

HISTORY, TRADITION, AND THE FRANCHISE

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INTRODUCTION

Over the last several years, Fourteenth Amendment jurisprudence in the Supreme Court has undergone a dramatic shift. Once the doctrinal bedrock for unenumerated rights, substantive due process now faces formidable challenges from multiple angles.¹ At a minimum, conservative justices have already tethered the doctrine to a static, historically bound test—one that demands proof of a right’s existence at either the time of the founding or at the time of the Amendment’s ratification.² More extreme critiques go

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1. See *infra* Part II.

2. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

further still, calling for wholesale abandonment of substantive due process in favor of resurrecting the Privileges or Immunities Clause, which many believed had lain dormant since the late nineteenth century.³ All signs suggest the Court has embarked on this course with little inclination to reverse.

Should this trajectory continue, the next “domino” of Fourteenth Amendment law poised to topple may well be the equal protection jurisprudence that undergirds much of American election law. Even more “progressive” originalists assert that the Equal Protection Clause has only a narrow role to play in safeguarding ballot access, and they warn that an expansive reading of the Clause to protect robust voting rights finds scant support in historical sources.⁴ While some of these same scholars claim that the Privileges or Immunities Clause can serve as the source of a fundamental right to vote, they concede it would not secure the modern one-person, one-vote principle.⁵ In parallel, an even more radical alternative envisions jettisoning equal protection altogether for the Guarantee Clause, a famously toothless constitutional provision that would effectively sideline federal courts from policing electoral inequities.⁶

It may be too late to salvage every aspect of the Court’s substantive due process jurisprudence, given the current majority’s deep commitment to textual and historical methodologies. But that does not mean the same fate must befall equal protection in the election context. As this Article will argue, there remain strategic and doctrinal opportunities—through both litigation and legislation—to reinforce equal protection principles so that American election law does not face a future governed by dormant clauses and historically blinkered assumptions. By shoring up the framework now, we can mitigate the risk that the next wave of conservative originalism will leave our core voting rights jurisprudence without a firm constitutional anchor.

This Article engages with these questions as part of a wide-ranging symposium recognizing the 150th anniversary of *Minor v. Happersett*, an 1874 Supreme Court decision which held that state constitutions excluding women from voting did not violate the federal constitution because voting was not a “privilege[] [or] immunit[y]” of national citizenship.⁷ In doing so the Court declared “[o]ur province is to decide what the law is, not to declare

3. See *infra* Part II.

4. See RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 367–68 (2021). For further discussion of “alternative” readings of the Fourteenth Amendment, see *infra* Section II.D.

5. *Id.*

6. See *infra* Section II.D.

7. 88 U.S. (21 Wall.) 162, 171 (1874).

what it should be.”⁸ This has become a rallying cry of sorts to the conservative legal movement⁹ and has even been adapted into the purpose statement of the Federalist Society, a key network for conservative and libertarian lawyers.¹⁰ Indeed, restricting or replacing the bogeyman of substantive due process as the constitutional guarantor of individual rights has been a longitudinal project for some conservative- and libertarian-leaning judges, academics, and lawyers.¹¹

But linking individual rights to what would have been considered a privilege or immunity of state citizenship in 1789 or of national citizenship in 1868 will, in our current legal environment, almost certainly result in a regressive interpretation of individual rights—namely, only those rights that would have been recognized by a majority of those with the franchise at the relevant times are likely to be sufficiently “rooted” in history. Of course, prior to the passage of the Fifteenth and Nineteenth Amendments, the franchise extended predominantly to only white males.¹²

This push to restrict or supplant substantive due process with the privileges or immunities of citizenship will have regressive repercussions in many areas of constitutional law. This Article explores this possibility by analyzing the opinions of several Supreme Court justices most closely associated with the conservative legal movement.¹³ The Article identifies the ways in which Justices Alito, Gorsuch, Scalia, and Thomas have discussed both substantive due process and the Privileges or Immunities Clause in their opinions over the last three decades, as well as the contributions of sympathetic legal academics and institutions.¹⁴ This

8. *Id.* at 178.

9. The term “conservative legal movement” has arisen primarily in the field of political science to describe the network of conservative and libertarian public interest law firms, legal networks, academics, and judges that emerged in the 1970s and 1980s to push back on the perceived liberal dominance of legal institutions. *See generally* STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008). For further discussion of the role of the conservative legal movement, see *infra* Section II.C.1.

10. *About Us*, FEDERALIST SOC’Y, <https://fedsoc.org/about-us> [<https://perma.cc/7HCX-69SK>] (“[The Federalist Society] is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.” (emphasis added)).

11. *See generally, e.g.*, AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015); MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013); TELES, *supra* note 9.

12. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* xvi (rev. ed. 2009). Note as well, that even after the passage of the Fifteenth Amendment, many states continued to suppress the votes of racial minorities with little legal opposition until the passage of the Voting Rights Act in 1964. *Id.*

13. *See generally* TELES, *supra* note 9. For further discussion of the role of the conservative legal movement, see *infra* Section II.C.1.

14. *See infra* Parts I, II.

analysis suggests a growing momentum behind calls for significant limitations on the scope of substantive due process doctrine or potentially even wholesale replacement of the doctrine with a jurisprudence based on the Privileges or Immunities Clause.

The Article then questions whether existing equal protection doctrine may be similarly vulnerable to retrenchment and restriction in the context of election law. Ultimately the Article concludes that such doctrinal revision is quite possible, and that imposing a “historically rooted” lens onto election law could significantly limit the electorate’s ability to challenge the constitutionality of election laws and regulations. Indeed, it seems that election law may be particularly susceptible to this regressive impact.

I. PRIVILEGES OR IMMUNITIES IN CONSTITUTIONAL LAW

For more than a century, accepted constitutional wisdom was that the Privileges or Immunities Clause of the Fourteenth Amendment had been shorn of all substantive meaning by the Supreme Court in a series of cases in the 1870s, most prominently, the *Slaughter-House Cases*.¹⁵ While various scholars of all political stripes have challenged the correctness of these decisions,¹⁶ the courts have steadfastly refused to identify a substantive set of “privileges or immunities” that the Fourteenth Amendment protected.¹⁷

But closing off the Privileges or Immunities Clause as an avenue for providing constitutional protections to individual rights did not, of course, end such litigation. In order to provide redress to alleged governmental violations of individual rights, the courts turned to other components of the Fourteenth Amendment, including its Due Process and Equal Protection Clauses.

A. *The Slaughter-House Cases*

Shortly after the ratification of the Fourteenth Amendment, the Supreme Court heard a case challenging what was essentially a zoning

15. 83 U.S. (16 Wall.) 36 (1873).

16. Ilya Shapiro & Josh Blackman, *The Once and Future Privileges or Immunities Clause*, 26 GEO. MASON L. REV. 1207, 1210 (2019) (“Constitutional scholars from across the spectrum, including Professors Laurence Tribe and Akhil Amar, agree that the Supreme Court misinterpreted the Fourteenth Amendment in *Slaughter-House*.”).

17. See *McDonald v. City of Chicago*, 561 U.S. 742, 809 (2010) (Thomas, J., concurring in part and concurring in the judgment) (“[*United States v. Cruikshank*, 92 U.S. 542 (1876),] effectively has been the Court’s last word on the Privileges or Immunities Clause. In the intervening years, the Court has held that the Clause prevents state abridgment of only a handful of rights, such as the right to travel, that are not readily described as essential to liberty.” (footnote omitted) (citation omitted)).

ordinance, which the plaintiffs claimed prevented them from engaging in their chosen profession.¹⁸ It was this ability to pursue a living that the litigants argued was a privilege or immunity of national citizenship.¹⁹ The specific statute at issue prohibited individuals in New Orleans, Louisiana from operating a slaughterhouse except in designated areas.²⁰ But because the permissible areas were already owned by existing slaughterhouses, the law amounted to a de facto prohibition on opening new abattoirs in New Orleans.²¹ The plaintiffs, would-be fellow slaughterhouse operators, argued that this created a state-sanctioned cartel and deprived them of the “privilege[] [or] immunit[y]” of pursuing their chosen profession.²²

The Court majority—over a spirited dissent from Justice Field—rejected the claim:

We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign.²³

While the Court declined to offer a comprehensive definition of “fundamental” privileges or immunities, it did provide that these would generally include “protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.”²⁴

This narrow reading of the Privileges or Immunities Clause, as adopted in the *Slaughter-House Cases*, has become a touchstone for some conservative critics. They argue that by limiting constitutional protection to a small set of federal rights, the Court effectively rendered the Clause impotent as a vehicle for individual rights.²⁵ Conservative legal scholars contend that this judicial “eviscerat[ion]” of the Clause paved the way for the modern doctrine of substantive due process, which, they claim, is an unmoored judicial innovation lacking a firm textual or historical

18. *Slaughter-House*, 83 U.S. at 58–60.

