PI + 9: A MODEST PROPOSAL TO PROTECT AMERICANS' INDIVIDUAL RIGHTS

LINCOLN SON CURRIE*

ABSTRACT

This Note introduces the "PI + 9 Framework," a methodology that combines the Privileges or Immunities Clause ("PI") with the Ninth Amendment ("9") to incorporate all enumerated rights in the Bill of Rights against the states while securing unenumerated rights via the Ninth Amendment. Scholars have considered these items separately. However, no scholarship has developed a cohesive methodology combining the Privileges or Immunities Clause with the Ninth Amendment while using Glucksberg*'s history-and-tradition test for unenumerated rights. The PI + 9 Framework is faithful to both the original public meaning and the original intent of the Privileges or Immunities Clause. The PI + 9 Framework offers judges and scholars a doctrinally sound and pragmatic way to analyze the incorporation of the Bill of Rights in conjunction with the Ninth Amendment. This Note provides the Court with a step-by-step guide to replace substantive due process with a better methodology: the PI + 9 Framework.*

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* Articles Editor, *Southern California Law Review*, Volume 99; J.D. Candidate 2026, University of Southern California Gould School of Law; B.S. 2023, Boston University. I thank my supervisor, Professor Rebecca Brown, for providing me with careful suggestions and guidance as I wrote this Note. I am grateful to the editors of the *Southern California Law Review* for their diligence in improving this Note. All errors are my own.

INTRODUCTION

Civil liberties deserve better protection than the dubious doctrine of substantive due process. Fortunately, an underappreciated, yet significant, development is ripening within the Supreme Court's jurisprudence surrounding the incorporation of the Bill of Rights. At least two Supreme Court Justices[1] are willing to consider opening the Privileges or Immunities

1. *See* Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) (expressing openness to revisiting the Privileges or Immunities Clause); *id.* (Thomas, J., concurring in the judgment) (expressing support for incorporation of the Bill of Rights via the Privileges or Immunities Clause).

Clause door to incorporation that the *Slaughter-House Cases* slammed shut.[2] What if three more Justices changed their minds and that door swung open?

This Note provides a new methodology called the "PI + 9 Framework." The PI + 9 Framework combines the Fourteenth Amendment's Privileges or Immunities Clause ("PI") with the Ninth Amendment ("9") to apply the Bill of Rights to the states in a more efficient, clear, and sturdy way. This proposition is a bold, yet modest, means by which to incorporate the Bill of Rights against the states while securing unenumerated rights. The Framework is faithful to the original public meaning and original intent of the Privileges or Immunities Clause. The PI + 9 Framework focuses on the procedures by which substantive rights are secured rather than seeking untested answers that could destabilize manifold areas of law. Instead, the PI + 9 Framework seeks to ground the Bill of Rights, including unenumerated rights, in something more robust than substantive due process. The emphasis on a proper mechanism addresses justified concerns about the Privileges or Immunities Clause and the Ninth Amendment becoming a Pandora's box.

This Note will begin by examining the only appropriate means for incorporating the Bill of Rights against the states: the Privileges or Immunities Clause. Part I conducts an in-depth textual analysis of the meaning of *privileges* and *immunities* in the context of the Privileges or Immunities Clause. Part II analyzes the case law surrounding the Clause, with a particular focus on the *Slaughter-House Cases* and some pertinent concurrences and dissents by Justice Black and Justice Thomas, respectively. Part III makes the case for overruling *Slaughter-House* based on the Supreme Court's recent application of stare decisis factors. This Part goes factor-by-factor to argue why stare decisis should not prevent *Slaughter-House* from being overruled. Part IV argues for an end to substantive due process due to its poor reasoning and inability to adequately secure rights. Part V discusses how the Court should recognize unenumerated rights and considers which Ninth Amendment methodology would best identify and secure those rights. Part VI applies the PI + 9 Framework to two hypothetical fact patterns—one involving an enumerated right and the other involving an unenumerated right. A helpful chart of the Framework is included in that Part. Part VII lays out the advantages the PI + 9 Framework has over the current substantive due process regime. This Note gives the Supreme Court a guide for replacing

2. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873); *see* Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation*, 131 YALE L.J. 2126, 2144 (2021) (reviewing AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES (2021)) (describing the *Slaughter-House Cases*' construction of the Privileges or Immunities Clause as only protecting "an insignificant subset of federally created rights").

substantive due process while preserving incorporation of the Bill of Rights and protecting the unenumerated rights that the Court is anxious about safeguarding.

I. TEXTUAL ANALYSIS OF THE PRIVILEGES OR IMMUNITIES CLAUSE

Before analyzing the Privileges or Immunities Clause's case law, the meaning of *privileges* and *immunities*—and the meaning of those words when used alongside one another—is worth examining.

A. INTERPRETING *PRIVILEGES* AND *IMMUNITIES* IN HISTORICAL CONTEXT

The meaning of *privileges* and *immunities* is best explored by looking at the words' meanings at the time of the Fourteenth Amendment's ratification—while also keeping in mind the historical usage of those words in the Anglo-American legal tradition.

1. A Few Meanings of *Privilege*

The meaning of *privilege* at the time of the Fourteenth Amendment's ratification, 1868,[3] offers a guide that may be considered independently or alongside the Framers' intent when interpreting the Privileges or Immunities Clause. A leading dictionary from around the time of ratification provided three definitions of *privilege*: (1) "[a] particular and peculiar benefit or advantage enjoyed by a person, company, or society, beyond the common advantages of other citizens"; (2) "[a]ny peculiar benefit or advantage, not common to others of the human race"; (3) "[a]dvantage; favor; benefit."[4] The first and second definitions are plausible, but the third is too vague to offer meaningful guidance toward understanding the Privileges or Immunities Clause in context. The first two definitions are more precise. Additionally, the third definition does not contradict the preceding definitions; thus, its interpretive value diminishes. Therefore, two definitions of *privilege* remain.

3. *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm [https://perma.cc/24GC-EML3].

4. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 780 (1867). Two additional definitions are included, but they are for *privilege* in its verb form. *Id.* Those definitions are not pertinent to the instant inquiry because the word *privileges* is used as a noun in the Privileges or Immunities Clause. U.S. CONST. amend. XIV, § 1.

2. *Privilege* As a Benefit Beyond Those Held by Common Citizens

The first definition of *privilege* does not suit the Privileges or Immunities Clause and is better understood in the mode that *privilege* is used in the Speech and Debate Clause found in Article I, Section 4 of the Constitution.[5] The Speech and Debate Clause guarantees that "Senators and Representatives" shall "be *privileged* from Arrest" during legislative sessions and when coming from and going to those sessions—except in cases of "Treason, Felony and Breach of the Peace."[6] This fits the first definition of *privilege* because the privilege granted to Senators and Representatives is not granted to common American citizens, who enjoy no such privilege.

Anglo-American jurists such as William Blackstone, Matthew Hale, and James Kent all occasionally used *privilege* to mean a benefit beyond those held by common citizens. For example, Blackstone described the "privilege of letters"[7] that allowed members of parliament to send and receive letters free of postage.[8] Hale wrote about bishops and abbots who "had special privileges granted to them to have mints."[9] Kent mentioned the privileges consuls are entitled to, "such as for safe conduct."[10] However, interpreting *privilege* in that manner in the context of the Privileges or Immunities Clause creates an incongruity. Under this inappropriate definition of *privilege*, the Privileges or Immunities Clause would guarantee that states could not abridge the benefits that citizens of the United States enjoyed beyond the benefits enjoyed by citizens of the United States. Inserting the first definition of *privilege* creates a contradiction. This preposterous result proves that *privilege* in the Privileges or Immunities Clause should not be interpreted as an advantage enjoyed beyond those enjoyed by common citizens.

3. *Privilege* As a Peculiar Benefit or Advantage Not Common to Others of the Human Race

To determine whether a "peculiar benefit or advantage not common to others of the human race"[11] is within the Clause's scope, the Court would need to consider which benefits or advantages of citizens of the United States

5. *See* U.S. CONST. art. I, § 6, cl. 1.
6. *Id.* (emphasis added).
7. 1 WILLIAM BLACKSTONE, COMMENTARIES *323.
8. *Id.*
9. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *200 (1736).
10. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 22 (Lonang Inst. 2006) (1826). James Kent also referred to the Speech and Debate Clause's guarantee that members of Congress will be privileged from arrest during their attendance of sessions of Congress, and in coming and going from the same. *Id.* at 118.
11. WEBSTER, *supra* note 4, at 780.

fall within the Clause's scope. Americans enjoy manifold privileges as citizens of a prosperous nation. However, regarding the Privileges or Immunities Clause, the legal privileges are the most suitable for judges to ascertain.

The writings of prominent Anglo-American jurists suggest that the second definition of *privilege*, as a peculiar benefit or advantage, encompasses rights. Anglo-American jurists sometimes used *privilege* interchangeably with *rights*. For example, Blackstone described "those civil privileges"[12] as part of what constitutes a right found in "the declaration of our rights and liberties."[13] Kent mentioned the "right of trial by jury"[14] in suits at common law, which the Seventh Amendment secures.[15] Elsewhere, Kent referred to the jury trial right as a privilege. For example, Kent described some of "the inherent rights and liberties of English subjects, of which the most essential were the exclusive power to tax themselves, and the privilege of trial by jury."[16]

Founding-era historical evidence offers additional proof that *privilege*'s second definition is the most appropriate one. At the time of the American Revolution, "[t]he words rights, liberties, privileges, and immunities, seem to have been used interchangeably."[17] Indeed, as evidenced by Blackstone's invocation of *privilege* and historical examples that predate or coincide with the American Revolution, the interchangeability of *privilege* and *right* is well-founded.[18]

Viewing *privilege* as interchangeable with *right*, *advantage*, *benefit*, or *immunity* results in an interpretation aligned with *privilege*'s original public meaning at the time of the Fourteenth Amendment's ratification. Under that definition, the Privileges or Immunities Clause would be understood to protect "the [rights, benefits, advantages] or [I]mmunities of citizens of the United States" from state abridgment.[19]

12. 1 BLACKSTONE, *supra* note 7, at *129.
13. *Id.*
14. 1 KENT, *supra* note 10, at 182.
15. U.S. CONST. amend. VII.
16. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 3 (Lonang Inst. 2006) (1827).
17. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64–65 (1986) (emphasis omitted).
18. Justice Thomas provided a thorough and concise summation of the historical meaning of *privilege* and *immunity* in his concurrence in *McDonald v. City of Chicago*. *See* McDonald v. City of Chicago, 561 U.S. 742, 813–19 (2010) (Thomas, J., concurring in part and concurring in the judgment) (recounting the historical usage of *privileges*, *immunities*, and *rights* in the Anglo-American legal tradition).
19. U.S. CONST. amend. XIV, § 1.

4. A Few Meanings of *Immunity*

Around the time of the Fourteenth Amendment's ratification, a leading American dictionary listed three definitions for *immunity*: (1) "[f]reedom or exemption from obligation"; (2) "[e]xemption from any charge, duty, office, tax, or imposition; a particular privilege or prerogative"; and (3) "[f]reedom."[20] Like the three definitions of *privilege*, the first two are plausible on their faces, but the third is too vague. Moreover, like the third definition of *privilege*,[21] the third definition of *immunity* does not contradict the first or second definition. Thus, two definitions are ripe for examination.

5. The Broader *Immunity* Definition Is the Best Match

The first definition of *immunity* is an incomplete match for how *immunities* is used in the Privileges or Immunities Clause.[22] The second and more capacious definition of *immunities*—"[e]xemption from any charge, duty, office, tax, or imposition; a particular privilege or prerogative"[23]—fits more naturally with other constitutional protections that existed at the time of the Fourteenth Amendment's ratification. One example precedes the Bill of Rights.

