



Be Careful What You Wish For: Why *McDonald v. City of Chicago*'s Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing for Rights

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INTRODUCTION

On June 28, 2010, the United States Supreme Court handed down its much-anticipated decision in *McDonald v. City of Chicago*,¹ holding that the Second Amendment's right to bear arms is incorporated against the States by the Fourteenth Amendment's Due Process Clause.² Despite a valiant effort by the plaintiffs and various amici, the Court declined to adopt the Fourteenth Amendment's Privileges or Immunities Clause as a vehicle for incorporation, and steadfastly refused to take the case as an opportunity to overturn its century-and-a-half old *Slaughter-House* decision.³

McDonald represents the latest attempt to "right the wrong" perpetuated in the much-reviled *Slaughter-House* decision that restricted the Privileges or Immunities Clause as a source for both enumerated and unenumerated rights. Almost since its inception, the *Slaughter-House* decision has received constant criticism for cabining the rights protected by the Privileges or Immunities Clause to those rights that are incidents of "national citizenship," including the right to become a citizen of any state, the right to protection on the high seas and foreign lands, the right to use navigable waters, to travel to the seat of and to petition national government, and the right to visit subtreasuries.⁴ Although almost universally recognized as an incorrect interpretation of the Privileges or Immunities Clause,⁵ and despite the reams of paper and oceans of ink dedicated to its abolition,⁶ *Slaughter-House* lives on.

1. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

2. *Id.* at 3050.

3. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *see McDonald*, 130 S.Ct. at 3028-31.

4. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79.

5. *See* Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 8-9, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (pointing to a "near-unanimous scholarly consensus on the history and meaning of the Clause"); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 632 (2001) (explaining "[v]irtually no serious modern scholar—left, right, and center—thinks that this is a plausible reading of the Amendment"); Brief for the Institute for Justice as Amicus Curiae in Support of Respondent at 27, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (noting the "overwhelming weight of evidence and scholarly opinion" indicating the "Court should revisit its Privileges or Immunities Clause jurisprudence").

6. *See* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1300 (2010) (describing *Slaughter-House* as "one of the Court's precedents most deserving of being overruled"); Josh Blackman and Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending The Right to Keep and Bear Arms To The States*, 8 GEO. J.L. & PUB. POL'Y 1, 19 (expressing "hope" that the Supreme Court would "take up this gauntlet" and overturn *Slaughter-House*); David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 336 (2003) (identifying a wide range of critics from Professor Lawrence Tribe to Justice

And this might not be such a bad thing. Although there is a strong temptation, from an academic point of view at least, to make right the constitutional order by correcting the *Slaughter-House* Court's misinterpretation of the Privileges or Immunities Clause, there is a large question regarding just what good such a result would do. Much of the work that the Privileges or Immunities Clause was supposedly designed to accomplish, such as the incorporation of the Bill of Rights against the States, has already been done through a different vehicle of the Fourteenth Amendment, the Due Process Clause.⁷ Additionally, *Slaughter-House* rejected the use of the Privileges or Immunities Clause to protect unenumerated rights; substantive due process jurisprudence has filled that gap as well.⁸ Thus, there is a serious question as to what work a revitalized Privileges or Immunities Clause would have to do.

The real force animating the discussion over privileges or immunities revival has to do with unenumerated rights. The many proponents hope that by moving the battle over unenumerated rights from substantive due process to the Privileges or Immunities Clause, existing unenumerated rights will be placed on a more secure basis with a firmer historical footing, and the stage will be set for a rights revival that could expand the concept of unenumerated rights, including positive rights.⁹

However, it is not at all clear that this would be the result. First, despite claims by proponents of privileges or immunities that the current doctrine of substantive due process is an ahistorical oxymoron, there is actually a long and prestigious line of authority for including the protection of substantive rights in the term "due process," a history that began with the "law of the land" provision in the Magna Charta.¹⁰ Second, there is no indication that the use of the Privileges or Immunities Clause would be any more effective than the Due Process Clause in protecting rights. Privileges or Immunities neither provides better guideposts for its use, nor in any way alters the real conflict inherent in the debate over unenumerated rights.¹¹

Further, despite the hopes and dreams of those who would advocate the use of the Privileges or Immunities Clause to open up a new avenue for the discovery and protection of unenumerated rights, there is little

Thomas who "agree on overruling the decision" in *Slaughter-House*); Roy Lucas, *From Patson & Miller to Silveira v. Lockyer: To Keep And Bear Arms*, 26 T. JEFFERSON L. REV. 257, 320 (2004) (arguing for the Court to overrule the "wrongful legacy of *Slaughter-House* and its progeny").

7. See *infra* notes 106-13 and accompanying text.

8. See *infra* notes 58-65 and accompanying text.

9. See *infra* notes 114-20 and accompanying text.

10. See *infra* notes 121-58 and accompanying text.

11. See *infra* notes 159-87 and accompanying text.

indication that the Court as currently comprised has an appetite for such a robust interpretation.¹² Rather, the principal attraction of the Clause for its proponents on the Court appears to be its suitability for restricting, rather than enhancing, substantive due process's method for recognizing unenumerated rights.¹³ In fact, there is a danger that the recognition of the Privileges or Immunities Clause as the primary vehicle for rights would destabilize the current substantive due process jurisprudence, throwing those rights currently recognized through that jurisprudence into doubt.¹⁴

This article examines the persistent attempt to revive the Privileges or Immunities Clause as a vehicle for enumerated and unenumerated rights, either as a replacement for, or as an addition to, the current substantive due process jurisprudence. Part I looks at the purpose of the Privileges or Immunities Clause, how that purpose was frustrated by the Court's *Slaughter-House* decision, and efforts to overturn *Slaughter-House* that culminated in the recent case of *McDonald v. City of Chicago*.¹⁵ Part II looks at the questions of incorporation and unenumerated rights, and examines how the Court's substantive due process jurisprudence has evolved to achieve most of the aims the Privileges or Immunities Clause would have accomplished.¹⁶ Part III then explores and evaluates the arguments for the revitalization of the Privileges or Immunities Clause and the possible unintended consequences of such a revival.¹⁷ The article concludes that, all in all, proponents of rights might be better off for the refusal of the Court in *McDonald* to revitalize Privileges or Immunities. Although the academic appeal of righting *Slaughter-House*'s wrong is undeniable, the practical effect of doing so might be a prime example of "be careful what you wish for," in that it might result in less, rather than more, protection for rights.¹⁸ Thus, beyond the mere intellectual satisfaction of righting a wrong, there is little to be gained and perhaps much to be lost by revitalizing the Privileges or Immunities Clause.

I. THE HISTORY AND PURPOSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE

The history of the Fourteenth Amendment's Privileges or Immunities Clause has been well documented. There is a current

12. See *infra* notes 187-218 and accompanying text.

13. See *infra* notes 227-32 and accompanying text.

14. See *infra* notes 225-38 and accompanying text.

15. See *infra* notes 19-105 and accompanying text.

16. See *infra* notes 106-218 and accompanying text.

17. See *infra* notes 219-37 and accompanying text.

18. See *infra* notes 257-62 and accompanying text.

consensus among almost all authorities on the subject that the Court in *Slaughter-House* got it wrong, and that the Clause means much more than what the Court in that case thought.¹⁹

One of the chief aims of Section One of the Fourteenth Amendment was plain: it was designed to overrule the *Dred Scott* decision and make it clear that African-Americans were citizens of the United States and of the States.²⁰ But Section One also provided that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person in its jurisdiction the equal protection of the laws.”²¹ Considerable evidence suggests that the purpose of this part of Section One, especially the portion relating to privileges or immunities and due process, was to incorporate the Bill of Rights and other fundamental rights against the States.

The principle architect of the Fourteenth Amendment was Congressman John Bingham of Ohio.²² He was a firm believer in both enumerated and unenumerated rights, and he subscribed to the opinion that Article IV’s Privileges and Immunities Clause protected fundamental rights against infringement by State government,²³ as expressed by Justice Bushrod Washington in *Corfield v. Coryell*.²⁴ Bingham was also critical of the Court’s 1833 opinion in *Barron v. Baltimore*,²⁵ which held that the Bill of Rights was not applicable to the States.²⁶ In discussing the Fourteenth Amendment’s Privileges or

19. See Brief Amicus Curiae of Cato Inst. and Pacific Legal Found. in Support of Petitioners at 2, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (arguing *Slaughter-House* was “wrongly decided” and the intent of the Fourteenth Amendment was “to provide federal protection for a broad list of individual rights in the wake of the Civil War”), Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 605 n.81 (1998) (arguing that in *Slaughter-House* “the Privileges and Immunities clause, contrary to its broad purpose, was read so narrowly as to make it practically a constitutional ‘dead letter’”), Richard L. Aynes, *Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) [hereinafter Aynes, *Justice Miller*] (stating “‘everyone’ agrees the Court incorrectly interpreted the Privileges or Immunities Clause”).

20. See CONG. GLOBE, 39TH Cong., 1st Sess. 3148 (1866) (stating the purposes of Section One). This purpose was accomplished by providing that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1.

21. U.S. CONST. amend XIV, § 1.

22. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 182 (1998).

23. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1295 (3d ed. 2000).

24. *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825).

25. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

26. See AMAR, *supra* note 22, at 148-49.

Immunities and Due Process Clauses before Congress, he cited *Barron v. Baltimore* as one of the reasons the Amendment was needed,²⁷ and made a number of other statements indicating that the purpose of the Amendment was to enforce the Bill of Rights and other fundamental rights against the States.²⁸ In discussing, post-ratification, the concept of privileges or immunities, he stated: “The privileges or immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States. . . . These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.”²⁹

Other proponents of the Amendment were also vocal in their belief that the Fourteenth Amendment protected fundamental rights, including the Bill of Rights, from State abridgment.³⁰ Further, there is persuasive evidence that the people of the United States at the time of the enactment would have understood that the terms “privileges” and “immunities” referred to fundamental rights, including the Bill of Rights.³¹ Early interpretations by judges and legal commentators following the passage of the Amendment also took this view.³²

Nevertheless, the United States Supreme Court thought differently a bare five years after passage of the Fourteenth Amendment. In a 5-4 decision in *Slaughter-House*, the Court rejected the contention by New Orleans butchers that a state-sanctioned monopoly violated their right to work.³³ Writing for the majority, Justice Samuel Miller stated that the Privileges or Immunities Clause “speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states.”³⁴ Thus, it protected only those privileges or immunities that were incident to national citizenship, rather than state citizenship. Instead, “the entire domain of the privileges and

27. See CONG. GLOBE, 39th Cong., 1ST SESS. 1089-90 (1866).

28. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 72-73 (1993) [hereinafter Aynes, *Misreading*] (cataloging Bingham’s statements on the matter).

29. CONG. GLOBE, 42nd Cong., 1ST SESS. APP. 84 (1871); see Aynes, *Misreading*, *supra* note 28, at 74.

30. See Aynes, *Misreading*, *supra* note 28, at 79-81 (discussing the various statements made by legislators); see also Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States*, 19 HARV. J.L. & PUB. POL’Y 443, 447 (1996) (noting that there were “about thirty speeches in the House and Senate” expressing this position).

31. See Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life after Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1089-1136 (2000).

32. See Aynes, *Misreading*, *supra* note 28, at 83-97.

33. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 60-62 (1873).

34. *Id.* at 74.

immunities of the citizens of the states . . . lay within the constitutional and legislative power of the states, and without that of the federal government.”³⁵

According to Miller, those privileges and immunities that were incident to national citizenship were those that “owe their existence to the Federal government, its National character, its Constitution, or its laws.”³⁶ As examples, Miller referenced the right of a citizen to “come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, and to engage in administering its functions.”³⁷ Miller also referenced the rights of a citizen to free access to the government’s seaports, subtreasuries, land offices and courts, as well as the right to demand the care and protection of the Federal Government when on the high seas or within the jurisdiction of a foreign government.³⁸ Finally, Miller referenced the right to peaceably assemble and petition, the privilege of the writ of habeas corpus, and the right to use navigable waters.³⁹ He was of the opinion that none of these rights, however, helped the butchers in question.⁴⁰

Miller’s and the rest of the *Slaughter-House* majority’s reasons for limiting the Privileges or Immunities Clause are unclear. Some theorists have charitably ascribed *Slaughter-House* to a misreading of the language of the Clause, arguing that Miller and the others looked only at the text rather than the history.⁴¹ Others have suggested that *Slaughter-House* was based on Justice Miller’s belief that the Supreme Court should safeguard both State and Federal spheres of authority, or the fear that the Privileges or Immunities Clause might give the Federal government too much authority.⁴² An even more intriguing theory is that

35. *Id.* at 77.