19. *Id.* at 66.

20. *Id.* at 61.

21. *Id.*

22. *Id.* at 66.

23. *Id.* at 76 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1832) (No. 3,230)).

24. *Id.* at 74 (quoting *Corfield*, 6 F. Cas. at 551–52).

25. See, e.g., Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 115 (2010) (“The [*Slaughter-House*] decision entombed, if it did not actually kill, the Privileges or Immunities Clause, rendering it for all intents and purposes void.”).

foundation.²⁶ This perspective undergirds the conservative project to restrict substantive due process to a narrow, historically bound set of rights or, in its most radical form, to replace it altogether with a revitalized reading of the Privileges or Immunities Clause.²⁷

B. *Minor v. Happersett*

In *Minor v. Happersett*, the U.S. Supreme Court applied its *Slaughter-House* interpretation of the Privileges or Immunities Clause to the question of whether women could be denied the franchise.²⁸ Virginia Minor, a citizen of the United States, was denied the right to vote by Missouri law, and she argued that this denial violated her rights under the Privileges or Immunities Clause.²⁹ The Court's response—that suffrage was not a privilege of citizenship—was based on the Court's determination that the specific prohibitions of disenfranchising citizens based on race indicated that reading a right to vote into the Clause would be inconsistent with the rest of the Fourteenth and Fifteenth Amendments.³⁰

This synthesized reading of the text may have been right as an initial understanding of the Reconstruction Amendments, but the more lasting impact of the Court's opinion was the artificial distinction it drew between civil and political communities (and by extension civil and political rights).³¹ This distinction, while historically entrenched, failed to grapple with the democratic revolution taking place after the Civil War.³²

The majority opinion, penned by Chief Justice Waite, first conceded that women were indeed citizens under the Fourteenth Amendment, thereby acknowledging that they were entitled to all the privileges or immunities of that status.³³ Chief Justice Waite quickly pivoted, however, to recounting a historical narrative demonstrating that voting had never been considered an inherent aspect of citizenship, citing state practices dating back to the founding period.³⁴

26. Alan Gura, Ilya Shapiro & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2009–2010 CATO SUP. CT. REV. 163, 167–68, 183–84 (2010).

27. See *infra* Part II.

28. 88 U.S. (21 Wall.) 162 (1874).

29. *Id.* at 165.

30. *Id.* at 174–75.

31. *Id.* at 166–68.

32. See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019); see also Shapiro & Blackman, *supra* note 16, at 1207 (“The second Founding emerged after the conclusion of the Civil War, with the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. Unfortunately, this rebalancing of our separation of powers is often ignored.”).

33. *Minor*, 88 U.S. (21 Wall.) at 168–70.

34. *Id.* at 171–73.

The majority's argument—that voting was not a necessary consequence of citizenship—was framed as a straightforward reading of history.³⁵ Fully convinced of this reading and somehow satisfied that the Fourteenth Amendment intended no radical changes,³⁶ the Chief Justice declared the Court powerless to extend the franchise, invoking what has become a talisman of sorts for the conservative legal movement: “Our province is to decide what the law is, not to declare what it should be.”³⁷ Yet, the Court's refusal to interpret the Privileges or Immunities Clause in a way that recognized the fundamental role of political participation in citizenship is a striking example of judicial minimalism masquerading as constitutional fidelity.

The Court's appeal to tradition failed to account for the radical departure the Fourteenth Amendment made from the constitutional order as it existed before the Civil War.³⁸ The very purpose of the amendment was to redefine the relationship between citizens and the state, particularly with respect to the protection of individual rights against state action. By severing voting from citizenship, the Court not only diminished the scope of the Privileges or Immunities Clause but also reinforced a system of exclusion that the amendment was meant to dismantle.

Perhaps most troubling about the decision in *Minor* is its failure to engage with the structural implications of denying half of the population the ability to participate in the political process. In treating suffrage as a mere state-granted privilege, the Court preserved the status quo and insulated states from the constitutional responsibility to ensure equal political participation. This was not merely an oversight; it was an abdication of the judiciary's role in enforcing constitutional equality. The Privileges or Immunities Clause should have served as a vehicle for expanding, rather than constraining, democratic participation.

II. THE CONSERVATIVE CRITIQUE OF SUBSTANTIVE DUE PROCESS

The *Slaughter-House* (and by extension, the *Minor v. Happersett*) reading of the Privileges or Immunities Clause has been the target of much scholarly criticism.³⁹ It has also received pushback from the judiciary, most

35. *Id.*

36. *Id.* at 174.

37. *Id.* at 178.

38. See, e.g., ANTHONY MICHAEL KREIS, *ROT AND REVIVAL: THE HISTORY OF CONSTITUTIONAL LAW IN AMERICAN POLITICAL DEVELOPMENT* (2024); FONER, *supra* note 32.

39. BARNETT & BERNICK, *supra* note 4, at 19–20 (“[I]t has become conventional wisdom among scholars that the Supreme Court in the 1873 *Slaughter-House Cases* misinterpreted the Privileges or

notably from Justices Thomas and Gorsuch.⁴⁰ But, so far, this judicial lamentation has primarily been limited to concurring and dissenting opinions, and the Clause remains narrowly cabined.⁴¹

With the relegation of the Privileges or Immunities Clause to the constitutional dustbin, the Court developed other ways of providing remedies for state violations of individual rights. As this Article will examine further below, in the realm of election law, the Equal Protection Clause emerged as the constitutional vehicle of choice. But in many other areas of law the Court read substantive content into the Due Process Clause of the Fourteenth Amendment, creating the doctrine of substantive due process.⁴²

According to the political scientist Steven M. Teles, it was this use of the substantive due process doctrine that eventually caught the attention of certain members of the conservative legal movement.⁴³ The subsequent support from conservative and libertarian judges, justices, and academics may ultimately serve to tip the balance of the Court in favor of wholesale replacement of substantive due process with a new doctrine based on the Privileges or Immunities Clause and unencumbered by more than a century of substantive due process precedent.

A. *Substantive Due Process Before Dobbs*

The most high-profile restriction on substantive due process in the modern era came when a majority of the Court voted to overrule *Roe v. Wade*⁴⁴ in the 2022 case, *Dobbs v. Jackson Women’s Health Organization*.⁴⁵ But the groundwork for that decision was laid long before the *Dobbs*

Immunities Clause to the point of effectively nullifying its original meaning.”); Ian Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 872 (2020) (“Most scholars agree that the clause referred at a minimum to state-defined rights and that Justice Samuel Miller was incorrect in the *Slaughter-House Cases* to limit the clause only to the privileges of national citizenship.”).

40. See, e.g., *Timbs v. Indiana*, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring); *McDonald v. City of Chicago*, 561 U.S. 742, 851–55 (2010) (Thomas, J., concurring in part and concurring in the judgment).

41. Shapiro & Blackman, *supra* note 16, at 1221.

42. See Wurman, *supra* note 39, at 820 (“It was not until after the adoption of the Fourteenth Amendment that courts in the 1870s began inferring and imposing substantive due process limitations upon the state legislatures.”).

43. See TELES, *supra* note 9, at 238 (“We believe it is timely and essential to begin a direct assault on the *Slaughter-House Cases*, which read the privileges or immunities clause out of the 14th Amendment. Such an assault must unfold as part of a carefully planned, long-term program to restore constitutional protection for economic liberty.” (quoting letter from Chip Mellor (chairman of the conservative public interest firm Institute for Justice) to James Piereson (executive directors of the John M. Olin Foundation, identified by Teles as a “patron” of the conservative legal movement))).

44. 410 U.S. 113 (1973).

45. 597 U.S. 215 (2022).

decision was handed down. This section will walk the reader through some of the more influential opinions attacking substantive due process in the lead-up to *Dobbs* itself.

