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## Let's All Agree to Disagree, and Move On: Analyzing *Slaughter-House* and the Fourteenth Amendment's Privileges or Immunities Clause Under "Sunk Cost" Principles

Emily Jennings

*Boston College Law School*, [emily.jennings.3@bc.edu](mailto:emily.jennings.3@bc.edu)

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# LET'S ALL AGREE TO DISAGREE, AND MOVE ON: ANALYZING *SLAUGHTER-HOUSE* AND THE FOURTEENTH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE UNDER "SUNK COST" PRINCIPLES

**Abstract:** The Privileges or Immunities Clause of the Fourteenth Amendment has lain nearly dormant since the U.S. Supreme Court's 1872 decision in the *Slaughter-House Cases*. Although legal historians have fought to overturn *Slaughter-House* for decades to restore the Privileges or Immunities Clause to its intended preeminence in American jurisprudence, these historians cannot agree on the correct meaning and scope of the clause. Each historical interpretation of the clause would affect the scope and power of the Privileges or Immunities Clause in the modern era; however, American jurisprudence has already found the clause's intended powers in alternative constitutional provisions post-*Slaughter-House*. Accordingly, the Supreme Court's likely reliance on "sunk cost" principles to justify its modern refusal to revive the clause is the most rational resolution to this long-debated issue of American Constitutional law.

## INTRODUCTION

The American Civil War remains the largest source of bloodshed this country has ever suffered.<sup>1</sup> The country, divided on the fundamental questions of who was a citizen and what rights he deserved, lost nearly 620,000 lives searching for these answers.<sup>2</sup> The result of the war was the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, collectively incorporating the African-American race into citizenship, and the males of that citizenry into enfranchisement.<sup>3</sup> Despite the broad successes that these amendments have achieved in the centuries following their adoption, histori-

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<sup>1</sup> *Civil War Facts*, CIVIL WAR TRUST, [www.civilwar.org/education/history/faq](http://www.civilwar.org/education/history/faq) (last visited Aug. 5, 2013).

<sup>2</sup> *See id.* This author notes that the use of the gendered term "he" is used intentionally as a reflection of attitudes in the nineteenth century.

<sup>3</sup> U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* amend. XIV; *id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . .").

ans still lament over the Fourteenth Amendment, dreaming of what could have been.<sup>4</sup>

The first section of the Fourteenth Amendment contains the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause.<sup>5</sup> Although few clauses in the Constitution have received as much attention as the Due Process and Equal Protection Clauses, the Privileges or Immunities Clause has lain nearly dormant since the U.S. Supreme Court decided the *Slaughter-House Cases* (“*Slaughter-House*”) in 1872.<sup>6</sup>

Legal historians have fought to overturn *Slaughter-House* for decades and have urged the Supreme Court to return the Privileges or Immunities Clause to its intended preeminence in American jurisprudence.<sup>7</sup> Because of their persistent efforts to overturn *Slaughter-House*, Supreme Court Justice Antonin Scalia aptly named this fight “the darling of the professoriate.”<sup>8</sup> Although most legal historians can agree that *Slaughter-House* wrongly interpreted the Privileges or Immunities Clause, these scholars cannot agree on exactly what its drafters intended for its meaning and scope.<sup>9</sup> For this reason, the debate has become largely history-based, and has focused on the Antebellum and

<sup>4</sup> See *id.* amend. XIV, § 1; *infra* notes 19–84 and accompanying text (describing the legal historians’ debate over the proper interpretations of the intended scope of the Privileges or Immunities Clause); *infra* notes 169–174 and accompanying text (describing the broad successes of the Fourteenth Amendment’s Due Process Clause). The debate over the Fourteenth Amendment that this Note considers involves primarily the amendment’s first section, which states:

All 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. No 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 within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

<sup>5</sup> *Id.*

<sup>6</sup> See *Butchers’ Benevolent Assoc. of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36, 78–80 (1872) [hereinafter *Slaughter-House*]. Compare *infra* notes 85–148 and accompanying text (illustrating the few Supreme Court cases that have addressed the Privileges or Immunities Clause and the narrow interpretation given to the clause), with *infra* notes 169–174 and accompanying text (describing the preeminence of Due Process case law in the modern era).

<sup>7</sup> See *infra* notes 19–84 and accompanying text (discussing three alternative interpretations of the Privileges or Immunities Clause based on legal historians’ different historical retellings of the Antebellum and Reconstruction Eras).

<sup>8</sup> Transcript of Oral Argument at 7, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) [hereinafter *McDonald Transcript*].

<sup>9</sup> See *infra* notes 19–84 and accompanying text.

Reconstruction Eras to determine what rights and protections the drafters of the Privileges or Immunities Clause intended to provide.<sup>10</sup> Despite the valiant efforts of historians, it seems that the true intention of the drafters of the Privileges or Immunities Clause may never be realized.<sup>11</sup> Nevertheless, following the narrowing of the Privileges or Immunities Clause to the point of near-eradication in *Slaughter-House*, the judiciary has relied on alternative legal provisions to source and secure Americans' substantive rights.<sup>12</sup>

This Note argues that the Supreme Court likely views the 140 years of *Slaughter-House* precedent under "sunk cost" principles and is unlikely to revive the Privileges or Immunities Clause to any preeminent source of power.<sup>13</sup> Additionally, where the majority of what the Privileges or Immunities Clause would have achieved in the nineteenth century has been achieved through alternative means in the centuries since, legal historians should begin to recognize and embrace the Supreme Court's ad hoc handling of the Privileges or Immunities Clause as the most rational approach to this storied clause.<sup>14</sup>

Part I of this Note details the disagreements among the three popular historical interpretations of the pre-ratification years and describes what each historical retelling holds in terms of the meaning of the Privileges or Immunities Clause.<sup>15</sup> Part II details the judicial interpretations of the Privileges or Immunities Clause.<sup>16</sup> Part III analyzes how each historical approach would affect the scope and power of the Privileges or Immunities Clause and, further, how American jurisprudence has found these powers in alternative avenues post-*Slaughter-House*.<sup>17</sup> Lastly, Part IV argues that interpreting the Privileges or Immunities Clause

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<sup>10</sup> See *infra* notes 19–84 and accompanying text.

<sup>11</sup> See *infra* notes 226–228 and accompanying text (arguing that the Supreme Court views the Privileges or Immunities Clause under "sunk cost" principles because the Court recognizes that the true intentions of the clause's drafters may never be ascertained).

<sup>12</sup> See *infra* notes 149–213 and accompanying text (describing the ways in which the purposes of the Privileges or Immunities Clause have been achieved through the Due Process Clause, the selective incorporation process, and a gradual change in the balance of power between the states and the federal government). For example, the Supreme Court has relied heavily on the Due Process Clause as a source of substantive rights in the years since *Slaughter-House*. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (recognizing a woman's right to determine whether to have an abortion as a fundamental right protected by the Due Process Clause); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (recognizing marital privacy as a fundamental right protected by the Due Process Clause).

<sup>13</sup> See *infra* notes 214–228 and accompanying text.

<sup>14</sup> See *infra* notes 229–254 and accompanying text.

<sup>15</sup> See *infra* notes 19–84 and accompanying text.

<sup>16</sup> See *infra* notes 85–148 and accompanying text.

<sup>17</sup> See *infra* notes 149–213 and accompanying text.

under sunk cost principles, as the Supreme Court has, proves that the modern refusal to revive the clause is the most rational resolution to this long-debated area of American Constitutional law.<sup>18</sup>

### I. THE HISTORICAL DEBATE RAGES ON

Legal historians have long attempted to articulate exactly what the drafters intended when writing, and later ratifying, the Privileges or Immunities Clause in 1868.<sup>19</sup> But, as Supreme Court Justice Clarence Thomas said, “Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873 [sic] [in *Slaughter-House*].”<sup>20</sup> Recognizing the historical backdrop to the drafting of the Privileges or Immunities Clause is a necessary prerequisite to understanding the disappointment that was *Slaughter-House*.<sup>21</sup> Moreover, only by placing the Privileges or Immunities Clause into its proper historical context can one identify the appropriate scope and meaning of the clause in our jurisprudence post-*Slaughter-House*.<sup>22</sup>

Section A discusses one historical retelling of the pre-ratification years, focusing primarily on the Comity Clause and its effect on the drafters’ and adopters’ interpretation of the Privileges or Immunities Clause.<sup>23</sup> Section B discusses another historical retelling of the pre-ratification years, focusing primarily on the actual ratification debates and their impact on the drafters’ and adopters’ interpretation of the Privileges or Immunities Clause.<sup>24</sup> Finally, Section C discusses a third historical retelling of the pre-ratification years, focusing on the prevalence of federalism as a theme in the Reconstruction Era, and its effect on the drafters’ and adopters’ interpretation of the Privileges or Immunities Clause.<sup>25</sup>

<sup>18</sup> See *infra* notes 214–254 and accompanying text.

<sup>19</sup> See U.S. CONST. amend. XIV, § 1; *infra* notes 26–84 and accompanying text.

<sup>20</sup> *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting).

<sup>21</sup> See *id.* at 528 (Thomas, J., dissenting) (noting that “[b]efore invoking the [Privileges or Immunities Clause], however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant”); see also *Slaughter-House*, 83 U.S. (16 Wall.) at 78–80.

<sup>22</sup> See *Saenz*, 526 U.S. at 522 n.1 (Thomas, J., dissenting).

<sup>23</sup> See *infra* notes 26–48 and accompanying text.

<sup>24</sup> See *infra* notes 49–68 and accompanying text.

<sup>25</sup> See *infra* notes 69–84 and accompanying text.

### A. Focus on the Antebellum Era: The Comity Clause

The Privileges or Immunities Clause of the Fourteenth Amendment states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>26</sup> It bears substantial likeness to the Comity Clause of Article IV, Section 2 of the U.S. Constitution, which states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>27</sup> Given both the similarities between the two clauses and the prevalence of Comity Clause issues involving slaves in the Antebellum Period, many legal historians believe that the drafters intended the Privileges or Immunities Clause to guarantee long-recognized Comity Clause protections to a new class of citizens: newly freed slaves.<sup>28</sup>

The Comity Clause had a long and storied history in the Antebellum Period.<sup>29</sup> A version of the Comity Clause was incorporated in Article IV of the Articles of Confederation and was seamlessly placed into the Constitution in 1787.<sup>30</sup> Such clauses were common in other countries and were largely intended to ensure that a citizen traveling to another jurisdiction would be afforded the same local rights as the citizens of that jurisdiction.<sup>31</sup> The relatively benign Comity Clause, however, was thrust into center stage during the Second Missouri Compromise of 1821.<sup>32</sup> As Missouri was petitioning to join the Union, its proposed constitution stated that it would be the duty of the Missouri

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<sup>26</sup> U.S. CONST. amend. XIV, § 1.

<sup>27</sup> See *id.* art. IV, § 2, cl. 1; *id.* amend. XIV, § 1.

<sup>28</sup> See generally, e.g., Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011) (explaining the prevalence and nature of Comity Clause issues in the Antebellum Period and proposing that the Privileges or Immunities Clause should be interpreted as an extension of the Comity Clause); Kevin Maher, *Like a Phoenix from the Ashes: Saenz v. Roe, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH L. REV. 105 (2001) (proposing that the Privileges or Immunities Clause was enacted, in part, because of the ineffectiveness of the Comity Clause in the Antebellum Period); Douglas G. Smith, *The Privileges and Immunities Clause Article of IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997) (explaining the application of the Comity Clause in the Antebellum Period and the states’ ways of circumscribing the Comity Clause’s protections).

<sup>29</sup> See Hamburger, *supra* note 28, at 83–97; Maher, *supra* note 28, at 113–14; Smith, *supra* note 28, at 816–22.

<sup>30</sup> See Articles of Confederation of 1781, art. IV. (stating that “the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States”); Hamburger, *supra* note 28, at 75.

