Id*. at 3068 (emphasis added).
[58] *Id*. at 3066-67 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1825) (finding that the privileges and immunities clause protects those rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.").
[59] *Id*. at 3072 ("Bingham emphasized that §1 was designed to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It ''hath that extent——no more.'') (quoting Cong. Globe, 39th Cong., 1st Sess. 2542-43 (1866)).
[60] See Senator Jacob Howard's speech introducing the new draft on the floor of the Senate, Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (explaining that the Constitution recognized "a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution," and that "there is no power given in the Constitution to enforce and to carry out any of these guarantees" against the states).
[61] *McDonald*, 130 S. Ct. at 3084 (Thomas, J., concurring) ("Both proponents and opponents of this Act described it as providing the "privileges of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms.").
[62] *Id*. at 3084 ("Freedmen's Bureau Act, which also entitled all citizens to the "full and equal benefit of all laws and proceedings concerning personal liberty" and "personal security." The Act stated expressly that the rights of personal liberty and security protected by the Act "includ[ed] the constitutional right to bear arms.") (citing Act of July 16, 1866, ch. 200, §14, 14 Stat. 176).
[63] *Id*. at 3076-77.
[64] *Id*. at 3083.

rights to a "handful" of rights that excluded rights of state citizenship.[65] But those latter, broader rights "'embraced nearly every civil right for the establishment and protection of which organized government is instituted'—that is, all those rights listed in *Corfield*."[66] The artificial distinction between federal and state rights "led the Court in future cases to conclude that constitutionally enumerated rights were excluded from the Privileges or Immunities Clause's scope"—an understanding Justice Thomas "reject[ed]."[67] The Privileges or Immunities Clause was not meant to "protect every conceivable civil right from state abridgement," but "the privileges and immunities of state and federal citizenship overlap."[68] Thomas also found that "*Cruikshank* is not a precedent entitled to any respect" because it relied on the discredited *Slaughterhouse*.[69]

But does the Privileges or Immunities Clause protect certain rights beyond those enumerated in the Constitution—that is, unenumerated rights? Recall that the butchers in *Slaughterhouse* sought protection of their right to "exercise their trade"—that is, a liberty of contract.[70] Justice Thomas noted that the four *Slaughterhouse* dissenters—whose view he generally supports—would have held the Clause to protect the right to earn an honest living.[71] Of course the right to earn a living was not at issue in *McDonald*, but Thomas was aware that his opinion would have broader application.[72] "The mere fact that the Clause does not expressly list the rights it protects," he wrote, "does not render it incapable of principled judicial

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[65] *Id*. at 3084-85.
[66] *Id.* at 3084 (citing *Slaughterhouse*, 83 U.S. (16 Wall.) at 76).
[67] *Id*. at 3085.
[68] *Id*.
[69] *Id*. at 3086.
[70] *Slaughterhouse*, 83 U.S. (16 Wall.) at 60.
[71] *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring).
[72] *Id.* at 3077 n.15 (Thomas, J., concurring) ("I address the coverage of the *Privileges or Immunities Clause* only as it applies to the *Second Amendment* right presented here, but I do so with the understanding that my conclusion may have implications for the broader argument.").

application."[73] Justice Thomas admitted that fears about the "risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts" apply equally whether those rights are recognized under the substantive due process doctrine or the Privileges or Immunities Clause.[74] Still, he was not troubled: by employing an originalist framework that seeks to learn "what the ratifying era understood the Privileges or Immunities Clause to mean." The interpretation of unenumerated rights, he wrote, "should be no more 'hazardous' than interpreting" other ambiguous clauses, such as the Necessary and Proper Clause.[75]

The most common question about the state of the legal world after *McDonald* has related to "gun rights." That is, what does this "application of the Second Amendment to the states" mean in practice and what kind of lawsuits will be successful? We are both, for example, regularly asked by friends, colleagues, media, and other public interlocutors to explain the scope of this individual right to keep and bear arms.[76] But Second Amendment litigation is almost beside *McDonald*'s point. Yes, the right at issue there—the one triggering, as it were, the fascinating seminar on incorporation doctrine—involved guns. But *McDonald* did not discuss the constitutionality of licensing or registration requirements, concealed-carry regimes, firearm- or ammunition-purchasing limits, automatic-rifle or "assault-weapon" prohibitions, or any of the myriad other issues at the heart of the legal and political battles over the future of gun regulations. Much like *Heller*—which decided "only" that the Second Amendment protected an individual right not connected to militia service—*McDonald* "merely" said that this right,

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[73] *Id.* at 3086.
[74] *Id.* at 3089-90, 3096, 3099.
[75] *Id.* at 3086.
[76] *See, e.g.*, Ilya Shapiro, Guest Appearance on The Colbert Report, July 8, 2010 (replying "no personal rocket launchers" when asked by the host to name one acceptable firearm regulation), available at http://www.colbertnation.com/the-colbert-report-videos/340923/july-08-2010/automatics-for-the-people---ilya-shapiro---jackie-hilly.

whatever its scope, offered protection against all levels of government, not just the federal. In neither case did the Court even attempt to sketch the line between constitutional and unconstitutional gun laws—because it didn't have to.