To better explore the push for a historically bound substantive due process doctrine, it is crucial to first understand both the historical context and the legal philosophies underpinning this shift. While initially introduced as a justification for striking down government regulations of economic activity,⁴⁶ over time, the substantive due process doctrine has been the cornerstone of landmark rulings that expanded individual rights related to privacy,⁴⁷ same-sex marriage,⁴⁸ bodily autonomy,⁴⁹ and more. In response, conservative lawyers, academics, and jurists have expressed unease with the doctrine, viewing it as unmoored from the Constitution's text and history. These actors have investigated, developed, and articulated increasingly restrictive, more historically cabined versions of the doctrine, and some have even advocated invoking the Privileges or Immunities Clause as a more textually and historically grounded alternative for protecting individual rights. The next two sections will examine some of the institutional, academic, and judicial contributions to this effort.

1. Intellectual and Institutional Capital and Substantive Due Process

According to political scientist Steven M. Teles, the conservative legal movement has, over the past several decades, forged a distinctive institutional infrastructure that now plays a decisive role in shaping American constitutional law.⁵⁰ As Teles notes, conservatives “slowly recognized that they needed to develop their own apparatus for legal change” in response to a liberal legal establishment that had, for decades, expanded constitutional rights through doctrines such as substantive due process.⁵¹ Conservative legal entrepreneurs have built networks—from the Federalist Society to specialized public interest law firms like the Institute for Justice and Center for Individual Rights to think tanks like the Cato Institute and the Heritage Foundation—that have provided the “intellectual capital” to challenge what conservatives and libertarians perceive as liberal

46. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

47. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

48. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

49. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113.

50. See generally TELES, *supra* note 9, at 56–57 (recounting the way in which the conservative legal movements arose in response to the then-orthodoxy of the Liberal Legal Network).

51. *Id.* at 57.

legal norms and promote a constitutional interpretation anchored in history and tradition.⁵²

For members of the conservative legal movement focused on substantive due process, their various doctrinal agenda tend to include three interconnected claims. First, they assert that the current doctrine of substantive due process rests on weak constitutional foundations. Ilya Shapiro and Josh Blackman, for example, assert that “the Supreme Court eviscerated the Privileges or Immunities Clause” in the *Slaughter-House Cases*,⁵³ and that the Court’s subsequent reliance on substantive due process lacks a stable historical basis.⁵⁴ This critique echoes the longstanding conservative view that expansive substantive due process grants judges broad discretion to impose their own policy preferences—an approach that many have condemned as judicial usurpation.⁵⁵

Second, while conservatives acknowledge that certain unenumerated rights may warrant protection, they insist that such rights must be “deeply rooted” in our nation’s history and tradition.⁵⁶ As Shapiro and Blackman observe, a return to a historical test—one that requires rights to be anchored in the public meaning of the text at the time of ratification—is essential to curbing judicial overreach.⁵⁷ This insistence on historical continuity reflects the conservative legal movement’s commitment to originalism, a principle that has guided the Federalist Society’s efforts to reshape constitutional interpretation. Michael Avery and Danielle McLaughlin note that “[s]ince the early years of the Federalist Society . . . its members have believed that the easiest way to change the law is to change the judges,” a strategy that has yielded a pipeline of judicial appointments closely aligned with originalist and conservative views.⁵⁸

Third, many conservative and libertarian scholars contend that the Privileges or Immunities Clause of the Fourteenth Amendment offers a

52. See, e.g., HOLLIS-BRUSKY, *supra* note 11, at 147; TELES, *supra* note 9, at 220–49; Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1227 (2005).

53. Shapiro & Blackman, *supra* note 16, at 1208.

54. *Id.* at 1213.

55. See Evan D. Bernick, *Substantive Due Process for Justice Thomas*, 26 GEO. MASON L. REV. 1087, 1088 (2019) (observing that “[s]ubstantive due process is associated with what some originalists consider to be among the Court’s most egregious decisions”).

56. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

57. Shapiro & Blackman, *supra* note 16, at 1217–18; see also, e.g., *Glucksberg*, 521 U.S. at 720–21.

58. AVERY & MCLAUGHLIN, *supra* note 11, at 21. This is, of course, not a new strategy, or one that is limited to conservatives. Liberals also seek to place ideologically aligned judges on the bench. The point here is not to criticize this strategy, but rather to help explain its impact on the doctrines of substantive due process and the Privileges or Immunities Clause.

more suitable basis for protecting individual rights than the Due Process Clause. Randy Barnett (in a book co-authored with left-leaning originalist Evan Bernick) argues that the “letter” and “spirit” demonstrate that it was the Privileges or Immunities Clause, not the Due Process Clause, that was meant to be the primary constitutional mechanism for securing a broad array of “civil rights” that include both enumerated and evolving post-political rights.⁵⁹

This multifaceted strategy has been underwritten by a dense network of institutional actors. The Federalist Society, as Avery and McLaughlin explain, “has been described as quite simply the best-organized, best-funded, and most effective legal network operating in this country,” and its influence extends from law school classrooms to the federal bench.⁶⁰ Conservative public interest law firms—such as the Institute for Justice and the Center for Individual Rights—have similarly emerged to challenge liberal legal doctrines by litigating cases that question expansive regulatory and social policies.⁶¹ Ilya Somin emphasizes that without such a conservative legal network, “conservatives could not easily find judicial appointees who could reliably be counted [on] to vote their way,” a circumstance that has, in recent decades, allowed the movement to exert significant influence over constitutional jurisprudence.⁶²

Yet, despite these concerted efforts and the sophisticated network-building that has defined the conservative legal movement, the prospect of a wholesale shift away from substantive due process remains uncertain. As Shapiro and Blackman assert, while Justice Thomas’s concurrence in *McDonald v. City of Chicago* reanimated the Privileges or Immunities Clause by noting that “the original meaning of the . . . [Clause] offers a superior alternative” to substantive due process, the Court continues to tether both substantive due process and any potential revival of the Privileges or Immunities Clause to history and tradition.⁶³

2. *Pre-Dobbs Criticisms of Substantive Due Process in the Court*

Justice Thomas has perhaps been the Court’s most vocal critic of substantive due process, repeatedly calling for its abandonment.⁶⁴ Though

59. BARNETT & BERNICK, *supra* note 4, at 19–21.

60. AVERY & MCLAUGHLIN, *supra* note 11, at 3.

61. See, e.g., TELES, *supra* note 9, at 220; Southworth, *supra* note 52, at 1245.

62. Ilya Somin, *Lessons from the Rise of Legal Conservatism*, 32 HARV. J.L. & PUB. POL’Y 415, 418 (2009).

63. Shapiro & Blackman, *supra* note 16, at 1216 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., concurring in part and concurring in the judgment)).

64. See, e.g., *McDonald*, 561 U.S. at 851–55 (Thomas, J., concurring in part and concurring in the judgment).

Justice Thomas has advocated for replacing substantive due process with privileges or immunities for nearly his entire career on the bench,⁶⁵ he made his most robust argument for this doctrinal change in *McDonald*.⁶⁶ Justice Alito authored the majority opinion in the case and seemed to provide some implicit support for the idea that the Privileges or Immunities Clause might pack more of a substantive wallop than the *Slaughter-House Cases* would allow.⁶⁷ Ultimately, however, he resolved the case by incorporating the Second Amendment against the states through the Due Process Clause of the Fourteenth Amendment, in line with prior judicial treatment of such questions.⁶⁸

In his concurring opinion, Justice Thomas urged the Court to revisit its reliance on substantive due process and argued that the Privileges or Immunities Clause, rather than the Due Process Clause, should be the vehicle for incorporating the Second Amendment against the states.⁶⁹ In making this argument, however, Justice Thomas made clear that his vision of the Privileges or Immunities Clause was bound by history and would provide constitutional protection to only those rights deemed (by a majority of the Court) as one of the privileges or immunities of citizenship in 1868:

The Privileges or Immunities Clause of the Fourteenth Amendment declares that “[n]o State . . . shall abridge the privileges or immunities of citizens of the United States.” In interpreting this language, it is important to recall that constitutional provisions are “written to be understood by the voters.” Thus, the objective of this inquiry is to discern what “ordinary citizens” at the time of ratification would have understood the Privileges or Immunities Clause to mean.⁷⁰

Justice Thomas’s critique of substantive due process relies heavily on the claim that the doctrine lacks constitutional fidelity. In his view, under

65. See *id.*; see also *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 600 U.S. 181, 231–43 (2023) (Thomas, J., concurring); *Ramos v. Louisiana*, 590 U.S. 83, 132–40 (2020) (Thomas, J., concurring in the judgment); *Timbs v. Indiana*, 586 U.S. 146, 157–70 (2019) (Thomas, J., concurring in the judgment); *Murr v. Wisconsin*, 582 U.S. 383, 419 (2017) (Thomas, J., dissenting).