Before the ratification of the Bill of Rights, Americans enjoyed an important immunity that remains in force. Article III, Section 3 of the Constitution grants Congress the power to decide how treason is punished but provides that "no Attainder of Treason shall work Corruption of Blood."[24] The Constitution does not define the prohibition of Corruption of Blood as punishment for treason as a right, immunity, or anything else. The punishment is simply prohibited. Any attempt by Congress to make treason punishable by Corruption of Blood would be voided due to its conflict with the Constitution.[25] Thus, Article III, Section 3 of the Constitution could reasonably be interpreted as providing immunity to American citizens from Corruption of Blood as a punishment for treason.

20. WEBSTER, *supra* note 4, at 517.

21. *See* discussion *supra* Section I.A.1.

22. A more fitting example of this usage of *immunity*—as a "[f]reedom or exemption from obligation"—is included in the second volume of William Blackstone's *Commentaries on the Laws of England*. Blackstone mentioned that some private subjects who had tended to the king's land had been granted certain immunities. Among those immunities were immunity from "toll or taxes," "be[ing] put on juries; and the like." 2 WILLIAM BLACKSTONE, COMMENTARIES *99.

23. WEBSTER, *supra* note 4, at 517.

24. U.S. CONST. art. III, § 3. Corruption of blood was a common-law penalty that disallowed a person adjudged of a felony or treason to inherit property or bequeath property to heirs. Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 729 (1992).

25. Judicial review would dispose of such a law in short order because "an act of the legislature, repugnant to the [C]onstitution, is void." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

In a similar way, several provisions in the Bill of Rights provide for exemptions against certain charges and impositions. The Fifth Amendment prohibits double jeopardy and thus exempts a person from any charge of which they were already acquitted.[26] The Eighth Amendment exempts or immunizes Americans from the imposition of excessive fines.[27] Even if the word *rights* were not synonymous with *immunities*, some provisions of the Bill of Rights could reasonably be interpreted as immunities.

B. *RIGHTS*, *PRIVILEGES*, AND *IMMUNITIES*

Rights, *privileges*, and *immunities* were interchangeable words at the time of the Fourteenth Amendment's ratification.[28] One needs to look no further than a dictionary to see that *privilege* and *immunity* were words used to define the word *right*.[29] Justice Thomas recognized this reality in his concurrence in *McDonald v. City of Chicago*.[30] Absent a showing that the Privileges or Immunities Clause means something other than what it says, the plain meaning appears to cover *at least* those rights enumerated in the Constitution at the time of the Fourteenth Amendment's ratification, namely those in the Bill of Rights.[31] The Bill of Rights originally established a baseline of rights that only applied to the federal government.[32] Despite the rights being limited to protection against federal government infringement, all citizens of the United States still nonetheless enjoyed those rights, albeit with application being limited to the federal government and not state governments.

The plain meaning of *privileges* and *immunities* in the Privileges or Immunities Clause is not ambiguous, but construing the Clause is trickier. Given that *rights*, *privileges*, and *immunities* were synonymous at the time of the Fourteenth Amendment's ratification, one would need to determine

26. U.S. CONST. amend. V; *see also* United States v. Ball, 163 U.S. 662, 671 (1896) ("[A] verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence.").

27. U.S. CONST. amend. VIII.

28. *See* CURTIS, *supra* note 17, 64–65.

29. The tenth definition of *right* is a "[j]ust claim; immunity; privilege; as, the *rights* of citizens." WEBSTER, *supra* note 4, at 858.

30. *See* McDonald v. City of Chicago, 561 U.S. 742, 813 (2010) (Thomas, J., concurring in part and concurring in the judgment) (explaining that *privileges* and *immunities* were both synonyms for *rights*).

31. Other rights are mighty enough on their own and do not require incorporation. For example, the Thirteenth Amendment's abolition of slavery does not distinguish between public/private action or federal/state government action. *See* U.S. CONST. amend. XIII.

32. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

whether the Bill of Rights is within the scope of rights enjoyed by citizens of the United States that no state shall abridge.

C. "CITIZENS OF THE UNITED STATES" SETS AN APPROPRIATE LIMIT ON THE CONSTITUTION'S ABRIDGMENT OF STATE POWER

Although several interpretations of the Privileges or Immunities Clause are reasonable,[33] the Clause must answer two questions. First, Are citizens of the United States the only persons whose privileges or immunities are protected from state abridgment? Second, Are states prohibited from infringing on those privileges or immunities that citizens of the United States hold? The first question asks who gets protected by the Privileges or Immunities Clause. The second question asks which rights are protected.

Justice Thomas answered the first question satisfactorily in his concurrence in *McDonald v. City of Chicago*.[34] One need not search outside the same section in which one finds the Privileges or Immunities Clause to find another that operates as a more natural and efficacious anti-discrimination provision: the Fourteenth Amendment's Equal Protection Clause.[35] The Supreme Court occasionally used the Equal Protection Clause to strike down discriminatory laws shortly after *Slaughter-House* was decided.[36] Furthermore, suppose a state passed a law that only abridged the rights of noncitizens. Such abridgment may violate the Fourteenth Amendment's commandment that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[37] The Privileges or Immunities Clause is read more naturally as a clause that establishes a "minimum baseline of federal rights" that states may not abridge.[38] Such a reading answers the aforementioned second question in the affirmative.

33. In an article on the Privileges or Immunities Clause, John Harrison identified three general categories that one could use to understand the Privileges or Immunities Clause as a substantive provision: (1) incorporating the first eight amendments to the United States Constitution; (2) protecting some natural rights such as property and contract rights; or (3) providing for rights arising out of national citizenship, which would require additional judicial construction. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1393–94 (1992).

34. *McDonald*, 561 U.S. at 850 (Thomas, J., concurring in part and concurring in the judgment) (concluding that the Privileges or Immunities Clause "establishe[d] a minimum baseline of federal rights").