36. *Id.* at 79.

37. *Id.*

38. *Id.*

39. *Id.* at 79-80.

40. *See id.*

41. *See, e.g.,* Bret Boyce, Heller, McDonald *and Originalism*, 2010 CARDOZO L. REV. DE NOVO 2, 11-12 (referring to *Slaughter-House* as “an example of ahistorical literalist textualism”); Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1297 (2003) (explaining the decision in *Slaughter-House* occurred “[d]espite the original understanding of the Privileges or Immunities Clause”); *see* Aynes, *Justice Miller, supra* note 19, at 684-86 (criticizing Miller’s “textual argument” and arguing there was a “clear consensus” that the Privileges or Immunities Clause was to have a “substantive role” and that view was “undoubtedly specifically known to the Justices”).

42. *See* David S. Bogen, *Rebuilding the Slaughter-House: The Cases’ Support for Civil Rights*, 42 AKRON L. REV. 1129, 1134-35 (2009) (arguing that Miller’s “concern for federalism led him to view the Privileges and Immunities Clause warily” and that he “feared the expansive nationalizing effect of privileges and immunities if the Fourteenth

Miller's opinion was misunderstood, and Miller's examples of rights, were, in fact, examples of sources of rights. These rights include: 1) those found in the text of the Constitution that explicitly applied against the states; 2) those derived from the national character of the federal government; 3) the fundamental rights encompassed in the Bill of Rights; and 4) rights established by the federal government either through legislation or treaties.⁴³

Whatever the reason for Miller's *Slaughter-House* opinion, its effect was clear. Two years later in *U.S. v. Cruikshank*,⁴⁴ the Court ruled that the Fourteenth Amendment did not incorporate the First Amendment against the States.⁴⁵ Together, *Slaughter-House* and *Cruikshank* halted any further attempt to argue incorporation under the Privileges or Immunities Clause. Since then, the Court has consistently rejected further attempts to revive Privileges or Immunities to incorporate the Bill of Rights,⁴⁶ and has further refused to use it as a source of unenumerated rights, with a few notable exceptions.⁴⁷

Although the Privileges or Immunities Clause remained moribund, the Due Process Clause of the Fourteenth Amendment has expanded to

Amendment Clause referred to the fundamental rights . . . identified . . . as the privileges and immunities of citizens in Article IV"); Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 298 (2006) (arguing that Justice Miller found a means by which to "keep alive his views of federalism" in *Slaughter-House*).

43. See William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 181-83 (2002); see also James W. Fox, Jr., *Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 67 (2002) (arguing for federal enforcement powers); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 769 (1984) (arguing that *Slaughter-House* supports incorporation); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 647-48 (2000) (same).

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

45. See *id.* at 552.

46. See, e.g., *Maxwell v. Dow*, 176 U.S. 581, 589-90 (1900) (citing *Slaughter-House* to hold that the Sixth Amendment's right to twelve-member juries was not incorporated); *Twining v. New Jersey*, 211 U.S. 78 (1908) (citing *Slaughter-House* to reject incorporation of the Fifth Amendment's protection against self-incrimination). The closest the Court has come to reinvigorating the incorporation doctrine through Privileges or Immunities was in 1947, in *Adamson v. California*, 332 U.S. 46 (1947). In that case, Justice Hugo Black came within one vote of using the Privileges or Immunities Clause to incorporate the protection against self-incrimination. See Clark M. Neily III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities*, 14 TEX. REV. L. & POL. 15, 39 (2009).

47. See *TRIBE*, *supra* note 23, at 1313-14. In *Saenz v. Roe*, 526 U.S. 489, 501-03 (1999), the Court held that the right to travel, and more specifically to establish residence in a new state and be treated the same as other citizens of the state, is protected by the Privileges or Immunities Clause.

become the primary vehicle for rights. Through the Due Process Clause, the entirety of the rights protected by the First,⁴⁸ Second,⁴⁹ Fourth,⁵⁰ and Sixth Amendments⁵¹ have been incorporated against the States.⁵² Most of the Fifth⁵³ and Eighth Amendments⁵⁴ have also been incorporated. The only substantive guarantees of the Bill of Rights that have not been incorporated are the Third Amendment's prohibition on the quartering of soldiers in private houses,⁵⁵ the Fifth Amendment's right to indictment by grand jury,⁵⁶ and the Seventh Amendment's right to jury trial in civil suits exceeding twenty dollars in controversy.⁵⁷ Although the Court has held that the Due Process Clause incorporates these rights not because they are listed in the Bill of Rights, but instead because they are

48. See *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating First Amendment's protection for speech and press); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (incorporating right to assemble and petition); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating Establishment Clause).

49. See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

50. See *Wolf v. Colorado*, 338 U.S. 25 (1949).

51. See *Irvin v. Dowd*, 366 U.S. 717 (1961) (incorporating right to public trial and notice of charges); *Irvin v. Dowd*, 359 U.S. 394 (1959) (incorporating right to an impartial jury); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating right to counsel in criminal cases); *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating Confrontation Clause); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating right to speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (incorporating right to compulsory process); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial in criminal cases).

52. See generally *Gitlow*, 268 U.S. at 652; *De Jonge*, 299 U.S. at 353; *Cantwell*, 310 U.S. at 296; *Everson*, 330 U.S. at 1 (1947).

53. See *Chicago, Burlington & Quincy Ry. Co. v. Chicago*, 166 U.S. 226 (1897) (incorporating ban on takings without just compensation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating protection against self-incrimination); *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating protection against double jeopardy).

54. See *Robinson v. California*, 370 U.S. 660 (1962) (incorporating ban on cruel and unusual punishment); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (assuming the applicability of the ban on excessive bail). There have been no cases addressing whether the Eighth Amendment's ban on excessive fines is incorporated. See RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* 507 (9th ed. 2009).

55. This Amendment has not actually been litigated.

56. See *Hurtado v. California*, 110 U.S. 516 (1884).

57. See *Minneapolis & St. Louis Ry. Co. v. Bombolis*, 241 U.S. 211 (1916). The Ninth and Tenth Amendment have also not been incorporated, but neither one protects substantive or procedural rights. The Ninth Amendment indicates that there are other fundamental rights beyond those in the Bill of Rights, but does not itself contain their substance. See U.S. CONST. art. XI; see generally Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 175 (2010). The Tenth Amendment simply sets up the separation of powers between the federal and state governments. See U.S. CONST. amend. X.

“fundamental” to justice and liberty,⁵⁸ the fact remains that, as far as incorporation is concerned, substantive due process has done almost everything that the Privileges or Immunities Clause would have achieved.

Substantive due process has also been the Court’s vehicle for protecting other important rights that are not mentioned in the Bill of Rights.⁵⁹ These rights include: the right to refuse unwanted medical treatment,⁶⁰ the right of parents to educate their children in private schools;⁶¹ the rights “to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children”;⁶² the right to use contraception;⁶³ the “constitutional liberty of [a] woman to have some freedom to terminate her pregnancy”;⁶⁴ and the liberty to engage in private sexual conduct.⁶⁵ Of course, substantive due process was also the vehicle for the short-lived “liberty of contract” that has caused problems for proponents of unenumerated rights.⁶⁶

In part, the *Slaughter-House* decision and its progeny, which slammed the door on the Privileges or Immunities Clause, opened the window for the use of the Due Process Clause as the vehicle for the

58. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (holding that those rights “absorbed” by the Fourteenth Amendment were such “that neither liberty nor justice would exist if they were sacrificed”).

59. See WALTER F. MURPHY, ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 1357-61 (3d ed., Foundation Press 2003) (1986); Jeffrey D. Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt’s Constitutional Fate*, 75 *MISS. L. J.* 495, 524 (2006).

60. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

61. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

62. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

63. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

64. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992).

65. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

66. See generally *Lochner v. New York*, 198 U.S. 45 (1905). Liberty of contract actually got its start eight years before *Lochner*, in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). However, the liberty of contract in *Allgeyer* was quite moderate. See David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 *HASTINGS CONST. L.Q.* 217, 259 (2009). *Lochner* marked the beginning of fundamental rights jurisprudence. See generally David E. Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *GEO. L.J.* 1 (2003) (arguing that *Lochner* is best understood in the context of the Court’s fundamental rights jurisprudence). *Lochner*’s liberty of contract jurisprudence was used to strike down state laws in cases such as *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) and *Chas. Wolff Packing v. Court of Indus. Relations*, 267 U.S. 552 (1925). It faded, however, throughout the 1930’s before finally losing its status in *West Coast Hotel v. Parrish*, 300 U.S. 379, 391-92 (1937), wherein the Court noted that “[t]he Constitution does not speak of freedom of contract.” See Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test*, 45 *U. RICH. L. REV.* 491 (2011) [hereinafter Jackson, *Rationality*] (tracing the evolution and decline of liberty of contract).

incorporation of enumerated and unenumerated rights.⁶⁷ In turn, the availability of substantive due process blunted any push for a reexamination of the Privileges or Immunities Clause; instead, litigants quickly began to frame their arguments in terms of the Due Process Clause, or, in many cases, the Equal Protection Clause.⁶⁸

Nevertheless, some litigants continued to push for a Privileges or Immunities revival as a source for rights.⁶⁹ The stage for the latest attempt was set when the Court decided *District of Columbia v. Heller*⁷⁰ in 2008. In a 5-4 decision, the *Heller* Court held that the Second Amendment guarantees an individual right to keep and bear arms.⁷¹ However, the Justice Scalia-authored opinion did not address whether, or how, the Second Amendment would be applicable to the States, except to note that the decision was not before the Court and to hint, somewhat cryptically, that *Cruikshank*'s holding that the Second Amendment did not apply to the States was probably not binding.⁷² This led to speculation that the Court would favorably entertain a suit on the subject of applying the Second Amendment to the States, and opened the door to the plaintiffs' attempt in *McDonald* to do so through the Privileges or Immunities Clause.

The effort to overrule *Slaughter-House* in *McDonald* was one of the most concerted attempts yet. In contrast to the usual inclusion of the Privileges or Immunities Clause as an afterthought, a full 66 pages of the Petitioner's Brief were devoted to the argument.⁷³ This left a mere seven pages for the due process argument.⁷⁴ Additionally, nine amicus briefs were principally devoted to the use of the Privileges or Immunities Clause for incorporation and the overruling of *Slaughter-House*.⁷⁵

67. See TRIBE, *supra* note 23, at 1310-12.

68. See *id.* at 1316-17.

69. See, e.g., Brief of Appellant at 20-21, *Adamson v. California*, 332 U.S. 46 (1947). In that case, the Privileges or Immunity argument was four small paragraphs thrown in after the argument under the Due Process Clause. *Id.*

70. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

71. *Id.* at 591-96.

72. See *id.* at 620 n.23. The opinion stated: "With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, [citation omitted] and *Miller v. Texas*, [citation omitted], reaffirmed that the Second Amendment applies only to the Federal Government." *Id.*

73. See Brief of Petitioner at 18-65, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

74. See *id.* at 66-72.

75. See generally Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief of Arms Keepers as Amicus Curiae in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521);

Legal pundits were excited about the possibility that the Court might revive the Privileges or Immunities Clause.⁷⁶ Their excitement was buoyed by the fact that at least one justice on the Court, Justice Thomas, had made a statement in an earlier case that seemed to indicate that he might be supportive of such a revival.⁷⁷ In his dissenting opinion in *Saenz v. Roe*, Justice Thomas stated: “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.”⁷⁸ Further, Justice Scalia’s majority opinion in *Heller* had intimated that the right to bear arms was one that might be incorporated against the States.⁷⁹ Because it seemed likely that the Court would be receptive to incorporating the Second Amendment against the States in some form, there was little for the plaintiffs in *McDonald* to lose by pressing the Privileges or Immunities argument. The Due Process Clause would always be available as a fall-back provision, and it was unlikely that the Court would fail to hold for incorporation just because the Due Process argument in the plaintiffs’ brief was sparse.⁸⁰

Brief Amicus Curiae of Cato Institute and Pacific Legal Foundation in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief for the Goldwater Institute, Scharf-Norton Center for Constitutional Government, and Wyoming Liberty Group as Amici Curiae Supporting Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief Amicus Curiae of Gun Owners of America, Inc., et al. in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief for the Calguns Foundation, Inc. as Amicus Curiae in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief of Amicus Curiae Institute for Justice in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief Amicus Curiae of Center of Constitutional Jurisprudence in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Amicus Curiae Brief of American Center for Law and Government in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521). Other amicus briefs mentioned the argument, but did not focus on it. See, e.g., Brief of the American Civil Rights Union, et al. as Amici Curiae in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

76. See, e.g., Posting of Michael Anthony Lawrence to Progressive Liberty Blog, <http://progressiveliberty.blogspot.com/2009/09/huge-news-supreme-court-grants.html> (Sept. 30, 2009, 11:07 AM); Posting of Josh Blackman to Joshblogs, <http://joshblogs.wordpress.com/2009/09/30/question-presented-in-2nd-amendment-case-asks-about-privileges-or-immunities-clause/> (Sept. 30, 2009) (Both calling the Supreme Court’s grant of cert on the issue: “HUGE”).

