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ARTICLES

REIMAGINING SUBSTANTIVE DUE PROCESS LIBERTY INTERESTS AS PRIVILEGES OR IMMUNITIES OF CITIZENSHIP

JASON BUHI*

ABSTRACT

This article engages with Justice Thomas's proposal to reimagine select modern substantive due process (SDP) liberty interests as privileges or immunities of citizenship. It is well known that the branch of SDP theory that allows a court to declare uncodified, unenumerated fundamental rights within the Fourteenth Amendment's Due Process Clause has been controversial. The conservative bench's stripping of federally-protected abortion choice in *Dobbs v. Jackson Women's Health Organization* marked the first pruning of a recognized SDP liberty interest since the liberal bench overturned *Lochner v. New York* in 1937. It also called into question whether this iteration of the U.S. Supreme Court will continue to honor other established SDP rights. Although Justice Thomas's *Dobbs* concurrence declared that he would support overturning the *Griswold*-line of SDP privacy cases, he also offered a possible alternative future wherein some of those liberty interests might be reimagined as privileges or immunities of citizenship. This proposal merits discussion in at least two respects: first, to advance the basic understanding of the Privileges and/or Immunities Clauses themselves; and second, for the opportunity to establish a firmer foundation for certain unenumerated rights. This article thus engages with previous scholarship and jurisprudence surrounding these three clauses while adding a new analysis: namely, an initial thought experiment addressing the specific issue of whether it is plausible to reimagine any SDP liberty interests as privileges or immunities of citizenship and, if so, which rights would be encompassed.

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* Associate Professor, Barry University Andreas School of Law (Ph.D., University of Hong Kong (2017); J.D., Penn State (2006)). The author wishes to sincerely thank the Barry University School of Law and its Dean, Leticia Diaz, for providing a grant to assist the research and writing of this article, as well as research assistants C. Thomas Mitchell and Anthony Sartini for their contributions. A draft of this paper was presented at the 8th American Constitution Society Conference held at the University of Oklahoma School of Law (16 Feb. 2024). The analysis provided herein, and any errors are solely those of the author.

I. INTRODUCTION

The U.S. Supreme Court's watershed opinion in *Dobbs v. Jackson Women's Health Organization* (2022) presented the first instance of the judiciary stripping recognition from a federally-protected substantive due process right in 85 years,[1] when the liberal New Deal Court overturned *Lochner v. New York* in 1937.[2] In so doing it called into question whether this new, more conservative iteration of the Supreme Court will continue to honor other established substantive due process (hereinafter "SDP") rights.[3] Whereas five members of the six-justice majority repeatedly insisted that they were not interested in targeting the other recognized SDP rights—distinguishing the abortion right at issue in *Dobbs* as "inherently different" because it "destroys […] potential life"—Justice Clarence Thomas offered no such reservation.[4] After reiterating his longstanding objection to the practice of judges declaring new, unenumerated fundamental rights as inherent within the Fourteenth Amendment's Due Process Clause as transgressing the proper judicial role, Justice Thomas announced his willingness to reconsider "all of this Court's substantive due process precedents, including *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*."[5] What he offered next, however, was novel:

> After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.[6]

This was not the first time that Justice Thomas has written that rights which have been recognized or extended through the Fourteenth Amendment's Due Process Clause rather ought to have been extended through the Fourteenth Amendment's Privileges or Immunities Clause.[7] It was, however, the first time he laid down the gauntlet so plainly, inviting direct legal argumentation.

This article thus engages with Justice Thomas's proposal, endeavoring to outline which currently recognized SDP liberty interests might enjoy independent or concurrent recognition as privileges or immunities of citizenship. In order to do so, it heeds Justice Thomas's correct assertion that

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1. 597 U.S. 215, 302 (2022).
2. 198 U.S. 45, 64-65 (1905).
3. *See Dobbs*, 597 U.S. at 362-64 (Kagan, J., dissenting).
4. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).
5. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).
6. *Id.* at 333 (Thomas, J., concurring) (quoting U.S. CONST. amend. XIV § 1) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010)).
7. *See McDonald*, 561 U.S. at 806-13.

"[t]o answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights."[8] The answers do demand a methodology, and so this article begins by identifying recognized SDP rights and privileges and/or immunities of U.S. citizenship before looking for potential overlaps.

This is only a thought experiment, given the disruptive effect of summarily renouncing a century's worth of precedent.[9] With that said, it is entirely possible to begin to correct the grievous jurisprudential errors perpetrated by the post-Civil War Supreme Court in *The Slaughter-House Cases* (1872) and *United States v. Cruikshank* (1875)—cases that stripped the Privileges or Immunities Clause of its intended meaning—by reexamining many of our unenumerated fundamental rights through the lens of privileges and/or immunities,[10] as developed under the Article IV Privileges and Immunities Clause as well as the Fourteenth Amendment's Privileges or Immunities Clause (hereinafter, the "P/I Clauses").[11] Identifying and establishing an alternative foundation for protecting those fundamental rights may help to reduce the ideological controversy underlying their recognition, thereby taking them "out of fire" of judicial suspicion. All of this is possible via historical reconstruction of the P/I Clauses and a holistic reading of Section 1 of the Fourteenth Amendment itself.

Following this introduction, Section II of this article describes the ideological controversies surrounding the discovery and protection of unenumerated rights under the federal Constitution. Next, Section III explores the SDP concept, the controversy surrounding its use, and a survey of recognized SDP liberty interests. Section IV explores the concept of privileges and/or immunities, the debates over establishing a proper jurisprudence for them, and the Supreme Court's struggles to announce what rights are included therein. It also proffers an incomplete list of privileges and/or immunities of citizenship derived from historical sources and precedents. Section V presents the thought experiment an initial attempt to harmonize those lists by reasoning which recognized SDP liberty interests may or may not also find independent

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8. *Dobbs,* 597 U.S. at 333 (citing *McDonald,* 561 U.S. at 854).

9. At stake are liberty interests including the rights to privacy, contraceptives, bedroom intimacy, marriage equality and recognition, to direct the education of one's own children, and to define one's own family structure. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the right to privacy is a fundamental right and that the use of contraceptives is within the right to privacy); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that bedroom intimacy falls under the fundamental right to privacy); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that marriage equality and recognition is a fundamental right); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that there is a liberty interest in directing one's own child's education); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that there is a fundamental right in defining one's own family structure).

10. The Slaughter-House Cases, 83 U.S. 36 (1872); United States v. Cruikshank, 92 U.S. 542 (1875).

11. U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1.

or concurrent protection under the P/I Clauses. Finally, Section VI will offer brief concluding remarks.

II. RECOGNITION AND PROTECTION OF UNENUMERATED RIGHTS UNDER THE U.S. CONSTITUTION

The U.S. Constitution both establishes the federal government of the United States as well as provides protections for individuals against certain government actions.[12] The individual rights that the Constitution now protects can be classified into three major categories according to their textual origins.[13] First and most securely, most of these individual rights are *codified and enumerated*, such as those contained in the Bill of Rights and subsequent amendments. Second, an untold number of these rights are *codified and unenumerated*, such as those encompassed by the original Article IV Privileges and Immunities Clause.[14] That is, the Constitution's Framers incorporated this loaded legal concept without explicitly recording the rights contained within it.[15] Third, and most controversially, the Supreme Court has held that the Constitution also protects *uncodified and unenumerated* rights. These select rights are not directly stated anywhere in the text but have been discovered via inference to other constitutional rights and the Court's perception of the zeitgeist of the times.[16]

Thus far, the word "liberty" within the Fourteenth Amendment's Due Process Clause has served as the primary fountainhead of unenumerated rights. Indeed, as one of the busiest clauses in the Constitution, the Due Process Clause now plays several roles at the same time: it encompasses the requirements of procedural due process;[17] it incorporates most of the Bill of Rights upon the states so as to protect individuals against the encroachments of their state and local governments;[18] and, over time, it has been interpreted to include a number

12. This is often referred to as "negative rights." *See, e.g.*, Dustin Coffman, *Pathways to Justice: Positive Rights, State Constitutions, and Untapped Potential*, 24 MARQ. BENEFITS & SOC. WELFARE L. REV. 181, 187-88 (2023). The U.S. Constitution does not mandate "positive rights," which means that it does not require government entities to actively provide certain services to individuals, such as healthcare, education, or employment. *Id.* at 188-89; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973) (quoting Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (Stewart, J., concurring)) (affirming the foundational principle that the Constitution does not provide affirmative rights).

13. Author's own taxonomy.

14. U.S. CONST. art. IV, § 2, cl. 1.

15. *See infra* Section IV.A.1 for a discussion of the origins of this clause.

16. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (discussing the "penumbras" formed throughout the guarantees of the Bill of Rights in recognizing a novel "right to privacy").