35. The Equal Protection Clause guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

36. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310–12 (1880) (striking down a West Virginia law that prohibited Black people from serving on juries), *abrogated by*, Taylor v. Louisiana, 419 U.S. 522 (1975); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that a law that was discriminatorily applied against Chinese people violated the Equal Protection Clause).

37. U.S. CONST. amend. XIV, § 1; *see, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 646 (1973) (striking down a New York statute that prohibited noncitizens from having jobs in civil service because the law violated the Equal Protection Clause).

38. *McDonald*, 561 U.S. at 850 (Thomas, J., concurring in part and concurring in the judgment).

II. PRIVILEGES OR IMMUNITIES CLAUSE CASE LAW

Any examination of the jurisprudence surrounding the Privileges or Immunities Clause must begin with the *Slaughter-House Cases*.[39] The majority opinion and dissents illuminate Reconstruction Era views of the Clause. Since the Court decided *Slaughter-House*, the few Justices who have conducted extensive historical analysis of the Clause's legislative history have arrived at a more expansive view of the Clause.[40]

A. *SLAUGHTER-HOUSE* SHUTS ONE DOOR FOR INCORPORATING THE BILL OF RIGHTS

In 1873, the Supreme Court in *Slaughter-House* held that the Privileges or Immunities Clause did not incorporate the Bill of Rights against the states.[41] Since then, the Privileges or Immunities Clause has been relegated to obsolescence.[42] Once, in *Saenz v. Roe*, the Court used the Clause to recognize a right to travel[43] by striking down a California law[44] limiting welfare benefits for new California residents.[45] In his *Saenz* dissent, Chief Justice Rehnquist lamented the Court's revival of the Clause, in part because the Clause had been dormant for so long.[46] Eleven years after *Saenz*, the Court in *McDonald v. City of Chicago* reluctantly affirmed, or at least refused to revisit, *Slaughter-House*'s narrow construction of the Privileges or Immunities Clause.[47] The reluctant affirmation of a questionable precedent was unwarranted in light of the developments after *Slaughter-House*. Federalism concerns pervaded the majority opinion's reasoning in *Slaughter-House*. The Court worried that the Constitution—and the Court expounding it—would become a "perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment."[48]

39. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

40. *See infra* Section II.B.

41. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74.

42. *See* Harrison, *supra* note 33, at 1387 ("[E]very student of constitutional law quickly learns that [the Privileges or Immunities Clause] was virtually read out of [the Constitution] by the *Slaughter-House Cases*.").

43. *See* Saenz v. Roe, 526 U.S. 489, 503 (1999).

44. *Id.* at 492–95, 511.

45. *Id.* at 492.

46. *See id.* at 511 (Rehnquist, C.J., dissenting) (explaining that the Privileges or Immunities Clause was "relied upon by this Court in only one other decision," Colgate v. Harvey, 296 U.S. 404 (1935), "overruled five years later" by Madden v. Kentucky, 309 U.S. 83 (1940)).

47. A plurality of the Court "decline[d] to disturb" precedent that narrowly read the Fourteenth Amendment's Privileges or Immunities Clause to cover only rights that owed their existence to the federal government. McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) (plurality opinion).

48. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873).

Nevertheless, the Supreme Court has incorporated most of the Bill of Rights against the states. The remaining unincorporated enumerated rights are the seldom-litigated Third Amendment,[49] the Fifth Amendment's Grand Jury Clause,[50] and the Seventh Amendment right to a trial by jury in suits at common law.[51] The resultant beefing up of the Fourteenth Amendment's Due Process Clause and Equal Protection Clause has achieved an effect rivaling the censor that the *Slaughter-House* majority feared.[52]

Although the Privileges or Immunities Clause's construction in *Slaughter-House* stands as good law today, the dissenters' views shed some light on other views of the Privileges or Immunities Clause around the time of the Fourteenth Amendment's ratification. Four Justices dissented in *Slaughter-House*.[53] Justice Field—joined by Chief Justice Chase, Justice Swayne, and Justice Bradley—dissented and wrote that if the Fourteenth Amendment's Privileges or Immunities Clause were interpreted as narrowly as the majority interpreted it, then the Privileges or Immunities Clause "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[54] Justice Field foresaw the superfluity of the new Clause if it were read so narrowly and wrote, "With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference."[55] Justice Field's prediction has but one blemish more than 150 years after the Court decided *Slaughter-House*: *Saenz v. Roe*.[56] Although Justice Field's prediction proved prescient, Justice Bradley and Justice Swayne wrote broader dissents that explicitly advocated incorporating the Bill of Rights against the states via the Privileges or Immunities Clause.

49. "The United States Supreme Court has yet to decide a case that directly implicates the Third Amendment, and its jurisprudence includes only a few cases that even make passing reference to it." Mark A. Fulks & Ronald S. Range, III, *The Third Amendment's Consent Clause: A Conceptual Framework for Analysis and Application*, 82 TENN. L. REV. 647, 650 (2015).

50. *See* Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that "due process of law" in the Fourteenth Amendment does not require an indictment by a grand jury in a state prosecution for murder).

51. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 567 (7th ed. 2023).

52. *Cf.* David S. Bogen, Slaughter-House *Five: Views of the Case*, 55 HASTINGS L.J. 333, 337 (2003) (explaining that a broadly interpreted Equal Protection Clause and substantive due process combine to achieve a greater effect than the Privileges or Immunities Clause could have).

53. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 111 (Field, J., dissenting) (noting that Chief Justice Chase, Justice Swayne, and Justice Bradley concurred with his dissent).

54. *Id.* at 96.

55. *Id.*

56. *See* Stephen Menendian, *The Shadow Constitution: Rescuing Our Inheritance from Neglect and Disuse*, 26 U. PA. CONST. L. 339, 384 (2024) ("To date, the Supreme Court has only applied this provision a single time to invalidate a state law . . . ."). That single time was in *Saenz v. Roe*. Saenz v. Roe, 526 U.S. 489 (1999).