<sup>31</sup> Hamburger, *supra* note 28, at 74; see THE FEDERALIST No. 80 (Alexander Hamilton) (stating that the Comity Clause was “the basis of the Union” as it guaranteed an “equality of privileges and immunities, to which the citizens of the Union [would] be entitled”).

<sup>32</sup> See Hamburger, *supra* note 28, at 83–86.

General Assembly, “as soon as may be, to pass such laws as may be necessary . . . [t]o prevent free Negroes and mulattoes from coming to and settling in this state, under any pretext whatsoever.”<sup>33</sup> Northerners viewed this provision as a clear violation of the Comity Clause and convinced Congress to include in the Missouri Compromise the command that the state could not pass any laws that would exclude citizens from “the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution.”<sup>34</sup>

Despite the wording of the Missouri Compromise, Missouri continued to attempt to find ways around the Comity Clause’s mandate.<sup>35</sup> Missouri and like-minded states asserted that free blacks were not citizens of the United States and, thus, were not protected by the Comity Clause.<sup>36</sup> Because many state courts held that free blacks were not citizens of the United States and, therefore, not protected by the Comity Clause, the result was that there was no such thing as a free slave in a slave state.<sup>37</sup> These decisions, and controversies surrounding them, served as catalysts for the now infamous 1856 Supreme Court decision *Dred Scott v. Sandford*.<sup>38</sup> In *Dred Scott*, the Supreme Court subscribed to the Southerners’ belief, holding that free blacks were not citizens of the United States and were, thus, not guaranteed the protections of the Constitution—particularly the Comity Clause.<sup>39</sup>

In the years after the *Dred Scott* decision, numerous discussions were sparked over the meaning of citizenship in the United States.<sup>40</sup> Representative John Bingham, who would later draft the Fourteenth Amendment in 1866, was no stranger to the larger debate on citizen-

<sup>33</sup> MO. CONST. of 1820, art. III, § 26; Hamburger, *supra* note 28, at 84 (citing MO. CONST. of 1820, art. III, § 26).

<sup>34</sup> See Hamburger, *supra* note 28, at 86–87 (citing Res. of Mar. 2, 1821, 3 Stat. 695 (1821)).

<sup>35</sup> See *id.* at 88–89 (describing Missouri’s interpretation of citizenship in the years prior to the *Dred Scott v. Sandford* decision).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 91–93. Missouri, and states like it, asserted that free blacks were not citizens of the United States and, thus, could not benefit from the protections of the Constitution. See *id.* Specifically, these states reasoned that the Comity Clause did not protect the non-citizen free blacks. See *id.* Accordingly, when free blacks traveled from a “free state” to a “slave state,” the “slave state” was not bound to respect the free slave’s freedom that it derived from its home state. See *id.* As a result, a free slave in a slave state was an impossibility. See *id.*

<sup>38</sup> See 60 U.S. (19 How.) 393, 405 (1856), *overruled by* U.S. CONST. amend. XIV; Hamburger, *supra* note 28, at 97.

<sup>39</sup> *Id.* (stating that “[i]t does not by any means follow, because [the plaintiff, a freed slave,] has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States”).

<sup>40</sup> See Hamburger, *supra* note 28, at 111–12; Smith, *supra* note 28, at 817–20.

ship in the years leading up to the Civil War.<sup>41</sup> For example, in reaction to Oregon's petition to join the Union in 1859, Bingham fiercely argued that all citizens of the states were inherently citizens of the United States and subject to the Constitution's protections.<sup>42</sup> Debates on the issues of citizenship and the Comity Clause continued for five more years, this time ending in bloodshed rather than compromise.<sup>43</sup>

At the close of the Civil War, Congress endeavored to enact protections to ensure that the degradation of African-Americans could never be resurrected and to prevent the states from becoming so fragmented as to succumb to secession again.<sup>44</sup> Congress first attempted to reach this end with a bill, entitled: "A Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States."<sup>45</sup> This proposed bill "aimed to protect the privileges and immunities owed to citizens of the states under the Comity Clause on the ground that these were 'the privileges and immunities of the citizens of the United States.'"<sup>46</sup> The bill failed due to objections to its constitutionality; some historians, however, believe that the bill was reincarnated into the Fourteenth Amendment as a constitutional, rather than a statutory, guarantee.<sup>47</sup>

Given the preeminence of the Comity Clause in the Antebellum Period and the continued discussion of the clause's meaning during the Reconstruction Era, many historians believe that the Privileges or

<sup>41</sup> Hamburger, *supra* note 28, at 111–12; Smith, *supra* note 28, at 817–20. John Bingham represented Ohio in the House of Representatives. Hamburger, *supra* note 28, at 123.

<sup>42</sup> See Hamburger, *supra* note 28, at 111–12; Smith, *supra* note 28, at 817–20.

<sup>43</sup> See Hamburger, *supra* note 28, at 112–13.

<sup>44</sup> See *id.* at 115–16; Maher, *supra* note 28, at 114.

<sup>45</sup> See A Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States, H.R. 437, 39th Cong. § 1 (1866); Hamburger, *supra* note 28, at 115.

<sup>46</sup> See H.R. 437 § 1; see also *Political Affairs: National Politics: The Proposed Constitutional Amendment—What It Provides.*, N.Y. TIMES, NOV. 15, 1866, at 2 [hereinafter *Political Affairs*]. An article in the *New York Times* on November 15, 1866, described Bingham's proposed amendment as "intend[ing] for the enforcement of the Second Section of the Fourth Article of the Constitution." *Political Affairs, supra*, at 2. The article observed that "[w]e have seen, in the first number, what privileges and immunities were intended." *Id.*

<sup>47</sup> See Hamburger, *supra* note 28, at 115–16; Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 409–10 (2011) (discussing bills in Congress that preceded the Fourteenth Amendment that indicate Congress's eventual intention for the Privileges or Immunities Clause).

Immunities Clause of the Fourteenth Amendment served to guarantee the Comity Clause's protection to all citizens of the United States.<sup>48</sup>

### B. *Focus on the Reconstruction Era: The Ratification Debates*

Some legal scholars, including Justice Thomas, believe that the ratification debates provide the key to understanding the intended meaning of the Privileges or Immunities Clause.<sup>49</sup> These scholars posit that constitutional amendments are written for adoption by the American people and, for this reason, the Fourteenth Amendment must be construed in light of how nineteenth-century voters would have understood it.<sup>50</sup> These legal historians argue that Reconstruction Era politics and the highly publicized ratification debates led to the broad public understanding that the Privileges or Immunities Clause was intended to

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<sup>48</sup> See Hamburger, *supra* note 28, at 143–44; Maher, *supra* note 28, at 113–15; Smith, *supra* note 28, at 816–22; see *infra* notes 156–167 and accompanying text (discussing the scope of the Privileges or Immunities Clause if interpreted with a focus on the Comity Clause).

<sup>49</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3071–74 (2010) (Thomas, J., concurring); Brief of Petitioner at 21–26, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) [hereinafter Petitioner Brief]; Brief for Goldwater Institute & Scharf-Norton Center for Constitutional Government, et al. as Amici Curiae Supporting Petitioners 21–23, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) [hereinafter Goldwater Brief]. Justice Thomas has written many articles supporting a revamping of the Privileges or Immunities Clause both while on the bench, and before. See David C. Durst, *Justice Clarence Thomas's Interpretation of the Privileges or Immunities Clause: McDonald v. City of Chicago and the Future of the Fourteenth Amendment*, 42 U. TOLEDO L. REV. 933, 937–38, 941–42 (2011) (describing the progression of Justice Thomas's thoughts on Originalism and the plain reading of the Constitution, most particularly, of the Privileges or Immunities Clause).

<sup>50</sup> *McDonald*, 130 S. Ct. at 3072 (Thomas, J., concurring) (stating that when one interprets the meaning of a constitutional provision, “the goal is to discern the most likely public understanding of a particular provision at the time it was adopted,” and that the statements by legislators can help “to the extent they demonstrate the manner in which the public used or understood a particular word or phrase”); Petitioner Brief, *supra* note 49, at 15 (citing *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964) (quoting *Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting)) (internal quotation marks omitted) (stating that “an amendment to the Constitution should be read in a sense most obvious to the common understanding at the time of its adoption[.] . . . [f]or it was for public adoption that it was proposed”); Goldwater Brief, *supra* note 49, at 14 (citing *United States v. Sprague*, 282 U.S. 716, 731 (1931)). Under Article V of the Constitution, a proposed constitutional amendment will be enacted if the legislatures of three fourths of the states vote to adopt it. U.S. CONST. art. V (stating that a proposed constitutional amendment “shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states”).

incorporate the Constitution's first eight amendments against state infringement.<sup>51</sup>

Following the conclusion of the Civil War, President Andrew Johnson issued a proclamation granting amnesty to all former Confederates.<sup>52</sup> Issued on Christmas Day of 1868, President Johnson's presidential pardon guaranteed "to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason . . . with restoration of *all rights, privileges, and immunities under the Constitution* and the laws which have been made in pursuance thereof."<sup>53</sup> This pardon and amnesty, not surprisingly, headlined every newspaper, and introduced "privileges and immunities" to the American voters as a term of art.<sup>54</sup> As Johnson's pardon was undeniably the most publicized event in its day, the American voter would likely have viewed this new term of art as inextricably linked to those rights under the Constitution, as Johnson had done.<sup>55</sup>

In addition to Johnson's pardon, scholars highlight speeches made during the ratification debates that illuminate not only the drafters' intent, but given the wide publication of those speeches, the public's interpretation of the Fourteenth Amendment.<sup>56</sup> The principle drafters of the Fourteenth Amendment, Representative Bingham, delivered a speech to the House of Representatives in February 1866 to discuss his first draft of the amendment.<sup>57</sup> In his speech, Bingham discussed the

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<sup>51</sup> See *McDonald*, 130 S. Ct. at 3071 (Thomas, J., concurring); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1302–03, 1309 (2009) (proposing that the ratification debates suggest that the Privileges or Immunities Clause was intended to give the federal government the ability to enforce the Constitution against state action); Christian B. Corrigan, *McDonald v. City of Chicago: Did Justice Thomas Resurrect the Privileges or Immunities Clause from the Dead? (And Did Justice Scalia Kill It Again?)*, 60 U. KAN. L. REV. 435, 450–53 (2011) (endorsing Justice Thomas's concurrence in *McDonald* as indicative of how the Court could revamp its understanding of the Privileges or Immunities Clause to better reflect an originalist reading of the clause).

<sup>52</sup> *McDonald*, 130 S. Ct. at 3071 (Thomas, J., concurring); see Proclamation No. 15, 15 Stat. 711–12 (Dec. 25, 1868).

<sup>53</sup> *McDonald*, 130 S. Ct. at 3071 (Thomas, J., concurring); Proclamation No. 15, 15 Stat. 711–12 (Dec. 25, 1868) (emphasis added).

<sup>54</sup> See, e.g., AMNESTY. *Important Proclamation by the President. Pardon and Amnesty Granted to All the Late Rebels*, N.Y. TIMES, Dec. 25, 1868, at 3; see also Kurt T. Lash, *The Origins of the Privileges and Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1243–44 (2010) (explaining the usage of the term "Privileges or Immunities" in both the Antebellum and Reconstruction Eras).

<sup>55</sup> See *McDonald*, 130 S. Ct. at 3071 (Thomas, J., concurring); Lash, *supra* note 54, at 1243–44.

<sup>56</sup> See *McDonald*, 130 S. Ct. at 3072–74 (Thomas, J., concurring); Petitioner Brief, *supra* note 49, at 27–31; Goldwater Brief, *supra* note 49, at 21–22.

<sup>57</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1088–90 (1866).