17. Mathews v. Eldridge, 424 U.S. 319, 333-35 (1976).

18. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the First Amendment freedoms of speech and press are among the rights incorporated upon the states through the Due Process Clause); *see also* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (holding that the Second Amendment right to bear arms is incorporated upon the states through the Due Process

of implied rights contained within the clause's promise of "liberty" (i.e., that no state shall "deprive any person of life, *liberty*, or property, without due process of law"). This practice of declaring new "liberty interests"—tantamount to new fundamental rights—is a major aspect of the field of jurisprudence known as Substantive Due Process (SDP).[19]

Along with the newly constitutionalized right of Equal Protection, both of the antebellum concepts of Privileges and Immunities and Due Process were reintroduced as part of the Fourteenth Amendment following the Civil War, thereby constituting new, hard-won limits upon the arbitrary abuses of state governments.[20] Despite their legislative histories, however, the new Due Process Clause usurped two important roles that the new Privileges or Immunities Clause was intended to play. First, the congressional record conclusively proves that the Privileges or Immunities Clause was meant to be the mechanism through which the Bill of Rights was incorporated upon the states.[21] That grandiose intention was quickly dashed by the Supreme Court in a line of narrowing opinions including *The Slaughter-House Cases* and *United States v. Cruikshank*,[22] discussed later. Second, it was expected that the new Privileges or Immunities Clause would also encompass other rights associated with national citizenship, but those same cases went so far as to circumscribe the natural rights jurisprudence traditionally associated with the Article IV Clause.[23]

With those differences being highlighted, two further important similarities must be noted. First, generally speaking, both SDP and P/I protect a recognized fundamental right to a similar degree, requiring judges to view any apparent encroachment upon them with heightened scrutiny.[24] Second, and most importantly for present purposes, the criteria for determining what constitutes a fundamental right under either of these clauses are not precisely defined.

Clause); *see also* Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (holding that the Fourth Amendment protection against unreasonable searches and seizures extends to the states through the Fourteenth Amendment Due Process Clause); *see also* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment right against self-incrimination is incorporated to the states through the Due Process Clause).

19. *See* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

20. U.S. CONST. amend. XIV, § 1.

21. *See infra* Section IV.A.2 for a discussion of the origins of this clause.

22. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).; United States v. Cruikshank, 92 U.S. 542 (1875).

23. *See, e.g.*, *The Slaughter-House Cases*, 83 U.S. at 77.

24. When the Supreme Court recognizes a fundamental right, it typically applies a rigorous standard known as "strict scrutiny" to any government action that limits that right. Roy G. Spece Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 295 (2015). Strict scrutiny requires that the government must show both that there is a compelling reason for advancing its restriction and that the restriction is narrowly tailored to achieve that purpose. *Id.* If it fails to establish either prong under this standard, the government action is deemed unconstitutional. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022). Conversely, when a right is not deemed fundamental, the Court applies a less rigorous standard known as rational basis review which is highly deferential to the government's desired actions. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1339 (2018).

III. RIGHTS IDENTIFICATION UNDER SUBSTANTIVE DUE PROCESS

Given the impetus of Justice Thomas's challenge to it, this article begins by surveying SDP jurisprudence. This section introduces: (A) the methodologies used to uncover and declare new liberty interests under the Due Process Clause; (B) criticisms of that practice; and (C) a survey of the liberty interests that have been declared through the use of SDP over time.

A. Methodologies

The jurisprudence surrounding the Due Process Clause is far more advanced than that of the P/I Clauses. Several different justifications have been offered for the discovery of new rights under SDP theory, the most resilient of which appears to be identification of a liberty interest that is "deeply rooted in this nation's history and tradition."[25] Other modern iterations have presented variations on that theme.[26] For example, Chief Justice Rehnquist announced the most demanding standard to date when he declared in *Washington v. Glucksberg* (1997) that:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed 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." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[27]

On the other hand, Justice Kennedy deployed the most abstract test for discovering a new SDP right to date in *Obergefell v. Hodges* (2014), stating:

> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." Rather, it requires courts to exercise reasoned judgment in identifying interests of the

25. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

26. The initial, more primitive iteration was based on the premise that the Supreme Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on its belief that a particular state law has no "rational or justifying" purpose or is offensive to a "sense of fairness and justice." *See, e.g.,* Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925); Griswold v. Connecticut, 381 U.S. 479, 511 (1965) (Black, J., dissenting).

27. *Glucksberg*, 521 U.S. at 720-21 (citations omitted).

> person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.[28]

Although they contest its probative value, Justices Rehnquist and Kennedy thus agree that American history and tradition is at least a factor to be considered in the process of declaring new uncodified, unenumerated rights under the Due Process Clause. These considerations, as abstract and malleable as they may be,[29] are nevertheless central to the Court's practice of identifying SDP liberty interests.

B. Criticisms

With that said, conservative jurists have focused suspicion upon SDP jurisprudence ever since the Court declared an over-arching constitutional "right to privacy" in *Griswold v. Connecticut* (1964).[30] Although Justice Douglas was extraordinarily careful to frame his opinion in terms of "penumbras" of the Bill or Rights rather than Fourteenth Amendment liberties—a jurisprudence he associated with the conservative bench of the *Lochner* Era—future jurists have discounted the distinction.[31] In his *Griswold* dissent, Justice Black warned:

> [T]here is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am

28. Obergefell v. Hodges, 576 U.S. 644, 663-64 (2015) (citations omitted).

29. Justices have continually warned that SDP allows judges free reign to insert their personal preferences into law. *See, e.g.*, *Griswold*, 381 U.S. at 520-21 (Black, J., dissenting); *Moore*, 431 U.S. at 502; *Glucksberg*, 521 U.S. at 720 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)); *Dobbs*, 597 U.S. at 239-40.

30. *Griswold*, 381 U.S. at 485.

31. Even within *Griswold*, Justices Harlan and White, concurring, framed their analyses around the Fourteenth Amendment's Due Process Clause. *See id.* at 499-507. Since then, the Court has characterized the *Griswold* decision as rooted in substantive due process. *See, e.g.*, *Glucksberg*, 521 U.S. at 720; *Obergefell*, 576 U.S. at 663.

> constrained to say will be bad for the courts, and worse for the country [. . .].[32]

Those criticisms persisted in one form or another, including by subsequent jurists who were self-conscious of their own deployment of SDP theory. For example, in *Moore v. City of East Cleveland* (1977), Justice Powell declared a liberty interest in allowing persons to define their own family units, while cautioning:

> Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment [. . .].[33]

That range of perspectives was on display once again, generations later, in the Court's landmark *Dobbs* decision.[34] Featuring a solid conservative majority for the first time in eight decades, the *Dobbs* Court overturned the federally-guaranteed access to abortion right announced in *Roe v. Wade* and upheld in *Casey v. Planned Parenthood*.[35] Although the three dissenting Justices aver that the *Dobbs* rationale threatens the entirety of SDP cases,[36] all but one of the majority Justices repeatedly insisted that their decision was focused solely upon abortion precedent,[37] stressing that *Roe* and *Casey* uniquely involved "potential life."[38]

The sole jurist who did not ascribe to that narrowing pledge was Justice Thomas, who wrote separately to emphasize his position. He began by summarizing his longstanding view that SDP is an "oxymoron" that "lack[s] any basis in the Constitution."[39]

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32. *Griswold*, 381 U.S. at 520-21 (Black, J., dissenting).

33. *Moore*, 431 U.S. at 502.

34. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

35. *Id.* at 302; *See also* Roe v. Wade, 410 U.S. 113, 164 (1973); *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

36. *See Dobbs*, 597 U.S. at 359-423 (Kagan, J., dissenting).

37. "[N]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Id.* at 295 (majority opinion); *Id.* at 332 (Kavanaugh, J., concurring).

38. *See Roe*, 410 U.S. at 159 (stating that abortion is "inherently different"); *Casey*, 505 U.S. at 852 (stating that abortion is "a unique act").

39. *Dobbs*, 597 U.S. at 331 (Thomas, J., concurring) (quoting Johnson v. United States, 576 U.S. 591, 607-08 (2015) (Thomas, J., concurring)). He concludes his concurrence in *Dobbs* by stating, "Substantive due process conflicts with that textual command and has harmed our country

> [T]he Due Process Clause at most guarantees process. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided." [. . .] "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." The resolution of this case is thus straightforward. Because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion.[40]

Extrapolating from that reasoning, Justice Thomas declared his position that other SDP cases should therefore be overturned:

> [I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents.[41]

What followed next, however, was novel: Justice Thomas announced his vision that several SDP liberty interests recognized by previous Court iterations might be recast as privileges or immunities of citizenship in a manner more acceptable to himself and other originalists.[42] Although Justice Thomas previously made this observation,[43] he never so clearly dropped the gauntlet to invite the exercise:

> After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause

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in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity." *Id.* at 336.

40. *Id.* at 331-32 (citations omitted) (quoting McDonald v. City of Chicago, 561 U.S. 742, 811 (2010)).

41. *Id.* at 332 (quoting Ramos v. Louisiana, 590 U.S. 83, 132 (2020) (Thomas, J., concurring)) (quoting Gamble v. United States, 587 U.S. 678, 718 (2019) (Thomas, J., concurring)).

42. *Id.* at 333.