Justice Bradley criticized the majority's decision by averring that "the Constitution itself" contains "some of the most important privileges and immunities of citizens of the United States."[57] One problem with narrowly construing the Privileges or Immunities Clause is that it denigrates the rights set forth in the Bill of Rights as not fundamental or less fundamental. A judge's place is not to decide which rights in the Bill of Rights are essential and which are not.[58] Those who ratified the amendments comprising the Bill of Rights thought each was important enough to become part of the nation's founding document. The people's will, as expressed through their passage of the amendments, ought to be dispositive on the issue of whether a right in the Bill of Rights is fundamental. Justice Bradley grasped this flaw when he wrote that other rights, privileges, and immunities "of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government."[59] The Fourteenth Amendment changed the equation by protecting the privileges or immunities of citizens of the United States from state abridgment.[60]

Justice Swayne wrote a separate dissent and believed that the Reconstruction Amendments "may be said to rise to the dignity of a new Magna Charta."[61] Justice Swayne also thought the majority's analysis served to obfuscate rather than clarify.[62] Justice Swayne believed the Privileges or Immunities Clause was clear and wrote, "Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out."[63] Justice Swayne believed the Privileges or Immunities Clause concerned, "among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the Nation."[64] This formulation would almost certainly cover each enumerated provision of the Bill of Rights and perhaps some rights not enumerated in the Constitution. After all, even the narrowly construed Privileges or Immunities Clause has already been held to protect at least one unenumerated right: the right to travel.[65] Justice Swayne acknowledged the

57. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting).

58. *Cf.* McDonald v. City of Chicago, 561 U.S. 742, 799–800 (2010) (Scalia, J., concurring) (criticizing Justice Stevens's dissent for describing some Bill of Rights provisions as "critical to leading a life of autonomy, dignity, or political equality" and others as not critical to protecting the same (quoting *id.* at 893 (Stevens, J., dissenting))).

59. *Slaughter-Houses Cases*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting).

60. U.S. CONST. amend. XIV, § 1.

61. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 125 (Swayne, J., dissenting).

62. *See id.* at 126.

63. *Id.*

64. *Id.*

65. *See* Saenz v. Roe, 526 U.S. 489, 503 (1999).

objection that "the power conferred is novel and large."[66] Justice Swayne had a simple answer to the objection:

> The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. It is such as should exist in every well-ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective.[67]

Justice Swayne ended his dissent by expressing hope that the consequences of the majority's decision would be "less serious and far-reaching than the minority fear they will be."[68] Justice Swayne's fear was partially realized. On the one hand, most of the Bill of Rights is now incorporated.[69] On the other hand, incorporation of the Bill of Rights against the states proceeded tardily.[70] The majority failed to create a precedent that provided a bulwark against the specter of the "perpetual censor"[71] of which the majority expressed great trepidation.[72] However, the majority succeeded in crafting a precedent that dissuaded most future jurists from pursuing incorporation of the Bill of Rights via the Privileges or Immunities Clause.

B. THE PRIVILEGES OR IMMUNITIES CLAUSE'S POST-*SLAUGHTER-HOUSE* CHAMPIONS

Following *Slaughter-House*, few Justices have dared to broaden the construction of the Privileges or Immunities Clause. The two most significant proponents of such a construction are Justice Black and Justice Thomas.

66. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 129 (Swayne, J., dissenting).
67. *Id.*
68. *Id.* at 130.
69. *See* CHEMERINSKY, *supra* note 51, at 565.
70. *See id.* at 565–66 (explaining which respective provisions of the Bill of Rights were incorporated against the states and the years in which each right was incorporated).
71. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78.
72. The majority also wrote, "[T]hese consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions." *Id. But see id.* at 129 (Swayne, J., dissenting) (explaining that "the novelty was known and the measure deliberately adopted").

1. Justice Black's "Eminently Reasonable" Method of Incorporating the Bill of Rights Against the States

In 1947, Justice Black, an early practitioner of constitutional originalism,[73] concluded in his dissent in *Adamson v. California* that the Privileges or Immunities Clause was intended to apply the first eight amendments of the Bill of Rights to the states.[74] In 1968, Justice Black, in a concurrence joined by Justice Douglas,[75] doubled down on his *Adamson* dissent. Justice Black once again concluded that the Privileges or Immunities Clause "seem[ed] to [him] an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the states."[76]

Experience as a prominent legislator guided Justice Black's view of the Privileges or Immunities Clause.[77] Justice Black's historical analysis of the Privileges or Immunities Clause—and the wholesale incorporation view that resulted therefrom—has value because of his decade-long experience as a United States senator.[78] Although Justice Black's opinions regarding incorporation lack the force of law, his experience as a legislator may guide current and future Justices in evaluating the Privileges or Immunities Clause's legislative history. Regarding the value of prior opinions, Justice Gorsuch wrote, "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges."[79] The wisdom of former legislators who served as Justices can only be found in the past. No current Supreme Court Justice was ever a legislator. Justice O'Connor was the most recent Justice with any legislative experience,[80] and Justice Black was the

73. Justice Black was the first Supreme Court Justice to use originalism as an overarching theory of constitutional interpretation. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 144–45 (2010).

74. Adamson v. California, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting). Justice Black also included an appendix documenting the Privileges or Immunities Clause's legislative history to buttress his point. *Id.* at 92–123. *But see* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949) (rejecting Justice Black's view of incorporating the first eight amendments against the states).

75. Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (Black, J., concurring).

76. *Id.* at 166. Justice Black also dedicated part of his concurrence in *Duncan* to refuting Charles Fairman's criticism of his dissent in *Adamson*. *See id.* at 165–66.

77. *See id.* at 165.

78. Justice Black served as a United States senator from Alabama from 1927 to 1937. *States in the Senate: Alabama Senators*, U.S. SENATE, https://www.senate.gov/states/AL/senators.htm [https://perma.cc/6J9R-785Y].