66. 561 U.S. at 805–58 (Thomas, J., concurring in part and concurring in the judgment).

67. *Id.* at 756 (majority opinion) (“Today, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation.”).

68. *Id.* at 791 (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”). Justice Alito’s discomfort with substantive due process will be discussed in more detail when analyzing his opinion in *Dobbs v. Jackson Women’s Health Organization* in Section II.B.

69. *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment) (“I agree with that description of the right. But I cannot agree that it is enforceable against the States through a Clause that speaks only to ‘process.’ Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”).

70. *Id.* at 813 (emphasis added) (citations omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008)).

the “legal fiction” of the substantive due process doctrine, the Court “has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights.”⁷¹ Instead, Justice Thomas contends that the original understanding of the Fourteenth Amendment clearly envisioned the Privileges or Immunities Clause as the means by which rights, such as the Second Amendment, would be protected from state infringement.⁷² According to Justice Thomas, the majority’s continued use of substantive due process to incorporate rights perpetuates doctrinal inconsistencies, which, in his view, are rooted in the problematic legacy of the *Slaughter-House Cases*.⁷³

Yet, Justice Thomas’s insistence on replacing substantive due process with the Privileges or Immunities Clause is more a nostalgic appeal to the supposed original meaning of the Constitution than a serious solution to the complex jurisprudential issues surrounding incorporation. While he decries the use of substantive due process as “tenuous”⁷⁴ and historically unsound, his proposal to resurrect a clause that has been dormant for over a century raises as many questions as it purports to answer.

Even accepting the premise that original public meaning should guide our interpretation of the Privileges or Immunities Clause, one of the primary flaws in Justice Thomas’s argument lies in his selective reading of history. His opinion glosses over the fact that the original meaning of the Privileges or Immunities Clause is far from settled.⁷⁵ Even if the *Slaughter-House Cases* improperly gutted the Clause, it is not clear that the historical record provides a coherent and definitive understanding of which rights the Clause was meant to protect.⁷⁶ As a result, Justice Thomas’s critique of substantive due process as lacking in constitutional clarity seems ironic at best. Substituting one ambiguous doctrine for another does little to advance a more principled or transparent method of constitutional interpretation. What it does accomplish is allowing the current Court to side-step its entire line

71. *Id.* at 811.

72. *Id.* (“All of this [precedent relying on substantive due process] is a legal fiction. 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.”).

73. *Id.* at 809 (“As a consequence of this Court’s marginalization of the [Privileges or Immunities] Clause, litigants seeking federal protection of fundamental rights turned to the remainder of § 1 [of the Fourteenth Amendment] in search of an alternative fount of such rights. They found one in a most curious place—that section’s command that every State guarantee ‘due process’ to any person before depriving him of ‘life, liberty, or property.’”).

74. *Id.* at 812.

75. *See supra* Section I.A.

76. *See supra* Section I.A.

of substantive due process precedent and to develop a new line of privileges or immunities cases, writing on a blank slate.⁷⁷

Justice Thomas's critique, however, is not an isolated position. The late Justice Scalia also expressed skepticism of substantive due process, although he was more cautious about fully abandoning it.⁷⁸ Justice Scalia's originalism often led him to criticize the lack of historical grounding for substantive due process,⁷⁹ but he remained reluctant to fully embrace the Privileges or Immunities Clause as a substitute.⁸⁰ Nevertheless, Justice Scalia's dissent in *Obergefell v. Hodges*,⁸¹ where he criticized the majority for creating new rights under the Due Process Clause without historical precedent, echoes the broader conservative frustration with the expansive potential of substantive due process.⁸²

Justice Gorsuch has also demonstrated a preference for grounding constitutional protections in the text and history of the Constitution. Before his elevation to the Supreme Court, then Tenth Circuit Judge Gorsuch signaled his openness to this particular line of argument.⁸³ Then, once confirmed, the newly minted Justice continued to show at least some mild interest in this project. In *Timbs v. Indiana*,⁸⁴ Justice Gorsuch joined the Court in incorporating the Eighth Amendment's protection against excessive fines through the Fourteenth Amendment's Due Process Clause.

77. A possibility Justice Thomas recognized in his dissent in *Saenz v. Roe*: "The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'" 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)). For further discussion of *Saenz v. Roe*, see *infra* notes 104–11 and accompanying text.

78. See, e.g., *McDonald*, 561 U.S. at 791 (Scalia, J., concurring) ("Despite my misgivings about substantive due process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.' This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it." (citation omitted) (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring))).

79. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

80. See Shapiro & Blackman, *supra* note 16, at 1213–14 (describing Scalia's more tepid approach to substantive due process).

81. 576 U.S. 644 (2015).

82. *Id.* at 720 (Scalia, J., dissenting) ("What possible 'essence' does substantive due process 'capture' in an 'accurate and comprehensive way'? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes.").

83. See *Browder v. City of Albuquerque*, 787 F.3d 1076, 1078 (10th Cir. 2015) ("The Supreme Court has interpreted [the Due Process Clause of the Fourteenth Amendment] as guaranteeing not only certain procedures when a deprivation of an enumerated right takes place (procedural due process), but also as guaranteeing certain deprivations won't take place without a sufficient justification (substantive due process). *Some suggest this latter doctrine with the paradoxical name might find a more natural home in the Privileges and Immunities Clause*; others question whether it should find a home anywhere in the Constitution." (emphasis added)).

84. 586 U.S. 146 (2019).

Justice Gorsuch, however, in a short concurrence, seems to have signed on to Justice Thomas's long-term project of replacing substantive due process.⁸⁵ Without adding much beyond a series of citations to Justice Thomas's prior concurrences and a selection of legal scholarship, Justice Gorsuch signaled his openness to revisiting the Privileges or Immunities Clause's dormant potential and indicated that he would prefer to use the Clause as the constitutional vehicle for incorporation.⁸⁶

In these opinions, we perhaps see an emerging pattern among at least a minority of the justices:⁸⁷ a recognition that substantive due process has been used to protect rights, but a growing desire to replace that framework with one that is allegedly rooted more firmly in the original meaning of the Constitution. While Justice Gorsuch, like Justice Scalia before him, has been cautious in fully outlining what a robust Privileges or Immunities Clause would look like, his initial forays into this debate point to an interest in using the Clause to refocus constitutional protections on rights that can be grounded in historical and textual analysis, rather than the broader interpretive scope of substantive due process. As with Justice Thomas's views, this historically cabined version of the Privileges or Immunities Clause would limit constitutional protections to those which seemed essential to citizenship in 1868.

B. *Dobbs and Substantive Due Process*

The conservative legal movement's campaign against substantive due process doctrine achieved a significant victory in the 2022 decision *Dobbs v. Jackson Women's Health Organization*,⁸⁸ when the conservative supermajority of the Court officially overruled *Roe v. Wade*, ending federal constitutional protections for reproductive rights.⁸⁹

85. *Id.* at 157 (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause.")

86. *Id.*

87. While Justice Kavanaugh has not yet indicated his views on the Privileges or Immunities Clause in a Supreme Court opinion, he did express some support for the interchangeability of substantive due process and privileges or immunities during his confirmation hearing for his nomination as an associate justice. See Shapiro & Blackman, *supra* note 16, at 1230 ("[W]hen asked by Senator Ted Cruz about unenumerated rights at his confirmation hearing, Judge Kavanaugh replied: I think the Ninth Amendment and the privileges and immunities clause and the Supreme Court's doctrine of substantive due process are three roads that someone might take that all really lead to the same destination . . . , which is that the Supreme Court precedent protects certain unenumerated rights so long as the rights are, as the Supreme Court said in the *Glucksberg* case, rooted in history and tradition." (quoting *Kavanaugh Supreme Court Hearing*, CNN NEWSROOM: TRANSCRIPTS (Sept. 5, 2018, 3:30 PM), <https://transcripts.cnn.com/show/cnr/date/2018-09-05/segment/08> [https://perma.cc/3U4D-KZTU])).

88. 597 U.S. 215 (2022).

89. *Id.* at 231.

