Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities*

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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. The Reconstruction amendments were specifically intended to reshape the relationship between government—federal, state, and local—and the people. And while an immediate goal of those amendments was to confer full and equal citizenship on newly freed African-Americans, they 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 attempts to abolish it, but that 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.

While a tremendous victory, the Reconstruction amendments 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. While the Amendments represented the intellectual and legal triumph of Republican antislavery ideology, that triumph was in many ways short-lived—and, in the case of the Privileges or Immunities Clause, barely more than momentary.

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. And 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. That display of raw judicial power 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 21st century by correcting a particularly glaring mistake from the 19th. 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 for engaging those issues that is based on the text and history of the Constitution.

I. Slavery, Abolition, and the Shifting Balance of Power Between the Federal Government, 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, including 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*. 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. And, 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.[1]

In striking a new balance between federal power and state power, one question loomed large: slavery. In the original Constitution, the Framers largely punted on this question—while some implicit references to slavery (such as the notorious "three-fifths compromise" of Article I, sec. 2) were necessary, the terms "slave," "slavery," "human bondage" and the like do not appear anywhere in the document.[2]

The Framers' failure to address slavery and 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 was and the precise bounds of its power vis-à-vis the states and the people.[3] One school of thought held that state governments retained the power to "nullify" federal laws they did not like.[4] Another, in part motivated by the Constitution's failure to grapple with the slavery problem, held that the Constitution itself was illegitimate.[5]

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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 the states.[6] While a surprising and certainly difficult argument to accept through modern eyes, there can be no doubt that it was sincerely held at the time.[7] Though mistaken, the view that the Bill of Rights applied directly to the states was apparently fairly common,[8] while a more sophisticated view held that the Article IV Privileges *and* Immunities Clause protected substantive rights from state incursion.[9]

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 appropriating private property because the Fifth Amendment's takings provision (along with the rest of the Bill of Rights) had no application to the states.[10] And in *Dred Scott*, the Court adopted a narrow reading of the Article IV 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.[11]

Notwithstanding judicial setbacks, however, antislavery legal theorists continued to insist that the Constitution provided a meaningful check on state actions. For example, Joel Tiffany in his 1849 *Treatise on the Unconstitutionality of Slavery*, made an impassioned defense of a vision of the Constitution under which 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 "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.[12]

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 hardly unusual.[13] As Michael Kent Curtis notes, this usage "had a long and distinguished history," appearing in Blackstone's landmark *Commentaries on the Laws of England* before the American Revolution.[14] Even the reviled *Dred Scott* decision referred to the Bill of Rights as the "rights and *privileges* of the citizen."[15]

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 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.[16]

The Republican understanding of Article IV's Privileges and Immunities Clause—that it protected substantive rights against state infringement, not simply discrimination against nonresidents—was also shared by Ohio Republican Representative John Bingham. In 1859, speaking out against 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 *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 became part of the Fourteenth Amendment, arguing that while there was "an ellipsis in the language employed in the Constitution," it was "self-evident" that it was meant to guarantee the natural rights of "citizens of the United States in the several States...."[17]

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, Bingham truly found fame several years later as the chief architect of the Fourteenth Amendment, taking 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.[18]

B. The Abuse, Redemption, and Surrender of Civil Rights in the Reconstruction 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.[19] In the case of the Fourteenth Amendment, the "mischief" that concerned Congress is easy to identify: state and local authorities throughout the South were systematically violating individual rights in open defiance of federal demands for full and equal citizenship for all. In 1866, Reconstruction Republicans undertook to set things straight.