43. *McDonald*, 561 U.S. at 806 (Thomas, J., concurring).

> protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights.[44]

That statement provided impetus for this article: to begin the thought experiment as to which recognized SDP liberty interests (past or present) might share a basis in privileges or immunities of citizenship.

C. Recognized Liberty Interests

This section briefly surveys the SDP liberty interests that have been recognized by the Supreme Court. Broadly speaking, these may be classified as: unfettered property ownership; economic liberty; directing the education of one's children; travel; privacy and contraceptives; abortion; family association; bedroom intimacy; and marriage equality.

1. Unfettered Property Ownership.—In support of the conservative bench's criticism that SDP is often wielded to "disastrous ends,"[45] jurists point out that the Supreme Court first invoked the Fifth Amendment's Due Process Clause in *Scott v. Sandford* to declare Congress powerless to emancipate persons held in bondage in the federal territories.[46] No subsequent Court iteration ever overturned that decision; rather, *Dred Scott* "was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox;"[47] that is, the Reconstruction Amendments themselves.[48]

2. Economic Liberty.—Economic Liberty stood as the original centerpiece of the Court's SDP jurisprudence. As early as the 1897 case of *Allgeyer v. Louisiana*, the Supreme Court applied the Fourteenth Amendment to hold that a state law prohibiting out-of-state insurance companies from doing business in the host state deprived a potential customer of its liberty without due process.[49] In a soaring rhetorical style often associated with later SDP cases,[50] that unanimous Court held that "liberty" meant:

> [N]ot only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to [be] free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work

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44. *Dobbs*, 597 U.S. at 333 (Thomas, J., concurring) (citing *McDonald*, 561 U.S. at 854 (Thomas, J., concurring)).

45. *Gamble*, 139 S. Ct. at 1989 (Thomas, J., concurring).

46. Obergefell v. Hodges, 576 U.S. 644, 695 (2015) (Roberts, C.J., dissenting) (citing Scott v. Sandford, 60 U.S. 393, 452 (1857)).

47. *Id.* at 696.

48. U.S. CONST. amend. XIV, § 1, cl. 1.

49. Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897).

50. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.").

> where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[51]

Allgeyer thus set the stage for what came to be known as the Lochner Era, a four-decade span wherein the Court repeatedly struck down state efforts to establish labor regulations by holding that the Fourteenth Amendment protects the individual's paramount freedom to contract.[52] Of course, that era is named after the more famous case of *Lochner v. New York* (1905),[53] where the Court invalidated a New York law that prohibited bakers from working more than sixty hours per week.[54] In another illustrative example, the Court invalidated child labor laws in *Hammer v. Dagenhart* (1918).[55] During the Great Depression, however, the Court shifted polarity. Four-term President Franklin Roosevelt appointed eight Justices during his twelve years in office, all of whom were committed to his New Deal platform of economic reforms.[56] By 1937, a new majority would repudiate freedom of contract as a fundamental right, upholding the constitutionality of a state minimum wage law in *West Coast Hotel Co. v. Parrish*.[57] Setting aside 40 years of precedent, Chief Justice Hughes wrote for the new majority "What is this freedom? The Constitution does not speak of freedom of contract."[58]

Perhaps a semblance of substantive due process regarding economic and property rights was already reimagined by the Rehnquist Court. For instance, *Pennell v. City of San Jose* (1988) involved a provision of a rent-control ordinance that was challenged on due process grounds.[59] The Court upheld the provision but accepted substantive due process as an appropriate basis for analysis.[60] Writing for the majority, Chief Justice Rehnquist invoked "reasonableness" as a suitable criterion for evaluating laws that impact property rights and determined that the policy at issue at least facially represented a

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51. *Allgeyer*, 165 U.S. at 589.

52. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

53. 198 U.S. 45 (1905).

54. *Id.* at 64. The petitioning bakers themselves wanted to hustle. *Id.* at 52-53.

55. 247 U.S. 251, 276-77 (1918).

56. Paul M. Sparrow, *FDR and the Supreme Court: A Lasting Legacy*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. AND MUSEUM (Feb. 23, 2016), https://fdr.blogs.archives.gov/2016/02/23/fdr-and-the-supreme-court-a-lasting-legacy/ [perma.cc/PQH7-RYP6].

57. 300 U.S. 379, 399-400 (1937).

58. *Id.* at 391; *see also* Olsen v. Nebraska, 313 U.S. 236, 246-47 (1941) (The Court cemented its abandonment of economic due process in *Olsen v. Nebraska*, upholding a state statute that limited the amount of compensation that private employment agencies could withhold from employees.).

59. Pennell v. City of San Jose, 485 U.S. 1 (1988).

60. *Id.* at 14.

rational attempt to accommodate conflicting interests.[61] Chief Justice Rehnquist drew upon a Warren Court precedent which stipulated that price controls may be held unconstitutional if deemed to be "arbitrary, discriminatory, or demonstrably irrelevant to [a] policy the legislature can adopt."[62] In so doing, he solidified that rational basis review is available as a basis for stringent review of government regulation when the justices choose to employ it.[63]

Other Rehnquist-era examples of substantive due process in the economic field are seen in *BMW v. Gore* (1995) and *State Farm v. Campbell* (2003).[64] Both cases asked whether punitive damages for economic harm imposed by state courts could be so excessive as to violate the Due Process Clause of the Fourteenth Amendment. *BMW* held that such a violation could occur, while *State Farm* refined the standards for punitive damages. Indeed, the *State Farm* majority held that a punitive damage award that was 145 times greater than the compensatory damages at issue in the underlying civil case was so excessive as to violate the Due Process Clause.[65] It is worth noting here that Justice Thomas did not agree with the majority in either case, citing general objections to substantive due process as well as the lack of any federal constitutional limits on the equity powers of state courts.[66]

3. Directing the Education of One's Children.—Less controversially, the pre-New Deal U.S. Supreme Court also recognized and upheld a SDP right of guardians directing the education of children, primarily through the landmark cases of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[67] In *Meyer*, the Court unanimously invalidated a Nebraska law that restricted the teaching of modern foreign languages to children.[68] Two years later, in *Pierce*, the Court extended this principle by striking down an Oregon law that required all children to attend public schools.[69] *Pierce* held that while the state may regulate all schools to ensure they meet certain standards, this law unconstitutionally "interfere[d] with the liberty of parents and guardians to direct the education and upbringing of children under their control."[70] These decisions were not only significant in establishing the doctrine of SDP, but form the foundations of its continued

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61. Justice Rehnquist left open the possibility that implementation of the provision at issue, which had not yet occurred in Pennell might generate valid due process objections.

62. *Id.* at 12 (citing The Permian Basin Rate Cases, 390 U.S. 747 (1968)).

63. Justice Thomas was not yet appointed to the Court.

64. BMW of North America Inc. v. Gore, 517 U.S. 559 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

65. *State Farm*, 538 U.S. at 429.

66. *BMW*, 517 U.S. at 598-99 (joining Scalia, J., dissenting); State Farm, 538 U.S. at 429-30 (Thomas, J., dissenting).

67. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

68. *Meyer*, 262 U.S. at 403. This landmark decision also spoke in heightened flourishes, recognizing the rights of individuals to contract "to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of [one's] own conscience." *Id.* at 399.

69. *Pierce*, 268 U.S. at 534-35.

70. *Id.*

practice today, offering a relatively stable and uninterrupted line of SDP precedent that is now a century old.

4. Travel.—In a largely forgotten case, *Kent v. Dulles*, the Supreme Court considered whether the executive branch could refuse to issue passports to individuals suspected of being Communists or suspected of wanting to travel abroad to further Communist causes.[71] Writing for a narrow 5-4 majority, Justice Douglas averred that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[72] Thus, although the Executive may regulate travel by requiring citizens to obtain passports, it may not condition that decision upon a political litmus test.[73]

5. Privacy, and Contraceptives.—In the 1960s the liberal Supreme Court began to build its SDP jurisprudence upon a new foundation: a right to privacy. Although the U.S. Constitution does not contain the word "privacy," momentum for formal recognition of an individual right to privacy had been building for decades.[74] In 1965, Justice Douglas claimed to discover that elusive right in *Griswold v. Connecticut*, opining:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'[75]

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71. Kent v. Dulles, 357 U.S. 116 (1958).

72. *Id*. at 125.

73. *Id.* at 128-29. However, this right has been subject to restrictions in some cases. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 19-20 (1965) (holding that the denial of a passport to travel to Cuba was constitutional); Korematsu v. United States, 323 U.S. 214, 223 (1944) (holding that the detention of Japanese Americans during World War II was a valid restriction).

74. For example, years before he was appointed to the Supreme Court, future-Justice Louis Brandeis eloquently argued for its existence in a famous and oft-cited 1890 Harvard Law Review article entitled "The Right to Privacy." *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

75. 381 U.S. 479, 484 (1965) (citations omitted).