While the majority opinion, authored by Justice Alito, did not explicitly advocate replacing substantive due process with the Privileges or Immunities Clause, it clearly reflected the conservative justices' deep discomfort with substantive due process as a doctrine, and implicitly underscored the appeal of an alternative framework rooted in the original meaning of the Constitution.

The majority opinion in *Dobbs* directly criticized substantive due process for the doctrine's alleged lack of textual and historical legitimacy.⁹⁰ Substantive due process, Justice Alito argued, had allowed the Court to recognize unenumerated rights that were not explicitly mentioned in the Constitution. This approach, according to Justice Alito, had led the judiciary into an "exercise of raw judicial power," one in which judges could impose their own views on social and moral issues, rather than applying principles rooted in constitutional text and history.⁹¹ Indeed, in his opinion, Justice Alito emphasized that any rights protected under substantive due process must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."⁹² By using this historical test, the majority rejected the idea that the right to abortion could be considered a fundamental liberty under the Due Process Clause, as it was not historically recognized at the time of the Fourteenth Amendment's ratification in 1868.⁹³ While the majority did not explicitly call for replacing substantive due process with the Privileges or Immunities Clause, its historical approach seemed to signal a methodological endorsement of the regressive vision of individual rights that such a doctrinal shift would entail.

Justice Thomas's concurring opinion in *Dobbs* went even further than the majority opinion by once again calling for a reconsideration of substantive due process altogether.⁹⁴ He reiterated his long-standing view that substantive due process is a "legal fiction" with no constitutional basis,

90. *Id.* ("[The Due Process Clause of the Fourteenth Amendment] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

91. *Id.* at 228.

92. *Id.* at 231 (quoting *Glucksberg*, 521 U.S. at 721).

93. *Id.* at 241 ("At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.").

94. *Id.* at 332 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*[,] [b]ecause any substantive due process decision is 'demonstrably erroneous . . .'" (quoting *Ramos v. Louisiana*, 590 U.S. 83, 138 (2020) (Thomas, J., concurring))).

echoing his critiques from prior cases like *McDonald* and *Timbs*.⁹⁵ As he had for more than two decades, Justice Thomas asserted that the Court's substantive due process jurisprudence had no grounding in the text of the Fourteenth Amendment and that it had opened the door to an unprincipled expansion of judicial power.⁹⁶

Justice Thomas once again argued that rights currently protected under substantive due process should be reexamined under other constitutional provisions, including the Privileges or Immunities Clause.⁹⁷ Justice Thomas's opinion did not specifically outline how the Clause would apply to modern rights claims, but his call to reconsider cases such as *Griswold v. Connecticut*,⁹⁸ *Lawrence v. Texas*,⁹⁹ and *Obergefell v. Hodges*¹⁰⁰ underscored his desire to replace substantive due process with a framework that would restrict constitutional protections to only those rights that a majority of the Court would determine existed in 1868.

Dobbs exemplifies the conservative justices' critique of substantive due process as an open-ended and ahistorical doctrine. For the conservative justices, the path forward seems, at minimum, to cabin the scope of the clause to only those rights "deeply rooted" in our country's history at the time the Fourteenth Amendment was ratified, or to take a step further and reconsider substantive due process altogether, perhaps replacing it with the Privileges or Immunities Clause. But, as discussed below, this shift would almost certainly narrow the scope of rights protected under the Fourteenth Amendment and limit the Court's ability to address evolving societal needs.

C. *Privileges or Immunities as a Substitute for Substantive Due Process*

The Privileges or Immunities Clause offers the conservative legal movement an attractive alternative to substantive due process. Unlike substantive due process, which requires the Court to interpret vague concepts like "liberty,"¹⁰¹ the Privileges or Immunities Clause could, in

95. *Id.* at 333.

96. *Id.* at 331 ("As I have previously explained, 'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'" (quoting *Johnson v. United States*, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring in the judgment))).

97. *Id.* at 333 ("[W]e 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.").

98. 381 U.S. 479 (1965) (recognizing a constitutional right to privacy which included the ability to privately access contraception).

99. 539 U.S. 558 (2003) (recognizing a constitutional right to privacy in sexual relationships that extended to same-sex relationships).

100. 576 U.S. 644 (2015) (holding that the Due Process Clause prohibited statutory bans on same-sex marriage).

101. *Dobbs*, 597 U.S. at 334 (Thomas, J., concurring).

theory, be tied to a more concrete set of rights rooted in the historical understanding of citizenship. The Privileges or Immunities Clause, in the view of some, offers a more historically grounded and limited approach to rights protection—one that aligns with the conservative judicial philosophy of originalism.¹⁰²

For Justices Thomas and Gorsuch, the historical context of the Privileges or Immunities Clause provides a more legitimate basis for rights claims.¹⁰³ But this is in large part because the only rights they view as legitimate are those which were valued by those who ratified the original Constitution and the Fourteenth Amendment. By reviving the Privileges or Immunities Clause as a source of rights, conservative justices can avoid the judicial activism they associate with substantive due process and engage in their own selective process of identifying which rights are worthy of constitutional protection.

Justice Thomas, for one, has made clear that it is this “history and tradition” based version of the Privileges or Immunities Clause that he would like to revive. In *Saenz v. Roe*,¹⁰⁴ the Court issued one of its only opinions striking down state law as violative of the Privileges or Immunities Clause.¹⁰⁵ Justice Stevens, writing for the majority, struck down a California law that provided lower welfare benefits to recent residents based on the rates from their prior state of residence.¹⁰⁶ He reasoned that this law violated the anti-discrimination principles enshrined in both the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment.¹⁰⁷ By treating new residents differently from long-term Californians, the state, according to Justice Stevens, ran afoul of the constitutional mandate to treat all citizens equally, regardless of their state of origin.¹⁰⁸

Justice Thomas authored a dissenting opinion arguing that the both the Privileges and Immunities and Privileges or Immunities Clauses should be best understood as providing substantive constitutional protections to certain rights, but only those rights historically deemed privileges and/or immunities of citizenship at the time of the Founding or when the

102. See *supra* Section II.A.1.

103. See *supra* Section II.A.2.

104. 526 U.S. 489 (1999).

105. Shapiro & Blackman, *supra* note 16, at 1209–11 (recounting the limited number of successful privileges or immunities challenges).

106. *Saenz*, 526 U.S. at 498.

107. *Id.* at 501–04.

108. *Id.* at 510–11. For further discussion of this “non-discrimination” reading of the Privileges and Immunities Clause of Article IV, see Martin H. Redish & Brandon Johnson, *The Underused and Overused Privileges and Immunities Clause*, 99 B.U. L. REV. 1535 (2019).

Fourteenth Amendment was ratified.¹⁰⁹ Needless to say, government benefits of the type at issue in *Saenz* would not have been included in that list.¹¹⁰ Justice Thomas went further making clear that the only version of the Privileges or Immunities Clause that he would accept is one securely tied to the understanding of citizenship in 1868. Allowing the Court to read other rights into the Clause, warned Justice Thomas, would “raise[] the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the ‘predilections of those who happen at the time to be Members of this Court.’”¹¹¹

This vision of the Privileges or Immunities Clause runs the risk of locking rights into a fixed historical moment, potentially precluding the expansion of civil rights protections in response to societal changes. But it is worth taking a step back and recognizing that replacing substantive due process with a new strain of jurisprudence based on the Privileges or Immunities Clause need not necessarily result in the historically cabined, regressive interpretation that appears in the opinions and scholarship discussed above. The next section addresses this possibility.

D. A Progressive Privileges or Immunities Clause?

As discussed above, contemporary scholars increasingly challenge the *Slaughter-House Cases*’ reading of the Privileges or Immunities Clause. While many contemporary scholars generally agree that *Slaughter-House* was wrongly decided, they disagree on which rights the Clause should be interpreted to protect. In contrast to the historically restrictive version of the Clause examined above, some scholars argue instead for a far more expansive construction that aligns with the Reconstruction Congress’s vision of robust individual rights. Randy Barnett and Evan Bernick, for example, contend that the Clause was originally intended to protect not only historically understood “civil rights”—including some rights not enumerated in the text of the Constitution—but also “post-political” rights that become fundamental over time.¹¹² Their account of the “letter” and “spirit” of the Fourteenth Amendment emphasizes how the Clause’s textual meaning can be read to affirm certain fixed core rights while also

109. *Saenz*, 526 U.S. at 522–25 (Thomas, J., dissenting).