The Fourteenth Amendment struck at three distinct "evils." First, it was meant to prevent 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 thereof, effectively overruling the *Dred Scott* decision.[20] Second, the Fourteenth Amendment was meant to prevent states from discriminating against newly freed slaves by, for example, refusing to provide black citizens with police protection—a problem addressed by the requirement that no state deny any person within its jurisdiction equal protection of the laws.[21] Third, it was meant to prevent states from locking freedmen and others out of *civil* society by stripping them of certain rights—like the right to speak freely, to defend themselves, and to earn a livelihood in the occupation 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 a free man.[22]

Republican concern for violations of civil liberties and natural rights did not start with the Reconstruction Congress. Indeed, the heated atmosphere of pre-Civil War 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," as states routinely prosecuted Republicans for the crime of circulating antislavery materials.[23]

And, of course the abuse of individual rights did not stop with the end of the Civil War or the adoption of the Thirteenth Amendment—to the contrary. Legislative testimony and newspaper accounts provide compelling evidence concerning the scope and intensity of the assault on civil liberties during Reconstruction.

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.[24] 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 freedmen, who [were] defenseless, for the civil law-officers disarm the colored man and hand him over to armed maurauders."[25] These acts were widely reported, fostering outrage not just in Congress, but throughout the popular press.[26] For many, if not most freedmen, life as a "free" man cannot have seemed much better than life as a slave.[27]

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,"[28] was a very deliberate attempt 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. 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.[29] Given the overlapping character of and motivations behind these measures, the debates surrounding them may be treated as a single coherent conversation over the central question of how to secure individual rights from predation by state and local governments.

The Fourteenth Amendment was largely drafted and guided by John Bingham, an Ohio congressman and moderate Republican whom "the *New York Times* described as 'one of the most learned and talented members of the House.'"[30] Bingham's leadership is important for several 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 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.[31] But Bingham understood that 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.[32]

While many members of Congress appeared unaware (or unwilling to acknowledge) that the Supreme Court had long ago rejected their theory of constitutional supremacy over the states, Bingham was all too aware of those decisions, and he deliberately framed the Fourteenth Amendment as a response to *Barron*, specifically responding to that opinion's admonishment that provisions that were to limit the powers of state governments should clearly read that "no State shall...."[33]

Debates over what became the Fourteenth Amendment are replete with the natural-rights language that Republicans had used for decades in arguing against slavery.[34] 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*. 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."[35]

That distinction is essential to a proper understanding of the Privileges or Immunities Clause.[36] After all, as Michael Kent Curtis has observed, "in the South, the ideal solution to the problem of speech about slavery was compelled silence"—fully applicable to blacks and whites equally.[37] Thus, far from being concerned only with equality, congressional Republicans wanted to prevent states from violating "guaranteed privileges" like the right to speak out against slavery or cruel or unusual punishment,[38] and to reaffirm and protect certain "inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws"—even ones that operated even-handedly.[39]

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."[40] 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.[41]

The understanding of the Amendment expressed in the House of Representatives was typical of the understanding nationwide. These sentiments were echoed in the Senate, where Senator Jacob Howard relied extensively on Justice Bushrod Washington's opinion in *Corfield v. Coryell*,[42] to illustrate the natural rights or "fundamental guarantees" that were encompassed in the term "privileges and immunities."[43] The same understanding can be found in the state-level debates

over the Amendment's ratification[44] and those expressed in newspaper articles and editorials.[45] And legal scholars took the same view. 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 substantive rights of American citizens.[46]

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. And the public appears by all accounts to have understood the proposed Fourteenth Amendment that way as well.[47] (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.

II. The Supreme Court's Breathtaking Judicial Activism in *Slaughter-House*

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 seven 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 over the expressed will of the people.

That blow, of course, was delivered by the Court in the infamous *Slaughter-House Cases*.[48] 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. 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.[49]

To the butchers, 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 (including, obviously, corrupt) government interference. 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, the butchers viewed the challenged law as a direct affront to their livelihoods. 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."[50] But instead of stopping there, as the doctrine of constitutional avoidance would have counseled, the majority went on to construe the Fourteenth Amendment, in what is arguably dicta, as an essentially meaningless provision that "most unnecessarily excited Congress and the people on its passage."[51]

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 held by virtue of one's national citizenship on the other—the rather obvious purpose of which is to disclaim any responsibility (or even authority) on the part of the federal government for protecting 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.