1833 case of *Barron v. City of Baltimore*, in which the Supreme Court determined that the Bill of Rights did not protect citizens from state action.<sup>58</sup> Bingham, who considered the *Barron* outcome unjust, stated that the first section of the Fourteenth Amendment was designed to enforce the Bill of Rights against the states.<sup>59</sup> This speech was broadly distributed to the American people in pamphlet form and was further reported in the national newspapers.<sup>60</sup> Although this draft of Bingham's amendment was later tabled, some historians believe that it served as a precursor to what would become the Fourteenth Amendment and identifies what Bingham was ultimately aiming to achieve.<sup>61</sup>

After Bingham redrafted the Fourteenth Amendment to include the wording that was ultimately adopted, Senator Jacob Howard delivered a speech to the Senate to introduce the new proposal.<sup>62</sup> Senator Howard first explained that despite the breadth of rights and privileges that the Constitution provides to its citizens, there existed "no power given in the Constitution to enforce and carry out any of [those] guarantees [against the states]."<sup>63</sup> Howard further articulated that, "the great object" of the first section of the Fourteenth Amendment was to act as a restraint on the states; according to Howard, the section served as "a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States."<sup>64</sup>

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<sup>58</sup> *Id.* See generally *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (finding that constitutional provisions, specially the Fifth Amendment, applied only to federal action).

<sup>59</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866). Representative Bingham stated to the House of Representatives that the purpose of the Privileges or Immunities Clause was "to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today." *Id.*

<sup>60</sup> See, e.g., *Thirty-Ninth Congress: First Session*, N.Y. TIMES, Feb. 26, 1866, at 8 [hereinafter *Thirty-Ninth Congress*]; see also *McDonald*, 130 S. Ct. at 3072 (Thomas, J., concurring) (stating that the speech was distributed in pamphlet form). The *New York Times* reported on Representative Bingham's speech regarding the proposed constitutional amendment:

Mr. Bingham said . . . [i]f such legislation had been on the statute book so as to enforce the Constitutional requirements in every State, the rebellion which had charred and blackened the land would have been an impossibility. The proposed amendment imposed no obligation on any State nor on any citizen in a State which was not now enjoined upon them by the very letter of the Constitution. It was impossible for man to frame words more obligatory than those already in the Constitution . . . .

*Thirty-Ninth Congress, supra.*

<sup>61</sup> See *McDonald*, 130 S. Ct. at 3072 (Thomas, J., concurring); Lash, *supra* note 47, at 409.

<sup>62</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765-67 (1866).

<sup>63</sup> *Id.* at 2765.

<sup>64</sup> *Id.* at 2765-66.

Howard described the rights to be protected by the clause as those rights already established by the Comity Clause and, additionally, those rights “secured . . . by the first eight amendments of the Constitution.”<sup>65</sup> Much like Bingham’s speech, Howard’s speech was widely circulated in the most popular newspapers of the time.<sup>66</sup>

Given the clarity of the drafters’ speeches on what they intended the Privileges or Immunities Clause to mean, coupled with the wide publication of those speeches to the American public, many historians subscribe to Bingham and Howard’s interpretation of the clause.<sup>67</sup> As such, these legal historians believe that the Privileges or Immunities Clause was intended to incorporate the first eight amendments of the Constitution against the states.<sup>68</sup>

### C. *Focus on Federalism as a Guiding Theme*

Some legal historians view the Civil War as a battle fought over ideological differences.<sup>69</sup> In line with the common understanding of “to the victor go the spoils,” these historians believe that the Fourteenth Amendment should be read in the context of the Republican construc-

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<sup>65</sup> *Id.* at 2765; see *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230) (holding that the Comity Clause protects certain fundamental rights and establishing criteria to determine whether a right is fundamental). Senator Howard discussed how in addition to the rights protected by the Comity Clause, as decided by the 1823 Circuit Court for the Eastern District of Pennsylvania decision in *Corfield v. Coryell*, the Privileges or Immunities Clause would cover additional rights:

To these privileges and immunities, whatever they may be[,] . . . should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, [and] . . . the right to keep and to bear arms[.]

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

<sup>66</sup> See *McDonald*, 130 S. Ct. 3020 at 3073–74 (Thomas, J., concurring).

<sup>67</sup> See *id.* at 3073–74 (Thomas, J., concurring); Aynes, *supra* note 51, at 1302–05; Corrigan, *supra* note 51, at 450–53.

<sup>68</sup> See *McDonald*, 130 S. Ct. at 3073–74 (Thomas, J., concurring); Petitioner Brief, *supra* note 49, at 26; Goldwater Brief, *supra* note 49, at 25; Aynes, *supra* note 51, at 1302–03; Corrigan, *supra* note 51, at 436–37.

<sup>69</sup> See Brief for Cato Institute & Pacific Legal Foundation as Amici Curiae Supporting Petitioners at 10–11, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08–1521) [hereinafter Cato Brief]; William J. Rich, *Why “Privileges or Immunities”? An Explanation of the Framers’ Intent*, 42 AKRON L. REV. 1111, 1126–27 (2009) (arguing that the Privileges or Immunities Clause was intended, in a very broad sense, to ensure state compliance under the powers of the federal government).

tion of federalism, which was a popular ideology in the North during the Antebellum Period.<sup>70</sup>

Prior to the Civil War, the United States was fiercely divided into two political ideologies: the various southern states' rights parties, and the Free Soil Party, which later became the Republican Party.<sup>71</sup> The Republican Party, and many Northerners who supported it, subscribed to a theory of paramount national citizenship: the idea that all the people of the United States comprised a single sovereign nation and were not simply a conglomerate of separate state citizens.<sup>72</sup> Accordingly, this theory asserted that natural and traditional common law rights applied to all Americans as a result of their shared federal citizenship.<sup>73</sup> This prong of the theory was important because it naturally produced the idea that a person's rights were protected because they were American, not because they were a citizen of a particular state.<sup>74</sup> As a result, their rights were protected by the federal government, and not susceptible to the whims of their state.<sup>75</sup>

Those subscribing to the states' rights view, by contrast, believed that states were solely responsible for defining and protecting the rights of each person.<sup>76</sup> Whereas the Republican Party pined for a strong national government and subsidiary state governments, the proponents of the states' rights view pushed for just the opposite.<sup>77</sup> After the Civil War, however, many Northerners rejected the notion of strong state governments, as many of them viewed unyielding state power as a source of the war.<sup>78</sup>

With this understanding of the ideological differences, some legal historians believe that the Fourteenth Amendment's Privileges or Immunities Clause was an attempt to incorporate the theory of para-

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<sup>70</sup> See Cato Brief, *supra* note 69, at 5–6; Rich, *supra* note 69, at 1112–13.

<sup>71</sup> See Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 394 (1995).

<sup>72</sup> See *id.* at 367 (describing the viewpoints of “reformers” in the Antebellum Period as those who articulated that national citizenship was paramount to state citizenship).

<sup>73</sup> See Cato Brief, *supra* note 69, at 6; Olson, *supra* note 71, at 367; Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 719–21 (2003) (explaining Bingham's understanding of citizenship).

<sup>74</sup> See Cato Brief, *supra* note 69, at 6; Olson, *supra* note 71, at 367–69.

<sup>75</sup> See Cato Brief, *supra* note 69, at 10–11; Olson, *supra* note 71, at 368.

<sup>76</sup> Cato Brief, *supra* note 69, at 10, 13–14.

<sup>77</sup> *Id.* at 5.

<sup>78</sup> See *id.* at 10–11; Rich, *supra* note 69, at 719–20 (discussing the changing views on the strength of state power as a result of the Civil War).

mount national identity into the Constitution.<sup>79</sup> To these scholars, the layout of the Fourteenth Amendment's first clause makes perfect sense to support this view: the amendment opens by defining the scope of American citizenship and then guarantees federal protection against state infringement of those "privileges or immunities" that are derived from this national citizenship.<sup>80</sup>

As such, these historians believe that in adopting the Privileges or Immunities Clause, the Republican drafters intended to constitutionalize the preeminence of federal citizenship over state citizenship.<sup>81</sup> Additionally, they believe that the drafters intended to taper the states' sovereignty and ability to define the scope of a person's rights, hoping that this issue would never again cause the states to engage in a bloody civil war.<sup>82</sup>

Accordingly, these legal historians believe that the Fourteenth Amendment was intended to incorporate the entirety of the Bill of Rights against state infringement.<sup>83</sup> Further, these scholars view the Privileges or Immunities Clause as incorporating the notion of paramount national citizenship as a theme within the federalism structure, thereby ensuring that the constitutional interpretation of nationality and federally protected individual rights would reign supreme.<sup>84</sup>

## II. JUDICIAL INTERPRETATION OF THE PRIVILEGES OR IMMUNITIES CLAUSE

Although legal historians may disagree on the intended purpose of the Privileges or Immunities Clause of the U.S. Constitution—whether it was intended to apply the Comity Clause to all citizens or to incorporate the Bill of Rights against the states—historians can agree on one thing: the clause was intended to have significance.<sup>85</sup> Only through understanding what legal historians perceive to be the intention of the

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<sup>79</sup> See Cato Brief, *supra* note 69, at 16–17; Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L & POL. 1, 25 (1998) (explaining how the Privileges or Immunities Clause was largely intended as a mechanism to protect one's national citizenship); Zietlow, *supra* note 73, at 737–38.

<sup>80</sup> Cato Brief, *supra* note 69, at 10–11; Shankman & Pilon, *supra* note 79, at 24–26.

<sup>81</sup> Cato Brief, *supra* note 69, at 5–6; Rich, *supra* note 69, at 1126–27.

<sup>82</sup> Cato Brief, *supra* note 69, at 10–11; Shankman & Pilon, *supra* note 79, at 24–25.

<sup>83</sup> Cato Brief, *supra* note 69, at 5–6; Rich, *supra* note 69, at 1126–27; Shankman & Pilon, *supra* note 79, at 24–25.

<sup>84</sup> Cato Brief, *supra* note 69, at 5–6; Rich, *supra* note 69, at 1126–27; Shankman & Pilon, *supra* note 79, at 24–25.

<sup>85</sup> See *supra* notes 19–84 and accompanying text.

drafters can one recognize how disappointing the 1872 Supreme Court decision in *Slaughter-House* and its progeny are.<sup>86</sup> Not only did the Supreme Court shelve the Privileges or Immunities Clause into its narrow scope in the nineteenth century, but the Court has since refused most modern attempts to revive the clause in the twentieth and twenty-first centuries.<sup>87</sup>

### A. *Initial Irrelevance: Slaughter-House* & *Cruikshank*

In 1872, four years after the adoption of the Fourteenth Amendment, the Supreme Court decided the three cases known collectively as *The Slaughter-House Cases*.<sup>88</sup> In 1869, the Louisiana legislature passed a statute that granted the city of New Orleans the right to create a slaughterhouse corporation, which was granted the exclusive right to run slaughterhouse operations in the city.<sup>89</sup> All butchers had to pay a fee in order to use the facility for slaughtering purposes.<sup>90</sup> In 1870, various butchers' associations sued the city, claiming that the statute created a monopoly.<sup>91</sup> The butchers argued that this monopoly violated their fundamental right to exercise their trade and, thus, infringed on their Fourteenth Amendment privileges or immunities.<sup>92</sup>

Justice Samuel Miller, writing for the 5–4 Court, ruled that the Louisiana statute did not violate the Privileges or Immunities Clause.<sup>93</sup> Justice Miller first articulated that there existed a difference between citizens of the United States and citizens of a state.<sup>94</sup> Given these two distinct citizenships, Miller asserted that the Privileges or Immunities Clause could only protect the privileges or immunities that stem from

<sup>86</sup> See *Butchers' Benevolent Assoc. of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36, 78–80 (1872) [hereinafter *Slaughter-House*]; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3073–74 (2010) (Thomas, J., concurring); *Saenz v. Roe*, 526 U.S. 489, 501–02 (1999); *United States v. Cruikshank*, 92 U.S. 542, 551–53 (1875).