What makes *McDonald* significant, therefore, is not what it said about the right to keep and bear arms or the "incorporation" of that right against the states, but what it said about rights generally. What rights do we have and how did we come to have them? Which constitutional provisions protect these rights? If we accept that the Constitution protects rights that are not explicitly enumerated therein—as we must if we are to give effect to the Ninth Amendment[77]—then what is the scope of these unenumerated rights? Most immediately, which state laws are now in jeopardy for violating the Fourteenth Amendment's substantive protections? These are the questions that are *McDonald*'s progeny.

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

[77] *See*, *e.g.*, Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009-2010 Cato Sup. Ct. Rev. 13 (2010).

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

Justice Thomas's forceful and scholarly opinion should have influenced future litigation, even though—especially because—it had nothing to do with guns or the Second Amendment. Rather, it addressed unenumerated rights, including the economic liberties that *Slaughterhouse* disparaged and that were subverted by the infamous *Carolene Products* footnote four.[78] Every complaint challenging the host of capricious laws impeding the fundamental right to earn an honest living—such as occupational licensing restrictions (typically sought by the very industry the law is supposed to be regulating) and other irrational barriers to entry—should cite Thomas's *McDonald* concurrence. His opinion should have strengthened challenges to the pervasive regulatory state that has exploded in recent years. But did it?

III. The Privileges or Immunities Clause Since *McDonald*

Since *McDonald* was decided in 2010, the Privileges or Immunities Clause has made only the slightest impact on federal litigation. Over the past eight years, the Supreme Court has

[78] *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (subjecting to higher scrutiny legislative actions relating to "specific prohibitions of the Constitution, such as those of the first ten amendments," as well as those affecting "discrete and insular minorities"). Ironically, Chicago's handgun ban implicated just such a specific constitutional prohibition—the Second Amendment. Inexplicably, both dissenting opinions missed this fact in arguing that gun-control regulations do not demand a searching judicial inquiry. See, e.g., McDonald, 130 S. Ct. at 3116 (Stevens, J., dissenting) ("[T]his is not a case, then, that involves a 'special condition' that 'may call for a correspondingly more searching judicial inquiry.'") (citing *Carolene Products*, 304 U.S. at 153, n.4.); *id*. at 3125 (Breyer, J., dissenting) ("We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting 'discrete and insular minorities.") (citing *Carolene Products*, 304 U.S. at 153, n.4).

only cited the Clause twice—both in dissents by Justice Thomas.[79] In the same period, two federal appellate judges have written separately to express sympathy with Justice Thomas's view.[80]

We were able to locate roughly 100 decisions in which a federal court discussed claims that were litigated under the Privileges or Immunities Clause. Obtaining a precise number is difficult for at least four reasons. First, courts do not always address all of plaintiffs' submitted claims. We only searched decisions reported on Westlaw and Lexis, and did not survey all filed complaints. Second, many litigants and courts alike fail to state, with precision, whether they are applying Article IV's "privileges *and* immunities" clause or the Fourteenth Amendment's "privileges *or* immunities" clause.[81] Third, many litigants rely on the entirety of Section 1 of the Fourteenth Amendment—privileges or immunities, due process, and equal protection—and courts often fail to distinguish the precise basis of their ruling.[82] In each case we identified, the plaintiffs unequivocally raised a claim under the Privileges or Immunities Clause, and the federal court resolved that precise claim. (In virtually every case, the claim was dismissed). Fourth, prisoners and other pro-se litigants often file "kitchen sink" complaints that include a litany of unsubstantiated allegations against the government, including frivolous Privileges or Immunities

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[79] *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) ("In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 836 (2011) (Thomas, J., dissenting) (noting that the *Slaughter-House Cases* were "inconsistent with the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.").

[80] *Monarch Bev. Co. v. Cook*, 861 F.3d 678, 686 (7th Cir. 2017) (Easterbrook, J., concurring) ("A bare majority of the Court in *Slaughter-House* drained that clause of force, but calls to overrule *Slaughter-House* have not succeeded."); *Korab v. Fink*, 979 F.3d 572, 598 n.8 (9th Cir. 2014) (Bybee, J., Concurring) (blaming "the Court's disastrous decision in The *Slaughter-House Cases*" for the "current confusion" of modern constitution doctrine).