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 "radical."[52] 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."[53]

Rather than read the Privileges or Immunities Clause as working 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."[54] 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 rights,[55] the 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 (no irony intended, at least by Justice Miller) of the states, making clear that the latter were "not intended to have any additional protection by this paragraph of the [A]mendment."[56] In short, the Privileges or Immunities Clause was rendered 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[57]).

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."[58] 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 are 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.[59]

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

IV, and, 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*.[60] 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."[61]

Despite compelling dissents by Justices Field, Bradley, and Swayne that utterly demolished the majority's reasoning (if it may be called that), *Slaughter-House* was universally understood as having effectively eliminated the Privileges or Immunities Clause as a source of meaningful protection for individual rights.[62] Of course, this was warmly received by opponents of the Fourteenth Amendment, many of whom applauded their fellow travelers on 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.

What is striking, given the breadth and ideological diversity of modern scholarship, however, is the consensus of opinion that has emerged: simply put, nearly "everyone" now agrees that *Slaughter-House* misinterpreted the Privileges or Immunities Clause.[63] 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."[64] And Professor Thomas McAfee has observed that "this is one of the few important constitutional issues about which virtually every modern commentator is in agreement."[65] Moreover, even the few scholars who defend *Slaughter-House* do so not on the merits, but rather on overtly 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*.[66]

But *Slaughter-House* did more than just misinterpret the Privileges or Immunities Clause. It fundamentally warped the Supreme Court's jurisprudence of rights in a 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 pressed into service to protect an increasing number of rights deemed sufficiently "fundamental" by the Supreme Court.

Unfortunately, the Court's unnecessary reliance on substantive due process has had a number of negative consequences for individual-rights jurisprudence. First is the obvious tension between "substantive" and "process," which prompted John Hart Ely's comparison of "substantive due process" to "green pastel redness."[67] By contrast, the term "privileges or immunities"—which 19th-century Americans appear to have used interchangeably with "rights"[68]—needs no gloss or embellishment to do its job.[69]

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.[70] 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 unsettling the change in federal-state relations that the Clause enacted. But that is obviously not a solid basis for principled jurisprudence.

III. 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.

The abandonment of any meaningful judicial protection for economic liberty has yielded predictable, and tragic, results. In the 1950s, only 4.5% of the workforce needed a government license in order to do their job—these were largely doctors, lawyers, architects, and similar professionals. Today, nearly 30% of the workforce needs the government's permission in order to earn a living.[71] Rather than protecting public health or safety, these new licensing requirements often serve as nothing more than a means to lock a politically disfavored group out of a portion of the economy in order to allow politically favored groups to earn higher profits.[72]

The Supreme Court's incentive to reconsider *Slaughter-House* has been 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.[73] The Court has also protected a number of unenumerated rights through that doctrine,[74] 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.[75] The right to keep and bear arms fits that bill perfectly.

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.[76] That decision resolved a long-standing and contentious constitutional debate,[77] but it left open a pressing question—given that the Second Amendment protects a right to keep and bear arms against infringement by the *federal* government,[78] does the Constitution prevent state and local governments from infringing the right to keep and bear arms, and if so how? The Court has now taken up that question[79] in a case challenging Chicago's handgun ban where the question presented asks "[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses."[80]

A candid, originalist reexamination of the Supreme Court's Fourteenth Amendment jurisprudence indicates that the Court has been protecting some rights (like free speech) incorrectly, by "incorporating" those rights through the Due Process Clause rather than simply recognizing them as among the inherent rights shared by all Americans and protected by the Privileges or Immunities Clause. Other rights, like economic liberty, have been all but ignored, despite their centrality to the Fourteenth Amendment's entire purpose, namely, the practical (not merely formal) elimination of servitude through the protection of those very rights necessary to overcome it.

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 sort of forcible disarmament that became all too common in the Reconstruction South. But it is equally clear that the Clause is meant to protect other rights, like the right to earn an honest living in the occupation of one's choice, a right that most Americans—but unfortunately not most Supreme Court Justices—recognize as being among the most fundamental rights we possess.