Although there were simple legislative means available to cancel Connecticut's long antiquated law prohibiting the use of contraceptives between married partners, the federal case was used to lay a foundation for future privacy claims.[76] Indeed, a number of new SDP liberty interests would be identified as existing under the umbrella of privacy.[77]

6. Abortion Choice.—The Court built upon the right to privacy by providing its watershed decision federalizing abortion access in *Roe v. Wade*.[78] That "right to choose" was specifically predicated upon the right to privacy announced in *Griswold*.[79] The privacy interest in abortion was again upheld a generation later in *Planned Parenthood of Southern Pennsylvania v. Casey*,[80] although *Roe*'s specific disposition—a trimester framework regulating access to abortion services—was discarded in favor of a new test which turned on fetal viability.[81] Subsequent case law struggled to consistently apply that standard across the unceasing efforts of pro-life state legislatures seeking to limit abortion access,[82] before the right itself was ultimately revoked by a new Supreme Court majority in *Dobbs*.[83]

7. Family Association.—The Court also recognizes SDP liberty interests related to family association and family definition. For example, in *Moore v. City of East Cleveland*, the Supreme Court struck down a city zoning ordinance that limited occupancy of a dwelling to members of a single family.[84] The city's definition of "family" was so restrictive that it would have prevented a grandmother from living with her own grandchildren.[85] The Court thus recognized a SDP right to extended family association, that is, to a definition of "family" that extends beyond the nuclear family unit.[86]

Other cases in this line include *Stanley v. Illinois* (finding a liberty interest that prevents states from presuming that unmarried fathers are unfit for parenthood without a hearing);[87] *Zablocki v. Redhail* (striking down a state law that required individuals with child support obligations to obtain court

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76. David J. Garrow, *How* Roe v. Wade *Was Written*, 71 WASH. & LEE L. REV. 893, 895-96 (2014).

77. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (holding, seven years after *Griswold*, that the specific liberty interest in procuring access to contraceptives for married partners would be extended to unmarried persons).

78. 410 U.S. 113, 164 (1973).

79. *Id.* at 152-53; *see also Griswold*, 381 U.S. at 484.

80. 505 U.S. 833, 846 (1992).

81. After viability, a state was free to ban abortion to protect the fetus. *Id.* But for a fetus that was not yet viable, if the state's restriction had the effect of placing a substantial obstacle in the path of a woman seeking an abortion, this restriction was an undue burden and was unconstitutional. *Id.* at 895.

82. *See* Stenberg v. Carhart, 530 U.S. 914 (2000); Gonzales v. Carhart, 550 U.S. 124 (2007); Whole Women's Health v. Hellerstedt, 579 U.S. 582 (2016).

83. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

84. 431 U.S. 494, 503-06 (1977).

85. *Id.* at 499.

86. *Id.* at 503-04.

87. 405 U.S. 645, 658 (1972).

permission before marrying);[88] *Michael H. v. Gerald D.* (upholding a state law that presumed a child born to a married woman to be a child of the marriage);[89] and *Troxel v. Granville* (2000) (overturning a state law that allowed any third party to petition for child visitation rights over parental objections).[90]

8. Bedroom Privacy.—In 1986, the Supreme Court initially refused to extend the right to privacy to encompass the liberty of consenting adults to engage in certain sexual activities.[91] Seventeen years later, the Court reversed itself in *Lawrence v. Texas*, invalidating Texas's anti-sodomy law.[92] Justice Kennedy, writing for the majority, penned a soaring rhetorical tribute to an array of personal freedoms, making it difficult to pinpoint exactly what rights were vindicated, stating: "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."[93]

9. Marriage Equality.—Twelve years later, Justice Kennedy again wrote for a narrow majority announcing the right of same-sex couples to marry and have their unions recognized.[94] The Court's decision in *Obergefell v. Hodges* articulated that the right to marry is a fundamental right inherent in personal liberty.[95] The four dissenting justices each authored separate opinions criticizing the propriety of using SDP to extend marriage rights to same-sex couples, all sharing a common thread that the majority's decision usurped the democratic process and thrust the Justices' personal moral views upon the nation.[96] *Obergefell* presents the last declaration of a novel SDP right by the Supreme Court as of the time of this writing.

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88. 434 U.S. 374, 390-91 (1978).

89. 491 U.S. 110, 129-31 (1989).

90. 530 U.S. 57, 75 (2000).

91. Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986).

92. 539 U.S. 558, 578-79 (2003).

93. *Id.* at 562.

94. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

95. 576 U.S. 644, 664-65 (2015).

96. Chief Justice Roberts argued that the Constitution had nothing to say about the issue of same-sex marriage, suggesting that such matters should be decided through the democratic process rather than by the courts. *Id.* at 690, 693 (Roberts, C.J., dissenting). Justice Scalia accused the majority of a "judicial Putsch" to impose the majority's personal views on the entire nation under the guise of constitutional interpretation. *Id.* at 717-18 (Scalia, J., dissenting). Justice Alito largely echoed those concerns about judicial overreach while adding his observations on religious liberty. *Id.* at 741-42 (Alito, J., dissenting). Justice Thomas focused on the original meaning of the Due Process Clause, restating his view that it was intended to protect procedural rights rather than to confer any particular substantive rights. *Id.* at 721-22 (Thomas, J., dissenting).

IV. RIGHTS IDENTIFICATION UNDER PRIVILEGES AND/OR IMMUNITIES OF CITIZENSHIP

In turn, this section explores: (A) the methodologies used to identify privileges and/or immunities of citizenship; (B) criticisms and elaborations of those methods; and (C) a survey of the rights that have been recognized through P/I Clause jurisprudence to date.

A. Methodologies

The jurisprudence surrounding rights identification under the P/I Clauses is far less developed than that of SDP. The Court "has never undertaken to give any exact or comprehensive definition of the words 'privileges and immunities.'"[97] No formal tests have been announced. Instead, a major philosophical debate is evident between the antebellum interpretation of the Article IV clause and the post-Civil War method of interpreting the 14th Amendment clause.

1. The Article IV Privileges and *Immunities Clause*.—Article IV outlines the relationship between the states as states, as well as the relationship between the states and the federal government. The first clause of its second section reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[98]

The scholarly approach to determining which rights are encapsulated in this clause has been largely historical, with reference to treatises and customs reflecting English common law.[99] The inclusion of these words within colonial charters proves that "privileges" and "immunities" encompass at least the rights of English citizens that the colonists sought to maintain during the colonial era.[100] Based on historical research, Forte and Spalding write that these ancient "privileges" would have included:

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97. Blake v. McClung, 172 U.S. 239, 248 (1898).

98. U.S. CONST. art. IV, § 2, cl. 1.

99. The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms" and had been since the time of Blackstone. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *123-125.

100. For example, the Virginia Charter of 1606 promised that colonists "shall HAVE [sic] and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*." 7 THE FEDERAL AND STATE CONSTITUTIONS[,] COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3788, (Francis Newton Thorpe ed., 1909). Likewise, the 1639 Maryland Act for the Liberties of the People guaranteed that all free Christian inhabitants "[s]hall have and enjoy all such rights liberties immunities privileges and free customs within this Province as any natural born subject of England hath […]." *See* David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 805-06 n.35 (1987).

> [T]rial by jury; the initiation of suits against freemen by summons, not arrest; freedom from civil process while a witness or an attorney was at court or while a clergyman was performing divine service; the exclusion of essential personal property, like plows or the tools of one's trade, from distraint; the benefit of clergy in capital cases (which meant that first-time offenders received more lenient sentences for certain crimes); the rights of possession and inheritance of land; the right to use deadly force to defend one's abode; the privilege of members of Parliament to be free from arrest while on duty; the writ of habeas corpus, and the right of merchants in certain towns to trade freely.[101]

They also assert that "[i]mmunities gave individuals, towns, or other entities freedom from having to abide by a legal obligation," such as exemptions from "having to pay tolls on merchandise produced within their precincts . . . [and] from compulsory public service."[102]

The compound phrase took on a life of its own in the American colonies, becoming associated with the animating natural rights philosophy of the revolutionary era.[103] The phrase became entrenched in ever more colonial charters,[104] subsequently transplanted into the Articles of Confederation,[105] and was apparently so well established (at least in an abstract sense) by the time of the Constitutional Convention that it was adopted with little debate in Philadelphia.[106] Nevertheless, jurists and scholars have consistently disagreed

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101. DAVID F. FORTE & MATTHEW SPALDING, THE HERITAGE GUIDE TO THE CONSTITUTION 349-50 (2nd ed. 2014).

102. *Id.* at 349.

103. Although the authors support a positive law interpretation of the clause, they concede that "[a]long the path to independence, 'Privileges and Immunities' began to be set alongside ideas of natural rights as mutual supports for the patriot cause." *Id.* at 350.

104. The 1765 Massachusetts Resolves explicitly grounded its foundations in natural law theory: "there are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the common Rights of Mankind" including "all other, essential Rights, Liberties, Privileges and Immunities of the People of *Great Britain*, have been fully confirmed to them by *Magna Charta*." THE MASSACHUSETTS RESOLVES (1765), *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 56 (Edmund S. Morgan ed., 1959).