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

[82] *See*, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 258 (2015).

claims.[83] Other cases involved idiosyncratic claims that had no discernible relationship to the Privileges or Immunities Clause as originally understood, or as it has been interpreted by the courts.[84] Accordingly, we excluded such outliers. Given these criteria, we identified roughly 100 cases with Privileges or Immunities claims that fall into three broad categories: economic rights, the right to travel, and challenges to lethal injection protocols.

A. Economic Rights

The Supreme Court's major decisions concerning the Privileges or Immunities Clause were arguably decided out of order. In 1873, the *Slaughter-House* Court rejected the argument that the clause protected an *unenumerated* right of the butchers to "exercise their trade," that is, a liberty of contract.[85] And in *Bradwell v. Illinois*, a companion case decided the following day, the Court rejected the right of a woman to practice as an attorney.[86] In 1875, the *Cruikshank* Court rejected the argument that the Privileges or Immunities Clause protected an *enumerated* right to keep and bear arms. As a general matter, courts are far more willing to protect rights that are written down, than unwritten rights; there is less guess work, and a greater likelihood that judges stay within the bounds of propriety. Perhaps the fate of the Privileges or Immunities Clause would have been different if the Court was first asked to secure a familiar right—the

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

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

[85] *Slaughter-House*, 83 U.S. (16 Wall.) at 60.

[86] 83 U.S. 130 (1873).

Second Amendment—rather than to rescue a "new" freedom of contract from the constitutional ether. Because of *Slaughterhouse's* original sin, the Court eventually turned to the Due Process Clause to protect liberties from state infringement. Yet, even more paradoxically, the Supreme Court began that process by protecting the very *unenumerated* right that was rejected in *Slaughter-House*: the liberty of contract in cases like *Lochner v. New York*. Only later, and after vigorous debate, did the Supreme Court turn to incorporating *enumerated* provisions of the Bill of Rights.

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

In the wake of *McDonald*, litigants continue to seek judicial protection of the right to earn a living.[87] Yet, unsurprisingly, the federal courts have shown no willingness to revisit these

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

paradoxes with respect to economic liberty.[88] Many of the litigants admit that their economic-liberty claims are precluded by binding precedent. For example, an African hair-braider challenged Utah's cosmetology licensing scheme, but "concede[d] that her Privileges or Immunities Clause argument is foreclosed by the U.S. Supreme Court's decision in the *Slaughter-House Cases*, and that only the Supreme Court can overturn the *Slaughter-House Cases*."[89] Still, the stylist "preserve[d] it for possible Supreme Court review."[90] In other cases, even as the Privileges or Immunities Clause was raised in the district court, plaintiffs abandoned this claim on appeal—perhaps to save pages and focus on arguments that are more likely to prevail.[91] The future of this right, which has a far stronger historical pedigree than other rights that the Court has held to be protected by the Fourteenth Amendment continues to look bleak.

B. The Right to Travel

In *Saenz v. Roe*, the Supreme Court recognized that the Privileges or Immunities Clause, even as interpreted by the *Slaughter-House Cases*, still provides protection of a right to travel.[92]

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[88] *See e.g.*, *Wilson-Perlman v. MacKay*, No. 215CV285JCMVCF, 2016 WL 1170990, at *9 (D. Nev. Mar. 23, 2016) ("[T]he right to pursue one's chosen occupation is not of a federal character and is therefore not protected by the Privileges or Immunities Clause of the Fourteenth Amendment.") (citing *Merrifield v. Lockyer*, 547 F.3d 978, 983-84 (9th Cir. 2008)).

[89] *See e.g.*, *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1213 (D. Utah 2012)

[90] *Id. See also Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 548 (4th Cir. 2013) ("Finally, appellants contend that the certificate-of-need program contravenes the 'right to earn an honest living' embodied in the Fourteenth Amendment's Privileges or Immunities Clause, which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' They concede, however, that this particular claim is foreclosed."); *Waugh v. Nev. State Bd. of Cosmetology*, 36 F. Supp. 3d 991, 1025 (D. Nev. 2014) ("As Plaintiffs concede, I am constrained by the Supreme Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases.* Relief cannot be had under this clause 'unless the claim depends on the right to travel.' I thus grant summary judgment on this claim in the Board's favor, but preserve the claim for possible Supreme Court review."); *Brantley v. Kuntz*, No. A-13-CA-872-SS, 2013 WL 6667709, at *3 (W.D. Tex. Dec. 16, 2013) (same); *Eck v. Battle*, No. 1:14-CV-962-MHS, 2014 WL 11199420, at *7 (N.D. Ga. July 28, 2014) (same); (same); *Roman Catholic Archdiocese of Newark v. Christie*, No. CV-155647-MAS-LHG, 2016 WL 1718676, at *1 n.1 (D.N.J. Apr. 29, 2016) (same); *Niang v. Carroll*, No. 4:14 CV 1100 JMB, 2016 WL 5076170, at *9 (E.D. Mo. Sept. 20, 2016), aff'd 879 F.3d 870 (8th Cir. 2018) (same).