CONCLUSION

The Fourteenth Amendment marked a watershed moment in American history, when the people of this country made a conscious decision to reject the fiction that state and local governments could, by virtue of their relative proximity to the polity, be entrusted with the protection of basic civil rights. The Fourteenth Amendment was the product of that decision, and it included a very conscious decision by the people of this country to charge the federal government not only with the power but the duty to protect a wide variety of individual rights from state governments. Unfortunately, in a breathtaking display of activism—and on the basis of a decision so profoundly flawed that it has been rejected by all serious constitutional scholars—the Supreme Court chose to defy the will of the people and forestall the constitutional revolution that culminated in the ratification of the Fourteenth Amendment. The Court has yet to honestly confront that mistake or fully acknowledge its initial refusal to implement the will of the people as expressed in their founding document. It is high time to do both by restoring the Privileges or Immunities Clause to its proper constitutional role. And 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.

Endnotes

1 Laurence H. Tribe, American Constitutional Law, 6.3 at 404; *see also, e.g.,* The Federalist No. 11 ("A unity of commercial, as well as political, interests, can only result from a unity of government.").

2 *See generally* Lysander Spooner, *The Unconstitutionality of Slavery* (1845), *available at* http://www.lysanderspooner.org/UnconstitutionalityOfSlaveryContents.htm.

3 *But see* U.S. Const. amend. X.

4 *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 (Liberty Fund 1992).

5 *See* Lysander Spooner, *No Treason, No. VI: The Constitution of No Authority* (1870), in 1 The Collected Works of Lysander Spooner (Charles Shively ed., 1971).

6 Michael Kent Curtis, *No State Shall Abridge* 43-56 (1986).

7 *See infra*.

8 Indeed, at one point a seemingly frustrated Representative John Bingham literally read aloud from *Barron v. Baltimore* in an attempt to persuade some of his doubtful 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).

9 Curtis, *supra* note 6, at 47-48.

10 Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 248 (1833).

11 Dred Scott v. Sanford, 60 U.S. (10 How.) at 422-23.

12 Joel Tiffany, *A Treatise on the Unconstitutionality of Slavery* 55 (1849) (cited in Michael Kent Curtis, *supra* note 6, at 42-43.

13 Akhil Reed Amar, *The Bill of Rights* 166-69 (1998).

14 Curtis, *supra* note 11, at 64.

15 60 U.S. (10 How.) at 403 (emphasis added).

16 Amar, *supra* note 13, 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).

17 Cong. Globe, 35th Cong., 2d Sess., 984 (1859).

18 *See infra*.

19 *Cf.* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must... examine the state of things existing when it was framed and adopted to ascertain the old law, the mischief, and the remedy.") (citation omitted).

20 *See* Don E. Fehrenbacher, *The Dred Scott Case* 579-81 (1978). The integration of freed slaves into *political* society was, of course, not complete until the introduction of the Fifteenth Amendment two years after the introduction of the Fourteenth Amendment.

21 *See, e.g.,* David Currie, *The Constitution in the Supreme Court: The First Hundred Years* 349 (1985).

22 *Cf.* Kimberly C. Shankman & Roger Pillon, *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).

23 State v. Worth, 52 N.C. 488, 492 (1860); *see also* Clement Eaton, *The Freedom of Thought in the Old South* 245 (1940) (detailing an indictment in Virginia for distribution of the same book).

24 *See* David T. Hardy, *Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866-68*, at 8-12 (2009), available at http://ssrn.com/abstract=1322323.

25 House Ex. Doc. No. 80, 39th Cong., 1st Sess. at 236-239 (1866).

26 *See* Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, at 7, 18, 31, 37 (1998) (discussing contemporaneous press coverage).

27 *Cf.* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Reviving 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.")

28 83 U.S. (16 Wall.) at 125 (Swayne, J., dissenting).

29 Curtis, *supra* note 6, at 57-58.

30 *Id.* at 58.

31 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 at 99 app. (1866).

32 *See* Curtis, *supra* note 6, at 80-81.

33 Amar, *supra* note 13, at 164-65 (1998) (quoting Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871) (emphasis altered)).

34 *E.g.*, Cong. Globe, 39th Cong., 1st Session at 1064 (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").