105. ARTICLES OF CONFEDERATION OF 1781, art. IV, cl. 2 ("The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.").

106. *See generally* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed., Yale University Press 1911). After the Convention, James Madison revealed that the former

since then as to whether that guarantee is based upon natural rights theory or a more narrow set of rights codified in positive law.[107]

Supporters of the positive law argument point out that the Article IV text does not require a state to provide any specific benefits to its own citizens, but only to treat out-of-state residents equally in the enjoyment of whatever privileges and immunities are extended by law.[108] For example, Judge William Cranch deployed this limited understanding in 1821 to uphold the constitutionality of a federal law prohibiting free Black persons from residing in the District of Columbia without first obtaining a surety from a Caucasian sponsor.[109] Treating the District as a state for jurisdictional purposes, Judge Cranch decided that "[a] citizen of one state, coming into another state, can claim only those privileges and immunities which belong to citizens of the latter state, in like circumstances."[110]

Nevertheless, just two years after Cranch's decision, Supreme Court Justice Bushrod Washington promulgated the watershed opinion in *Corfield v. Coryell* that bestowed a natural rights interpretation to the Article IV clause.[111] In a case upholding New Jersey's right to discriminate against out-of-state citizens in the harvesting of oysters,[112] Justice Washington, riding circuit, wrote:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.[113]

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privileges and immunities clause in the Constitution was shortened because its immediate predecessor was too complicated and undermined Congress's plenary power to regulate naturalization. THE FEDERALIST NO. 42 (James Madison).

107. Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan,* 45 SAN DIEGO L. REV. 777, 780-81 (2008).

108. Justice Thomas acknowledges this was the Court's jurisprudence during the Reconstruction Era, stating "the weight of legal authorities at the time of Reconstruction indicated that Article IV, § 2, prohibited States from discriminating against sojourning citizens when recognizing fundamental rights, but did not require States to recognize those rights and did not prescribe their content." McDonald v. City of Chicago, 561 U.S. 742, 821 (2010) (Thomas, J., concurring). He cited several state high court opinions and treatises on this point. *See, e.g.*, Livingston v. Van Ingen, 9 Johns. 507, 561 (N.Y. Sup. Ct. 1812); Campbell v. Morris, 3 H. & McH. 535, 553-54 (Md. 1797); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 15-16 n. 3 (1868); JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 35 (11th ed. 1867).

109. Costin v. Corporation of Washington, 2 D.C. 254, 613-14 (1821).

110. *Id.*

111. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

112. *Id.* at 548.

113. *Id.* at 551.

This interpretation became accepted by the abolitionist cause and would come to feature prominently in the congressional debates over drafting the Privileges or Immunities Clause of the Fourteenth Amendment.[114] In *Conner v. Elliott*, Justice Curtis advocated for a case-by-case, common law approach to developing the clause,[115] and so it seemed they might as late as in *Ward v. Maryland*, when the Court overturned Maryland's requirement of out of state merchants to get an in state license to sell most non-agricultural goods.[116]

Nevertheless, the post-war Supreme Court soon proved that it was hostile to this methodology. As discussed below, it declared an end to the natural rights interpretation of the Article IV clause in *The Slaughter-House Cases* stating:

> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.[117]

This reading was in line with that Court's contemporary interpretation of the new Fourteenth Amendment clause,[118] which is discussed below.

2. The Fourteenth Amendment Privileges or Immunities Clause.—Adopted as part of the post-war Reconstruction Amendments, Section 1 of the Fourteenth Amendment commands that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[119] Thus, whereas the Article IV clause speaks to fundamental rights derived from state citizenship, this clause, by its own terms, addresses rights inherent in national citizenship.[120]

Unlike its Article IV antecedent, there is no want of legislative history on the Privileges or Immunities Clause. Abundant records reveal a shared intention that the new text should encompass and extend a robust bundle of rights, including at least those guaranteed by the first eight amendments to the U.S.

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114. *See* Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 702 n.5 (2019) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 29 (1980) (stating that the Fourteenth Amendment's "framers repeatedly adverted to the *Corfield* discussion as the key to what they were writing")).

115. 59 U.S. (18 How.) 591, 593 (1855) ("We do not deem it needful to attempt to define the meaning of the word privileges in this clause of the constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein.").

116. 79 U.S. (12 Wall.) 418, 430 (1870); for a survey of antebellum case law on the clause, see David R. Upham, Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483 (2005).

117. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1872).

118. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

119. U.S. CONST. amend. XIV § 1.

120. This reading is reinforced by a holistic reading of the Fourteenth Amendment including the Citizenship Clause.

Constitution.[121] For example, Representative John Bingham introduced his draft of the amendment by arguing that the Supreme Court's refusal to enforce the Bill of Rights against the states in *Barron v. Baltimore* and its progeny necessitated an amendment to "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."[122] Bingham's speech was published and broadly disseminated in a pamphlet styled "In support of the proposed amendment to enforce the Bill of Rights."[123] Likewise, Senator Jacob Howard positively cited *Corfield* and asserted that "[t]o these privileges and immunities, whatever they may be . . . should be added the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution."[124]

Unfortunately, the contemporaneous Supreme Court quickly pruned that ambitious intent. The first blow came in *The Slaughter-House Cases*. There, several butchers challenged Louisiana's grant of a monopoly license, alleging that it interfered with their right to "exercise their trade" in violation of the Privileges or Immunities Clause.[125] The Court rejected their claim, holding that the clause protected only those rights of federal citizenship "which own [sic] their existence to the Federal government, its National character, its Constitution, or its laws."[126] In other words, the Supreme Court held the bundles of rights protected by each of the P/I Clauses to be mutually exclusive.[127]

Although this left open the possibility that the individual rights enumerated in the Bill of Rights would qualify, the Supreme Court foreclosed that possibility in a pair of decisions issued within the next three years. First, in *Minor v. Happersett*, the Court upheld a state law barring women from voting after concluding that the elective franchise is not a privilege of national citizenship.[128] Second, the fatal blow arrived in *United States v. Cruikshank*, where the Court expressed its view that the clause did not incorporate the Bill of Rights by specifically refusing to uphold the individual rights to assemble and bear arms against state and private encroachments.[129] According to the *Cruikshank* Court,

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121. Indeed, prior to the Fourteenth Amendment's adoption in 1868, the Supreme Court held that the Bill of Rights applied only to the Federal Government. *See* Barron *ex rel.* Tiernan v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

122. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

123. JOHN A. BINGHAM, ONE COUNTRY, ONE CONSTITUTION, AND ONE PEOPLE: IN SUPPORT OF THE PROPOSED AMENDMENT TO ENFORCE THE BILL OF RIGHTS (1866).

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

125. The Slaughter-House Cases, 83 U.S. (16. Wall.) 36, 60 (1872).

126. *Id.* at 79.

127. McDonald v. City of Chicago, 561 U.S. 742, 852 (2010) (Thomas, J., concurring).

128. 88 U.S. 162, 163 (1874). This line may qualify as dicta as the facts of the case involved private encroachment rather than state encroachment upon the right.

129. 92 U.S. 542 (1875). As Justice Thomas put it, "*Cruikshank*'s holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery." *McDonald*, 561 U.S. at 855-56 (Thomas, J., concurring).

the right to peaceably assemble was excluded because it "existed long before the adoption of the Constitution,"[130] while the right to bear arms was not "in any manner dependent upon that instrument for its existence."[131] Thus, on the one hand, the right to vote was deemed insufficiently entrenched to qualify; on the other, the codification of the rights to assemble and bear arms was irrelevant because these were natural rights that pre-existed the Constitution's adoption. Instead, the post-war Court would limit the privileges or immunities of national citizenship to a relatively narrow list of uncodified items.

B. Criticisms and Elaborations

Slaughter-House, *Minor*, and *Cruikshank* are widely condemned today, with Justice Thomas himself observing that their "circular reasoning effectively has been the Court's last word on the Privileges or Immunities Clause."[132] On the other hand, *Corfield* has its detractors, mainly among textualists who criticize Justice Washington's natural rights approach and question its precedential value.[133]

Although the Supreme Court effectively circumscribed the P/I Clauses in these post-Civil War cases, scholarly debate has persisted. At least three modern schools of thought are evident. First, those coming from a fundamental rights perspective argue that the P/I Clauses reach back through history to protect certain natural rights belonging to all citizens of the realm.[134] Second, those coming from a non-discrimination perspective argue that the clauses refer only to positive laws that codify fundamental rights; once a right is extended through law, it must belong equally to all.[135] Finally, some argue from a stricter formalist perspective, hesitant to approach the clauses at all given their indeterminate text and history.[136]

As for Justice Thomas, he declared his position in *Saenz* that:

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130. *Cruikshank*, 92 U.S. at 551.

131. *Id.* at 553.

132. *McDonald*, 561 U.S. at 809 (Thomas, J. concurring) (citing Saenz v. Roe, 526 U.S. 489, 503 (1999)).

133. It has been said that "[a] number of courts cited *Corfield v. Coryell* before the Civil War, but only for its holding and never for its dictum." FORTE & SPALDING, *supra* note 101, at 352.