77. See, e.g., Josh Blackman & Ilya Shapiro, *Keeping Pandora’s Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL’Y 1 (2010).

78. *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting).

79. *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008).

80. Also, there were a number of other briefs in the case that addressed the Due Process argument in more detail, thus making sure it did not go unargued. See Brief of the Maryland Arms Collectors’ Association, Inc., as Amicus Curiae in Support of Petitioners at 15-41, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief of Thirty-Four California District Attorneys et al. as Amici Curiae in Support of Petitioners at 18-22, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief of Amicae Curiae Women State

Thus, *McDonald* seemed to be “ideally suited” to bring about a Privileges or Immunities Clause revival.⁸¹

The Court’s grant of certiorari also provided hope for proponents of the Privileges or Immunities Clause. The Court granted certiorari on a combined Question Presented that asked: “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.”⁸² The Court’s inclusion of the privileges or immunities argument in the Question Presented led to hopeful discussion about whether the time had at last come for the Privileges or Immunities Clause revival.⁸³

By the time the case headed for oral argument, however, there were indications that the optimism of privileges or immunities proponents was to be short-lived. On January 25, 2010, the Court granted a motion by The National Rifle Association (NRA), which allowed the NRA to argue incorporation, splitting time with the plaintiffs.⁸⁴ The NRA had filed a brief that urged the incorporation of the Second Amendment through the Due Process Clause.⁸⁵ The NRA had asked to be allowed to argue so that “both issues encompassed within the question presented are fully explored at oral argument,” and it had noted that the Due Process Clause was the “most straightforward and direct route to reversal of the decision below.”⁸⁶ Plaintiffs’ counsel had objected to splitting time but to no

Legislators and Academics in Support of Petitioners at 10-16, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief of Amicus Curiae Foundation for Moral Law, in Support of Petitioners at 25-36, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); Brief of Amici Curiae State Legislators in Support of Petitioners at 14-29, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

81. See Blackman & Shapiro, *supra* note 6, at 89.

82. *NRA of Am. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted*, *McDonald v. City of Chicago*, 130 S. Ct. 48 (U.S. Sep. 30, 2009) (No. 08-1521).

83. See Blackman & Shapiro, *supra* note 6, at 20 (discussing the discussion engendered by the Court’s grant).

84. See Motion of Respondents-Supporting-Petitioners for Divided Argument, *McDonald*, 130 S. Ct. 3020 (No. 08-1521); see *McDonald*, 130 S. Ct. 1317 (2010) (granting motion). Because the NRA had been a plaintiff in the underlying case, but had not had its own petition for certiorari granted, it had filed a brief as a “Respondent[.]” on “Behalf of Petitioners.” Brief for Respondents The National Rifle Association of America in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

85. See Brief for Respondents The National Rifle Association of America in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

86. Motion of Respondents-Supporting-Petitioners for Divided Argument at 3, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

avail.⁸⁷ Legal commentators saw the decision to allow the NRA argument time as a bad sign for a Privileges or Immunities revival.⁸⁸

The oral argument bore out those fears. At argument, the plaintiffs' counsel was barely able to start on his Privileges or Immunities argument before receiving questions from an unexpected quarter. Justice Scalia inquired: "why are you asking us to overrule 150, 140 years of prior law, when—when you can reach your result under substantive due [process]—I mean, you know, unless you're bucking for a—place on some law school faculty."⁸⁹ Scalia went on to state that while the idea of reviving the Privileges or Immunities Clause was the "darling of the professoriate," it was contrary to precedent.⁹⁰ Even more disappointing to those privileges or immunities proponents who had counted on his hostility to substantive due process to pave the way, Justice Scalia then asked: "Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have—even I have acquiesced in it."⁹¹ Aside from some discussion in rebuttal about whether using the Privileges or Immunities Clause would give judges more or less discretion than they had under substantive due process doctrine, incorporation through the Privileges or Immunities Clause was not further discussed.⁹²

The Court's discussion at oral argument was a harbinger of the decision. By a 5-4 decision, a majority of the Court held that the Fourteenth Amendment incorporated the Second Amendment against the States.⁹³ However, three of the justices in the majority gave short shrift to the idea of the Privileges or Immunities Clause as a vehicle for incorporation. In the majority opinion, authored by Justice Alito, those justices noted that "[t]oday, many legal scholars dispute the correctness

87. See Opposition to Motion of National Rifle Association for Divided Argument, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

88. See, e.g., Orin Kerr, *NRA Gets Oral Argument Time in McDonald v. City of Chicago*, THE VOLOKH CONSPIRACY, (Jan. 25, 2010, 2:24 PM), <http://volokh.com/2010/01/25/nra-gets-oral-argument-time-in-mcdonald-v-city-of-chicago/> ("[i]f the Court was on board [to overturn *Slaughter-House*] the Justices wouldn't carve away some of the precious 30 minutes needed to make the case . . . for the much more humdrum and precedent-based [Due Process] argument featured in the NRA brief."); Brian Doherty, *The NRA Muscles into McDonald v. Chicago*, REASON MAGAZINE, Feb. 10, 2010, available at <http://reason.com/archives/2010/02/10/the-nra-muscles-into-mcdonald> (suggesting that the Court's decision to grant ten minutes of the 30 minute oral argument to the NRA "seems likely to hurt chances that the Court will take the more dramatic route [Privileges or Immunities argument] laid before them").

89. See Transcript of Oral Argument at 6-7, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

90. *Id.* at 7.

91. *Id.*

92. See *id.* at 61-65.

93. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

of the narrow *Slaughter-House* interpretation [of the Privileges or Immunities Clause].”⁹⁴ However they went on to state that “petitioners are unable to identify the Clause’s full scope. Nor is there any consensus on that question among the scholars who agree that the *Slaughter-House Cases*’ interpretation is flawed.”⁹⁵ The plurality opinion then closed the door on privileges or immunities, stating that: “For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.”⁹⁶ The Court went on to analyze the matter under substantive due process and held that the Second Amendment was incorporated through the Due Process Clause.⁹⁷

Of particular disappointment to proponents of using the privileges or immunities clause was the concurring opinion written by Justice Scalia, who joined the plurality in using the Due Process Clause for incorporation.⁹⁸ Echoing his harsh questioning of petitioners’ counsel at oral argument, he stated: “I join the Court’s opinion. Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights ‘because it is both long established and narrowly limited.’”⁹⁹

The dissenting opinion authored by outgoing-Justice Stevens was similarly dismissive of the Privileges or Immunities Clause. Justice Stevens wrote:

I agree with the plurality’s refusal to accept petitioners’ primary submission. [Citation omitted]. Their briefs marshal an impressive amount of historical evidence for their argument that the Court interpreted the Privileges or Immunities Clause too narrowly in the *Slaughter-House Cases*. But the original meaning of the Clause is not as clear as they suggest—and not nearly as clear as it would need to be to dislodge 137 years of precedent.¹⁰⁰

He quoted a law review article, written by Judge Harvie Wilkinson, cautioning against cavalier use of Privileges or Immunities. The article stated: “For the very reason that it has so long remained a clean slate, a revitalized Privileges or Immunities Clause holds special hazards for

94. *Id.* at 3029-30.

95. *Id.* at 3030 (citation omitted).

96. *Id.* at 3030-31.

97. *Id.* at 3031-50.

98. *See id.* at 3050-58 (Scalia, J. concurring).

99. *Id.* at 3050 (Justice Scalia quoting his own concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 275 (1994)).

100. *Id.* at 3089 (Stevens, J., dissenting) (citations omitted).

judges who are mindful that their proper task is not to write their personal views of appropriate public policy into the Constitution.”¹⁰¹ Justice Stevens then stated, definitively, that “[t]his is a substantive due process case.”¹⁰²

Justice Clarence Thomas was the sole supporter of using the Privileges or Immunities Clause for incorporation. In his concurring opinion, he argued that the Court should incorporate the Second Amendment through privileges or immunities rather than through substantive due process.¹⁰³ He called the notion of substantive due process “legal fiction” and stated that a return to what he called the “original meaning” of the Fourteenth Amendment 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.”¹⁰⁴ He did not, however, find it necessary to overrule the *Slaughter-House* cases, as they did not involve an enumerated right. Rather, he argued that *Cruikshank* should be overruled and merely urged rejection of *Slaughter-House* “insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship.”¹⁰⁵

The final count in the wake of *McDonald* found four justices, Alito, Kennedy, Stevens, and Chief Justice Roberts, rejecting the attempted privileges or immunities revival. Justice Scalia also favored the use of substantive due process, at least as applied to the Second Amendment. Three justices, Breyer, Ginsburg, and Sotomayor, expressed no opinion with regard to the privileges or immunities versus due process question, instead arguing simply that the Second Amendment was not incorporated against the States. Only Justice Thomas affirmatively argued for incorporation through privileges or immunities. Although some proponents of using privileges or immunities remain hopeful, arguing that Justice Thomas’s opinion somehow puts the Privileges or Immunities Clause closer to revival,¹⁰⁶ the decision in *McDonald* seems to clearly indicate that the Clause will indeed remain dormant for the foreseeable future.

However, for those who care about constitutional rights, both enumerated and unenumerated, this actually is not such a bad thing.

101. *Id.* (quoting J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL’Y 43, 52 (1989)).

102. *McDonald*, 130 S. Ct. at 3090 (Stevens, J., dissenting).

103. *Id.* at 3058-88 (Thomas, J., concurring).

104. *Id.* at 3062.

105. *Id.* at 3086.

106. *See, e.g.*, Posting of Randy Barnett to SCOTUSblog, <http://www.scotusblog.com/2010/06/privileges-or-immunities-clause-alive-again/> (June 28, 2010, 5:01 PM EST).

While a number of proponents of a Privileges or Immunities Clause revival hope such a revival will usher in a new era of unenumerated rights, as well as garner new protections for those rights that the Court has already recognized as fundamental under the Due Process Clause, very little suggests that this would be the result of such a revival. In fact, it is debatable whether a privileges or immunities revival would do anything that substantive due process does not. Further, a revival could backfire and destabilize those rights that have already been recognized under substantive due process. There are many good reasons to leave well enough alone.

II. EXPLORING THE JUSTIFICATION OF A PRIVILEGES OR IMMUNITIES RENEWAL

A. *Privileges or Immunities and the Bill of Rights: An Unnecessary Solution to a Non-Existent Problem*

One of the main arguments for privileges or immunities revival has to do with what many proponents see as *Slaughterhouse's* (or possibly *Cruikshank's*) betrayal of one of the Clause's main purposes: to incorporate the Bill of Rights against the states. Many articles have been written "proving" this was the original intent of the Clause.¹⁰⁷ There is a strong desire among these proponents to remedy the original error and to restore the Clause's "original meaning" with regard to incorporation.¹⁰⁸

Beyond the simple intellectual satisfaction of returning the Privileges or Immunities Clause to its alleged historical meaning, however, it is difficult to see what the incorporation of enumerated rights through the Privileges or Immunities Clause would accomplish. As noted above, substantive due process has already done almost all the

107. See generally, William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 57-91 (1986); Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1996); Aynes, *Misreading*, *supra* note 28; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509 (2007). Of course, these arguments have also engendered gallons of ink attempting to show that this was not the purpose of the Clause. See, e.g., RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

108. See, e.g., Aynes, *Misreading*, *supra* note 28, at 103-04.

work in this regard.¹⁰⁹ With the incorporation of the Second Amendment in *McDonald*, the only guarantees of the Bill of Rights that have not been incorporated are the Third Amendment's prohibition on the quartering of soldiers in private houses, the Fifth Amendment's right to indictment by grand jury, and the Seventh Amendment's right to jury trial in civil suits exceeding twenty dollars in controversy.¹¹⁰ There is not now, nor really has there ever been, a huge clamor for incorporating any of these rights against the States.