79. NEIL GORSUCH WITH JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 217 (2019).

80. Justice O'Connor was the most recent Supreme Court Justice with legislative experience. Justice O'Connor served in Arizona's state senate. PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, THE SUPREME COURT: AN ESSENTIAL HISTORY 377 (2d ed. 2018).

last member of Congress to serve on the Court.[81] Justice Black's perspective regarding the Privileges or Immunities Clause aids the argument that views the legislative history of the Privileges or Immunities Clause as intending a full incorporation of the Bill of Rights.

Some have lamented when a judge heavily relies on history,[82] but Justice Black's opinions offer helpful surveys of the Fourteenth Amendment's legislative history. The lived experience of a decade as a United States senator adds weight to his opinions regarding the Privileges or Immunities Clause's legislative history. The fact that no current Justice on the Supreme Court has any experience as a legislator would be a problem if the Court had no previous opinion from a former legislator from which to draw. This is not the case. Justice Black passed down his learning about the Privileges or Immunities Clause's meaning through his opinions in cases such as *Adamson v. California*[83] and *Duncan v. Louisiana*.[84] No judge ought to be required to follow Justice Black's jurisprudence on every matter that touches legislative history on account of his experience. However, his legislative experience and pioneering originalism lend a unique perspective to any jurist seeking the original meaning of the Privileges or Immunities Clause.

2. Justice Thomas's Revival of Privileges or Immunities in *McDonald v. City of Chicago*

In the past twenty years, Justice Thomas has led the charge for a potent Privileges or Immunities Clause in concurring opinions when a case arises in which the incorporation of a provision of the Bill of Rights is at issue.[85]

81. Justice Minton was the last Congressperson to be appointed on the Supreme Court. STUART BANNER, THE MOST POWERFUL COURT IN THE WORLD: A HISTORY OF THE SUPREME COURT OF THE UNITED STATES 497 (2024). However, Justice Minton retired in 1956, whereas Justice Black served on the Court until 1971. *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/6ZJD-WFJZ].

82. "It is not the role of federal judges to be amateur historians." McDonald v. City of Chicago, 561 U.S. 742, 910 (2010) (Stevens, J., dissenting); *see* Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 595 (2000) ("Legal professionals are not competent to umpire historical disputes. Because they are not, inevitably they pick the side of the dispute that coincides with their preferences based on different grounds altogether.").

83. *See* Adamson v. California, 332 U.S. 46, 92–123 (1947) (appendix to dissent of Black, J.) (analyzing the legislative history of the Fourteenth Amendment).

84. *See* Duncan v. Louisiana, 391 U.S. 145, 164–67 (1968) (Black, J., concurring) (defending the view that the Fourteenth Amendment's legislative history supports total incorporation of the Bill of Rights).

85. *See McDonald*, 561 U.S. at 806 (Thomas, J., concurring in part and concurring in the judgment) ("[T]he 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."); Timbs v. Indiana, 586 U.S. 146, 157–58 (2019) (Thomas, J., concurring in the judgment) ("I would hold that the right to be free from excessive

Justice Thomas's interpretation of the Constitution centers around a search for the Constitution's original meaning.[86] Justice Thomas employed this interpretive method in his concurring opinion in *McDonald v. City of Chicago*.[87] In *McDonald*, Justice Thomas concluded that the Second Amendment's right to keep and bear arms applied to the states via the Fourteenth Amendment's Privileges or Immunities Clause.[88] After a detailed treatment of the Fourteenth Amendment's text and history,[89] Justice Thomas wrote the following about the Privileges or Immunities Clause as it relates to incorporating the Bill of Rights:

> This evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. As the Court demonstrates, there can be no doubt that § 1 was understood to enforce the Second Amendment against the States. In my view, this is because the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.[90]

Justice Thomas recognized that the legislative history surrounding the Clause was "less than crystal clear."[91] He also acknowledged the difficulties that interpreting the once-dormant Clause may pose. Still, he argued that interpretation of the Privileges or Immunities Clause was "far more likely to yield discernible answers[ ]than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support."[92]

In *McDonald*, Justice Thomas was alone in his interpretation of the Privileges or Immunities Clause. The plurality opinion stated that it "saw no need to reconsider" *Slaughter-House* and "therefore decline[d] to disturb the

fines is one of the 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.").

86. *See* Gregory E. Maggs, *How Justice Thomas Determines the Original Meaning of Article II of the Constitution*, 127 YALE L.J.F. 210, 211 (2017).

87. "[T]he 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." *McDonald*, 561 U.S. at 813 (Thomas, J., concurring in part and concurring in the judgment) (citation omitted). Justice Thomas had wanted to revisit the Privileges or Immunities Clause since *Saenz v. Roe*. *See* Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) ("I would be open to reevaluating [the Privileges or Immunities Clause's] meaning in an appropriate case.").

88. *McDonald*, 561 U.S. at 806 (Thomas, J., concurring in part and concurring in the judgment).

89. Justice Thomas's extensive analysis surveyed the historical usage of the text, in addition to pertinent legislative debates surrounding the text and the public's understanding of the Fourteenth Amendment after ratification. *See id.* at 806–37.

90. *Id.* at 837–38. *But see id.* at 859 (Stevens, J., dissenting) ("[T]he original meaning of the Clause is not as clear as [the petitioners] suggest . . . .").

91. *Id.* at 834 (Thomas, J., concurring in part and concurring in the judgment).

92. *Id.* at 855.

Slaughter-House holding."[93] The phrasing in that sentence is crucial. The plurality did not reject Justice Thomas's view on the merits or defend *Slaughter-House* on the merits. Instead, they saw another path to incorporation—substantive due process. Because that path remained open, the plurality believed it was merely unnecessary—though perhaps not improper—to revisit *Slaughter-House*.