134. *See* BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 64-71 (1987); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 194-203 (2004); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 340-51 (2005).

135. *See* Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GEORGIA L. REV. 1120 (2008); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1410-33, 1451-66 (1992); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 342-51 (Univ. of Chicago Press 1985).

136. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW, 166-67 (Simon & Schuster 1990).

> [R]epeated references to the *Corfield* decision, combined with what appears to be the historical understanding of the Clause's operative terms, [support] the inference that, at the time the Fourteenth Amendment was adopted, people understood that the "privileges or immunities of citizens" were fundamental rights, rather than every public benefit established by positive law.[137]

Thomas's further commentaries in *McDonald* and *Dobbs* would cement this position and elucidate his preferred methodology over the next two decades. He positively cites *Corfield* while targeting *Slaughter-House* and *Cruikshank* with harsh criticism.[138] His *McDonald* concurrence resuscitates the idea of incorporating the Bill of Rights through the Privileges or Immunities Clause,[139] while his *Dobbs* concurrence invited the reimagination of SDP liberty interests through the P/I Clauses.[140]

Despite this relative liberality toward the P/I Clauses, Justice Thomas envisions a limiting principle that distinguishes the SDP and P/I exercises:

> [I]t is argued that the mere possibility that the Privileges or Immunities Clause may enforce unenumerated rights against the States creates "special hazards" that should prevent this Court from returning to the original meaning of the Clause. Ironically, the same objection applies to the Court's substantive due process jurisprudence, which illustrates the risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts. But I see no reason to assume that such hazards apply to the Privileges or Immunities Clause. The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited. When the inquiry focuses on what the ratifying era understood the Privileges or Immunities Clause to mean, interpreting it should be no more "hazardous" than interpreting these other constitutional provisions by using the same approach. To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer. I believe those questions are more worthy of this Court's attention—and far more likely to yield discernible

137. Saenz v. Roe, 526 U.S. 489, 527 (1999) (Thomas, J., dissenting).
138. McDonald v. City of Chicago, 561 U.S. 742, 819-20, 852-58 (Thomas, J., concurring).
139. *Id.* at 809-10.
140. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (Thomas, J., concurring).

> answers—than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support.[141]

Justice Thomas advocates for the original public meaning approach to be applied to the P/I Clauses, the goal of which, in his words, is to "discern the most likely public understanding of a particular provision at the time it was adopted."[142] He began to apply this methodology to the P/I Clauses in his *Saenz* and *McDonald* opinions by exploring colonial charters, the antecedent clause in the Articles of Confederation, Justice Bushrod Washington's "landmark opinion" in *Corfield v. Coryell*, and the Congressional debate over the drafting of the Fourteenth Amendment. Though the original public meaning approach is also not without critics, it does provide a coherent methodology.[143] Justice Thomas has thus set the stage for the arguments he invites: reconstituting SDP liberty interests as privileges and/or immunities of citizenship.

C. Recognized Privileges and/or Immunities of Citizens

Before conducting that exercise, it remains necessary to take account of the rights that have been recognized under the P/I Clauses. When Justice Bushrod Washington attempted this task *vis-à-vis* the Privileges and Immunities Clause, he opined that it "would perhaps be more tedious than difficult to enumerate" them all, but suggested that they could "be all comprehended under the following general heads," namely: "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."[144] With greater precision, he went on to list specific rights:

> 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;[145] to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; . . . to which may be added, the elective franchise, as regulated

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141. *McDonald*, 561 U.S. at 854-55 (Thomas, J., concurring).

142. *Id.* at 828-29 ("This evidence is useful not because it demonstrates what the draftsmen of the text may have been thinking, but only insofar as it illuminates what the public understood the words chosen by the draftsmen to mean.").

143. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

144. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (E.D. Penn. 1823).

145. The right of a nonresident to have "reasonable and adequate" access to the courts of a host state was developed in Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 562 (1920).

> and established by the laws or constitution of the state in which it is to be exercised.[146]

In addition to his aforementioned limiting principle that jurists should "confin[e] these expressions to those privileges and immunities which are, in their nature, fundamental,"[147] Washington also conceded that the Article IV rights are incumbent upon state citizenship,[148] thereby deciding the case and allowing New Jersey to favor its own citizens in the harvesting of a limited natural resource.

Yet, the advent of the Fourteenth Amendment's Privileges or Immunities Clause raised another question: how to interpret it in concert with the Article IV Privileges and Immunities Clause. Clearly the two have different roles to play in the federalist system, given their textual placements and contextual adoptions. In *Slaughter-House*, the post-war Court began to provide its new vision of rights inherent in national citizenship. Unlike those explored in *Corfield*, the Court confined these to a positive law nature, "ow[ing] their existence to the Federal government, its National character, its Constitution, or its laws."[149] Building upon the kernel of a "privilege" of interstate travel cited in the antebellum case of *Crandall v. Nevada*,[150] the *Slaughter-House* Court stated:

> 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 subtreasuries, land offices, and courts of justice in the several States."[151]

Beyond this specific guarantee of travel to specific places for specific purposes, the *Slaughter-House* majority continued to proffer its own list of the other privileges and immunities of national citizenship:

> [T]o 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. . . . The right to peaceably assemble and petition for redress of grievances [and] the privilege of

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

147. *Id.* at 551.

148. *Id.* at 552. Justice Washington reasoned that "we cannot accede to the proposition which was insisted on by the counsel, that, under [Article IV], the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens."

149. *The Slaughter-House Cases*, 83 U.S (16 Wall.) 36,79 (1872)

150. 73 U.S. 35, 40 (1867).

151. *The Slaughter-House Cases*, 83 U.S at 79.

> the writ of habeas corpus, are rights of the citizen 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. . . . [A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.[152]

Unfortunately, the *Slaughter-House* majority is no clearer from where it conjured this list than the one provided by Justice Washington in *Corfield*. Neither opinion provided much in the way of citation or methodology for its conclusions. It is also worth noting that four dissenting *Slaughter-House* Justices would also have vindicated the right that the butchers asserted—that is, the right to one's work—as a privilege or immunity of citizenship,[153] which briefly seemed to open the door to further argumentation.[154]

However, three years after *Slaughter-House*, the new *Cruikshank* majority took an even more hardline view.[155] The new majority began its analysis with a statement that both echoed and transformed Justice Washington's observation, stating that "[v]aluable rights and privileges almost without number are granted and secured to citizens by the Constitution and laws of Congress, none of which may be with impunity invaded in violation of the prohibition contained in that section [of the Fourteenth Amendment]."[156] The first half of the first clause begins by echoing Justice Washington, citing an expansive source of rights and privileges; however, unlike Washington, that fountainhead was quickly limited to positive law recognition in the second half, nearly reducing the clause to a truism. Furthermore, the new majority did not attempt to attach any new rights to the clause; instead, the *Cruikshank* majority ignominiously dropped mention of the right of assembly—that had been explicitly acknowledged in *Slaughter-House*—from its new list.[157] In so doing, the majority doubled down on the

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152. *Id.* at 79-80.

153. In his dissent, Justice Stephen Field positively cited *Corfield* and wrote in favor of "the right to pursue a lawful employment in a lawful manner." *Id.* at 97 (Field, J., dissenting).

154. *Id.* at 83; *id.* at 111 (Bradley, J. dissenting); *id.* at 124 (Swayne, J. dissenting).

155. Both were 5-4 decisions, with significant alignment change. Chief Justice Salmon Chase (who dissented in *Slaughter-House*) passed away and was replaced by Morrison Waite (part of the *Cruikshank* majority). Justices Miller and Strong remained in the majority, while Justice Bradley remained in dissent. Justices Clifford, Davis, and Hunt, all formerly in the majority, were now in dissent, while Justice Swayne, who dissented in *Slaughter-House*, was in the new majority.

156. United States v. Cruikshank, 92 U.S. 542, 566 (1875).

157. *Id.* at 551.

positive law approach, paradoxically asserting that the fact that a common law right pre-existed the constitution disqualified it from P/I recognition:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall in *Gibbons v. Ogden*, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution.[158]

Between this and the refusal to uphold the Second Amendment's right to bear arms against state encroachment,[159] the Radical Republican dream of shock therapy incorporation was defeated. Instead, the only constitutional provision to explicitly survive from *Slaughter-House* to *Cruikshank* with its dual classification intact was the Fifteenth Amendment, with the *Cruikshank* majority reasoning, "[t]he right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States."[160] These would prove to be the Court's most significant words on the matter for over a century (a century in which the process of incorporation was forced to drag on slowly under the Due Process Clause instead).

In the interim, some slow development occurred for the establishment of a right to travel under the P/I Clauses. In *Edwards v. California*,[161] *United States* v. *Guest*,[162] and most notably *Saenz v. Roe*,[163] the Supreme Court invoked the Fourteenth Amendment clause to expound upon this right. The most recent decision, *Saenz*, involved judicial review of a California statute that limited new residents' access to welfare benefits during their first year of state residency.[164] In overturning this law, Justice Stevens explained for the majority that that right to travel consists of three different components:

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158. *Id.*

159. *Id.* at 553.