This is not to say that recognition of the Privileges or Immunities Clause's incorporation of the Bill of Rights would not have been useful at some time. Certainly, early adoption of this view would have forestalled cases such as *Twining v. New Jersey*¹¹¹ and *Palko v. Connecticut*,¹¹² which respectively refused to apply the Fifth Amendment's protections against self-incrimination and double jeopardy to the States. Substantive due process has since done so.¹¹³ Furthermore, because this incorporation came through the Due Process Clause, there is no danger that constitutional protection might be rolled back for the simple reason that, when it comes to enumerated rights, incorporation traditionally works in only one direction. No enumerated right has been "disincorporated."¹¹⁴ Thus, for all intents and purposes, the incorporation question has already been settled and reviving privileges or immunities would add nothing.

B. *Unenumerated Rights: The Heart of Matter*

In truth, the argument over incorporation is beside the point. Rather, the real driving force in the argument over privileges or immunities and due process has to do with unenumerated rights, their protection, and possible expansion. The desire to better protect unenumerated rights and provide a basis for their further expansion is a cause with which I am sympathetic. However, those who wish to replace

109. See *supra* notes 48-53 and accompanying text (addressing the Court's practice of selective incorporation of the Bill of Rights through the Due Process Clause).

110. See *supra* notes 55-57 and accompanying text.

111. *Twining v. New Jersey*, 211 U.S. 78 (1908).

112. *Palko v. Connecticut*, 302 U.S. 319 (1937).

113. See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding protection against self-incrimination applicable against the States); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (applying double jeopardy against the States).

114. The only possible argument for a scaling-back of constitutional protection comes from the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), wherein the Court determined that neutral laws of general applicability that burdened First Amendment Free Exercise of Religion should be subject to a rational basis rather than a strict scrutiny standard. *Id.* at 885-86.

substantive due process with the Privileges or Immunities Clause as a basis for unenumerated rights should be careful what they wish for.

For proponents of unenumerated rights, the case for reviving the Privileges or Immunities Clause tends to boil down to the following arguments, broadly stated: 1) the Privileges or Immunities Clause is the more natural place for unenumerated rights, both linguistically and historically;¹¹⁵ 2) the Due Process Clause jurisprudence is burdened by the spectre of *Lochner*, and thus suffers from illegitimacy concerns;¹¹⁶ 3) the Privileges or Immunities Clause provides better guideposts for use;¹¹⁷ and 4) the use of Privileges or Immunities would result in a revitalization of rights jurisprudence.¹¹⁸ To some extent, the first and second arguments are interrelated; they both concern the legitimacy of unenumerated rights jurisprudence.¹¹⁹ The third argument may actually be a red herring,¹²⁰ and the fourth argument is the one most likely to backfire.¹²¹

1. Exploring the Linguistic and Historical Accuracy of Substantive Due Process

John Hart Ely famously referred to substantive due process as “a contradiction in terms,” somewhat like a “green, pastel redness.”¹²² It is true that the notion of a clause speaking only of procedure having a substantive content strikes the listener as odd and clumsy.¹²³ However,

115. See CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 105-06 (1997); ELY, *supra* note 107, at 18; Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 420 (1990); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 191-223 (2004); DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION* 199 (1993); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1147 (1992). See also TRIBE, *supra* note 23, at 1317; Bogen, *supra* note 6, at 385-88 (discussing both of these arguments).

116. See ELY, *supra* note 107, at 20; TRIBE, *supra* note 23, at 1318.

117. See Brief of the Institute for Justice and Cato Institute as Amici Curiae in Support of Petitioners at 15, *NRA of Am. v. City of Chicago*, 130 S. Ct. 3543 (2010) (No. 08-1497).

118. See BARNETT, *supra* note 115, at 259-69; BLACK, *supra* note 115, at 100-06; Chemerinsky, *supra* note 115, at 1147.

119. See *infra* notes 122-70 and accompanying text.

120. See *infra* notes 171-87 and accompanying text.

121. See *infra* notes 188-238 and accompanying text.

122. See ELY, *supra* note 107, at 18. David Bogen argues that this really is not a contradiction, in that “[l]inguistically, there is no problem in saying that procedures that are premised on an unconstitutional law violate due process.” Bogen, *supra* note 6, at 386. He calls it “aqua pastelness.” *Id.*

123. See, e.g., CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 443 (3d ed. 2009) (stating that “[s]ubstantive due process is an ungainly concept”).

in order to understand why substantive due process is not such an odd concept after all, it is necessary to look at its history and usage.

First, from a linguistic standpoint, it should be remembered that the term “substantive due process” was coined by its opponents, as a way of denigrating the concept.¹²⁴ The phrase itself is noticeably absent from the United States Reports until 1948, even though the “golden period” of substantive due process had come twenty to thirty years earlier.¹²⁵ In its so-called heyday, courts spoke of the “liberty” which protected persons from arbitrary interference with rights.¹²⁶ It was only after the concept itself had fallen out of favor among judges that the “life, liberty or property” guaranteed by the Due Process Clause was transformed into an oxymoron.¹²⁷

More importantly, those who believe as Justice Thomas does, that “[t]he notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words,”¹²⁸ do not know their history. The term “due process” has its roots in the “law of the land” provision in Chapter 39 of the Magna Charta, which provided that “[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by lawful judgment of his peers and by the law of the land.”¹²⁹ By the seventeenth century, Chapter 39 had come to mean not only that the government must obey the laws in force by using proper procedure, but also that the laws themselves must be consistent with the natural and customary rights of the people.¹³⁰ Those laws that contravened the customary rights were not

124. See Jackson, *Rationality*, *supra* note 66, at 495; JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 134 (2003) (stating that the term substantive due process was “devised precisely to discredit” the idea).

125. See Jackson, *Rationality*, *supra* note 66, at 526; James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 (1999). James Ely identified Justice Rutledge’s dissent in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948), as the first mention of the term by a justice on the Supreme Court. Ely, *supra*, at 319 n.20.

126. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Dobbins v. City of Los Angeles*, 195 U.S. 223, 236 (1904).

127. See James W. Ely, Jr., *supra* note 125, at 319. Rutledge’s dissent in *Republic National Gas* was strongly favorable to the power of States to regulate correlative rights in natural gas production. See *Republic Natural Gas*, 334 U.S. at 90–95 (Rutledge, J., dissenting).

128. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring).

129. James W. Ely, Jr., *supra* note 125, at 320–21.

130. See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, High-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596–612 (1999) (explaining the use of the “law of land” provision in

entitled to be called “law,” but instead were arbitrary assertions of power, and though Parliament might pass them and courts enforce them, they still were not valid in the way true laws were valid.¹³¹ When the American colonists came from England, they brought with them the idea of a “substantive” guarantee in due process.¹³² By the time of the American Revolution, the colonists were arguing Magna Charta’s “law of the land” provision as a substantive bar to Parliament’s actions.¹³³

The idea of substance in the various “due process” and “law of the land” provisions persisted throughout the early days of the nation.¹³⁴ This idea was also expressed regarding the Federal Constitution. In the time leading up to the Civil War, abolitionists such as Salmon P. Chase argued that by recognizing slavery in the territories, the Federal Government was denying slaves their right to freedom in violation of the Due Process Clause of the Fifth Amendment.¹³⁵ The “substance” of the Due Process Clause was also evident in the most-reviled Supreme Court opinion of those days, *Dred Scott v. Sanford*.¹³⁶

English Constitutional law of the late Seventeenth Century); JOHN PHILLIP REID, *THE RULE OF LAW* 78-79 (2004).

131. Gedicks, *supra* note 130, at 644-45 (discussing the classical understanding of “the law”).

132. *See id.* at 595; REID, *RULE OF LAW*, *supra* note 129, at 78-79; JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 76 (1995).

133. *See* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 968 (1990); REID, *RULE OF LAW*, *supra* note 130, at 77-78; REID, *AUTHORITY OF RIGHTS*, *supra* note 132, at 75-76. For example, James Otis and John Adams argued that Parliament’s actions were limited by the “law of the land,” and that therefore the Navigation Acts and the Stamp Act were invalid.” *See* RODNEY L. MOTT, *DUE PROCESS OF LAW* 125-36 (1926).

134. *See* James W. Ely, III, *supra* note 129, at 328-38 (tracing the development of substantive due process in antebellum America). *See also* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. OF LEGAL HIST. 305, 317 (1988) (stating that “a substantial number of states . . . imbued their respective due process clauses with a substantive content”).

135. *See, e.g.*, Salmon P. Chase, “The Address and Reply on the Presentation of a Testimonial to S.P. Chase by the Colored People of Cincinnati” 29-30 (1845) *available at* <http://dlxs2.library.cornell.edu/cgi/t/text/pageviewer-idx?c=mayantislavery;idno05836604;view=image;seq=1;cc=mayantislavery;page=root;size=s;frm=frameset>. *See also* EARL M. MALTZ, *THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION* 8 (2003) (referencing Chase’s argument). According to Maltz, this argument “formed the centerpiece of antislavery constitutional doctrine, appearing in every antislavery party platform between 1844 and 1860”. *Id.*

136. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). In fact, critics of substantive due process have cited its use in *Dred Scott* as a reason not to use the doctrine. *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888* 271 (1985) (stating that *Dred Scott* was “the original precedent for *Lochner* . . . and *Roe*”); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990) (stating that “[w]ho says *Roe* must say . . . *Scott*”).

In the first edition of his influential work, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, published a mere two years after the drafting of the Fourteenth Amendment, Thomas Cooley expressed the view that the Due Process Clause contained limitations of substance rather than just procedure:

The principles, then, on which the process is based are to determine whether it is “due process” or not, and not any considerations of mere form. . . . When the government, through its established agencies, interferes with the title to one’s property, or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence which have become established in our system of law, and not by any rules that pertain to forms of procedure merely. . . . Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.¹³⁷

Thus, there is ample evidence to support Justice Stevens’s statement in his *McDonald* dissent that “at least by the time of the Civil War if not much earlier, the phrase “due process of law” had acquired substantive content as a term of art within the legal community.”¹³⁸

This is not to say that the Due Process Clause was the only, nor even the best, guarantor of rights in the Fourteenth Amendment. Certainly the language of the Privileges or Immunities Clause would suggest, even more clearly, that the purpose of the Fourteenth Amendment was to protect rights. An amount of redundancy in asserting bases for rights would not be unusual to persons versed in the early American legal tradition.¹³⁹ However, the argument is not that the Due Process Clause is the “natural home” for unenumerated rights, as proponents of Privileges or Immunities sometimes claim for their

137. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 356 (1868). See James W. Ely, III, *supra* note 129, at 342-43.

138. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3090 (2010) (Stevens, J., dissenting).

139. See REID, *AUTHORITY OF RIGHTS*, *supra* note 132, at 87-95 (noting the traditional practice in American colonial law of asserting numerous bases for rights so as to give them a firmer foundation, and stating that the American colonists at the time of the Revolution asserted no less than ten different bases for the rights they claimed).

Clause.¹⁴⁰ Rather, the argument is that it is not an entirely “unnatural” one.

The argument that the “textual gymnastics”¹⁴¹ and knowledge of history required to link unenumerated rights and due process undermines public confidence in judicial decisions and makes judges more reluctant to use substantive due process has only slightly more validity. According to this line of argument, because substantive due process is an awkward concept for rights, the public will lack confidence that there is a valid textual basis for rights that courts protect, and this could undermine the entire concept of judicial review.¹⁴² Further, the doctrinal shakiness of substantive due process leads judges to refrain from using it when required, resulting in the instability of rights; arguing as much, Charles Black wrote that, “[substantive due process] has been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution.”¹⁴³

There is some initial appeal to this argument. After all, unlike enumerated rights, there is reason to worry about the security of unenumerated ones. *Allgeyer*’s freedom of contract went from what was basically a fundamental right status in *Lochner v. New York*¹⁴⁴ to minimal status after *West Coast Hotel v. Parrish*.¹⁴⁵ Similarly, the strict protection of the right to an abortion from *Roe v. Wade*¹⁴⁶ became a looser “undue burden” standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁴⁷

Upon closer inspection, however, it seems doubtful that either of these situations can be blamed on substantive due process. Rather, both *Parrish* and *Casey* seem to be products of the controversial nature of the right involved, not the mechanism used to establish it. It is doubtful that either the right to an abortion or the liberty of contract would be any less controversial if they were labeled “privileges” or “immunities.”¹⁴⁸

140. See, e.g., John Harrison, *Equality, Race Discrimination and the Fourteenth Amendment*, 13 CONST. COMMENT. 243, 253 n.18 (1996) (arguing that the Privileges or Immunities Clause is the “natural home of the debates over marriage and segregation, including school segregation”).