<sup>87</sup> See *Slaughter-House*, 83 U.S. (16 Wall.) at 78–80; *McDonald*, 130 S. Ct. at 3030–31 (plurality opinion); *Saenz*, 526 U.S. at 503; see also *id.* at 527 (Thomas, J., dissenting) (“The *Slaughter-House Cases* sapped the [Privileges or Immunities] Clause of any meaning.”).

<sup>88</sup> *Slaughter-House*, 83 U.S. (16 Wall.) at 57–58; see U.S. CONST. amend. XIV.

<sup>89</sup> *Slaughter-House*, 83 U.S. (16 Wall.) at 59.

<sup>90</sup> *Id.* at 59–60.

<sup>91</sup> *Id.* at 60.

<sup>92</sup> *Id.* at 60, 66. The butchers in *Slaughter-House* argued that the monopoly granted an exclusive privilege to engage in the butcher trade to some members of the community, but denied the privilege to others. *Id.* at 60.

<sup>93</sup> *Id.* at 80.

<sup>94</sup> *Id.* at 74–75.

one's federal citizenship.<sup>95</sup> Justice Miller suggested that the privileges or immunities to be protected by the federal government were those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."<sup>96</sup> Justice Miller continued to list several other rights, in dicta, that may be protected by the clause, including the rights to sue the government, to free access of seaports, and to peaceably assemble.<sup>97</sup>

Justice Miller reasoned that the Fourteenth Amendment must have been intended to protect only those privileges that stem from one's federal citizenship.<sup>98</sup> Specifically, Justice Miller concluded that the drafters could not possibly have intended to burden the federal government to become a "perpetual censor upon all legislation of the States."<sup>99</sup> Applying this reasoning to the case, Justice Miller concluded that the privilege of operating a slaughterhouse did not owe "its existence to the Federal government, its National character, its Constitution, or its laws."<sup>100</sup> Rather, the privilege was a result of the legitimate police power of the states.<sup>101</sup> Accordingly, Justice Miller reasoned that operating a slaughterhouse business was a privilege of state, not federal,

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<sup>95</sup> *Slaughter-House*, 83 U.S. (16 Wall.) at 74–75.

<sup>96</sup> *Id.* at 78–79.

<sup>97</sup> *Id.* at 79. Justice Miller elaborated on further rights that might be protected by the Privileges or Immunities Clause:

It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 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, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.

...

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government[;] . . . to peaceably assemble and petition for redress of grievances, [and] the privileges of the writ of *habeas corpus* are rights of the citizens guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.

*Id.* at 79–80 (citations omitted) (internal quotation marks omitted).

<sup>98</sup> *Id.* at 77–79.

<sup>99</sup> *Id.* at 78.

<sup>100</sup> *Id.* at 74–75, 79.

<sup>101</sup> *Slaughter-House*, 83 U.S. (16 Wall.) at 74–75, 79.

citizenship and thus did not warrant protection from the federal government.<sup>102</sup>

Justices Stephen Field and Joseph Bradley strongly dissented to Justice Miller's reading of the Privileges or Immunities Clause.<sup>103</sup> Field believed the majority's interpretation afforded no additional protection than was available prior to the Clause's adoption.<sup>104</sup> Accordingly, Justice Field concluded that Miller's interpretation of the clause made it a "vain and idle enactment, which accomplished nothing."<sup>105</sup> Alternatively, Justice Field believed the clause was meant to have a "profound significance and consequence," and was intended to protect the "natural and inalienable rights" that "of right belong to the citizens of all free governments."<sup>106</sup> As such, Justice Field subscribed to a view of the Privileges or Immunities Clause that mirrored, yet expanded, the scope of the Comity Clause.<sup>107</sup> Justice Bradley also contended that the Privileges or Immunities Clause provided broader substantive protections than

<sup>102</sup> *Id.* at 80.

<sup>103</sup> *See id.* at 83 (Field, J., dissenting); *id.* at 111 (Bradley, J., dissenting).

<sup>104</sup> *Id.* at 96 (Field, J., dissenting). Justice Field, commenting on Miller's interpretation of the Privileges or Immunities Clause, stated:

[I]f this . . . only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference.

*Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 96–97.

<sup>107</sup> *Slaughter-House*, 83 U.S. (16 Wall.) at 100–01 (Field, J., dissenting); *see* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 80–82 (1996) (stating that Justice Field understood the Privileges or Immunities Clause as requiring the states to treat their citizens equally); *supra* notes 26–48 and accompanying text (describing an interpretation of the Privileges or Immunities Clause that focuses on the Comity Clause). Justice Field articulated the scope of privileges or immunities protected by the Fourteenth Amendment in terms of the Comity Clause's scope:

What the [Comity Clause] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.

*Slaughter-House*, 83 U.S. (16 Wall.) at 100–01 (Field, J., dissenting).

the majority found.<sup>108</sup> Bradley believed the clause was written to protect the fundamental rights of citizens and, thus, incorporated the protections granted in the Constitution and its early amendments against state infringement.<sup>109</sup>

Although Justice Miller's opinion in *Slaughter-House* narrowly characterized the reach of the Privileges or Immunities Clause, Miller still recognized, albeit in dicta, that amendments in the Bill of Rights could be protected by the clause.<sup>110</sup> Only three years later, however, in *United States v. Cruikshank*, the Supreme Court narrowed the Privileges or Immunities Clause even further.<sup>111</sup>

In 1873, an armed militia attacked and killed a group of African-Americans that had assembled to protest at a Louisiana courthouse.<sup>112</sup> The victims' families petitioned that the state militia had deprived the victims of their privileges as American citizens to peaceably assemble pursuant to the First Amendment.<sup>113</sup> The victims relied on Justice Miller's opinion in *Slaughter-House* to argue that the right to peaceably assemble stemmed from one's national citizenship and was, therefore, a

<sup>108</sup> *Id.* at 118–20 (Bradley, J., dissenting).

<sup>109</sup> *Id.* Justice Bradley articulated the scope of the privileges and immunities that the Fourteenth Amendment should protect:

The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character . . . such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law*. These, and still others, are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.

*Id.* at 118–19.

<sup>110</sup> *Id.* at 79 (majority opinion) (enumerating in dicta the rights that the Privileges or Immunities Clause may protect, including certain provisions of the Bill of Rights).

<sup>111</sup> See *Cruikshank*, 92 U.S. at 550–51.

<sup>112</sup> Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 763; see *Cruikshank*, 92 U.S. at 550–51.

<sup>113</sup> *Cruikshank*, 92 U.S. at 548–50; Palmer, *supra* note 112, at 763; see U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

privilege protected from state infringement by the Privileges or Immunities Clause.<sup>114</sup>

Rejecting the families' arguments, the Supreme Court ruled that only the right to peaceably assemble to petition the national government was an attribute of one's national citizenship and, therefore, protected by the federal government.<sup>115</sup> As such, the Court held that the right to peaceably assemble, for any reason other than petitioning Congress, is a privilege of state citizenship, and thereby could not be regulated by the federal government.<sup>116</sup> In ruling that the Privileges or Immunities Clause did not protect American citizens from state action, the Supreme Court dashed hopes for the clause's relevance following the *Slaughter-House* decision.<sup>117</sup>

### B. *Modern Hints at Revival: Saenz & McDonald*

Nearly 130 years passed before the Supreme Court would seriously consider the scope and meaning of the Privileges or Immunities Clause again.<sup>118</sup> In 1999, the Supreme Court decided *Saenz v. Roe* partly on the basis of the Privileges or Immunities Clause, but relied on the clause in a more restrained way than legal historians may have hoped.<sup>119</sup>

In 1992, the California legislature enacted a statute that limited the welfare benefits available to newly arrived residents in the state.<sup>120</sup> For a family residing in California for less than a year, the statute limited the family's welfare benefits to the equivalent payable to the family in its previous state of residence.<sup>121</sup> Three families, having recently moved to California, sued the state, claiming that the statute's durational residency requirement was unconstitutional.<sup>122</sup> The plaintiffs

<sup>114</sup> *Cruikshank*, 92 U.S. at 551–52; see *Slaughter-House*, 83 U.S. (16 Wall.) at 79.

<sup>115</sup> *Cruikshank*, 92 U.S. at 552.

<sup>116</sup> *Id.* at 552–53.

<sup>117</sup> See *id.*; *Slaughter-House*, 83 U.S. (16 Wall.) at 79 (indicating, in dicta, that the Bill of Rights may be protected by the Privileges or Immunities Clause).

<sup>118</sup> See generally *Slaughter-House*, 83 U.S. (16 Wall.) 36; *Saenz*, 526 U.S. 489.

<sup>119</sup> See 526 U.S. at 503–04.

<sup>120</sup> *Id.* at 492.

<sup>121</sup> *Id.* at 493–94. This statute was passed in an effort to reduce the state's budget, while also modestly reducing its already generous welfare package relative to its neighboring states. *Id.* For example, one petitioner moved to California from Louisiana. *Id.* Given her circumstances, if she had lived in California for more than one year, her family would receive \$641 in welfare benefits. *Id.* Under the California statute, because her family had lived in California for less than twelve months, the family was entitled to their corresponding benefits in Louisiana, which totaled \$190. *Id.* at 494.

<sup>122</sup> *Id.* at 494.

argued that this statute violated their right to travel and, thus, infringed upon their Fourteenth Amendment privileges or immunities.<sup>123</sup>

Justice John Paul Stevens, writing for the 6–2 Court, ruled that the California statute unconstitutionally restricted newly arrived California citizens from enjoying the privileges and immunities available to all other California citizens.<sup>124</sup> Noting the stark disagreement over the Privileges or Immunities Clause’s meaning, as expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, Justice Stevens nonetheless stated that the clause had always been understood to protect that component of the right to travel.<sup>125</sup> Justice Stevens found support for this proposition by referring to both Justice Miller’s majority opinion and Justice Bradley’s dissenting opinion in *Slaughter-House*.<sup>126</sup>

Chief Justice William Rehnquist and Justice Thomas dissented to Justice Stevens’s reading of the Privileges or Immunities Clause.<sup>127</sup> Chief Justice Rehnquist questioned the majority’s reliance on a clause that the Court had almost wholly ignored in its 130-year tenure.<sup>128</sup> Chief Justice Rehnquist determined that the California statute did not violate any constitutional provision and was in line with the Court’s long-standing acceptance of certain bona fide residence requirements.<sup>129</sup>

Justice Thomas rejected the majority’s decision as attributing meaning to the Privileges or Immunities Clause that was “unintended when the Fourteenth Amendment was enacted and ratified.”<sup>130</sup> Thomas posited that the Privileges or Immunities Clause was both intended

<sup>123</sup> *Id.* at 498–502.

<sup>124</sup> *Id.* at 502.

<sup>125</sup> *Saenz*, 526 U.S. at 503 (citing *Slaughter-House*, 83 U.S. (16 Wall.) at 80).

<sup>126</sup> *Id.* (citing *Slaughter-House*, 83 U.S. (16 Wall.) at 80) (noting that in *Slaughter-House*, “Justice Miller explained that one of the privileges conferred by this Clause ‘is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State’”); *id.* (citing *Slaughter-House*, 83 U.S. (16 Wall.) at 112–13 (Bradley, J., dissenting)) (noting that in *Slaughter-House*, “Justice Bradley, in dissent, used even stronger language to make the same point [as Justice Miller]: . . . ‘A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of the rights with every other citizen’”).

<sup>127</sup> *Id.* at 511 (Rehnquist, C.J., dissenting); *id.* at 521 (Thomas, J., dissenting).

<sup>128</sup> *Id.* at 511 (Rehnquist, C.J., dissenting) (stating that “[b]ecause I do not think any provision of the Constitution—and surely not a provision relied upon for only the second time since its enactment 130 years ago—requires this result, I dissent”).