160. *Id.* at 555-56 (It is reasonable to conclude that the freedom from slavery and indentured servitude guaranteed by the Thirteenth Amendment cited in the same *Slaughter-House* clause was also preserved under the same logic.).

161. 314 U.S. 160, 178 (1941) (A state cannot prohibit indigent people from moving into it. "The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and [sic] immunities clause of the Fourteenth Amendment against state interference.") (Douglas, J., concurring) (emphasis added).

162. 383 U.S. 745 (1966) (reaffirming the principle that the right to interstate travel is a fundamental right protected under the Constitution and acknowledging the federal government's role in ensuring this right against private interference during the Civil Rights Movement); *id.* at 764 (Harlan, J., concurring in part (notably, positively citing *Corfield* for the origin of the right).

163. Saenz v. Roe, 526 U.S. 489 (1999).

164. *Id.* at 493.

> It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[165]

Evinced in this formulation of the right to travel is the acknowledgment of a dynamic synergy between the P/I Clauses. Whereas Justice Stevens attributes the first and third of these right-to-travel components to protection by the 14th Amendment, he attributes the second—the right to be treated as a welcome visitor rather than an unfriendly alien—to being protected by Article IV.[166] This creates an interesting opportunity, as Justice Thomas has also acknowledged this romance between the clauses. In his *McDonald* concurrence, Justice Thomas asserted, "I reject *Slaughter–House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship,"[167] further observing "it can be assumed that the public's understanding of [the Fourteenth Amendment clause] was informed by its understanding of [Article IV clause because] they overlap."[168] And while "[t]his is not to say that [they] are the same,"[169] it potentially simplifies the inquiry.

V. THE REIMAGINATION EXERCISE

This section presents an initial effort at predicting how rights currently recognized under SDP might be reimagined as privileges and/or immunities of citizenship. Although this is a highly speculative exercise, the key variables have already been identified. The preceding sections catalogued the rights at issue and made clear that history and tradition already have an established role in both practices, thereby providing a baseline methodology that can be modified in future scholarship to better comport with the original public meaning approach. In sum, this section surveys which recognized SDP liberty interests might share a sufficient basis to be recognized under P/I jurisprudence, at least in Justice Thomas's conception of the challenge.

A. Unfettered Property Ownership

Addressing this former SDP interest through the P/I Clauses is conclusive. This nation must never revert to the practice of slavery that was upheld in *Scott v. Sandford* when SDP was used to strike down the Missouri Compromise.[170]

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165. *Id.* at 500-01 ("The second component of the right to travel is, however, expressly protected by the text of [. . .] [t]he first sentence of Article IV; § 2.")

166. *Id*. at 501.

167. McDonald v. City of Chicago, 561 U.S. 742, 855 (2010) (Thomas, J., concurring).

168. *Id*. at 852-53.

169. *Id*.

170. 60 U.S. (19 How.) 393, 432 (1856).

The Thirteenth Amendment authoritatively put an independent constitutional end to the practice of slavery after the Civil War, and the *Slaughter-House* majority specifically cited its guarantee (as well as the Fifteenth Amendment's promise of equal access to the ballot on the basis of race) as qualifying as a privilege or immunity of national citizenship protected by the Fourteenth Amendment—a proposition that even the *Cruikshank* Court did not refute.[171]

B. Economic Liberty

Writing for the *Slaughter-House* dissent, Justice Stephen Field wrote in favor of "the right to pursue a lawful employment in a lawful manner."[172] The modern Court's embrace of originalism and suspicion of administrative power may provide a foundation for revisiting the right to contract.[173] This view has influential supporters. Professor David Bernstein asserts that *Lochner*-era freedom of contract proponents were "originalists, trying to adhere to what they saw as the constitutional understandings of the Fourteenth Amendment's Framers,"[174] while Professor Randy Barnette argues that *Lochner*'s primary mistake was not its holding but its reliance upon the Due Process Clause, rather than the Privileges or Immunities Clause, to do it.[175]

There is ample originalism on point to support the general argument. The Framers' reliance on English philosopher John Locke,[176] who famously declared "life, liberty and estate" to be natural rights,[177] is well known. These "inalienable rights" were prominently grafted into the Declaration of Independence as "life, liberty and the pursuit of happiness," and were ultimately codified in the Fifth and Fourteenth Amendments. The idea of freedom of contract was so entrenched by the early 20th century that the *Lochner* Court barely bothered to describe it, simply asserting it to be "part of the liberty of the individual" protected by the Fourteenth Amendment.[178]

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171. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80. While the *Cruikshank* majority did not specifically repeat the Thirteenth Amendment pledge, it did repeat the Fifteenth Amendment pledge, showing that at least some rights explicitly guaranteed by the constitutional text might also be protected as privileges or immunities. United States v. Cruikshank, 92 U.S. 542, 555-56 (1875).

172. *Id.* at 97 (Field, J., dissenting).

173. *See, e.g.*, West Virginia v. Env't Prot. Agency, 597 U.S. 143 (2021); Biden v. Texas, 597 U.S. 785 (2022); Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

174. DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 119 (Univ. of Chicago Press 2011).

175. Randy E. Barnette, *What's So Wicked About* Lochner*?,* 1 N.Y.U. J.L. & LIBERTY 325-33 (2005).

176. *See, e.g.,* RICHARD ASHCRAFT, REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES OF GOVERNMENT (Princeton Univ. Press 1986).

177. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 49 (Barnes & Noble 2004) (1690).

178. Lochner v. New York, 198 U.S. 45, 53 (1905).

For his part, Justice Thomas has condemned *Lochner*. In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority,*[179] a case dealing primarily with the dormant commerce power, Justice Thomas wrote that the *Lochner* Court "located a 'right of free contract' in a constitutional provision that says nothing of the sort. The Court's negative Commerce Clause jurisprudence, created from whole cloth, is just as illegitimate as the 'right' it vindicated in *Lochner*."[180] Interestingly, Thomas's long-time ideological ally, Justice Antonin Scalia, argued for reimagining the Court's dormant commerce power jurisprudence with the P/I Clauses' nondiscrimination imperative,[181] presenting another potential future dimension for them.

In the end, after nearly a century of negative citation, *Lochner* itself appears too toxic to simply reinstate.[182] That does not mean its spirit is unapproachable. The author finds it more likely that a conservative Court could give *Lochner*'s SDP "right to contract" a second life by reimagining it along the lines of modern "right to work" jurisprudence, guaranteeing an employee's ability to work for an employer without being forced to join a union or pay union fees.[183] There is evidence that this is already occurring. For instance, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Court's conservative wing held that mandating union fees for public sector employment violates the right to free speech.[184] Justice Alito's majority opinion pointed out that "into the 20th century, every individual employee had the 'liberty of contract' to 'sell his labor upon such terms as he deem[ed] proper,'" positively citing a case from the *Lochner* Era.[185] Arguments in this line will likely aver that economic freedoms are essential for the full participation of citizens in the economic life of the nation.[186]

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179. 550 U.S. 330, 355 (2007) (Thomas, J., concurring).

180. *Id*.

181. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting).

182. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022); *id.* at 341 (Kavanaugh, J., concurring); *id.* at 401 (Breyer, J., dissenting).

183. This is codified in several state constitutions, including Florida's, at Article I, Section 6, which reads, "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

184. 585 U.S. 878, 929-30 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), which previously allowed such fees).

185. *Id.* at 904 n.7 (citing Adair v. United States, 208 U.S. 161 (1908), a defining decision of the *Lochner* Era).

186. In the years ahead, there may also be an appeal to recast the *Pennell v. City of San Jose* precedent, which suggested that rational basis analysis could be used to strike down price controls under SDP analysis, given the recent advocacy for adopting widespread national price controls in a major candidate's presidential campaign.

C. Directing the Education of One's Children

The concept of educational choice for one's own children has deep historical roots, forming the longest-lasting and least controversial line of SDP jurisprudence.[187] To reimagine them as P/I of citizenship would not require much in the way of new analysis while still providing a firmer basis for these established rights.

Formal education was largely a privilege for the English elite at the time the American colonies were established.[188] The colonists appreciated the more democratic virtues of mass education, although educational practices varied greatly by region across the colonies.[189] Whereas the feudal system was more closely adhered to in the South,[190] New England Puritans chose to emphasize literacy for religious reasons, leading to early forms of mass public education as evinced by the Massachusetts Bay Colony's 1647 law requiring towns to establish schools.[191] It was not until the 19th century that there was a broader push for establishing public school systems across the nation, with Horace Mann and others leading a movement to establish a universal system of non-sectarian education.[192] This created deep tensions between state policy and private choice, as well as secular versus sectarian schools, and it was within these contexts that *Meyer* and *Pierce* were decided a century ago.