110. *Id.* at 527 (“[A]t the time the Fourteenth Amendment was adopted, people understood that ‘privileges or immunities of citizens’ were fundamental rights, rather than every public benefit established by positive law.”).

111. *Id.* at 528 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)).

112. BARNETT & BERNICK, *supra* note 4, at 42–44 (describing “civil rights” as encompassing more than enumerated protections).

acknowledging later additions—provided they garner a deep national consensus.¹¹³

Bernick previewed this point in his solo work on substantive due process, noting that many of the aims currently addressed under “substantive due process” might find a firmer textual anchor if courts revisited the Privileges or Immunities Clause.¹¹⁴ Ultimately, for both Barnett and Bernick, the Supreme Court’s mid-nineteenth-century pivot in *Slaughter-House* foreclosed the Clause’s natural role, forcing courts to rely on interpretive workarounds that have proven controversial.¹¹⁵

Anthony Michael Kreis offers additional insight into how that pivotal decision frustrated the broader agenda of the Reconstruction project. As Kreis observes, “The *Slaughterhouse Cases* was an inflection point in constitutional law because of how it interpreted the Fourteenth Amendment. It pitted two Radical Republican principles against one another: the nationalization of citizenship and the success of free labor under Southern Reconstruction governments.”¹¹⁶ While white butchers contended that Louisiana’s monopoly violated a fundamental right to pursue their trade under the Privileges or Immunities Clause, the Supreme Court responded by embracing an “inexplicable” reading of national citizenship, one designed in part to preserve states’ police powers and thereby “give greater latitude to Reconstruction state governments.”¹¹⁷ For Kreis, this doctrinal “compromise” ironically undercut the Amendment’s capacity to fully protect civil rights—including rights central to the economic and civic freedom of formerly enslaved persons.¹¹⁸

Indeed, Kreis describes *Slaughter-House* as emblematic of how the “remade Constitution” after the Civil War ultimately validated “a right of enterprise access” for certain groups but stopped short of recognizing “a right to public dignity” for others.¹¹⁹ By tethering the Clause’s protections to a cramped view of national citizenship, the Court shielded state laws from meaningful privileges or immunities scrutiny—thereby diverting subsequent challenges into the narrower channels of due process or equal protection. Over time, that doctrinal shift fueled what Kreis labels a “deregulatory juggernaut,” allowing courts to champion various economic

113. *Id.* at 20–23.

114. Bernick, *supra* note 55, at 1089–90.

115. BARNETT & BERNICK, *supra* note 4, at 31.

116. KREIS, *supra* note 38, at 71.

117. *Id.* at 72.

118. *Id.* (“A broad reading of the Fourteenth Amendment, as advocated by the white butchers, could presumably hamstring states and especially Reconstruction governments from drawing any distinctions necessary to rebuild the South, safeguard public health, and protect Black free labor.”).

119. *Id.* at 70.

liberties while doing comparatively little to enforce anti-subordination mandates emanating from Reconstruction.¹²⁰

Jamal Greene's *How Rights Went Wrong* places these issues in a broader critique of American constitutional rights discourse.¹²¹ According to Greene, the Court's refusal to develop the Fourteenth Amendment as a robust guarantor of, among other things, racial equality is deeply intertwined with the country's tendency to treat rights as either absolute or nonexistent. As Greene puts it: "[W]e protected the wrong rights."¹²² Rather than calibrating competing claims or facilitating forms of "rights mediation," the post-*Slaughter-House* jurisprudence drew rigid lines between the rights deemed worthy of judicial protection and those left at the discretion of political actors.¹²³ This rigid model, Greene contends, neglects the dynamic interplay among "the intimate lives . . . of actual people"¹²⁴ and transforms every rights clash into a battle with "an enemy . . . to destroy."¹²⁵

But a fuller appreciation of the Privileges or Immunities Clause could mitigate this all-or-nothing approach. Greene's work underscores that the historical context—particularly the Reconstruction Amendments' focus on safeguarding newly emancipated African Americans—was largely supplanted by a narrow concept of "strong rights" pressed into the realm of economic liberties.¹²⁶ If, instead, courts recognized that the Clause was designed to ensure a more pluralistic mediation of rights, an approach less enthralled by absolute judicial mandates might emerge. Such a method, Greene argues, would widen the array of protected interests while relieving some of the burdens that come from forcing every dispute to revolve around an all-or-nothing question of whether an asserted right really exists.¹²⁷

Together, these accounts—Barnett and Bernick's originalist defense, Kreis's historical chronicle of Reconstruction, and Greene's broad critique

120. *Id.* ("This inflection point in the Court's history limited the war amendments' full potential and laid the path for the Court to become a deregulatory juggernaut.").

121. JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021).

122. *Id.* at xxiii ("The American legal profession's aversion to proportionality emerged out of a shortsighted attempt to correct a tragic, peculiarly American mistake—indeed, the defining mistake of the twentieth century: we protected the wrong rights. During the same period in which courts were shamefully disregarding the rights of Black citizens, they were routinely deploying the Fourteenth Amendment to shield businesses from health, safety, and labor regulations.").

123. *Id.* at xx (emphasis omitted).

124. *Id.* at xix.

125. *Id.* at xvii.

126. *Id.* at xvi–xvii ("Strong rights protection is far from harmless. The proliferation of strong rights can frustrate the democratic will and erode the solidarity of communities. Judicial dominion over constitutional rights can absolve the rest of us of our responsibility to take rights seriously, leading our moral intuitions to atrophy and eventually to decay. Rights can breed resentment of those who win the Constitution's favor at the expense of others.").

127. *Id.* at 9.

of binary rights adjudication—outline how the Privileges or Immunities Clause might have functioned as a more capacious guarantor of individual freedoms. Rather than relegating unenumerated liberties to precarious substantive due process rulings, a reinvigorated Clause could vindicate both classic civil rights (e.g., those protected by the Bill of Rights) and newly recognized fundamental privileges (e.g., emerging rights viewed by a broad national consensus as essential to citizenship). The same lens would underscore how the Clause was intended to check the abuses of state and local government, consistent with the Fourteenth Amendment’s overarching commitment to “national” rather than purely “state” citizenship.¹²⁸

This “progressive” vision of privileges or immunities faces a stubborn reality: The Supreme Court consistently ties both substantive due process and the Privileges or Immunities Clause to history and tradition. Even Barnett and Bernick concede that courts require empirical proof of a right’s entrenchment in our history and tradition before conferring constitutional protection.¹²⁹ The justices’ reluctance to expand constitutional guarantees beyond well-documented historical baselines suggests that no matter how textually or historically valid a broader reading of the Clause might be, its wholesale adoption remains unlikely in the near term. As *Slaughter-House* itself illustrates, the Court’s wariness toward new categories of fundamental privileges can impede doctrinal shifts, especially if doing so compels justices to revisit multiple lines of precedent. Even modern expansions of substantive due process have tended to hinge on whether particular liberties are “objectively, deeply rooted in this Nation’s history.”¹³⁰

In short, while some scholarship around the Privileges or Immunities Clause offers a powerful argument that the Clause was intended to champion a more substantial catalogue of rights—both enumerated and unenumerated—a Court bound by its traditional, historically anchored approach is unlikely to embrace that broader textual promise. The path to such a restoration, though perhaps sound as a matter of constitutional interpretation, remains obscured by judicial practice that continues to look backward for doctrinal affirmation.

128. See, e.g., BARNETT & BERNICK, *supra* note 4, at 228–29 (discussing the concept of “republican citizenship” as the proper lens for evaluating the privileges or immunities of U.S. citizens).

129. *Id.* at 23 (“When these goods become sufficiently entrenched—or as the Court would put it some centuries later, ‘deeply rooted in this Nation’s history and traditions’—we can say that they are *deemed* fundamental by the citizenry and thereby become civil rights of citizenship” (footnote omitted)).

130. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

This mirrors the regressive interpretation of the Privileges or Immunities Clause in *Minor v. Happersett*, where the Court refused to recognize voting as a privilege of citizenship. Just as the *Minor* Court chose to restrict the Clause's scope, today's conservative justices may, through their originalist approach, limit the protections available under the Privileges or Immunities Clause. By insisting that rights must be historically grounded, the Court could undermine future efforts to expand protections for vulnerable or historically marginalized groups. This Article now turns to the potential impact of this methodology on election law.