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

[92] 526 U.S. 489 (1999).

It held that California could not discriminate against newly arriving residents by imposing residency requirements for certain welfare benefits. Accordingly, it is unsurprising that a large share of privileges-or-immunities litigation concerns allegations that a state violated the right to travel. These cases arise in a wide range of context. In *Fish v. Kobach*, plaintiffs contended that a Kansas voter registration law violated their "right to travel," a claim the district court dismissed.[93] Another case considered the application of the "right to travel" to Nebraska's Sex Offender Registry Act, because it discriminated against newly arrived citizens and "prevent[s] migration into the state of undesirable citizens."[94] Yet another case rejected the argument a school district's failure to credit a teacher's out-of-state experience did not violate his "right to travel."[95] John Sturgeon, whose case ultimately made it to the Supreme Court, asserted that his "inability to use his hovercraft for moose-hunting purposes arguably implicates his right under the Privileges or Immunities Clause of the Fourteenth Amendment 'to use the navigable waters of the United States, however they may penetrate the territory of the several States.'"[96] The Ninth Circuit rejected that claim.

Courts will often stress that the "right to travel" is the *only* right protected by the Privileges or Immunities Clause. Consider *Young v. Ricketts*: a California real-estate broker challenged a Nebraska law requiring agents who advertise properties in the state to register with the state. She claimed that the statute "infringed on her right to practice her chosen profession."[97] In light of *Slaughterhouse*, the Eight Circuit found that it could not "grant relief based upon that

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[93] Fish v. Kobach, No. 16-2105-JAR-JPO, 2018 WL 276767, at *16-17 (D. Kan. Jan. 3, 2018).
[94] *A.W. v. Nebraska*, 865 F.3d 1014, 1020 n.3 (8th Cir. 2017).
[95] *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 216 (3d Cir. 2013), as amended (May 10, 2013) ("In sum, because Connelly's allegations cannot support an inference that Steel Valley penalized him for exercising his right to interstate travel, its salary classification does not implicate a fundamental right. . . . Therefore, Steel Valley's decision to provide Connelly with less than full credit for out-of-state teaching experience is subject to rational basis review.") (citations omitted).
[96] *Sturgeon v. Masica*, 768 F.3d 1066, 1072 (9th Cir. 2014), *vacated and remanded sub nom. Sturgeon v. Frost*, 136 S. Ct. 1061, 194 L. Ed. 2d 108 (2016)
[97] *Young v. Ricketts*, 825 F.3d 487, 495 (8th Cir. 2016).

clause *unless the claim depends on the right to travel*."[98] Likewise, in *Courtney v. Goltz*, the Ninth Circuit explained that "[e]ven if the Privileges or Immunities Clause recognizes a federal right 'to use the navigable waters of the United States,'" that is, a right to travel, "the right does not extend to protect the [plaintiff's intrastate] use of Lake Chelan to operate a commercial public ferry."[99] *Courtney* expressly concerned the right to the navigable waters—a right that was protected by the *Slaughter-House* majority.

Another subset of the "right to travel" cases challenge firearms restrictions for non-residents. These cases meld the two different aspects of *McDonald* together: the right to bear arms and privileges or immunities. So far, courts seem hostile to this synergy. In *Peterson v. Martinez*, the Tenth Circuit held that Colorado could restrict gun permits to Colorado residents. Such a law did not violate the right to travel protected by Privilege or Immunities Clauses.[100] The Eastern District of California reached a similar conclusion by rejecting "the right to possess a firearm for purposes of travel."[101] We were not able to locate a successful privileges-or-immunities claim in a firearms-related case.