The public-school movement was only beginning to gain ground when the Fourteenth Amendment was ratified in 1868.[193] Therefore, the argument could certainly be made that the ability of parents to direct the upbringing and education of their children is an inherent right associated with citizenship. Even though the Court has held that public schools must serve all resident children, regardless of origin,[194] the argument still stands for additional P/I recognition along the lines of public education representing an inherent good for a democratic society because it fosters the cultivation of informed citizens.[195]

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187. *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 269 U.S. 510 (1925).

188. PETER LASLETT, THE WORLD WE HAVE LOST: FURTHER EXPLORED 231-32 (4th ed. 2000).

189. JOHN D. PULLIAM AND JAMES VAN PATTEN, HISTORY OF EDUCATION IN AMERICA 22-23 (6th ed. 1995).

190. *Id.* at 23-27.

191. *Id.* at 30-35 (citing the "Old Deluder of Satan Act" passed in 1647 so that the common person would have a basis to educate themselves in virtue).

192. *Id.* at 59, 71.

193. Massachusetts became the first U.S. state to pass a compulsory universal public education law in 1837 with the Common School Act. *See History of Education Law in America*, EDUCATIONLAWYERS.COM, https://www.educationlawyers.com/blog/2022/12/15/history-of-education-law-in-america#:~:text=The%20Common%20School%20Act%20was,for%20other%20states%20to%20follow [https://perma.cc/7JWJ-25ZM] (last visited Aug. 22, 2024).

194. *See* Plyler vs. Doe, 457 U.S. 202 (1982).

195. As a note to conclude this section, perhaps the greatest argument in favor of SDP over P/I lies in the fact that the Due Process Clause speaks in terms of personhood, while the P/I

D. Travel

Perhaps the right to travel presents the model of Justice Thomas's vision: a recognized SDP liberty interest with overlapping origins already widely presumed to be inherent in the P/I Clauses. Although Justice Douglas identified it as a Fifth Amendment liberty interest in *Kent v. Dulles*, that opinion stands in the shadow of the Court's longstanding right-to-travel jurisprudence under the P/I Clauses, extending back to *Corfield* and most elaborately described in *Sanez*. It is under this umbrella that the right comes to full form, encompassing the right to reside, work, and receive benefits in different states, which in turn impacts one's economic liberty and personal autonomy.

E. Privacy, Abortion Choice, Intimacy, and Marriage Equality

While each is a distinct liberty interest with its own crowning case, all share a common lineage in the broad right to privacy announced in *Griswold v. Connecticut*. They further share the distinction of being specifically identified for overturning in Justice Thomas's *Dobbs* concurrence. Therefore, the question is whether Justice Thomas intended to completely exclude reconsideration of these liberty interests under the P/I analysis or if they are invited to be reargued along with the other areas he did not name. Time may soon tell.

It is doubtful that abortion choice will receive another full hearing by the present Court, which stated that it did not see a basis for it anywhere in the federal constitution (thereby presumptively abridging both Equal Protection and P/I-based arguments).[196] Justice Kavanaugh wrote separately to note that the right to travel must not be abridged for a woman seeking an abortion across state lines,[197] which may provide further opportunity for the Court to develop a modest subset of abortion jurisprudence to the extent it is tied to the right to travel. Indeed, the Court provided some elaboration on the very day that *Roe* was decided when (in a much less noticed opinion) it overturned Georgia's law that tied access to abortion services to a residency duration requirement in *Doe v. Bolton*.[198]

Beyond that, general privacy rights, while not named as such, have deep roots in English common law principles and practices that influenced American legal thought. As stated, the ancient "privileges" would have included protections that reverberate in modern privacy considerations, specifically when it comes to criminal process, including: the initiation of suits against freemen by summons rather than arrest; freedom from civil process while a witness or an attorney was at court, or while a clergyman was performing service; the

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Clauses speak in terms of citizenship. That is among the reasons to argue for concurrent recognition.

196. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

197. *Id.* at 346 (Kavanaugh, J., concurring).

198. 410 U.S. 179, 200 (1973).

exclusion of essential personal property from seizure; the right to use deadly force to defend one's abode; and the privilege of members of Parliament to be free from arrest while on duty.[199] Beyond these, the "right to be left alone" can be traced back to the common law principle of nuisance,[200] while defamation and the virtue of confidentiality in communications all have long historical antecedents.[201] The main challenge in further entrenching these rights would be in careful delineation of which aspects of privacy are considered fundamental rights inherent to citizenship, as opposed to more general expectations of privacy influenced by societal norms and technological changes.

The author is more optimistic for a vindication of liberty interests in intimacy and marriage under both the Equal Protection guarantee as well as the freedom of association protected by the First and Fourteenth Amendments. As to the first, Justice O'Connor wrote separately in *Lawrence* to assert her belief that personal intimacy should have been protected by a relatively modest extension of Equal Protection jurisprudence rather than the more controversial SDP methodology.[202] In turn, Justice Kennedy intentionally conflated the Due Process and Equal Protection guarantees of the Fourteenth Amendment in his *Obergefell* decision.[203] This avenue certainly remains open, but so do others.

Another alternative is to reestablish these rights under the freedom of association protected by the First and Fourteenth Amendments. In *NAACP v. Alabama ex rel. Patterson*, the Court extended the First Amendment's freedom to "peaceably assemble" to cover "association,"[204] an expansive sleight of hand also acknowledged to be rooted in SDP methodology.[205] The right to associate has not only been broadly interpreted to include a freedom from forced association, but also to protect a dimension of "intimate association" from governmental intrusion.[206] It is here that the bridge to SDP theory is crossed,

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199. FORTE & SPALDING, *supra* note 101, at 349-50.

200. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890); 3 WILLIAM BLACKSTONE, COMMENTARIES *216-222.

201. 4 WILLIAM BLACKSTONE, COMMENTARIES *150-153; Daniel J. Solove & Neil M. Richards, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123 (2007).

202. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

203. Obergefell v. Hodges, 576 U.S. 644, 672 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.").

204. 357 U.S. 449, 461 (1958).

205. *Id*. at 460-61 ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

206. Roberts v. U.S. Jaycees, 468 U.S. 609, 617-29 (1984).

and it is noted that Justice Thomas has joined several majority opinions upholding the right to association without expressing reservation.[207]

F. Family Association

Likewise, the author asserts that freedom of assembly-*cum*-association should act to reinforce the family association precedents recognized in *Moore* and its progeny.

In early modern England, the family unit was primarily nuclear, consisting of parents and their children.[208] However, extended family members, such as grandparents, aunts, uncles, and cousins, as well as non-relatives like servants and apprentices, might live together or in close proximity, contributing to a broader definition of the family unit.[209] The common notion of "family" therefore extended beyond blood relations to include those bound by economic or social ties, reflecting the family's traditional role as both a domestic unit and an economic enterprise.[210] The average household size varied, with urban families typically being smaller due to space and economic constraints, while rural households were often larger to accommodate labor needs for farming and artisanal trades.[211] From this history, there should be ample evidence to protect these rights under the alternative P/I rubric.

VI. CONCLUSION

Predicting how the Supreme Court or legal scholarship will evolve in these areas is challenging, especially given the Court's changing composition and the diverse judicial philosophies of its justices. However, there is a growing interest in revisiting the privileges or immunities clause as a source of rights protection, which could lead to a renaissance in its application to modern legal challenges.

This article represents a first effort to engage with Justice Thomas's specific proposal to reimagine SDP rights under the P/I Clauses. In so doing, the author hopes to have advanced an understanding of the challenge, outlining the rights that have been recognized under both SDP and P/I jurisprudence, including both their shared methodological commonalities as well as their tumultuous jurisprudential histories. SDP liberty interests in economic liberty, travel, privacy, intimacy, marriage, family definition, and the education of one's own

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207. *Compare* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (regarding intimate association) *with* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (regarding expressive association).

208. *See* PETER LASLETT, THE WORLD WE HAVE LOST: FURTHER EXPLORED 90 (3rd ed. 1983).

209. *Id.* at 12, 90-95.

210. *Id*. at 12; *see also* ROSEMARY O'DAY, THE FAMILY AND FAMILY RELATIONSHIPS, 1500–1900: ENGLAND, FRANCE & THE UNITED STATES OF AMERICA 12 (1994).

211. *Id*.

children all may enjoy overlapping protections as privileges and/or immunities of citizenship.

Recognizing that rights displacement is a very grave matter, this thought experiment was undertaken in the abstract with an eye toward establishing a concurrent recognition of SDP liberty interests under the P/I Clauses where plausible. Establishing alternative bases for the protection of fundamental rights may help to reduce the ideological controversy underlying their recognition as well as mitigate the shocking impact of any course corrections, thereby taking reliance interests "out of fire" of judicial suspicion.

Wherever the Court chooses to go in the years ahead, renewed focus upon the P/I Clauses should help to more deeply entrench the panoply of individual rights protected by the U.S. Constitution, enhance the jurisprudence of constitutional interpretation generally (especially with regard to developing a finer methodology of historical approaches),[212] and finally correcting the grievous historical errors perpetrated in *The Slaughter-House Cases* and *United States v. Cruikshank.*

212. *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) (Barrett, J., concurring) (arguing for the need to develop a more methodological approach to originalism).