III. EQUAL PROTECTION AND A REGRESSIVE CONSTITUTION

The preceding discussion has shown that the conservative legal movement's efforts to restrict (and perhaps even supplant) the doctrine of substantive due process have been successful. Given the Court's current makeup, it seems likely this trend will continue for the foreseeable future. The question raised in this final Part is: how might all of this play out in the arena of election law?

As an initial matter, it is important to note that much of our election law doctrine directly impacting the individual right to vote has been decided under the Equal Protection Clause of the Fourteenth Amendment and not the doctrine of substantive due process.¹³¹ And while equal protection doctrine has not of late received the same level of attention and criticism from conservative jurists and scholars that substantive due process has, it has received significant pushback since at least the time of the Warren Court¹³²—especially, in the modern era, from Justice Thomas.¹³³

A. Resistance to Individual Rights Protections in Election Law

While the Equal Protection Clause has long been invoked in various election regulation cases, it did not take on its current prominent place in election law until the one-person, one-vote cases of *Baker v. Carr*¹³⁴ and

131. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that racially gerrymandered districts may violate the Equal Protection Clause); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding that the Equal Protection Clause prohibits poll taxes); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires application of the one-person, one-vote principle to state legislative districts).

132. See, e.g., *Reynolds*, 377 U.S. at 589 (Harlan, J., dissenting) (accusing the majority of using the Equal Protection Clause to “plac[e] basic aspects of state political systems under the pervasive overlordship of the federal judiciary”); *Baker v. Carr*, 369 U.S. 186, 285–86 (1962) (Frankfurter, J., dissenting) (criticizing the majority's use of the Equal Protection Clause to extend beyond prohibitions on racial discrimination).

133. See *infra* notes 145–54 and accompanying text

134. 369 U.S. 186 (1962).

Reynolds v. Sims.¹³⁵ This history has been documented ad nauseam, so I will simply note that use of the Equal Protection Clause to provide judicial oversight to state election regulations has long been a subject of contentious debate within the U.S. Supreme Court.¹³⁶ This historical discomfort has never gone away and the Court (especially the conservative justices on the Court) has struggled to distinguish regulations that violate the Equal Protection Clause from those that don't.

But the Court's current majority is less consistently critical of how equal protection doctrine is applied in election law cases than it has been of substantive due process. Justice Thomas, for example, was perfectly willing to sign on to both the Court's per curiam opinion in *Bush v. Gore*,¹³⁷ and Chief Justice Rehnquist's concurrence,¹³⁸ both of which relied in part on the Equal Protection Clause as justification for halting Florida's recount of the 2000 presidential election.

But in what was viewed at the time as a potentially explosive case, Justice Thomas seemed far less comfortable with the doctrine, raising concerns about using the Equal Protection Clause to justify the one-person, one-vote standard. In *Evenwel v. Abbott*,¹³⁹ voters in Texas challenged the state's electoral maps for state senate districts as violative of one-person, one-vote.¹⁴⁰ The districts were within accepted ranges for total population, but deviations in the number of qualified voters in each district in some cases exceeded forty percent.¹⁴¹ This disparity, the petitioners claimed, meant that their votes were unconstitutionally underweighted.¹⁴² Justice Ginsburg's majority opinion quickly rejected the equal protection claim,

135. 377 U.S. 533 (1964).

136. See, e.g., Justice Frankfurter's dissent in *Baker v. Carr*: "To find such a political conception [as one person, one vote] legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution." 369 U.S. at 300 (Frankfurter, J., dissenting). Or Justice Harlan's dissent in *Reynolds v. Sims*:

Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people; other factors may be given play only to the extent that they do not significantly encroach on this basic "population" principle. Whatever may be thought of this holding as a piece of political ideology—and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate—I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.

377 U.S. at 590 (Harlan, J., dissenting) (citation omitted).

137. 531 U.S. 98 (2000).

138. *Id.* at 111–22 (Rehnquist, C.J., concurring).

139. 578 U.S. 54 (2016).

140. *Id.* at 62.

141. *Id.*

142. *Id.*

relying on precedent which held districting by population to be constitutionally permissible.¹⁴³

Justice Thomas concurred in the judgment but wrote separately to question the entire line of one-person, one-vote cases that relied on equal protection doctrine.¹⁴⁴ The concurrence went further, hearkening back to the Warren Court dissents¹⁴⁵ attacking the one-person, one-vote requirement. Justice Thomas asserted that:

[T]he majority has failed to provide a sound basis for the one-person, one-vote principle because no such basis exists. The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government.¹⁴⁶

Put another way, Justice Thomas advocated for replacing equal protection doctrine with only those protections afforded by the “Guarantee Clause” of Article IV.¹⁴⁷ Thus, we once again see Justice Thomas attempting to shift constitutional doctrine away from a rights-protective line of precedent to another long-discarded constitutional provision.¹⁴⁸ But unlike Justice Thomas’s attempts to inject substance into the Privileges or Immunities Clause, his *Evenwel* concurrence does little to reassure readers that the Guarantee Clause can provide essential protections long-understood to be under the umbrella of equal protection.

Justice Thomas reiterated his belief that the Equal Protection Clause provides no substantive limits on state redistricting decisions in his concurring opinion in *Alexander v. South Carolina State Conference of the NAACP*.¹⁴⁹ Not only did this opinion double down on his earlier criticisms of the one-person, one-vote principle, it also asserted that the Elections

143. *Id.* at 74–75.

144. *Id.* at 75 (Thomas, J., dissenting).

145. See *supra* note 132 and accompanying text discussing dissenting opinions criticizing the use of the Equal Protection Clause as a constitutional basis for striking down state election laws.

146. *Evenwel*, 578 U.S. at 75–76.

147. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”). It is worth noting that Justice Frankfurter made similar arguments in his dissenting opinion in *Baker v. Carr* asserting that “[t]o divorce ‘equal protection’ from ‘Republican Form’ is to talk about half a question.” 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting).

148. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (declaring the Guarantee Clause non-justiciable).

149. 602 U.S. 1, 39 (2024) (Thomas, J., concurring in part).

Clause of Article I¹⁵⁰ prohibited any branch of the federal government, other than Congress, from overseeing state districting decisions at all.¹⁵¹ According to Justice Thomas, then, *all* redistricting decisions must be exempt from judicial review. If this approach were adopted, it would further limit the ability of individual voters to challenge redistricting gerrymanders beyond the limitations imposed on partisan gerrymanders by *Rucho v. Common Cause*.¹⁵²

Nor is Justice Thomas the only conservative legal thinker to propose replacing equal protection doctrine with the Guarantee Clause. Michael McConnell, for example, began arguing in 2000 that even the most landmark equal protection decisions in election law—those establishing the one-person, one-vote rule—should have been decided under the Guarantee Clause.¹⁵³ Professor McConnell asserts that the Guarantee Clause would allow courts to better examine the democratic legitimacy of a redistricting scheme than would the equal protection doctrine, with its focus on numerical equality.¹⁵⁴ But in reality, the Guarantee Clause is another functionally defunct constitutional provision that, even if revived and given substantive teeth, could easily be shaped to defend only historically based (and therefore predominantly regressive) visions of the electorate.

And other members of the Court's conservative majority may be inclined to limit constitutional protections in this area as well. Chief Justice John Roberts has demonstrated a similar willingness to limit judicial protections in election-related cases. His approach, however, has focused more on limiting the types of cases voters can bring under the Voting Rights Act rather than attacking equal protection doctrine itself. This approach is perhaps most evident in *Shelby County v. Holder*.¹⁵⁵ The Chief Justice's majority opinion exemplifies a narrow and formalistic approach to constitutional interpretation, one that disregards the practical realities of discriminatory voting regulations in the modern era.¹⁵⁶ By declaring Section

150. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”). Note this is another long-neglected clause in constitutional law that the conservative legal movement has sought to restore to prominence. See *Moore v. Harper*, 600 U.S. 1 (2023).

151. *Alexander*, 602 U.S. at 49 (Thomas, J., concurring in part).

152. 588 U.S. 684 (2019).

153. U.S. CONST. art. IV, § 4; see also Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000).

154. McConnell, *supra* note 153, at 107–09.

155. 570 U.S. 529 (2013).