The dissents rejected Justice Thomas's view for similar reasons. In his dissent, Justice Stevens acknowledged the "impressive amount of historical evidence"[94] that the petitioners compiled in support of their position that *Slaughter-House*'s narrow reading of the Privileges or Immunities Clause was erroneous. Yet, Justice Stevens believed the original meaning of the Clause was "not nearly as clear as it would need to be to dislodge 137 years of precedent."[95] In a separate dissent joined by Justice Ginsburg and Justice Sotomayor, Justice Breyer declined to defend *Slaughter-House* on the merits and instead wrote only that "the plurality today properly declines to revisit our interpretation of the Privileges or Immunities Clause."[96] The refusal to substantively engage with Justice Thomas's opinion or to defend *Slaughter-House* on the merits is at least some evidence of the weak footing on which opposition to Justice Thomas's conclusion rests. A maxim from Chief Justice Marshall is enough to support Justice Thomas's conclusion and defeat *Slaughter-House*'s construction of the Privileges or Immunities Clause, such that the only justification for upholding *Slaughter-House* is stare decisis. In *Marbury v. Madison*, Chief Justice Marshall wrote, "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[97] The words of the Privileges or Immunities Clause do not require such a narrow construction. *Slaughter-House* ought to be overruled unless stare decisis justifies upholding the precedent.

3. The Post-*McDonald* Future of the Privileges or Immunities Clause

Although Justice Thomas was unsuccessful in reviving the Privileges or Immunities Clause in *McDonald*, he has continued to defend his interpretation of the Clause. In *Timbs v. Indiana*, Justice Thomas would have applied the Eighth Amendment's prohibition of excessive fines to the states via the Privileges or Immunities Clause—not the Due Process Clause.[98] In

93. *Id.* at 758 (plurality opinion).
94. *Id.* at 859 (Stevens, J., dissenting).
95. *Id.* at 859–60.
96. *Id.* at 934 (Breyer, J., dissenting).
97. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).
98. Timbs v. Indiana, 586 U.S. 146, 157–58 (2019) (Thomas, J., concurring in the judgment).

Dobbs v. Jackson Women's Health Organization, Justice Thomas argued for reconsidering every substantive due process precedent and deciding whether the rights protected by those precedents are protected by the Privileges or Immunities Clause.[99] Since *McDonald*, Justice Thomas has found one potential ally to support his view of the Privileges or Immunities Clause. In 2019, Justice Gorsuch has emerged as a possible proponent of incorporation via the Privileges or Immunities Clause, a position he contemplated in *Timbs*.[100]

III. STARE DECISIS FACTORS POINT TO OVERRULING *SLAUGHTER-HOUSE*

Stare decisis is not an "inexorable command."[101] However, the rule of law rests on a measure of stability. Justice Brandeis was prudent to say, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[102] Nevertheless, the oft-wise policy is weakest when the Supreme Court interprets the Constitution because changing a constitutional precedent can only be accomplished via constitutional amendment—an arduous process—or by overruling the precedent.[103]

The *Slaughter-House* majority's interpretation of the Privileges or Immunities Clause is wrong and should be overruled. To overrule it, the Court would need to find that stare decisis factors weigh in favor of overruling the case. The Court tends to rely on six stare decisis factors: (1) nature of the error; (2) quality of the reasoning; (3) workability of the rule established; (4) disruptive effect on other areas of law; (5) developments since the case was decided; and (6) reliance interests.[104] All but one particular factor is either neutral or weighs in favor of overruling *Slaughter-House*. The factors as a whole weigh strongly in favor of overruling *Slaughter-House* and interpreting the Fourteenth Amendment's Privileges or Immunities Clause as fully incorporating the Bill of Rights.

99. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300–02 (2022) (Thomas, J., concurring).

100. "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." *Timbs*, 586 U.S. at 157 (Gorsuch, J., concurring).

101. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

102. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

103. Agostini v. Felton, 521 U.S. 203, 235 (1997).

104. *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018); *Dobbs*, 142 S. Ct. at 2265.

A. THE NATURE OF THE *SLAUGHTER-HOUSE* MAJORITY'S ERROR

The first factor focuses on the degree of wrongness and the damaging effects of the decision rather than the reasoning itself.[105]

The *Slaughter-House* majority's opinion constituted the type of egregious and deleterious error[106] that makes the first stare decisis factor weigh in favor of overruling *Slaughter-House*. Suppose that each provision of the Constitution were interpreted as narrowly as the Privileges or Immunities Clause. If each constitutional provision were interpreted so narrowly as to be famous for having little or no effect,[107] what purpose would the Constitution serve? The judicial nullification of the Privileges or Immunities Clause is repugnant to a democratic people and disrespects the ratifiers of the Fourteenth Amendment. The majority's decision in *Slaughter-House* was nothing more than the "exercise of raw judicial power,"[108] which in effect nullified part of the Fourteenth Amendment.

Decisions that invent "principles or values that cannot fairly be read into [the Constitution] usurp the people's authority."[109] Here, the *Slaughter-House* majority did the inverse of what the *Dobbs* majority criticized *Roe v. Wade*[110] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[111] for doing. The *Dobbs* majority believed that *Roe* and *Casey* improvidently took a decision not yet made by the American people and made it for them via judicial pronouncement;[112] the *Slaughter-House* majority took a decision already made by the American people, through the ratification of the Fourteenth Amendment, and revoked it via an impermissibly narrow interpretation[113] of the Privileges or Immunities Clause that sapped the Clause of all might.

105. *See Dobbs*, 142 S. Ct. at 2265 (describing Roe v. Wade, 410 U.S. 113 (1973), as "egregiously wrong and deeply damaging" in the first factor analysis).

106. "A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it." Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

107. *See supra* note 42 and accompanying text.

108. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting).

109. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting).

110. *Roe*, 410 U.S. 113.

111. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

112. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) (criticizing *Roe* and *Casey* for damming the democratic process from reaching the issue of abortion).

113. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77–78 (1873) (explaining the Court's holding that the Privileges or Immunities Clause does not incorporate the Bill of Rights against the states).