35 Cong. Globe, 39th Cong., 1st Session at 2465 (1866).

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

37 Curtis, *supra* note 27, at 47.

38 Cong. Globe, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

39 210 Cong. Globe, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence); *see also* Curtis, *supra* note 39, at 44-65 (describing and debunking what Curtis calls the "equality only" view of Privileges or Immunities).

40 Cong. Globe, 39th Cong., 1st Session 1089-90 (1866) (emphasis added).

41 Cong. Globe, 39th Cong., 1st Sess. at 1066 (1866).

42 6 F. Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1823).

43 Cong. Globe, 39th Cong., 1st Sess. at 2766 (1866). Other Senators took similar positions. *See, e.g.*, Bernard Siegan, *The Supreme Court's Constitution* 55-65 (1987).

44 *See, e.g.*, Michael Kent Curtis, *supra* note 6, at 138-39.

45 *See* Hardy, *supra* note 24, at 15-23; *see also id* at 21 (quoting "Madison," *The National Question: The Constitutional Amendments—National Citizenship*, The New York Times, Nov. 10, 1866 at 2, col. 2-3).

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

47 *See, e.g.*, Hardy, *supra* note 36.

48 83 U.S. (16 Wall.) 36 (1873).

49 *Id.* at 59-60.

50 83 U.S. at 60.

51 *Id.* at 96 (Field, J., dissenting).

52 *Id.* at 77-78.

53 *Id.*at 70.

54 *Id.* at 79.

55 *E.g.*, 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 (2000).

56 83 U.S. at 74.

57 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* http://www.ij.org/index.php?option=com_content&task=view&id=676&Itemid=165.

58 83 U.S.at 96 (Field, J., dissenting).

59 *Id.* at 87-88.

60 *Id.* at 98.

61 *Id.*at 110.

62 *See, e.g.,* United States v. Cruikshank, 92 U.S. 542, 549 (1875).

63 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* Laurence H. Tribe, *American Constitutional Law* 1320-21 (3d ed. 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."); Akhil Reed Amar, *The Bill of Rights* 213 (1998) (explaining "[t]he obvious inadequacy—on virtually any reading of the Fourteenth Amendment—of Miller's opinion" in *Slaughter-House*).

64 Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 503 (1988).

65 Thomas B. McAffee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986).

66 *E.g.*, 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.").

67 John Hart Ely, *Democracy and Distrust* 18 (1978). 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).

68 *See, e.g.*, Curtis, *supra* note 6, at 64-65.

69 C*f.* 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' ....").

70 *Cf.* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723 (1838) ("In the construction of the constitution, we must... examine the state of things existing when it was framed and adopted... to ascertain the old law, the mischief and the remedy….") (internal citation omitted).

71 *See* Morris M. Kleiner, *Licensing Occupations* 1 (Upjohn Institute 2006); *see also* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, National Bureau of Economic Research Working Paper 14979, at 10-13 (2009), *available at* http://www.nber.org/papers/w14979 (providing most recent data).

72 *See* E. Frank Stephenson and Erin Wendt, *Occupational Licensing: Scant Treatment in Labor Texts*, 6 Econ. Journal Watch 181, 185-86 (2009) (summarizing research documenting how occupational licensing is used to erect barriers to entry or mobility); Walter Gelhorn, *The Abuse of Occupational Licensing*, 44 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"); *see also* Dick M. Carpenter, *Designing Cartels* (documenting the efforts of a professional lobbying group to persuade state legislators to adopt interior-design licensing laws that have no plausible health or safety justification).

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

74 *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967) (striking down laws against racial intermarriage); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down an Oregon law against sending children to private schools); Meyer v.

Nebraska, 262 U.S. 390 (1923) (striking down Nebraska law forbidding teaching of German language in schools).

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

76 District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008).

77 *See generally* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi.-Kent L. Rev. 349 (2000).

78 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).

79 McDonald v City of Chicago, No. 08-1521, 2009 WL 1631802 (Sept. 30 2009).

80 *See* http://origin.www.supremecourtus.gov/qp/08-01521qp.pdf.