141. See TRIBE, *supra* note 23, at 1317.

142. See *id.*; BLACK, *supra* note 115, at 100-06; RICHARDS, *supra* note 115, at 199.

143. See BLACK, *supra* note 115, at 3, 102-05.

144. *Lochner v. New York*, 198 U.S. 45 (1905).

145. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

146. *Roe v. Wade*, 410 U.S. 113 (1973).

147. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

148. See Bogen, *supra* note 6, at 387 (noting that “[i]t is hard to imagine an opponent of the decision in *Roe v. Wade* suddenly saying that the Court would have been acting appropriately if only it had placed its decision on the privileges or immunities clause”).

Moreover, it is unlikely that a change in the mechanism involved would make judges any more likely to use privileges or immunities rather than substantive due process. The argument is long on speculation and short on evidence. About the closest thing that critics of substantive due process can come up with in terms of a coherent example of disrespect for substantive due process is the argument articulated by Professor Charles L. Black. He used the Court's decision in *Moore v. City of East Cleveland*,¹⁴⁹ wherein the Court considered a zoning ordinance restricting the definition of "family," as an example of this insufficient dedication to rights he claimed was engendered by the use of substantive due process. He found the plurality opinion written by Justice Powell to be what he termed "almost an apology" for using the concept of substantive due process.¹⁵⁰ He then referenced Justice White's dissenting opinion arguing that due process did not forbid the statute in question, which Black felt "would be impossible to write (or so I should hope) against any other background than that of perceived or felt fundamental weakness in the concept of "substantive due process."¹⁵¹ Black goes on to state that Justice White's argument for limited judicial intervention is "a perfect illustration of what you can lose when you rely on a highly vulnerable and totally puzzling general theory—such as 'substantive due process.'"¹⁵²

Black's argument ignores two important things. The first is that, as apologetic as it may sound, the Court's plurality opinion in *Moore* acknowledged a protected right in family living arrangements.¹⁵³ Black's carefully-selected "apologetic" excerpt is not the beginning passage of the opinion with respect to substantive due process, but simply the cautionary clause to a more expansive and forceful passage. It comes only after Justice Powell's section quoting Justice Harlan's dissenting opinion in *Poe v. Ullman*, which stated:

149. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

150. BLACK, *supra* note 115, at 102-03. The part that Black felt was apologetic was Powell's explanation of the role of substantive due process. Powell stated that "Substantive Due Process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be members of this Court. That history counsels caution and restraint." *Moore*, 431 U.S. at 502.

151. BLACK, *supra* note 114, at 103-04.

152. *Id.* at 104.

153. *See Moore*, 431 U.S. at 499 (stating that "when the government intrudes on choices concerning family living arrangements, this court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation").

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the process terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum, which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeful restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.¹⁵⁴

Further, while Justice White’s dissent was critical of substantive due process as a concept, its main argument was his disagreement as to the scope of permissible governmental zoning regulation.¹⁵⁵ Justice White contended:

Under our cases, the Due Process Clause extends substantial protection to various phases of family life, but none requires that the claim made here be sustained. I cannot believe that the interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause.¹⁵⁶

If White was unlikely to accord the interest in *Moore* heightened protection, it seems similarly unlikely that he would be willing to find that the interest was a privilege or immunity of citizens of the United States.

There is no real evidence that substantive due process’s unwieldy name or its less than obvious applicability to unenumerated rights are responsible for the reluctance of judges to use the concept.¹⁵⁷ While some rights moved from greater to lesser protection, such as liberty of contract, others, such as the liberty to engage in private sexual conduct

154. *Id.* at 502 (quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)).

155. *See id.* at 545 (White, J., dissenting) (stating that “accepting the cases [recognizing substantive due process] as they are and the Due Process Clause as construed by them . . . the threshold question in any due process attack on legislation, whether the challenge is procedural or substantive, is whether there is a deprivation of life, liberty or property”).

156. *Id.*

157. *See* Bogen, *supra* note 6, at 386. Bogen notes that “Neither the general public nor the Supreme Court has been particularly troubled by substantive due process. . . . We have been living with substantive due process for more than a century with no apparent diminution in respect for the Court. Indeed, the Court has probably gathered more support as an institution in the latter part of the twentieth century than ever before, especially in the area of incorporated rights.” *Id.*

and the right to keep and bear arms free of state interference, have moved in the other direction.¹⁵⁸ The problem is not the term used, but the nature of unenumerated rights in general. As one commentator has noted, “[o]nce one gets beyond the express provisions of the Bill of Rights, there is no general consensus on the mechanism for ascertaining those rights.”¹⁵⁹ As a result, judges are generally reluctant to expansively declare unenumerated rights—just as they also would be reluctant to declare privileges or immunities.

For the same reason, the argument that the linguistic difficulties inherent in the concept of substantive due process reduce the public’s respect for judicial review is not compelling. I doubt very much whether the average citizen thinks about the Privileges or Immunities Clause versus the Due Process Clause as a home for unenumerated rights. Rather, the battleground is over who gets to determine when such rights exist, and how to make such a determination. Which portion of the Fourteenth Amendment gets used to do it is entirely beside the point.

2. Exploring the Burden of *Lochner*

An argument against substantive due process that perhaps has a little more validity is that substantive due process jurisprudence is irredeemably burdened by the spectre of *Lochner*.¹⁶⁰ The argument goes that, whatever the merits of the right in question, every time the Court uses substantive due process to protect a right, “it will inevitably face charges that it is merely repeating the sins of *Lochner*.”¹⁶¹ According to those critics, the public perception of the *Lochner* line of cases is that the Court in those cases was motivated by its belief in *laissez-faire* economics, substituted its judgment for that of the legislature, and struck down laws designed to aid workers and economic recovery in a misguided attempt to favor business.¹⁶² In this narrative, the principle sin of *Lochner* was that the Court believed it had the power to strike down laws simply because they believed the legislature acted unwisely.¹⁶³

158. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

159. Bogen, *supra* note 6, at 387.

160. See *TRIBE*, *supra* note 23, at 1318; *ELY*, *supra* note 107, at 20. See also Bogen, *supra* note 6, at 387-88 (recognizing and refuting this argument).

161. *TRIBE*, *supra* note 23, at 1318.

162. See *id.*; Bogen, *supra* note 6, at 387-88 (both presenting this basis as the argument, although not agreeing with its characterization of *Lochner* or the argument’s validity). See also Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. Rev. 677, 686-87 (2005) (relating the traditional *Lochner* narrative).

163. See Balkin, *supra* note 162, at 687.

As with the previous argument, the spectre of *Lochner* argument has some initial traction. After all, *Lochner* remains one of the most commented-on Supreme Court cases in history.¹⁶⁴ As one distinguished commentator has noted, “avoiding *Lochner*’s mistake is the ‘central obsession’ of modern constitutional law.”¹⁶⁵ Thus, it seems logical that a move to avoid linking unenumerated rights with *Lochner* would be a good thing.

Upon closer inspection, however, this argument does not hold up for a number of reasons, not the least of which is that almost none of the constitutional scholars who have actually studied the matter believes the traditional *Lochner* story. A flood of new *Lochner* scholarship refutes the idea that the Court substituted its wisdom for the legislature’s to support of *laissez-faire* economics, favoring a number of other theories.¹⁶⁶ The work of these *Lochner* revisionists has done much to ameliorate the sting of the charge of “*Lochnerism*.”¹⁶⁷

Of course, judges are not “all constitutional scholars,” and neither are most members of the public. So, the argument that substantive due process is tainted by *Lochnerism* might still have some force for them; however, it is unlikely that many judges or members of the public today could recite what *Lochner*’s error actually was. While *Lochner* was well-known in the 1940s, ‘50s, and ‘60s when the battle for the New Deal was fresh, and was used as recently as 1973 as an indictment of *Roe*, it is no longer the lightning rod that it was then.¹⁶⁸ *Lochner* is still taught in law school, but it has made an appearance in the Supreme Court’s decisions only eight times in the last decade, almost all of them

164. See David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 2 (2003) (stating that *Lochner* and its progeny remain the “touchstone of judicial error”); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244-45 (1998) (arguing that *Lochner* is the most important case in constitutional law’s “anti-canon”).

165. Bernstein, *Lochner’s Legacy’s Legacy*, *supra* note 164, at 3 (citing Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 223 (1999)).

166. See, e.g., Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 873-75 (1987) (arguing that the *Lochner* Court’s motivation was based on preexisting common law norms); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 1-18 (Duke University Press 1993) (arguing that *Lochner* was the result of an opposition to class legislation); David E. Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) (arguing that *Lochner* is best understood in the context of the Court’s fundamental rights jurisprudence).

167. See Balkin, *supra* note 162, at 678 (noting that an increasing number of legal thinkers believe that if *Lochner* was wrongly decided at all, it was because facts afterwards changed, not because the decision itself was bad legal reasoning).

168. See *id.* at 682-90 (chronicling *Lochner*’s fall out of the “anti-canon” of constitutional law).

in the dissenting or concurring opinions of Justice Thomas.¹⁶⁹ It seems doubtful that *Lochner* has the resonance for the “man on the street” that it did just a few short decades ago.

Rather, the battleground with regard to unenumerated rights and judicial overreaching has now shifted to *Roe* and its progeny.¹⁷⁰ While there is no question that these are also substantive due process cases, they tend to be generally thought of as “right to privacy” cases or “abortion” cases. The mechanism is almost irrelevant; the subject dominates the conversation.

To a great extent, however, the whole argument about the spectre of *Lochner* on substantive due process jurisprudence misunderstands what all the fuss is about. The argument over *Lochner* and *Roe* is not an argument over the viability of substantive due process as a concept, but rather an argument over the power of courts in general to pass on the validity of laws. This is a controversial subject that goes to the heart of the American system of law. Whichever mechanism the court uses to enforce this power, whether substantive due process, the Privileges or Immunities Clause, or the Ninth Amendment, the controversy will remain. Anyone who believes that a switch from substantive due process to the Privileges or Immunities Clause will somehow change this debate is deluding him or herself. As Professor David Bogen has noted, “[i]t is hard to imagine an opponent of the decision in *Roe v. Wade* suddenly saying that the Court would have been acting appropriately if only it had placed its decision on the privileges or immunities clause.”¹⁷¹

3. The Guideposts of Privileges or Immunities

Another argument that has been trotted out in favor of using the Privileges or Immunities Clause instead of substantive due process is that privileges or immunities provides more definite guideposts that courts

169. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 130 S. Ct. 2592, 2606 (2010); *MeadWestVaco Corp., ex rel. Mead Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 34 (2008) (Thomas, J., concurring); *Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 766 n.15 (2007) (Thomas, J., concurring); *Morse v. Frederick*, 551 U.S. 393, 420 n.8 (Thomas, J., concurring); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (majority); *Id.* at 355 (Thomas, J., concurring); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 515 (2005) (Thomas, J., dissenting); *United States v. United Foods, Inc.*, 533 U.S. 405, 429 (2001) (Breyer, J., dissenting).

170. See Balkin, *supra* note 162, at 688 (noting that “*Roe v. Wade* has become the central and fraught symbol of the Supreme Court’s legitimacy and authority to interpret the Constitution”).