C. The Death Penalty

Much to our surprise, the Privileges or Immunities Clause has been extensively litigated in the context of the death penalty. The *Slaughter-House Cases* provided a cramped listing of liberties that they deemed privileges or immunities of federal citizenship. One of privileges had a very international flavor: "all rights secured to our citizens by treaties with foreign nations."[102] Ohio death-row inmates challenged the states execution protocol as a violation of "their

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[98] *Id.* (emphasis added).
[99] *Courtney v. Goltz*, 736 F.3d 1152, 1158 (9th Cir. 2013)
[100] *Peterson v. Martinez*, 707 F.3d 1197, 1212 (10th Cir. 2013)
[101] *Peterson v. Farrow*, No. 215CV00801JAMEFB, 2016 WL 3477238, at *5 (E.D. Cal. June 27, 2016).
[102] *Slaughterhouse*, 83 U.S. 36, 79–80 (1872).

unenumerated right as American citizens not to be subjected to nonconsensual medical experimentation, allegedly protected from infringement by the Privileges or Immunities Clause of the Fourteenth Amendment."[103] They asserted that "[t]he right against being subject to involuntary human experimentation is clear, established as it is in numerous international treaties to which the United States is a party."[104] The court found that the "*Slaughter-House Cases* did recognize that a right accruing to national citizenship protected by the Privileges or Immunities Clause is any right secure to an American citizen by international treaty."[105] However, because "none of the treaties cited . . . purports to prevent an American State from executing an American citizen by using lethal drugs 'experimentally' in the way alleged by Plaintiffs," the claim was dismissed.[106] These claims, though creative and not infrequent, have been unsuccessful.

IV. Where Do We Go from Here?

Given the consensus regarding the original meaning of the Privileges or Immunities Clause—and its role as the protector of most substantive rights against state violation—one would think that it won't be long until we see movement in the courts to shift Fourteenth Amendment jurisprudence in that direction. After all, it's exceptionally rare for scholars and legal-policy types across the ideological spectrum to agree on anything. Even the age requirement for presidential eligibility can be plausibly (if facetiously) disputed in a way that the Privileges or Immunities Clause can't.[107] Despite the Supreme Court's apparent openness to

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[103] In re Ohio Execution Protocol Litig., No. 2:11-CV-1016, 2017 WL 2964901, at *17 (S.D. Ohio July 12, 2017), reconsideration denied sub nom. In re Ohio Execution Protocol Litig., No. 2:11-CV-1016, 2017 WL 3167650 (S.D. Ohio July 25, 2017), aff'd sub nom. In re Ohio Execution Protocol Litig., 709 F. App'x 779 (6th Cir. 2017).
[104] *Id.* at *18.
[105] In re Ohio Execution Protocol Litig., No. 2:11-CV-1016, 2018 WL 1033486, at *26 (S.D. Ohio Feb. 22, 2018), adhered to on reconsideration, No. 2:11-CV-1016, 2018 WL 2118817 (S.D. Ohio May 8, 2018)
[106] *Id.*
[107] *See* Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional: The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217 (1996).

revisiting the Clause in *McDonald*, however, only Justice Thomas actually went there—adopting the originalist consensus. And in the near-decade since, as our above research shows, there has been no movement in the courts.

Still, ours is not a counsel of despair. This past June, in the penultimate week of a fascinating term, the Supreme Court granted cert. in another case about incorporation under the Fourteenth Amendment—in those precise terms. *Timbs v. Indiana*, a case implicating the national debate over civil-asset forfeiture, asks "Whether the Eighth Amendment's excessive fines clause is incorporated against the states under the Fourteenth Amendment."[108] So October Term 2018 will see a renewed argument over the meaning of the Constitution's protections against state infringement of individual liberty. Given his commitment to original-public-meaning originalism, it would be no surprise if Justice Neil Gorsuch joined Thomas in taking the Privileges or Immunities Clause seriously.

The addition of Justice Brett Kavanaugh to the high bench may add even further support. Not because Kavanaugh has had a particularly deep record in this area—the D.C. Circuit has no occasion to consider the Fourteenth Amendment, and his non-judicial writings generally focus on structure and powers rather than rights—but because he's generationally closer to contemporary academic trends. When asked by Senator Ted Cruz about unenumerated rights at his confirmation hearing, Judge Kavanaugh replied, "I think the Ninth Amendment and the privileges and immunities clause and the Supreme Court's doctrine of substantive due process are three roads that someone might take that all really lead to the same destination . . . which is that the Supreme Court precedent protects certain unenumerated rights so long as the rights are,

[108] *Timbs v. Indiana* (17-1091), cert. granted June 18, 2018.

as the Supreme Court said in the *Glucksberg* case, rooted in history and tradition."[109] Time will tell whether Kavanaugh sees the distinction between privileges or immunities and substantive due process as meaningful, but he does seem more receptive to historical evidence than most of his colleagues.

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

[109] *Confirmation Hearing on the Nomination Of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 115th Cong. ___ (2018), transcript available at http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.08.html (Sept. 5, 2018)