156. See *id.* at 593 (Ginsburg, J., dissenting) (“In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.”). See also Adam Bolotin, *Out*

4(b) of the Voting Rights Act unconstitutional, Chief Justice Roberts effectively dismantled a core protection for minority voters without acknowledging the ongoing need for robust federal oversight.¹⁵⁷ His reasoning rested on the claim that the “extraordinary” measures of the Act could no longer be justified by outdated data from the 1960s and 1970s,¹⁵⁸ ignoring evidence that discriminatory practices persist today in subtler (but equally harmful) forms.¹⁵⁹

Chief Justice Roberts framed the decision as a defense of state sovereignty, suggesting that the preclearance requirement, once triggered by the now-invalidated coverage formula, imposed an undue burden on states.¹⁶⁰ Yet this framing obscures the central role of the federal government in ensuring equal access to the ballot—precisely the remedy the Voting Rights Act sought to preserve.¹⁶¹ In this way, Chief Justice Roberts’s opinion casts the federal safeguards as anachronisms, as if the passage of time alone has eradicated the need for them. The decision’s failure to account for the enduring effects of racial discrimination in voting rights law signals a judicial retreat from the promises of the Fifteenth Amendment.

In his effort to limit federal oversight, Chief Justice Roberts reframed voter discrimination as a historical artifact rather than a present-day issue, which left voters in formerly covered jurisdictions more vulnerable to restrictive and discriminatory laws.¹⁶² By gutting the preclearance regime, the Court not only weakened the remedies available to marginalized communities but also sent a message that the judiciary would no longer serve as a robust protector of voting rights. Ironically, the *Shelby County* opinion reframed history as irrelevant to the current reach of rights

of Touch: Shelby v. Holder and the Callous Effects of Chief Justice Roberts’s Equal State Sovereignty, 49 J. MARSHALL L. REV. 751, 752 (2016) (“*Shelby County* opens the door to new forms of voting discrimination all for the sake of protecting equality amongst the states.”).

157. *See, e.g., Shelby County*, 570 U.S. at 590 (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”).

158. *Id.* at 557 (majority opinion).

159. *See id.* at 575–76 (Ginsburg, J., dissenting) (discussing congressional findings during the 2006 authorization of the act only seven years prior to *Shelby County* that “voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made”).

160. *Id.* at 544 (majority opinion).

161. *See id.* at 563 (Ginsburg, J., dissenting) (“Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated.”).

162. *Id.* at 557 (“Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”).

protections—in many ways the mirror opposite of how the conservative justices often deploy history to restrict the rights-protecting capacity of the Fourteenth Amendment.¹⁶³

As seen above, the conservative justices' combined judicial philosophies reflect a broader trend toward restricting the scope of constitutional and statutory protections for individual voters. Their approaches underscore a preference for limiting constitutional (and statutory) interventions in electoral processes and state-administered elections. This trend is characterized by a skepticism toward applying existing doctrine to electoral disputes and a preference for deferring to state practices and policies.

B. The Risks of Constitutional Regression

To understand the risks of relying on a historically cabined vision of the Constitution in election law doctrine, it is essential to confront the realities of America's electoral history. For much of the nation's existence, voting was a privilege reserved for white, propertied men.¹⁶⁴ The framers of the Constitution, while concerned with creating a democratic republic, constructed a system that favored property owners, a reflection of their belief in the need to preserve the political power of the wealthy elite.¹⁶⁵ This vision persisted even as the franchise slowly expanded over the nineteenth and twentieth centuries.

The Reconstruction Amendments tried, but ultimately failed, to change this dynamic. The drafters of the amendments were focused on securing rights for formerly enslaved Black Americans, but the full recognition of those rights—particularly voting rights—was not realized for decades.¹⁶⁶ The failure of the Fourteenth Amendment to effectively combat discrimination in voting laws was exacerbated by the historically cabined decision in *Minor v. Happersett*.¹⁶⁷ And, in fact, the Court's conclusion that framers of the Fourteenth Amendment chose not to explicitly include voting as a fundamental right under the Privileges or Immunities Clause remains good law today.

163. See *supra* Parts I, II.

164. See generally KEYSSAR, *supra* note 12 (documenting the difficulties faced by marginalized communities in gaining access to the franchise).

165. *Id.*; see also GREENE, *supra* note 121, at 36 (“White supremacy was a constitutional promise to slaveholders.”).

166. See, e.g., *Shelby County*, 570 U.S. at 560 (Ginsburg, J., dissenting) (“A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the ‘blight of racial discrimination in voting’ continued to ‘infec[t] the electoral process in parts of our country.’” (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966))).

167. See *supra* Section I.B.

Of course, because of the Nineteenth Amendment,¹⁶⁸ piecemeal (or even wholesale) replacement of equal protection doctrine with the Privileges or Immunities Clause (or some other constitutional relic) would not risk reinstating the result from *Minor v. Happersett*. But that case offers an essential reminder of how a narrow reading of the Privileges or Immunities Clause was used to exclude women from the franchise and how a historically bound interpretation of the Clause could easily limit the ability of courts to maintain electoral protections for disenfranchised groups. Indeed, this exclusionary framework continued well into the twentieth century, with poll taxes,¹⁶⁹ literacy tests,¹⁷⁰ and other voting restrictions systematically disenfranchising Black Americans, poor whites, and immigrants. The Voting Rights Act of 1965 marked a crucial turning point as it sought to dismantle these barriers to political participation.¹⁷¹ But even that watershed moment risks erosion as the conservative majority continues to limit the judicial remedies available under the statute.¹⁷² The long history of disenfranchisement in the United States illustrates that election laws have often served as tools for preserving the power of the dominant social and political classes.

All of this is to highlight the fact that the push to revive a historically constrained vision of the Constitution poses unique dangers if applied to election law cases. At its core, this vision seeks to limit constitutional protections to those rights historically recognized by the framers of the Fourteenth Amendment in 1868. To be clear, the Privileges or Immunities Clause may not be the constitutional vehicle through which the conservative legal movement seeks to roll back (or even completely reverse) the reach of equal protection doctrine. But the same criticisms that conservative jurists and scholars have levelled against substantive due process have—though less frequently—been aimed at equal protection as well.¹⁷³ We would be naïve to think that election law doctrine—based as it is in the Warren

168. U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

169. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down state poll taxes as a violation of the Equal Protection Clause).

170. See *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959) (upholding the constitutionality of equally applied literacy tests).

171. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 3 (2004) (“The 1965 [Voting Rights] act fundamentally recast the legal and administrative context for voting in the South. Previously what might be called ‘wholesale shrinkage’ of the electorate had been accomplished with literacy tests, poll taxes, stringent residency requirements, requirements that registration occur months before elections, and inconvenient hours and arrangements for registration.”).

172. See discussion of *Shelby County* in notes 150–56 and accompanying text.

173. See *supra* Section III.A.

Court's expansive view of constitutional protections—will be immune from attempts to restrict the rights-protective capacity of the Constitution.

Such a regressive interpretation of the Constitution, and especially the Fourteenth Amendment, ignores the fundamental truth that, throughout much of U.S. history, election laws and regulations were designed to protect the interests of the wealthy, the white, and the politically powerful, to the exclusion of marginalized groups. The adoption of this historically bound framework risks perpetuating historical injustices and threatens the future of American democracy by making it more difficult to challenge contemporary voting restrictions that disproportionately affect racial minorities, the poor, and those lacking political power.

Put simply, a historically bound interpretation of the Constitution, if applied to election law cases, would likely result in a regression of voting rights, particularly for groups that have historically been disenfranchised. By focusing on the narrow understanding of citizenship rights as they existed in 1868, the Court could deny modern challenges to voting restrictions and reforms, creating a significant barrier to addressing ongoing issues of voter suppression.

CONCLUSION

Imposing a historically bound vision of the Constitution in election law cases would perpetuate the very inequalities that the Fourteenth Amendment was intended to address. While the framers of the Fourteenth Amendment sought to protect the rights of newly emancipated African Americans, they did so within the context of a broader system of political exclusion. The conservative push to revive this narrow vision of the Privileges or Immunities Clause demonstrates how such a regressive view of the Constitution threatens to undo decades of progress in expanding voting rights and political participation for marginalized groups.

A regressive interpretation of the Privileges or Immunities Clause not only risks locking the Court into an exclusionary framework but also threatens the future of American democracy. Election laws have historically been used as tools for political entrenchment, and the Court's adoption of a historically bound vision of the Clause would make it more difficult to challenge modern forms of voter suppression, gerrymandering, and other manipulations of the electoral process. The history of American election law is one of exclusion and suppression, and the adoption of a regressive interpretation of the Constitution—either through the Privileges or Immunities Clause, the Guarantee Clause, or some other equally limited provision—would only serve to reinforce those historical injustices.