171. Bogen, *supra* note 6, at 387.

can use to establish the contours of unenumerated rights.¹⁷² The premise behind this argument is that the language of the Clause, the debates and contemporaneous public documents surrounding the adoption are a firmer historical anchor for unenumerated rights.¹⁷³ The current chief advocates for this argument are Clark Neily and Robert J. McNamara, who first presented it in an article¹⁷⁴ and later reiterated it in an amicus brief they helped write for the Institute of Justice in support of the petitioners in *McDonald*.¹⁷⁵ According to Neily and McNamara, “[b]ecause 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 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.”¹⁷⁶

However, a closer look at the history surrounding the adoption of the Fourteenth Amendment shows that this supposed historical anchor is not as firm as the proponents of the argument suggest. First, while there is ample evidence regarding the main purposes of the Fourteenth Amendment as whole, that is, to prevent States from denying rights to free blacks, it must be remembered that the Fourteenth Amendment contains both the Privileges or Immunities Clause and the Due Process Clause, as well as the Equal Protection Clause. There is less evidence regarding the particular part the Privileges or Immunities Clause was designed to play in this scheme. Beyond the consensus that the Fourteenth Amendment was intended to support the Civil Rights Act of 1866 and possibly incorporate the Bill of Rights against the States, there is very little guidance as to what the “privileges or immunities of citizens of the United States” actually are. As with the “life, liberty and property” protected by the Due Process Clause, any rights designated as “privileges or immunities” must be ascertained with reference to some outside source.

The chief architect of the Fourteenth Amendment, Representative John Bingham, stated in an 1871 speech, that the privileges and immunities protected by the Fourteenth Amendment were “chiefly

172. See, e.g. Clark M. Neily III & Robert J. McNamara, *supra* note 46, at 42.

173. See *id.* See also Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 342 (2005) (noting that a “fair reading of the evolution of privileges or immunities clearly implies that it is only traditional liberties, with equal weight on both terms, that are protected”).

174. See generally Neily & McNamara, *supra* note 46.

175. See Brief of Amicus Curiae Institute for Justice in Support of Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

176. *Id.* at 18; McNeily & McNamara, *supra* note 46, at 42.

defined in the first eight amendments to the Constitution of the United States.¹⁷⁷ As for what other rights may be encompassed, however, he was silent.¹⁷⁸

In presenting the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction, Senator Jacob Howard of Michigan read to the committee from Justice Bushrod Washington's opinion in *Corfield v. Coryell*,¹⁷⁹ which referenced:

[T]hose privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.¹⁸⁰

In *Corfield*, Justice Washington had declined to provide a list of these privileges or immunities, although he had stated that:

They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities. . . .¹⁸¹

177. See CONG. GLOBE, 42nd Cong., 1st Sess. App. 84 (1871) (statement of Rep. Bingham).

178. Bingham was no more forthcoming on the Due Process Clause. When asked by Representative Andrew Rogers of New Jersey regarding what the phrase "due process" meant, Bingham answered: "I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions." CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham).

179. *Corfield v. Coryell*, 6 F. Cas 546 (C.C.Pa. 1823).

180. *Id.* at 551. See also CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Remarks of Senator Howard).

181. *Corfield*, 6 F. Cas. at 551-52.

Senator Howard then stated: “to these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution.”¹⁸²

About the only guidance that can be discerned from Senator Howard’s description of privileges or immunities is that they might be limited to fundamental historical rights.¹⁸³ Beyond that, however, terms such as the “enjoyment of life and liberty” are quite broad.

Nor were other descriptions of privileges or immunities by those in Congress at the time more specific. Congressman Frederick Woodbridge of Vermont described privileges and immunities as “the natural rights which necessarily pertain to citizenship.”¹⁸⁴ An opponent of the Amendment, Congressman Andrew Jackson Rogers, thought the term too broad, stating:

What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities. . . .¹⁸⁵

As can be seen, the Privileges or Immunities Clause provides no more real guidance to its use than do the terms “life,” “liberty,” or “property” in the Due Process Clause. In fact, if the best that can be said of the Privileges or Immunities Clause is that its protection is limited to “fundamental rights,” then it sounds suspiciously like the Court’s interpretation of the Due Process Clause.¹⁸⁶ It is unclear how this is an interpretative improvement.

Moreover, it is questionable whether this argument is more than just a red herring to assure courts that adopting the Privileges or Immunities Clause as a source for unenumerated rights would not open the door to numerous new rights. Although their amicus brief in *McDonald* seemed designed to reassure the Court of this fact, Clark Neilly and Robert

182. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard).

183. See Epstein, *supra* note 172, at 342.

184. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (Rep. Woodbridge).

185. CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1865) (Rep. Rogers).

186. See, e.g. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (stating that substantive due process protects those rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

McNamara's article, from which the brief was taken, does not envision a limited Privileges or Immunities Clause, but a stronger one that would protect substantial economic liberty.¹⁸⁷

All in all, with respect to unenumerated rights, the Privileges or Immunities Clause runs into the same arguments as the Due Process Clause. Neither Clause defines what those rights might be in detail, each Clause leaves substantial room for interpretative differences, and either Clause can be interpreted expansively.

4. The Fallacy of Reinvigoration

Many proponents of the Privileges or Immunities Clause want exactly such an expansive interpretation. One of the main arguments for using privileges or immunities in place of substantive due process is the hope that it will "reinvigorate" rights jurisprudence, which proponents argue is currently moribund.¹⁸⁸ Their hope is that by placing all rights, including unenumerated ones, on the new blank slate of privileges or immunities, rights jurisprudence will free itself from the confines of the Court's tiered-scrutiny analysis exemplified by such cases as *Washington v. Glucksberg*.¹⁸⁹ It is not surprising that many of these advocates weighed in with amicus briefs in *McDonald*.¹⁹⁰

Tiered-scrutiny as currently practiced, (or at least preached) by the Court is articulated in its most complete form in *Washington v. Glucksberg*,¹⁹¹ and was recently reaffirmed in *District Attorney's Office for the Third Judicial District v. Osborne*.¹⁹² Under this test, the Court has required a "careful description" of the purported right or liberty interest in question.¹⁹³ The Court then looks to see whether the purported right or liberty interest is "fundamental," employing a test looking at whether the interest is "deeply rooted" in the history and traditions of the

187. See McNamara & Neilly, *supra* note 46, at 42-43.

188. See BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 115, at 259-69; Chemerinsky, *supra* note 115, at 1147; Michael Anthony Lawrence, *The Potentially Expansive Reach of McDonald v. Chicago: Enabling the Privileges or Immunities Clause*, 2010 CARDOZO L. REV. DE NOVO 139, 150-58; See also Blackman & Shapiro, *supra* note 6, at 22-31 (advocating a more restrained view).

189. *Washington v. Glucksberg*, 521 U.S. 702 (1997); See, e.g., Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1496 (2008) (arguing that Glucksberg's view of rights is incorrect); see also Blackman & Shapiro, *supra* note 6, at 30 (stating that the idea of writing on a "blank slate" is a motivating factor in the so-called Progressive's push for a Privileges or Immunities revival).

190. For instance, Ilya Shapiro helped author the amicus brief for the Cato Institute, while Professor Barnett was included on the Brief of Law Professors, as was Professor Michael Anthony Lawrence.

191. *Washington*, 521 U.S. at 720-22.

192. *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009).

193. *Washington*, 521 U.S. at 721.

nation.¹⁹⁴ If the right is deeply rooted, and thus fundamental, it is subject to strict scrutiny and cannot be infringed unless the regulation at issue is both in furtherance of a compelling governmental interest and “narrowly tailored” to furthering that interest.¹⁹⁵ As a practical matter, a finding that an interest is fundamental is fatal to the infringing law.¹⁹⁶ If, however, the interest is not fundamental, then the infringing law need only be “reasonably” or “rationally” related to a legitimate state interest in order to pass constitutional muster.¹⁹⁷ This lowered standard of review nearly always results in the law being upheld by the reviewing court.¹⁹⁸

Tiered-scrutiny’s perceived “all-or-nothing” approach has led to criticism that it insufficiently protects rights.¹⁹⁹ The argument is that because recognizing a fundamental right under substantive due process places it beyond the reach of the democratic process, judges are reluctant to categorize asserted rights as fundamental, instead subjecting them to a rational basis review, which is tantamount to no review at all.²⁰⁰ Proponents of using the Privileges or Immunities Clause instead of substantive due process see the Clause as a way to break free from the shackles of tiered-scrutiny, and instead move to a better system of recognition and enforcement of unenumerated rights.

For example, Randy Barnett would use the Privileges or Immunities Clause to implement his “presumption of liberty” framework.²⁰¹ Under this framework, any federal or state law that interferes with “rightful conduct,” that is, with the liberty interest of an individual, is presumed to be unconstitutional.²⁰² In order for the law to be upheld, the government has the burden to prove that the interference with the liberty interest is truly necessary and proper to achieve a legitimate aim of government.²⁰³

194. *See id.* at 720-21.

195. *Id.* at 721.

196. *See* Joseph F. Kadlec, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 386, 387-88 (2007).

197. *Washington*, 521 U.S. at 722, 728.

198. *See* Kadlec, *supra* note 196, at 388. There are some notable exceptions. *Lawrence v. Texas* may have actually been a rational basis case, although the Court did not actually state that standard, instead holding that the interest involved was part of the personal liberty inherent in the Fourteenth Amendment, and could not be criminalized by the state. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003). There have also been a number of cases under the Equal Protection Clause where a more searching rational basis standard was applied to strike down legislation. *See Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Romer v. Evans*, 517 U.S. 620 (1996).

199. *See* Jackson, *Rationality*, *supra* note 66, at 527 (discussing these criticisms).

200. *See id.* at 548.

201. *See* BARNETT, *supra* note 115, at 259-69.

202. *Id.* at 261-65.

203. *Id.* at 260-61.

Another proponent, Michael Anthony Lawrence, argues for replacing tiered-scrutiny with a “time, place or manner” test for all liberty interests.²⁰⁴ Under this test, as with Barnett’s “presumption of liberty,” the governmental action is presumed to be invalid unless justified as a reasonable time, place, and manner restriction that is narrowly tailored to serve a significant governmental function.²⁰⁵

Both Barnett’s and Lawrence’s proposed schemes for privileges or immunities share a dislike of the current test’s presumption of constitutionality, where the challenger of a law has the burden to prove its unconstitutionality.²⁰⁶ Both also dislike the idea inherent in tiered-scrutiny that certain rights exist on a different plane than others.²⁰⁷ They instead would replace the current tiered-scrutiny with a balancing test in which the governmental purpose must justify the burden placed on liberty.

I am not unsympathetic to these views. In a prior article, I noted that “were the task to design a mechanism to protect unenumerated rights on a blank slate,” I would find Barnett’s view regarding the presumption of liberty very appealing.²⁰⁸ The problem is that while the Privileges or Immunities Clause itself might be a blank slate, the field of unenumerated rights is hardly *tabula rasa*. Rather, over one hundred and some odd years of jurisprudence and doctrine, both good and bad, have built up around unenumerated rights and their protection.²⁰⁹

This jurisprudence and doctrine underscores the main flaw in the constitutional plans set out by Barnett, Lawrence, and those others who seek to use the Privileges or Immunities Clause to set up a more rights-friendly order. They would require a major sea change in constitutional doctrine that is simply not very likely to happen. It is exceedingly rare for the Supreme Court to change an entire system of doctrine. Most constitutional change, especially with regards to rights jurisprudence,

204. See Lawrence, *supra* note 188, at 150-60.

205. *Id.* at 152-54 (explaining the test).

206. See BARNETT, *supra* note 115 at, 260-61 (arguing that the original justification for the presumption of constitutionality is no longer operative, in that legislatures no longer consider the constitutionality of the regulations they pass); Lawrence, *supra* note 188, at 157 (arguing that the “government must explain to the individual when it restricts a person’s liberty” rather than “requiring the person to approach the government hat-in-hand to redeem the liberty that is rightly hers in the first place”).

207. See BARNETT, *supra* note 115, at 260 (noting that “[t]he Constitution makes no distinction between fundamental rights and mere liberty interests”); Lawrence, *supra* note 188, at 159 (arguing that this approach “enforces constitutional liberty interests in a more evenhanded, almost ministerial sense”).