<sup>129</sup> *Id.* at 518–21 (citing *Sosna v. Iowa*, 419 U.S. 393, 406–09 (1975) (holding that one-year residence requirements prior to obtaining a divorce in a state court was constitutional); *Vlandis v. Kline*, 412 U.S. 411, 453–454 (1973) (holding that a state’s establishment of reasonable criteria to determine in-state status for education requirements was constitutional)).

<sup>130</sup> *Id.* at 521 (Thomas, J., dissenting).

and understood to be a corollary to the established Comity Clause doctrine.<sup>131</sup> Accordingly, Thomas cited to Comity Clause precedent to reason that the Privileges or Immunities Clause was intended not to guarantee “equal access to all public benefits,” but to protect “only *fundamental* rights that belong to all citizens of the United States.”<sup>132</sup> In his conclusion, Thomas noted that he believed that the “the demise of the Privileges or Immunities Clause” had led to “disarray” in Fourteenth Amendment jurisprudence.<sup>133</sup> Accordingly, he stated that he “would be open to reevaluating its meaning in an appropriate case.”<sup>134</sup>

In 2010, when the Supreme Court granted certiorari in *McDonald v. City of Chicago*, scholars were hopeful that it was the “appropriate case” to which Thomas had alluded to in *Saenz*.<sup>135</sup> Specifically, scholars believed the Court would overturn *Slaughter-House* in the course of incorporating the Second Amendment to the states.<sup>136</sup> These scholars mounted opposition to *Slaughter-House* by means of the numerous briefs filed in support of the petitioners.<sup>137</sup> Proponents of the Privileges or Immunities Clause, however, would remain disappointed by the Court’s decision to leave the *Slaughter-House* decision unscathed.<sup>138</sup>

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<sup>131</sup> *Saenz*, 526 U.S. at 524–26 (Thomas, J., dissenting); see U.S. CONST. art. IV, § 2, cl. 1.

<sup>132</sup> *Saenz*, 526 U.S. at 525–26 (Thomas, J., dissenting) (emphasis added) (citing *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230)).

<sup>133</sup> *Id.* at 527–28.

<sup>134</sup> *Id.* at 528. Justice Thomas elaborated that prior to reevaluating the meaning of the Privileges or Immunities Clause, “[W]e should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.” *Id.*

<sup>135</sup> See *McDonald*, 130 S. Ct. 3020; *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting); Cato Brief, *supra* note 69, at 4; Goldwater Brief, *supra* note 49, at 13–14.

<sup>136</sup> See U.S. CONST. amend. II; *McDonald*, 130 S. Ct. at 3020 (plurality opinion); *Slaughter-House*, 83 U.S. (16 Wall.) at 36.

<sup>137</sup> See generally, e.g., Petitioner Brief, *supra* note 49 (relying on the ratification debates to urge the Supreme Court that the Privileges or Immunities Clause was intended to incorporate the Bill of Rights); Cato Brief, *supra* note 69 (relying on the theory of paramount national citizenship to argue that the Privileges or Immunities Clause was intended to incorporate the Bill of Rights); Goldwater Brief, *supra* note 49 (proposing that the Privileges or Immunities Clause was intended to incorporate the Bill of Rights because such an interpretation was the ordinary and normal reading of the clause at the time of its adoption).

<sup>138</sup> Compare *McDonald*, 130 S. Ct. at 3030–31 (plurality opinion) (stating that the Supreme Court “decline[s] to disturb the *Slaughterhouse* holding”), with Cato Brief, *supra* note 69, at 33 (concluding that the Supreme Court should overturn *Slaughter-House*) and Goldwater Brief, *supra* note 49, at 5 (same).

In *McDonald*, a group of petitioners challenged aspects of Chicago's gun registration law.<sup>139</sup> The petitioners argued, in part, that the city's restrictions infringed on their privilege to bear arms, which stemmed from their federal citizenship.<sup>140</sup> Although the Court found that the Second Amendment was incorporated against the states, the Court found this right via the Due Process Clause, rather than through the Privileges or Immunities Clause.<sup>141</sup>

Both in oral arguments and briefly within the majority's opinion, the Supreme Court identified its discomfort with the idea of overturning *Slaughter-House* and resurrecting the Privileges or Immunities Clause as preeminent substantive authority.<sup>142</sup> Justice Antonin Scalia quipped at oral arguments that using the Privileges or Immunities Clause in *McDonald* would be "contrary to 140 years of our jurisprudence;" he 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."<sup>143</sup> The same attitude of acquiescence was mirrored in Justice Samuel Alito's plurality opinion, in which Alito noted 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."<sup>144</sup>

The only justice in support of employing the Privileges or Immunities Clause as a path to recognizing the petitioners' Second Amendment rights was Justice Thomas.<sup>145</sup> Justice Thomas concurred in the decision that the Second Amendment was incorporated against the states, but noted: "I believe there is a more straightforward path to this conclusion, one that is more faithful to the Fourteenth's Amendment's text and history."<sup>146</sup> Justice Thomas proceeded to cite the ratification debates to articulate that the Fourteenth Amendment was intended to

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<sup>139</sup> *Id.* at 3026–27. In *McDonald*, the Court considered the constitutionality of Chicago's gun registration law that "prohibit[ed] registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside[d] in the City." *Id.* at 3026.

<sup>140</sup> *Id.* at 3028.

<sup>141</sup> *Id.* at 3050.

<sup>142</sup> See *id.* at 3030–31; *McDonald* Transcript, *supra* note 8, at 7.

<sup>143</sup> *McDonald* Transcript, *supra* note 8, at 7.

<sup>144</sup> *McDonald*, 130 S. Ct at 3030–31 (plurality opinion).

<sup>145</sup> *McDonald*, 130 S. Ct at 3059–60 (Thomas, J., concurring).

<sup>146</sup> *Id.*

incorporate the Bill of Rights against state action.<sup>147</sup> Although Justice Thomas made a persuasive argument—standing alone, his concurrence was a far cry from the outcome for which *Slaughter-House* critics had hoped.<sup>148</sup>

### III. A WORLD WITHOUT *SLAUGHTER-HOUSE*

Most legal historians can agree that the Court has mischaracterized the Privileges or Immunities Clause in the 1872 Supreme Court decision in *Slaughter-House* and its progeny.<sup>149</sup> Each historical retelling of the ratification period, however, leads to a different conclusion about what the scope of the Privileges or Immunities Clause would be today if the court overturned *Slaughter-House*.<sup>150</sup> Nevertheless, the point appears to be moot, as most of what historians claim the Privileges or Immunities Clause was meant to achieve has since been accomplished through alternative means in the 140 years after *Slaughter-House*.<sup>151</sup> In this way, overturning *Slaughter-House* today would add very little new substance to our “constitutional constellation.”<sup>152</sup>

Section A discusses how the historical focus on the Comity Clause would affect the scope of the Privileges or Immunities Clause, and how such concerns have since been addressed through the Due Process Clause of the Fourteenth Amendment.<sup>153</sup> Section B discusses how the historical focus on the ratification debates would affect the scope of the Privileges or Immunities Clause, and how such concerns have since been handled by the selective incorporation of most of the Bill of

<sup>147</sup> See *supra* notes 49–68 and accompanying text (summarizing Justice Thomas’s argument that the ratification debates highlight the drafters’ intention that the Privileges or Immunities Clause incorporated the Constitution’s first eight amendments against state action).

<sup>148</sup> See *McDonald*, 130 S. Ct. at 3088 (Thomas, J., concurring); Petitioner Brief, *supra* note 49, at 15–16; Cato Brief, *supra* note 69, at 10–11; Goldwater Brief, *supra* note 49, at 21.

<sup>149</sup> See *Butchers’ Benevolent Assoc. of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36, 78–80 (1872) [hereinafter *Slaughter-House Cases*]; *supra* notes 19–84 and accompanying text.

<sup>150</sup> Compare *supra* notes 26–48 and accompanying text (explaining the historical retelling of the Antebellum Period with a focus on the Comity Clause issues), with *supra* notes 49–68 and accompanying text (explaining the historical retelling of the Reconstruction Era with a focus on the Fourteenth Amendment ratification debates), and *supra* notes 69–84 and accompanying text (explaining the historical retelling of the Antebellum and Reconstruction Eras with a focus on the theory of a paramount national citizenship).

<sup>151</sup> See *infra* notes 156–213 and accompanying text.

<sup>152</sup> See *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); see also *infra* notes 156–213 and accompanying text.

<sup>153</sup> See *infra* notes 156–174 and accompanying text.

Rights.<sup>154</sup> Finally, Section C discusses how the historical focus on federalism as a theme in the Reconstruction Era would affect the scope of the Privileges or Immunities Clause, and how much of the federalism concerns have since been quelled through a gradual shift in power from the states to the federal government.<sup>155</sup>

#### A. *The Comity Clause Approach*

Given both the similarities in wording between the Privileges or Immunities Clause and the Comity Clause, and the prevalence of Comity Clause issues involving slaves in the Antebellum Period, many legal historians believe that the Privileges or Immunities Clause should be tied to the rights protected by the Comity Clause.<sup>156</sup> Therefore, these historians first believe that the Fourteenth Amendment grants national citizenship to African-Americans.<sup>157</sup> Furthermore, they believe that the Fourteenth Amendment linked the Comity Clause protection to this newly recognized national citizenship.<sup>158</sup> Consequently, by tying the Comity Clause protection to one's national citizenship, the Privileges or Immunities Clause would arm Congress with the power to enforce the Comity Clause against state infringement.<sup>159</sup> In this way, Congress would have the power to prevent any attempts by states to rout the Comity Clause, such as the state action allowed by the Supreme Court in its 1856 decision in *Dred Scott v. Sandford*.<sup>160</sup>

Whereas the Comity Clause protected the "privileges and immunities" that were a result of one's state citizenship, these historians interpret the Fourteenth Amendment to secure those "privileges or immunities" that are a product of one's national citizenship.<sup>161</sup> Inherent in this interpretation is the idea that the definition of which rights were

<sup>154</sup> See *infra* notes 175–196 and accompanying text.

<sup>155</sup> See *infra* notes 197–213 and accompanying text.

<sup>156</sup> See *supra* notes 26–48 and accompanying text.

<sup>157</sup> U.S. CONST. amend. XIV, § 1 ("All 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."); see Hamburger, *supra* note 28, at 122; Maher, *supra* note 28, at 113–14; Smith, *supra* note 28, at 885–89.

<sup>158</sup> U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."); see *supra* notes 26–48 and accompanying text.

<sup>159</sup> See *supra* notes 26–48 and accompanying text.

<sup>160</sup> See 60 U.S. (19 How.) 393, 405 (1856), *overruled by* U.S. CONST. amend. XIV; *supra* notes 26–48 and accompanying text (explaining that before the adoption of the Fourteenth Amendment, states could narrowly define citizenship to avoid bestowing the Comity Clause's protections to whole classes of people).

<sup>161</sup> See Hamburger, *supra* note 28, at 133–34.

“privileges or immunities” would be less susceptible to public opinion than in the Antebellum Period.<sup>162</sup> The Comity Clause was unable to protect the fundamental right of freedom in *Dred Scott* because Missouri was able to narrowly define “privileges and immunities” and “citizen.”<sup>163</sup> As such, these historians believe that the Privileges or Immunities Clause was an effort to arm Congress with the power to prevent states from dictating who was a citizen and what rights he deserved.<sup>164</sup>

Accordingly, these historians believe that the Privileges or Immunities Clause should be held to protect the same rights that the Comity Clause has long been found to protect.<sup>165</sup> The Comity Clause’s jurisprudence stems from the Circuit Court for the Eastern District of Pennsylvania 1823 decision in *Corfield v. Coryell*.<sup>166</sup> In *Corfield*, Judge Bushrod Washington determined that the privileges and immunities protected by the Comity Clause includes those rights “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.”<sup>167</sup>

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<sup>162</sup> See *Dred Scott*, 60 U.S. (19 How.) at 405 (finding that a freed slave’s state citizenship did not naturally confer national citizenship onto the slave and, therefore, the slave was not entitled to the Constitution’s protections); Hamburger, *supra* note 28, at 133–34.

<sup>163</sup> See *Dred Scott*, 60 U.S. (19 How.) at 405–07; Hamburger, *supra* note 28, at 91–93; *supra* notes 35–37 and accompanying text (describing the way in which Missouri and like-minded states narrowly defined citizenship to find that the Constitution’s protections did not apply to freed slaves).

<sup>164</sup> See *Dred Scott*, 60 U.S. (19 How.) at 405–07; Hamburger, *supra* note 28, at 116; Maher, *supra* note 28, at 113–14.

<sup>165</sup> See Hamburger, *supra* note 28, at 83–97; Maher, *supra* note 28, at 113–14; Smith, *supra* note 28, at 816.

<sup>166</sup> See 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1398–01 (1992) (explaining, generally, the state of Comity Clause jurisprudence and its development prior to the ratification of the Fourteenth Amendment).

<sup>167</sup> 6 F. Cas. at 551 (emphasis added). Judge Washington attempted to enumerate some of the fundamental rights protected under the Comity Clause:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. 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

Interpreting the Comity Clause as a mechanism to protect “fundamental” rights bears substantial similarity to the interpretation of the Due Process Clause that has developed in the decades after *Slaughter-House*.<sup>168</sup> Although its name leads one to believe that the Due Process Clause is meant to protect procedure, our constitutional jurisprudence has identified this clause as protecting a broad range of substantive rights as well, including those rights that would likely have been protected under a Comity Clause-focused Privileges or Immunities Clause.<sup>169</sup> The Supreme Court has held under the Due Process Clause that some liberties are so “implicit in the concept of ordered liberty” that they are deemed to be “fundamental” and that the government, therefore, cannot infringe upon them unless strict scrutiny is met.<sup>170</sup>

Further, the Court has used the Due Process Clause to protect fundamental rights even in the face of harsh public criticism.<sup>171</sup> In

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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. . . .

*Id.* at 551–52.

<sup>168</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). In the 1997 Supreme Court decision in *Washington v. Glucksberg*, Chief Justice Rehnquist articulated that the Due Process Clause “specially protects those *fundamental rights* and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Id.* (emphasis added) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784 (1968)).

<sup>169</sup> See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (holding that a parent had a “fundamental right to make decisions concerning the rearing of her [children]” pursuant to the Due Process Clause); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that “marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival” and is protected by the Due Process Clause (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))).

<sup>170</sup> See *Glucksberg*, 521 U.S. at 720–21; *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); *Palko*, 302 U.S. at 325. In the Court’s 1993 decision in *Reno v. Flores*, Justice Antonin Scalia articulated the strict scrutiny standard that applies to fundamental rights under the Due Process Clause by stating that the Due Process Clause “forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” 507 U.S. at 301–02 (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986)).

<sup>171</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (utilizing the Due Process Clause to uphold a woman’s right to an abortion, despite contrary popular sentiment); *Loving*,

1967, during the peak of the civil rights movement, the Supreme Court relied on the Due Process Clause to invalidate miscegenation laws in *Loving v. Virginia*.<sup>172</sup> In 1973, in *Roe v. Wade*, the Supreme Court relied on the Due Process Clause to uphold a woman's right to an abortion—despite considerable public opinion to the contrary.<sup>173</sup> As such, despite historians' fears that judicial safeguarding of substantive rights would be too susceptible to public opinion and suffer without the proper protection of the Privileges or Immunities Clause, the Due Process Clause has effectively accomplished the goals of the Comity Clause and repeatedly withstood contrary popular opinion.<sup>174</sup>

### B. *The Ratification Debates Approach*

Legal historians focusing on the ratification debates as evidence of the intended meaning of the Privileges or Immunities Clause believe that the Clause was ratified to incorporate the first eight amendments of the U.S. Constitution against state action.<sup>175</sup> These legal historians primarily focus on the speeches of the chief drafters of the Fourteenth Amendment, among them Representative Bingham and Senator Howard, in which they presented incorporation as the intended purpose for the Privileges or Immunities Clause.<sup>176</sup> As the speeches of Bingham, Howard, and others were widely distributed, these legal historians believe that incorporation was not only what the drafters' intended, but also what the public expected.<sup>177</sup>

Prior to the adoption of the Fourteenth Amendment, none of the constitutional amendments had been incorporated against the states.<sup>178</sup> This meant that the Constitution's first eight amendments only applied

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388 U.S. at 12–13 (utilizing the Due Process Clause to establish a fundamental right of marriage, thereby invalidating anti-miscegenation laws); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (finding that a Connecticut law banning sales of contraceptives to unmarried couples violated a person's fundamental right and inhibited marital privacy).

<sup>172</sup> 388 U.S. at 12–13.

<sup>173</sup> 410 U.S. at 164–65.

<sup>174</sup> See *id.*; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 485–86; Hamburger, *supra* note 28, at 133–34.

<sup>175</sup> See *supra* notes 49–68 and accompanying text.

<sup>176</sup> See *supra* notes 49–68 and accompanying text.

<sup>177</sup> See *supra* notes 49–68 and accompanying text.

<sup>178</sup> See *Twining v. New Jersey*, 211 U.S. 78, 99 (1908). It was not until 1908, in *Twining v. New Jersey*, that the Supreme Court first contemplated the possibility of incorporation. 211 U.S. at 99.

to federal action, rather than state action.<sup>179</sup> For example, the federal government was prohibited from infringing a person's freedom of speech; from conducting a warrantless search; and from inflicting cruel and unusual punishment; whereas the states had free reign under the Constitution to do so.<sup>180</sup> Accordingly, the proponents of this reading of the Privileges or Immunities Clause believed that the ratification of the Fourteenth Amendment meant that the Constitution would serve to limit not only federal action, but state action, as well.<sup>181</sup>

Although such an interpretation of the Privileges or Immunities Clause would have incorporated the entirety of the Bill of Rights in one swift maneuver, in the decades since *Slaughter-House*, the Supreme Court has incorporated a majority of the Bill of Rights against state action through a selective incorporation process.<sup>182</sup> The process of incorporation began in 1908, in *Twining v. New Jersey*, in which the Supreme Court recognized the possibility that some of the Constitution's first eight amendments could be incorporated against state action because to not do so would violate a person's Due Process rights.<sup>183</sup> The Court

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<sup>179</sup> See U.S. CONST. amend. VIII; *id.* amend. VII; *id.* amend. VI; *id.* amend. V; *id.* amend. IV; *id.* amend. III; *id.* amend. II; *id.* amend. I; *supra* note 178 and accompanying text.

<sup>180</sup> See U.S. CONST. amend. VIII (cruel and unusual punishment); *id.* amend. IV (unreasonable search and seizure); *id.* amend. I (freedom of speech); *supra* note 178 and accompanying text. This is no longer the case; the Supreme Court has incorporated the First Amendment's freedom of speech protection, the Fourth Amendment's protection from unreasonable search and seizure, and the Eighth Amendment's protection from cruel and unusual punishment against state action. *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (holding that the Eighth Amendment's protection from cruel and unusual punishment is incorporated against state action); *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the Fourth Amendment's protection from unreasonable search and seizure is incorporated against state action); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (holding that the First Amendment's protection for the freedom of speech is incorporated against state action).

<sup>181</sup> See *supra* notes 49–68 and accompanying text.

<sup>182</sup> See *infra* notes 185–188 and accompanying text.

<sup>183</sup> 211 U.S. at 99. In *Twining*, Justice William Moody explained the incorporation justification:

[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.

has continued to justify incorporation of a majority of the Bill of Rights with the same reasoning.<sup>184</sup>

Thus far, the Supreme Court has incorporated the First,<sup>185</sup> Second,<sup>186</sup> Fourth,<sup>187</sup> and Sixth<sup>188</sup> Amendments in their entirety. Although the Supreme Court has never heard a case on the Third Amendment's incorporation, the Second Circuit has held that it is incorporated in its entirety.<sup>189</sup> Furthermore, a majority of the Fifth<sup>190</sup> and Eighth<sup>191</sup> amendments have also been incorporated. The Supreme Court has only expressly declined to incorporate two provisions of the Bill of Rights: the Fifth Amendment's right to a grand jury indictment in crim-

<sup>184</sup> See *infra* notes 185–188 and accompanying text.

<sup>185</sup> See U.S. CONST. amend. I; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 503 (3d ed. 2006). See generally *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the free exercise clause); *Hague v. CIO*, 307 U.S. 496 (1939) (incorporating the right to petition); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (incorporating the freedom of assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (incorporating the freedom of the press); *Gilow*, 268 U.S. 652 (incorporating the freedom of speech).

<sup>186</sup> See U.S. CONST. amend. II; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (plurality opinion) (incorporating the entirety of the Second Amendment).

<sup>187</sup> See U.S. CONST. amend. IV; CHEMERINSKY, *supra* note 185, at 503. See generally *Wolf*, 338 U.S. 25 (incorporating the protection against search and seizures and the requirement for a warrant based on probable cause).

<sup>188</sup> See U.S. CONST. amend. VI; CHEMERINSKY, *supra* note 185, at 504. See generally *Washington v. Texas*, 388 U.S. 14 (1967) (incorporating the right to obtain favorable witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating the right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating the right to confront adverse witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1965) (incorporating the right to have assistance of counsel); *Irvin v. Dowd*, 366 U.S. 717 (1961) (incorporating the right to an impartial jury); *In Re Oliver*, 333 U.S. 257 (1948) (incorporating the right to a public trial and the right to notice of charges).

<sup>189</sup> See U.S. CONST. amend. III (proscribing the quartering of soldiers); CHEMERINSKY, *supra* note 185, at 505; see also *McDonald*, 130 S. Ct. at 3035 n.13 (plurality opinion) (“We never have decided whether the Third Amendment . . . applies to the States through the Due Process Clause”). See generally *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982) (holding that the Third Amendment applies to both federal and state action).

<sup>190</sup> See U.S. CONST. amend. V; CHEMERINSKY, *supra* note 185, at 504. See generally *Benton*, 395 U.S. 784 (incorporating double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the protection against self-incrimination); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (incorporating the requirement that the government pay just compensation for taking property).

<sup>191</sup> See U.S. CONST. amend. VIII; CHEMERINSKY, *supra* note 185, at 504. See generally *Schillb v. Kuebel*, 404 U.S. 357 (1971) (incorporating the prohibition against excessive bail); *Robinson*, 370 U.S. 660 (incorporating the prohibition against cruel and unusual punishment). The Court has never determined whether the Eighth Amendment's prohibition on “excessive fines” is incorporated against the states. *McDonald*, 130 S. Ct. at 3035 n.13 (plurality opinion) (“We never have decided whether . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause.”).

inal cases<sup>192</sup> and the Seventh Amendment's right to a jury trial in civil cases.<sup>193</sup>

The development of the incorporation doctrine since *Twining* indicates that overturning *Slaughter-House* today would have a much smaller impact than the followers of the ratification-debates approach would have foreseen.<sup>194</sup> Reviving the Privileges or Immunities Clause, under this historical interpretation, would serve as a catalyst to total incorporation of the remaining unincorporated provisions of the Bill of Rights.<sup>195</sup> Accordingly, such a decision would only affect portions of the Fifth and Seventh Amendments, the only two provisions of the Bill of Rights that the Supreme Court has expressly refused to incorporate in the years since *Slaughter-House*.<sup>196</sup>

### C. *The Federalism Approach*

The legal historians who view the Privileges or Immunities Clause as a product of the ideological debate over federalism see the clause as indoctrinating the preeminence of the national government over the state governments.<sup>197</sup> Accordingly, these historians believe the Fourteenth Amendment was drafted both to fully incorporate the Bill of Rights against state infringement and to constitutionalize the preeminence of national citizenship over state citizenship.<sup>198</sup>

<sup>192</sup> *Hurtado v. California*, 110 U.S. 516, 538 (1884) (noting that the Court was “unable to say that the substitution for a presentment or indictment by a grand jury . . . is not due process of law”).