208. See Jackson, *Rationality*, *supra* note 66, at 530-31.

209. The exact number of years depends on what is considered the starting point? Is it Justice Washington’s opinion in *Corfield v. Coryell*, which would put the number at 187 years? *Dred Scott*? The *Slaughter-House Cases*?

comes gradually, with changes in facts, circumstances and attitudes, as rights are revisited and re-conceptualized. Thus, the Court's rejection of a "fundamental right [of] homosexuals to engage in sodomy"²¹⁰ becomes the Court's determination that the liberty protected by the Due Process Clause includes the liberty to engage in "intimate, consensual conduct."²¹¹

That is not to say that major constitutional change never happens, but when it does occur it usually comes as a result of major political and social upheaval and at a time when a large segment of the population and the Court believe that the developed doctrine is either incorrect or no longer serving its purpose.²¹² Outside of academic circles, there is really no great sense that substantive due process as a concept has failed with regard to rights. Rather, substantive due process decisions in the last decade have led to an increasing protection for unenumerated rights, including the incorporation of the Second Amendment.²¹³ That is not to say that the current doctrine is perfect; in fact, the Court's current substantive due process test, at least as it applies to nonfundamental rights, is in need of revision.²¹⁴ However, tweaking substantive due process is more desirable than abandoning it wholesale.

In order for privileges or immunities to be the springboard for a new rights revolution, a number of things would have to occur. First, the Court would have to overrule *Slaughter-House* and use the Privileges or Immunities Clause as the new constitutional hook for rights. Overruling a one hundred and thirty-seven-year-old precedent may in fact be the easiest step. The bigger hurdle is the Court recognizing that the current due process formulation is insufficient. Even proponents of privileges or immunities like Michael Anthony Lawrence recognize:

It will require a radical re-directing of the U.S. Supreme Court's constitutional jurisprudence to realize the full and proper intended promise of the Privileges or Immunities Clause—a task, frankly, for which most members of the Roberts Court, with their cramped views of liberty and equal justice, are probably not well-suited.²¹⁵

210. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

211. *See Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

212. *See, e.g.* BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (arguing that the 1937 "Switch-in-Time" was a constitutional moment of higher lawmaking). I would also include *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) as a large shift.

213. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

214. *See generally* Jackson, *Rationality*, *supra* note 66.

215. *See Lawrence*, *supra* note 188, at 150.

Even were this to occur, the Court would then have to adopt a formulation for privileges or immunities that is completely at odds with the way that it has interpreted rights in the past, with wide swaths of presumptive liberty rather than the “careful description of the asserted fundamental liberty interest.”²¹⁶ The chance of all three of these events occurring in tandem is surpassingly small.

For the most part, this is because the difficulty associated with a rights revolution is not in the clause used as a basis for the right. Rather, the difficulty lies in the concept of unenumerated rights in the first place. It is generally accepted that they exist, but there is no consensus on the mechanism for finding and applying them.²¹⁷ There will always be a tension between the rights of the people and powers of the legislature, and this tension will not disappear simply because the phrase “privileges or immunities” is substituted for “life, liberty, or property.”²¹⁸ Tiered-scrutiny under the Due Process Clause represents the best way that the current jurisprudence has resolved the tension inherent in the concept of unenumerated rights.

That tension would not disappear simply by moving the analysis to the Privileges or Immunities Clause. Given this tension, even some proponents admit that it would not be surprising to see the Court’s privileges or immunities jurisprudence taking the same shape as its current substantive due process jurisprudence.²¹⁹

III. BE CAREFUL WHAT YOU WISH FOR

In fact, a sort of substantive due process status quo may be the best outcome that unenumerated rights proponents could expect from a revival of the Privileges or Immunities Clause. There is instead a real chance that a revival would result in a narrowing, rather than a broadening, of unenumerated rights jurisprudence.

216. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

217. See Bogen, *supra* note 6, at 387.

218. See *id.* (noting that “[t]he difficulty with *Lochner* and *Dred Scott* does not disappear by magic through changing clauses—like a snake shedding its skin, it is still the same old natural law snake”).

219. See, e.g., TRIBE, *supra* note 23, at 1329 (acknowledging that “it seems far more likely that many of the same principles that presently guide judges in the application of substantive due process doctrine would continue to inform their analysis of questions arising out of the Privileges or Immunities Clause” than that judges would use a new analysis for unenumerated rights). In fact, this is precisely the approach favored by Privileges or Immunities proponents Josh Blackman and Ilya Shapiro. They advocate using the *Glucksberg* framework as the template for rights protection under the Privileges or Immunities Clause, although they would use this framework to extend protection to economic liberties. See Blackman & Shapiro, *supra* note 6, at 65-89.

Intellectually shaky though the doctrine of substantive due process may be, it does have one undeniable advantage: its century-and-some pedigree and the precedent that has been built up around it.²²⁰ There is no denying that, for good or ill, the Due Process Clause has been the guarantor of individual liberty, and a long line of cases have relied on its premise that the “Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint.”²²¹

It is difficult to overstate the importance of precedent to our judicial system. Even at the Supreme Court level, where justices are theoretically able to overturn or completely reorganize fields of law, precedence shapes the Court’s decisions.²²² Because even Supreme Court justices feel a certain fidelity to precedent, they are reluctant to overturn decisions that they might personally disagree with. Thus, though former Chief Justice Rehnquist was a firm opponent of the *Miranda* rule, and as an assistant attorney general in the Office of Legal Counsel had even advocated a constitutional amendment to overrule it,²²³ he wrote the opinion refusing to overrule it in *United States v. Dickerson*.²²⁴ Similarly, despite joining a prior opinion suggesting that *Roe* was wrongly decided,²²⁵ Justice Kennedy helped author an opinion in *Planned Parenthood v. Casey*²²⁶ refusing to overrule *Roe*’s central premise.

A switch to the Privileges or Immunities Clause as the basis for unenumerated rights would throw substantive due process doctrine into doubt, and with it, the major rights decisions of the last century plus. Rather than providing a more secure resting place for rights, or a new basis for their expansion, a switch to the Privileges or Immunities Clause might actually imperil rights by removing the theoretical underpinnings for their recognition.

That is not to say, of course, that all of the rights that were recognized under the Due Process Clause would be imperiled if

220. See *supra* note 209 and accompanying text.

221. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3091 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. at 719).

222. See Michael Gerhardt, *The Irrepressibility of Precedence*, 86 N.C. L. REV. 1279, 1282-86 (2008) (discussing the institutional perspective on precedent).

223. See Yale Kamisar, *Miranda’s Reprieve*, 92 A.B.A. J. 48, 49-50 (2006) (detailing Rehnquist’s record of hostility towards *Miranda*).

224. *United States v. Dickerson*, 530 U.S. 428 (2000). Of course, there have been other explanations for Rehnquist’s conduct. See Kamisar, *supra* note 223, at 51 (summarizing the theories on the subject).

225. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 518-20 (1989) (opinion of Rehnquist, Kennedy and White).

226. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

substantive due process fell by the constitutional wayside. Certainly, a large number of substantive due process decisions, such as those involving the right to marry and to educate one's children, have been a part of the fabric of American constitutionalism for so long that they would obtain status as "privileges or immunities." Similarly, decisions such as the right to contraception from *Griswold* are probably in no danger, because they have garnered wide social acceptance.²²⁷ However, it is doubtful that the same can be said for decisions such as *Roe/Casey* or *Lawrence v. Texas*. Unless the Court "incorporated" the whole of its due process jurisprudence into the Privileges or Immunities Clause, the replacing of substantive due process with privileges or immunities for unenumerated rights might throw those decisions into doubt. Even if the Court were to eventually reaffirm all those decisions, one would shudder to think of the havoc such a switch might wreak in the lower courts.

Even if this "worst-case" scenario did not come true, there is other mischief that might be unleashed without the stability provided by substantive due process doctrine. It should concern those proponents of an expansive view of rights that the strongest supporter for Privileges or Immunities Clause revival on the Court at present is Justice Clarence Thomas. While in his concurrence in *McDonald* Justice Thomas disavowed any attempt to determine "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised,"²²⁸ he nonetheless, clearly expressed his disapproval of the Court's expansive interpretation of the substantive component of the Due Process Clause.²²⁹ Additionally, though he claimed not to reach the question of whether the Privileges or Immunities Clause might include other rights not listed in the Bill of Rights,²³⁰ Justice Thomas stated that he did not believe that such rights would necessarily include all those stated by Justice Bushrod Washington in his opinion in *Corfield v. Coryell*.²³¹ This, combined with Justice Thomas's earlier opinion in *Saenz* where he expressed his preference for considering whether the Privileges or Immunities Clause should "displace, rather than augment, portions of our equal protection

227. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 589 (2009) (noting that "Durable and canonical constructions like *Griswold* or the Voting Rights Act become part of the 'constitutional catechism' that all Supreme Court Justices who seek confirmation must accept as valid").

228. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3063 (2010) (Thomas, J., concurring).

229. *Id.* at 3062 (stating that "any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights the Court's cases now claim it does").

230. See *id.* at 3085-86.

231. *Id.* at 3085.

and substantive due process jurisprudence,”²³² strongly suggests that Thomas, at least, would take a very restrictive view of the “privileges or immunities of Citizens of the United States.” Justice Stevens picked up on this thread in his dissent, noting that “[i]t is no secret that the desire to ‘displace’ major ‘portions of our equal protection and substantive due process jurisprudence’ animates some of the passion that attends this interpretive issue.”²³³

Some historical evidence suggests that the Privileges or Immunities Clause may be more restrictive than substantive due process in one particular way. The legislative history of the Clause seems to suggest that only “fundamental” rights qualify as privileges or immunities.²³⁴ If Justice Bushrod Washington’s opinion from *Corfield* is a guiding force as to which rights qualify as privileges or immunities, it must be remembered that he stated that those rights would be only those “which are in their nature fundamental.”²³⁵ While Justice Washington’s list of fundamental rights was quite broad, his conviction that a right must be fundamental to qualify provides ammunition for rights restriction rather than expansion. Similarly, Representative Bingham’s statement that the privileges or immunities guaranteed by the Clause are “chiefly defined in the first eight amendments to the Constitution of the United States”²³⁶ tends to suggest that these rights were the main focus and that other rights are less important. Of course, the Framers were careful to point out in the Ninth Amendment that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²³⁷ However, Bingham’s focus on the incorporation of the first eight amendments of the Bill of Rights gives short shrift to other rights, and provides even more support for those who would limit unenumerated rights.

Just as importantly, a shift from substantive due process to Privileges or Immunities ignores the other important substantive due process function: the Due Process Clause serves as a hedge against arbitrary legislation. Even where a right is not classified as “fundamental,” the Due Process Clause has traditionally been interpreted to require that a law affecting a liberty interest bear a reasonable relation

232. *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).

233. *McDonald*, 130 S. Ct. at 3089 n.3 (Stevens, J., dissenting) (quoting *Saenz*, 526 U.S. at 528 (Thomas, J. dissenting)).

234. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Senator Howard) (referencing Justice Washington’s opinion in *Corfield*).

235. *Corfield v. Coryell*, 6 F. Cas 546, 551 (C.C.E.D. Pa. 1823).

236. See CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871) (statement of Rep. Bingham).

237. U.S. CONST. amend. IX.

to some end within the government's power.²³⁸ Although the test as currently practiced by the Court is extremely weak, it sometimes rears its head in unexpected places. There is at least some argument that *Lawrence v. Texas* was a rational basis case.²³⁹

Of course, it is possible that the Privileges or Immunities Clause could complement, rather than completely displace, substantive due process. Privileges or immunities jurisprudence could then handle rights, while substantive due process could then still serve as a hedge against arbitrary legislation. However, this is unlikely, especially given the scorn that proponents of privileges or immunities have heaped on the whole idea of substantive due process. It is more likely that if privileges or immunities replaces substantive due process, the whole idea of due process as a hedge against arbitrary legislation will fall by the wayside.

It is also certainly possible that none of these dire forecasts would come to pass. It may be that a switch to the Privileges or Immunities Clause as the basis for unenumerated rights would make the concept stronger, or at least preserve the status quo. However, the danger of unexpected consequences, combined with the limited expected gain, should be enough to give proponents of unenumerated rights serious pause. It may just be that the unwillingness of the Court in *McDonald* to use privileges or immunities as a basis for incorporation, and its decision instead to continue the development of substantive due process, was a blessing in disguise for rights.

IV. AN ASIDE: AFTER *MCDONALD*, WHITHER THE PRIVILEGES OR IMMUNITIES CLAUSE?

After the Court's rejection of the Privileges or Immunities Clause as a basis for incorporation in *McDonald*, is there still a part for the Clause to play with regard to rights? Some proponents refuse to give up the fight. In an editorial for the Wall Street Journal in the wake of *McDonald*, Professor Randy E. Barnett argued that Justice Thomas's vote to use privileges or immunities resulted in the "lost Privileges or Immunities Clause" being "suddenly found."²⁴⁰ He compared Justice Thomas's opinion to Justice Powell's opinion in *Regents of the*

238. See, e.g. 1 WILLIAM BLACKSTONE, COMMENTARIES *126; *Citizen's Sav. and Loan Ass'n v. City of Topeka*, 87 U.S. 655, 662 (1874). For a discussion of the development of the Due Process Clause as a hedge against arbitrary legislation, see generally Jackson, *Rationality*, *supra* note 66.