<sup>193</sup> *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 219 (1916) (holding that the right to a jury trial in civil actions did not apply to state action where there is “no ground for the proposition that the Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law”).

<sup>194</sup> Compare *McDonald*, 130 S. Ct. at 3073–74 (Thomas, J., concurring) (subscribing to the belief that the Privileges or Immunities Clause incorporates the first eight amendments of the Constitution), *Butchers' Benevolent Assoc. of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36, 118–20 (1872) [hereinafter *Slaughter-House*] (Bradley, J., dissenting) (suggesting that the majority opinion eviscerated the efficacy of the Privileges or Immunities Clause), and *id.* at 96–97 (Field, J., dissenting) (same), with *supra* notes 175–196 and accompanying text (illustrating how the majority of the Bill of Rights has already been incorporated against the states).

<sup>195</sup> See *McDonald*, 130 S. Ct. at 3073–74 (Thomas, J., concurring); Petitioner Brief, *supra* note 49, at 15–16; Goldwater Brief, *supra* note 49, at 21; Corrigan, *supra* note 51, at 436–37.

<sup>196</sup> See *Minneapolis & St. Louis R.R. Co.*, 241 U.S. at 219 (Seventh Amendment); *Hurtado*, 110 U.S. at 538 (Fifth Amendment); *supra* notes 185–191 and accompanying text (illustrating how the remaining Bill of Rights amendments have been largely incorporated).

<sup>197</sup> See *supra* notes 69–84 and accompanying text.

<sup>198</sup> See *supra* notes 69–84 and accompanying text.

Given the polarizing nature of the Antebellum Period, it is not surprising that the drafters may have intended to constitutionalize an understanding of federalism that mandated for a stronger federal power and subordinate state powers.<sup>199</sup> The relative power of states has been a heated issue since the Constitutional Convention of 1787.<sup>200</sup> It was not until a century later, however, that Americans would realize the real dangers of allowing states to accrue too much power.<sup>201</sup> In the Antebellum Period, the southern states began to disagree with the northern states on fundamental questions of slavery and citizenship.<sup>202</sup> As the schism continued to splinter the North and South, the federal government was nearly powerless to resolve it.<sup>203</sup> The legal historians subscribing to a federalism-driven interpretation believe that the Privileges or Immunities Clause was intended to reinvigorate the national government so that it could suppress any future resurgence of state power prior to the point of secession.<sup>204</sup>

Although tempering state power was a major concern in the Reconstruction Era, in the years since *Slaughter-House*, even in the absence of a constitutional mandate to that effect, the federal government has asserted itself as dominant over state governments.<sup>205</sup> No example is more revealing than the desegregation saga of the 1950s.<sup>206</sup> In 1954 in *Brown v. Board of Education*, the Supreme Court held that segregated

<sup>199</sup> See Cato Brief, *supra* note 69, at 10–11; Rich, *supra* note 69, at 1126–27; Shankman & Pilon, *supra* note 79, at 24–25.

<sup>200</sup> See Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1717–23 (2011) (describing debates at the Constitutional Convention of 1787 regarding the power among states; the power between the federal government and state governments; and the power between Congress and the President).

<sup>201</sup> See Cato Brief, *supra* note 69, at 10–11; Shankman & Pilon, *supra* note 79, at 34 (noting the realized dangers associated with state power following the Civil War and stating that “[t]he Civil War generation meant to rewrite, in this limited way, the relationship between the federal government and the states”).

<sup>202</sup> See *Dred Scott*, 60 U.S. at 405–07 (1856) (finding one’s state citizenship did not naturally confer national citizenship); Hamburger, *supra* note 28, at 88–89 (describing the debate on state and federal citizenship during the Antebellum period).

<sup>203</sup> See Cato Brief, *supra* note 69, at 10–11; Rich, *supra* note 69, at 1126–27; Shankman & Pilon, *supra* note 79, at 24–25.

<sup>204</sup> Cato Brief, *supra* note 69, at 5–6; Rich, *supra* note 69, at 1126–27.

<sup>205</sup> See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that Arkansas was required to follow the Supreme Court’s ruling in *Brown*); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954) (holding segregated schools unconstitutional under the Equal Protection Clause); *Leser v. Garnett*, 258 U.S. 130, 137–38 (1922) (holding that the Nineteenth Amendment applied to both federal and state elections, regardless of a particular state’s constitutional limitation on election qualifications).

<sup>206</sup> See *Cooper*, 358 U.S. at 18; *Brown*, 347 U.S. at 495–96.

schools were per se unconstitutional under the Equal Protection Clause.<sup>207</sup> Following a subsequent court order mandating desegregation of the Little Rock, Arkansas school district, Arkansas Governor Orval Faubus refused to comply.<sup>208</sup> Governor Faubus went so far as to call the Arkansas National Guard to prevent the African-American school children from entering their newly desegregated school.<sup>209</sup> In response, President Dwight D. Eisenhower federalized the Arkansas National Guard such that they could no longer take orders from Governor Faubus and, further, deployed federal troops to escort the African-American school children into the desegregated schools.<sup>210</sup> As the Little Rock school children continued to attend school, without interference from the disgruntled state government, it was abundantly clear that the federal government had preeminent power over the Arkansas state government.<sup>211</sup>

The 140 years since *Slaughter-House* is replete with examples, both subtle and palpable, of the dominance of the federal government over state governments.<sup>212</sup> Although the Civil War might have convinced some that the only way to temper state power was through a constitutional mandate to that effect, the federal government has been able to establish its modern-day predominance without one.<sup>213</sup>

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<sup>207</sup> See *Brown*, 347 U.S. at 495–96.

<sup>208</sup> See *Cooper*, 358 U.S. at 4.

<sup>209</sup> Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1659–60 (1997).

<sup>210</sup> *Id.* at 1662. The power of the federal government was further emphasized in the Supreme Court's 1958 decision in *Cooper v. Aaron*. See 358 U.S. at 18. During the 1950s, the Little Rock school board sought suspension of the desegregation order from *Brown* by citing the recent enactment of an Arkansas state law that blocked desegregation. *Id.* at 7–8. The unanimous Court, in a decision signed by each member, held that the Court's decision would always be binding on all states, regardless of any state law to the contrary. *Id.* at 18.

<sup>211</sup> See *Cooper*, 358 U.S. at 18; *Brown*, 347 U.S. at 495–96.

<sup>212</sup> See, e.g., *Leser*, 258 U.S. at 137–38 (holding that the Nineteenth Amendment, granting universal suffrage to women, applied to both federal and state elections, regardless of a state's constitutional limitation on suffrage by sex); *supra* notes 206–211 and accompanying text (providing further examples of how the federal government has asserted itself over state governments).

<sup>213</sup> Compare *supra* notes 69–84 and accompanying text (detailing legal historians' arguments that the Privileges or Immunities Clause was intended to constitutionalize the theory of paramount national citizenship), with *supra* notes 206–212 and accompanying text (describing the modern growth in federal power).

IV. SUNK COSTS: WHY THE SUPREME COURT'S ADHERENCE TO "SUNK COST" PRINCIPLES IS A RATIONAL RESOLUTION TO THE LONG-DEBATED ISSUES OF *SLAUGHTER-HOUSE* AND THE PRIVILEGES OR IMMUNITIES CLAUSE

The Privileges or Immunities Clause may always be considered a quirk of American Constitutional Law.<sup>214</sup> Case in point: if recent Supreme Court decisions are any indication, the Court is unlikely to appease legal historians if they continue to encourage the Court to disavow *Slaughter-House*.<sup>215</sup>

In deciding to continue to uphold *Slaughter-House*, the Supreme Court should, and may already, view the Privileges or Immunities Clause under "sunk cost" principles.<sup>216</sup> Under these principles, the Court should recognize the 140 years that American jurisprudence has invested in the *Slaughter-House* interpretation of the Privileges or Immunities Clause.<sup>217</sup> Furthermore, the Court should consider that few substantive rights would be recognized if *Slaughter-House* were overturned.<sup>218</sup> Because of these factors, legal scholars should both accept that the *Slaughter-House* interpretation of the Privileges or Immunities Clause is unlikely to change, but also embrace that the Court's ad hoc approach in the years since *Slaughter-House* has nevertheless secured substantive rights through alternative legal avenues.<sup>219</sup>

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<sup>214</sup> See Hamburger, *supra* note 28, at 61.

<sup>215</sup> See generally McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (holding that the Second Amendment was incorporated against state action without "disturb[ing] the *Slaughterhouse* holding"); Saenz v. Roe, 526 U.S. 489 (1999) (finding that the right to travel was protected by the Privileges or Immunities Clause without altering the Court's ruling in *Slaughter-House*); McDonald Transcript, *supra* note 8 (signaling both a sense of acquiescence regarding the Privileges or Immunities Clause's diminished status in the years since *Slaughter-House*, and acceptance of the Due Process Clause's preeminence in its absence).

<sup>216</sup> See Hal R. Arkes & Peter Ayton, *The Sunk Cost and Concorde Effects: Are Humans Less Rational Than Lower Animals?*, PSYCHOL. BULL., Sept. 1999, at 594; Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 124, 124 (1985); Thomas Kelly, *Sunk Costs, Rationality, and Acting for the Sake of the Past*, 38 NOUS 60, 61–63 (2004); Michael Roberto, *Cutting Your Losses: How to Avoid the Sunk Cost Trap*, IVEY BUS. J. (Nov.–Dec. 2009), <http://www.iveybusinessjournal.com/topics/global-business/cutting-your-losses-how-to-avoid-the-sunk-cost-trap>.

<sup>217</sup> See *infra* notes 220–228 and accompanying text.

<sup>218</sup> See *infra* notes 229–241 and accompanying text.

<sup>219</sup> See *infra* notes 242–254 and accompanying text.

### A. The “Sunk Cost” Principles as Manifested in American Jurisprudence

“Sunk cost” principles are “manifested in a greater tendency to continue an endeavor once an investment in money, effort, or time has been made.”<sup>220</sup> Relying on sunk costs, however, is irrational because one’s prior investment should not influence one’s consideration of future options.<sup>221</sup> Instead, the benefit of a future action, alone, should inform a decision, rather than a past investment—which, for better or for worse, cannot be changed.<sup>222</sup> Despite the inherent irrationality in considering the sunk costs of a previous action, research suggests that people commonly commit this error as a result of a popular “don’t waste” mindset.<sup>223</sup> Instead, the rational consideration to make before taking an action is to consider the “opportunity cost” of that action.<sup>224</sup> Opportunity costs are the profits sacrificed by rejecting to seek a particular path; simply put, they are the costs of “the road not taken.”<sup>225</sup>

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<sup>220</sup> Arkes & Blumer, *supra* note 216, at 124. Arkes and Blumer describe a common example of a “sunk cost” situation:

A man wins a contest sponsored by a local radio station. He is given a free ticket to a football game. Since he does not want to go alone, he persuades a friend to buy a ticket and go with him. As they prepare to go to the game, a terrible blizzard begins. The contest winner peers out his window over the arctic scene and announces that he is not going, because the pain of enduring the snowstorm would be greater than the enjoyment he would derive from watching the game. However, his friend protests, “I don’t want to waste the twelve dollars I paid for the ticket! I want to go!” The friend who purchased the ticket is not behaving rationally according to traditional economic theory. Only incremental costs should influence decisions, not sunk costs. If the agony of sitting in a blinding snowstorm for three hours is greater than the enjoyment one would derive from trying to see the game, then one should not go. The \$12 has been paid whether one goes or not. It is a sunk cost. It should in no way influence the decision to go. But who among us is so rational?

*Id.* at 125.

<sup>221</sup> Kelly, *supra* note 216, at 61 (noting that “the conventional wisdom about sunk costs then, might be summarized as the conjunction of two claims: (1) individuals often do give weight to sunk costs in their decision-making, and (2) it is irrational for them to do so”); Roberto, *supra* note 216 (stating that “[t]he amount of any previous irreversible investment in [an] activity ought to not affect the decision that is being made. Prior investments, which cannot be recovered, represent sunk costs which should not be relevant”).

<sup>222</sup> Kelly, *supra* note 216, at 63–64; Roberto, *supra* note 216.

<sup>223</sup> Arkes & Ayton, *supra* note 216, at 565 (noting that relying on sunk costs is often predicated on one’s desire “not to appear to be wasteful”); Kelly, *supra* note 216, at 64 (noting that “individuals often continue to pour resources into already-begun projects because they fear that, if they abandon a project in which they have already invested heavily, they will be perceived as being *wasteful* by others”).

<sup>224</sup> Roberto, *supra* note 216.

<sup>225</sup> *Id.* (stating that “[b]y sticking to a previously chosen path, an organization naturally forsakes other possible uses for its physical, financial, and human resources”).

Although the sunk cost doctrine is generally understood to describe economic or psychological happenings, it applies just as easily to the treatment of the Privileges or Immunities Clause in American Constitutional jurisprudence.<sup>226</sup> For example, the Supreme Court's 2010 decision in *McDonald v. City of Chicago* to not revive the Privileges or Immunities Clause highlighted a "don't waste" mindset: the Court noted that overturning *Slaughter-House* was not worth risking decades of precedential decisions.<sup>227</sup> Although the Court's current Privileges or Immunities Clause jurisprudence may mischaracterize the drafters' intentions, the decisions of the Supreme Court suggest that the Court believes overturning 140 years of case law in the name of historical purity would be "wasteful."<sup>228</sup>

### B. *Maintaining the Slaughter-House Decision Today: The Lack of Opportunity Cost*

Although it is irrational to consider the sunk costs of an action prior to proceeding, the Supreme Court's choice to stave off modern attempts to revive the Privileges or Immunities Clause is nonetheless rational.<sup>229</sup> This is because there are no real opportunity costs sacrificed if the Supreme Court continues to uphold *Slaughter-House*.<sup>230</sup> If the Supreme Court had decided *Slaughter-House* differently in 1872, such a decision would have massively expanded Americans' substantive rights at that time.<sup>231</sup> In contrast, if the decision to revive the Privileges or

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<sup>226</sup> See Arkes & Ayton, *supra* note 216, at 598–99; Arkes & Blumer, *supra* note 216, at 124; Kelly, *supra* note 216, at 63–64; Roberto, *supra* note 216.

<sup>227</sup> See 130 S. Ct. at 3030–31 (plurality opinion) (noting that the Supreme Court had capably analyzed fundamental rights under the Due Process Clause for the 140 years since *Slaughter-House*, and for that reason, "declin[ing] to disturb the *Slaughterhouse* holding"); McDonald Transcript, *supra* note 8, at 7. During oral argument in *McDonald*, Justice Scalia addressed the petitioner's Privileges or Immunities Clause argument and 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." *Id.* at 7.

<sup>228</sup> See Arkes & Blumer, *supra* note 216, at 124. Compare *supra* notes 19–84 and accompanying text (describing three interpretations of the Antebellum and Reconstruction Eras that support a robust Privileges or Immunities Clause), with *supra* notes 85–148 and accompanying text (illustrating how the Supreme Court has relegated the Privileges or Immunities Clause to a position of relative insignificance and has expressed a disinclination to move from this position).

<sup>229</sup> See Arkes & Ayton, *supra* note 216, at 598–99; Kelly, *supra* note 216, at 65–66.

<sup>230</sup> See *infra* notes 156–213 and accompanying text.

<sup>231</sup> See Hamburger, *supra* note 28, at 61.

Immunities Clause were made today, the impact on those same rights would be quite underwhelming.<sup>232</sup>

In terms of the Privileges or Immunities Clause, the cost of “the road not traveled” is relatively low.<sup>233</sup> Whether one subscribes to an interpretation of the Privileges or Immunities Clause based on the Comity Clause,<sup>234</sup> the ratification debates,<sup>235</sup> or the theme of federalism,<sup>236</sup> the truth is that most of the advances that the Privileges or Immunities Clause would have achieved in 1872 have been attained through alternative avenues in the subsequent decades.<sup>237</sup> If the Supreme Court decided to revive the Privileges or Immunities Clause under a Comity Clause-based interpretation, the Privileges or Immunities Clause would provide very little beyond what has already been achieved through substantive Due Process standards.<sup>238</sup> Alternatively, if the Supreme Court relied on the ratification debates to restore the Privileges or Immunities Clause, the clause would only serve to incorporate the remaining two provisions of the Bill of Rights that have not yet been incorporated through the selective incorporation process.<sup>239</sup> Lastly, if the Supreme Court referred to the growing sense of federalism as a guide to interpret the Privileges or Immunities Clause, the clause would add very little to the federal government’s dominance over the states, which has been significantly established through organic growth.<sup>240</sup> Because most of the rights that the Privileges or Immunities Clause would have protected at the time of *Slaughter-House* have been secured through alter-

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<sup>232</sup> See *supra* notes 156–213 and accompanying text (describing how the intended effects of the Privileges or Immunities Clause have been achieved through alternative legal avenues since *Slaughter-House*).

<sup>233</sup> See *supra* notes 156–213 and accompanying text.

<sup>234</sup> See *supra* notes 26–48 and accompanying text.

<sup>235</sup> See *supra* notes 49–68 and accompanying text.

<sup>236</sup> See *supra* notes 69–84 and accompanying text.

<sup>237</sup> See *supra* notes 156–213 and accompanying text (illustrating how the gains that are sought after based on each of these approaches have been largely achieved through alternative avenues in the years following *Slaughter-House*).

<sup>238</sup> Compare *supra* notes 26–48 and accompanying text (describing the Comity Clause approach), with *supra* notes 156–174 and accompanying text (describing how this approach’s sought-after gains have been largely achieved through alternative means).

<sup>239</sup> Compare *supra* notes 49–68 and accompanying text (describing the ratification debates approach), with *supra* notes 175–196 and accompanying text (describing how this approach’s sought-after gains have been largely achieved through alternative means).

<sup>240</sup> Compare *supra* notes 69–84 and accompanying text (describing the federalism approach), with *supra* notes 197–213 and accompanying text (describing how this approach’s sought-after gains have been largely achieved through alternative means).

native means in the subsequent decades, there are no real opportunity costs that necessitate that the Supreme Court change course today.<sup>241</sup>

### C. *Was the Wrong Way the Right Way All Along?*

Given the lack of opportunity costs in maintaining the current course of Privileges or Immunities Clause jurisprudence, it is clear that the Supreme Court was rational in refusing the modern attempts to revive the Clause.<sup>242</sup> In addition, the argument could be made that Justice Miller's decision to shelve the Privileges or Immunities Clause in *Slaughter-House* may have been the most rational decision the Supreme Court could have made at that time.<sup>243</sup> This is the case because even if a majority of the Court at the time believed that the Privileges or Immunities Clause should have extended substantive rights, there may have been real dangers in doing so.<sup>244</sup> In the Reconstruction Era, the American people may not have been ready for the sudden wealth of substantive rights that the Privileges or Immunities Clause would have provided.<sup>245</sup> The country had just weathered the most divisive event in its history—and such wounds do not heal overnight.<sup>246</sup> If the Privileges or Immunities Clause had been interpreted as its drafters intended it, the drastic change in the legal landscape may have occurred too soon—which might have threatened the fragile, newly formed Union.<sup>247</sup> Even if the justices felt that the Privileges or Immunities Clause should have expanded substantive rights, they might have also realized that issuing a decision reaching this conclusion would have come at a potentially steep price.<sup>248</sup> The costs of extending these rights simply might not have been worth the benefits.<sup>249</sup>

<sup>241</sup> See *supra* notes 233–240 and accompanying text.

<sup>242</sup> See Roberto, *supra* note 216; *supra* notes 229–241 and accompanying text.

<sup>243</sup> See *Butchers' Benevolent Assoc. of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36, 78–80 (1872) [hereinafter *Slaughter-House*]; Hamburger, *supra* note 28, at 77–79 (suggesting that in 1872, America may not have been ready for such a significant increase in substantive rights); see also David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 392–95 (2003) (arguing that the Due Process and incorporation doctrines better serve Americans' fundamental rights than would a robust Privileges or Immunities Clause).

<sup>244</sup> See *supra* notes 229–241 and accompanying text (arguing that there are no real opportunity costs sacrificed if the Supreme Court maintains its current interpretation of the Privileges or Immunities Clause).

<sup>245</sup> See Hamburger, *supra* note 28, at 77–79.

<sup>246</sup> See *id.* at 77.

<sup>247</sup> See Bogen, *supra* note 243, at 393–94.

<sup>248</sup> See *id.*

<sup>249</sup> See *id.*

In a similar way, the Court's ad hoc approach in the years after *Slaughter-House* suggests that the Court recognized additional substantive rights only when it thought it was rational to do so.<sup>250</sup> Rather than instantaneously recognizing a whole slew of substantive rights—a potentially risky move—the Court predominantly recognized rights in a timely way that was in line with public opinion, instead of acting too far ahead of it.<sup>251</sup> Instead of incorporating the entirety of the Bill of Rights in 1872, the Court has incorporated a majority of the Bill of Rights slowly through the selective incorporation process.<sup>252</sup> And, rather than establish a formal hierarchy of federal citizenship as supreme over state citizenship, this supremacy has been accomplished organically through the decades through other means.<sup>253</sup> As such, the drafters' goal in enacting the Privileges or Immunities Clause, whatever it truly was, has been inevitably realized in the 140 years after its adoption—albeit in a very nuanced and rational way.<sup>254</sup>

#### CONCLUSION

Although legal historians may never stop pushing to overturn *Slaughter-House*, they should reflect on what their goals are for doing so. If the goal is to usher in monumental additions to our substantive rights, they may be out of luck, as much of what the Privileges or Immunities Clause would have achieved in 1872 has since been realized in the subsequent decades. Furthermore, it is unlikely that the Supreme Court will ever overturn *Slaughter-House*. Instead, the Supreme Court has likely subscribed to sunk cost principles. Specifically, the Court has expressed its resistance to overturn *Slaughter-House* due to the long-established alternative legal avenues that have largely achieved the intended goals of the Privileges or Immunities Clause. Legal scholars should recognize that the Supreme Court's dependence on these principles, although typically irrational, is in fact rational under these circumstances. This is particularly true in the case of *Slaughter-House* be-

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<sup>250</sup> See *supra* notes 168–174 and accompanying text (explaining the way in which the Supreme Court has employed the Due Process Clause to protect certain fundamental rights); *supra* notes 182–196 and accompanying text (describing the Supreme Court's use of a selective incorporation process that has incorporated nearly all of the Bill of Rights against state action); *supra* notes 205–213 and accompanying text (detailing the Supreme Court's role in ensuring that federal power trumped state power at pivotal moments in the country's history).

<sup>251</sup> See *supra* notes 156–174 and accompanying text (due process gains).

<sup>252</sup> See *supra* notes 175–196 and accompanying text (gradual incorporation).

<sup>253</sup> See *supra* notes 197–213 and accompanying text (federal power growth).

<sup>254</sup> See *supra* notes 156–213 and accompanying text.

cause the opportunity costs in maintaining the current Privileges or Immunities Clause jurisprudence are relatively low. For the most part, the potential purposes of the clause have been otherwise achieved. Perhaps, instead, legal scholars who advocate for a revival of the Privileges or Immunities Clause should ask themselves whether their advocacy for the clause is entirely rational.

EMILY JENNINGS