239. See, e.g. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008) (characterizing *Lawrence* as a rational basis case).

240. Randy E. Barnett, *The Supreme Court's Gun Showdown*, THE WALL STREET JOURNAL, June 29, 2010, at A19, available at http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703964104575335060436777670.html.

University of California v. Baake,²⁴¹ and argued that just as Powell's concurring opinion suggesting "diversity" as a grounds for affirmative action was later adopted by the Court in *Grutter v. Bolinger*,²⁴² so might Thomas's opinion regarding privileges or immunities be adopted.²⁴³ He further argued that "there is no longer a majority of the court willing to use the Due Process Clause in a case in which the Privileges or Immunities Clause is the right clause on which to rest its decision," and claimed that "[b]y declining to take issue with Justice Thomas's impressive 56-page originalist analysis, the other justices in effect conceded what legal scholars have for some time maintained—that the Court's cramped reading of the clause in 1873 was inconsistent with its original meaning."²⁴⁴

However, Barnett's analysis of the opinion in *McDonald* is wildly overly-optimistic, and, unfortunately, factually incorrect. His argument that "there is no longer a majority of the court willing to use the Due Process Clause in a case in which the Privileges or Immunities Clause is the right clause on which to rest its decision" fails as a matter of mathematics. In addition to the plurality opinion using the Due Process Clause that was written by Alito and joined by Roberts, Kennedy and Scalia, the dissenting opinion by Justice Stevens explicitly rejected the Privileges or Immunities Clause, flatly stating that "[t]his is a substantive due process case."²⁴⁵ Thus, there were five votes in favor of substantive due process in *McDonald*; five of nine votes is a majority any way you figure it.²⁴⁶ Further, the actual situation appears to be worse than that. The other three justices, Breyer, Ginsburg, and Sotomayor, all dissented without addressing the question of the proper clause, although they did "agree that the Fourteenth Amendment's guarantee of 'substantive due process' does not include a general right to keep and bear firearms for private self-defense."²⁴⁷ However, Breyer and Ginsburg had supported the use of substantive due process for unenumerated rights in the past, most notably in *Lawrence v. Texas*. Thus, it seems as though Justice

241. *Regents of the Univ. of California v. Baake*, 438 U.S. 265 (1978).

242. *Grutter v. Bolinger*, 539 U.S. 306 (2003).

243. See Barnett, *The Supreme Court's Gun Showdown*, *supra* note 240.

244. *Id.*

245. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3090 (2010) (Stevens, J., dissenting).

246. The only way in which Barnett could be correct is if he considered Stevens's opinion as not a vote to "use" substantive due process because Stevens would have rejected the incorporation of the Second Amendment under it. However, this sort of interpretation would be too cute by half.

247. *McDonald*, 130 S. Ct. at 3120 (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.)

Thomas is the lone voice on the current court crying out for privileges or immunities.

Nor is the argument that Thomas's concurring opinion may be as influential as Justice Powell's opinion in *Baake* persuasive. The Powell opinion in *Baake* gained prominence because *Baake* failed to conclusively establish the standard for equal protection review of affirmative action programs. The opinion, authored by Justice Stevens and joined by Chief Justice Burger, and Justices Stewart and Rehnquist, would have invalidated the medical school admission set-aside as unconstitutional under statutory grounds, specifically Title VI of the 1964 Civil Rights Act.²⁴⁸ They did not reach the question regarding the Equal Protection Clause.²⁴⁹ Justice William Brennan, joined by Justices Blackmun, Marshall and White, would have applied intermediate scrutiny and found that the set-aside at issue was valid and that race could be a factor in admissions decisions.²⁵⁰ Justice Powell's opinion would have applied strict scrutiny to invalidate the set-aside at issue, but he recognized that colleges and universities could consider race as a factor because they have a compelling interest in a diverse student body.²⁵¹ Thus, the final count was five votes to set aside the statute (Powell, Stevens, Burger, Rehnquist and Stewart), and five votes for the proposition that the Equal Protection Clause, rather than Title VI, was the proper ground for analysis (Powell, Brennan, Blackmun, Marshall and White), although no agreement was made as to the proper level of scrutiny. Given the situation, it is not surprising that Powell's opinion, which garnered a majority on both counts, became thought of as the "touchstone for constitutional analysis of race-conscious admissions policies."²⁵²

In contrast, Justice Thomas was in the majority on only one part of the *McDonald* opinion, the part holding that the Second Amendment applied to the states through the Fourteenth Amendment.²⁵³ He was in the minority on the correct clause of the Fourteenth Amendment to use, as there were five distinct votes for the Due Process Clause as the proper forum for analysis.²⁵⁴ In fact, as noted above, he was probably alone in his advocacy for the Privileges or Immunities Clause.

More importantly, however, Justice Powell's opinion in *Baake* was so important because of what *Baake* left unanswered. The failure to

248. *Regents of the Univ. of California v. Baake*, 438 U.S. 265, 408-21 (1978).

249. *See id.*

250. *Id.* at 324-79 (Brennan, J., joined by Blackmun, Marshall and White, JJ.)

251. *Id.* at 272-324 (Powell, J.).

252. *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003).

253. *See McDonald v. City of Chicago*, 130 S.Ct. 3020, 3026 (2010).

254. *Id.*

reach a decision on the proper standard to apply for race-conscious admissions policies guaranteed that the question would present itself in the future, and that the Court would be forced to make a decision at some point. However, the incorporation of the Second Amendment in *McDonald* assured almost the exact opposite. There is now no avenue through which the incorporation of the Second Amendment will again come up before the Court. Therefore, the only way in which the use of the Privileges or Immunities Clause as a vehicle for incorporation can come before the Court is in the context of the incorporation of either the Fifth Amendment's right to a grand jury or the Seventh Amendment's right to a jury trial in civil cases. Neither of these provisions are likely to provide the same nature of sentiment as the incorporation of the Second Amendment. It appears that the Second Amendment was truly the last best chance for revival of the Privileges or Immunities Clause as a vehicle for incorporation.

It is possible that the Privileges or Immunities Clause could be raised again in the context of unenumerated rights. However, given the restrictive attitude toward unenumerated rights applied by the current court, and the especially restrictive attitude held by privileges or immunities lone proponent, this does not seem likely.

Rather, it appears that the push for the revival of the Privileges or Immunities Clause, at least with respect to incorporated and judicially-declared unenumerated rights, has finally run its course. However, that does not mean that the Privileges or Immunities Clause may not still have a part to play in connection with rights. Legal scholars such as Professors William Rich and James Fox have argued that Section 5 of the Privileges or Immunities Clause gives Congress the power to create personal rights, both positive and negative, through federal statutes, and to authorize private causes of action against states for the violations of these rights.²⁵⁵ According to those scholars, support for this view can be found, among other places, in Justice Miller's *Slaughter-House* opinion, wherein he stated that the privileges or immunities of citizens of the United States are those which "owe their existence to the Federal Government . . . or its laws."²⁵⁶

According to this theory, the Fourteenth Amendment gives Congress great responsibility and power to determine what the privileges or immunities of United States citizens are, and to provide for their

255. Fox, *supra* note 43, at 102-18.

256. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872). According to Rich, Justice Miller was referring to this authority when he gave as examples of the privileges or immunities of United States citizens the "right to use the navigable waters of the United States" and "all rights secure to our citizens by treaties with foreign nations." See Rich, *supra* note 43, at 182.

enforcement. Further, such enforcement power would override state sovereign immunity, thus providing an end-run around the Court's Eleventh Amendment jurisdiction.²⁵⁷

This theory is not without its problems, not the least of which is that the current Court has shown no inclination to revise its Eleventh Amendment jurisprudence, and will not likely be convinced to do so "simply because counsel argues a new clause."²⁵⁸ Nevertheless, it does suggest an avenue through which proponents of rights can argue for greater rights protection: from Congress rather than judges. It could also serve as a basis for the expansion of rights to include positive rights.²⁵⁹ This may be the place that Privileges or Immunities finally becomes relevant with regard to rights. It may not be enough to satisfy those who still yearn for a full-scale resurrection of the Clause, but it may be the only avenue left after *McDonald*.

CONCLUSION

The *McDonald* opinion was no doubt a blow to those proponents of the Privileges or Immunities Clause of the Fourteenth Amendment as a vehicle for the incorporation of the Bill of Rights or as a foundation for unenumerated rights. By granting certiorari on a question that seemed to indicate the Court might be responsive to reconsidering privileges or immunities, the Court raised the hopes of proponents that it might move to correct what many saw as one of its biggest mistakes in the *Slaughter-House Cases*.²⁶⁰ The summary dismissal of the Privileges or Immunities Clause by the majority of justices in *McDonald* surely seemed a betrayal of those hopes.

However, rather than decrying the Court's failure to right the *Slaughter-House* wrong in *McDonald*, those who care about the protection of rights should instead reflect on what might have happened had the Court actually done so. It is unclear exactly what a revival of the Privileges or Immunities Clause in connection with incorporation or unenumerated rights would gain.²⁶¹ First, while there is some attraction in the idea that the Privileges or Immunities Clause might provide a more intellectually satisfying home for rights from a historical standpoint, this

257. See Rich, *supra* note 43, at 202-09.

258. Bogen, *supra* note 6, at 363 (critiquing this theory).

259. See, e.g. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 105-51 (1994) (arguing for a more progressive view of the Fourteenth Amendment to include positive rights); Gerhardt, *supra* note 114, at 437-49 (critiquing the negative view of rights under the Privileges or Immunities Clause and advocating Congressional legislation to provide for positive rights).

260. See *supra* notes 75-82 and accompanying text (detailing the excitement leading up the arguments in the *McDonald* case).

261. See *supra* notes 106-218 and accompanying text.

argument is blunted by the fact that the Due Process Clause is not such an ahistorical home for rights as might be supposed.²⁶² The Due Process Clause has been doing the work of protecting rights, both enumerated and unenumerated, for over a century, and there is little reason to believe that the Privileges or Immunities Clause would be any more effective in this regard. The words “privileges” and “immunities” provide no more clear guideposts than do the words “life,” “liberty,” and “property” in the Due Process Clause.

While many of the proponents of the Privileges or Immunities Clause argue that its revival would help to revitalize the field of unenumerated rights, this seems unlikely. The central problem with unenumerated rights is how to identify them, and how to justify overturning democratically enacted laws in their name. This problem will not go away just because the rights are asserted to be “privileges” or “immunities” rather than “liberty” rights.²⁶³ Thus, it is difficult to see how resurrecting privileges or immunities will materially alter the legal landscape in favor of rights. Rather, it seems more likely that the status quo under substantive due process would remain.

In fact, the status quo might be the best thing to come from a move to the use of the Privileges or Immunities Clause. In righting what they perceive to be a constitutional wrong, the proponents of a privileges or immunities revival might actually be advocating a path that will injure, rather than benefit rights. While a revival of privileges or immunities does not have the potential to do much good, it does have the potential to do quite a bit of harm. There is over a century of jurisprudence that has built up regarding the protection of rights under the Due Process Clause. A rejection of substantive due process would make all of these decisions suddenly unstable and ripe for reconsideration. While it seems likely that most of the rights that have existed under substantive due process would weather this storm, it cannot be said with any certainty that all of them, especially the more recent ones, would.²⁶⁴ Further, even if the rights under substantive due process were incorporated wholesale into the Privileges or Immunities Clause, the nature of the current Court, and especially the judicial philosophy of its most ardent supporter of privileges or immunities, might actually serve to limit the further expansion of rights.²⁶⁵

All in all, the Court’s rejection of the Privileges or Immunities Clause in *McDonald* might not be the worst thing that could have

262. See *supra* notes 121-37 and accompanying text.

263. See *supra* notes 169-70, 216-18, and accompanying text.

264. See *supra* notes 221-26 and accompanying text.

265. See *supra* notes 227-32 and accompanying text.

happened to those proponents of rights, especially unenumerated ones. The worst thing could have been its acceptance.