B. THE QUALITY OF THE *SLAUGHTER-HOUSE* MAJORITY'S REASONING

Silence and evasion cry out for criticism. When nobody stands to defend a precedent's reasoning, the quality of the reasoning is weaker.[114] In 2020, a plurality of the Court in *Ramos v. Louisiana* found the quality of the reasoning factor to weigh in favor of overruling a precedent, partly because "no Member of the Court today defend[ed] [the precedent] as rightly decided."[115] Justices from across the spectrum have attacked the *Slaughter-House* majority's reasoning by refusing to defend the merits of *Slaughter-House*'s interpretation of the Privileges or Immunities Clause.[116] The Justices were right to refuse to defend the opinion on the merits because doing so is almost impossible. The consensus of constitutional scholars is that the *Slaughter-House* majority's interpretation of the Privileges or Immunities Clause was wrong.[117]

The reasoning in *Slaughter-House* was "exceptionally weak."[118] The reasons for the narrow construction were (1) a bald, results-based conclusion and (2) an absurd reading that ignores text and legislative history.

1. A Bald, Results-Based Conclusion

Beginning with the bald conclusion, the Court stated, "There can be little question that the purpose of both [Article IV's Privileges and Immunities Clause and the Fourteenth Amendment's Privileges or Immunities Clause] is the same, and that the privileges and immunities intended are the same in each."[119] In clear language, the Court admitted its result-oriented construction was "not always the most conclusive" argument.[120] Nevertheless, the Court made its choice out of fear of a theory that "radically change[d]" the relationship between state and federal governments and about concerns that the Court would become a "perpetual

114. *Cf.* Citizens United v. FEC, 558 U.S. 310, 363 (2010) (explaining that a precedent is weaker when "neither party defends the reasoning of a precedent").

115. Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (plurality opinion).

116. *Compare* McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) (plurality opinion) ("For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding."), *with id.* at 934 (Breyer, J., dissenting) ("[T]he plurality today properly declines to revisit our interpretation of the Privileges or Immunities Clause.").

117. *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 22 (2021); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 74–75 (1997).

118. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2266 (2022) (criticizing the quality of the reasoning in Roe v. Wade, 410 U.S. 113 (1973)).

119. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75 (1873).

120. *Id.* at 78.

censor" over state legislatures.[121] The Court's reasoning depended on avoiding a purportedly undesirable outcome, but that feared result has already been achieved.[122] The reasoning undergirding *Slaughter-House*'s results-based conclusion has crumbled as substantive due process has grown.[123]

To overcome its concerns about a radical change to the constitutional order, the Court asked for "language which expresse[d] such a purpose too clearly to admit of doubt."[124] The Court adopted something akin to a beyond-reasonable-doubt standard for interpretation that had no basis in constitutional interpretation. The total concoction of a novel standard for constitutional interpretation is further evidence of an egregiously wrong opinion.

2. An Absurd Reading That Ignores Text and Legislative History

In the majority opinion, Justice Miller set forth an anti-textual reading of the Fourteenth Amendment that distinguished between the privileges or immunities of citizens of a state and the privileges or immunities of citizens of the United States.[125] According to Justice Miller, the privileges and immunities of the citizen of a state "embrace[] nearly every civil right for the establishment and protection of which organized government is instituted."[126] Conversely, the privileges and immunities of the citizen of the United States were limited to things like the right to travel to and from the seat of government and access to seaports.[127] The dichotomy between state citizens' rights and United States citizens' rights is difficult to square with Justice Miller's belief that the purpose and effect of the Fourteenth Amendment should be to protect Black Americans.[128] The plain language of the Privileges or Immunities Clause seems to desire some nationwide baseline for individual rights. If that baseline was as paltry as Justice Miller suggested, then the enactment truly was "vain and idle."[129]

Regarding legislative intent, Justice Miller did not believe that a broad Privileges or Immunities Clause was intended. Justice Miller summarily concluded that he was "convinced that no such results were intended by the

121. *Id.*
122. *See* CHEMERINSKY, *supra* note 51, at 565–66 (listing the provisions in the Bill of Rights that have already been incorporated against the states).
123. *See infra* Section III.E.
124. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78.
125. CURTIS, *supra* note 17, at 175.
126. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 76.
127. *Id.* at 79.
128. *See* CURTIS, *supra* note 17, at 176.
129. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

Congress which proposed these amendments, nor by the legislatures of the States which ratified them."[130] Justice Miller failed to conduct even a cursory survey of the legislative history. If he had done so, he would have found that leading Republicans in the Congress that passed the Fourteenth Amendment believed the capacious definition of privileges and immunities was appropriate for the federal government to prevent state infringement of the same.[131] Adding to the case against Justice Miller's reading of the legislative history is the fact that Representative John Bingham, the Privileges or Immunities Clause's primary draftsman, stated in a speech in Congress that the purpose of the Clause was to apply the Bill of Rights to the states.[132] The quality of the *Slaughter-House* majority's reasoning was abysmal because it failed to heed the Privileges or Immunities Clause's plain text or legislative history.

For the above reasons and many more, "[v]irtually no serious modern scholar—left, right, and center—thinks that [the majority's reading] is a plausible reading of the Amendment."[133] The quality of the majority's reasoning surpasses an excusable "garden-variety error"[134] and makes the quality of the reasoning factor weigh strongly in favor of overruling the precedent.

C. THE WORKABILITY OF THE RULES IMPOSED ON THE COUNTRY

The workability factor asks whether the rule "can be understood and applied in a consistent and predictable manner."[135] To laud *Slaughter-House* for creating a workable rule would be a mistake. The opinion created a bright-line rule that refused to incorporate any provision of the Bill of Rights.[136] This rule is easy for lower courts to apply in the same way that the following absurd, bright-line interpretation would be easy to apply: Suppose the Court held that "Speech" in the First Amendment[137] context must be construed in the same manner as "Speech" described in Article I's Speech and Debate Clause.[138] That construction would be easy for lower courts to

130. *Id.* at 78 (majority opinion).
131. *See* CURTIS, *supra* note 17, at 176.
132. McDonald v. City of Chicago, 561 U.S. 742, 829 (2010) (Thomas, J., concurring in part and concurring in the judgment).
133. Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).
134. Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).
135. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2272 (2022).
136. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873).
137. U.S. CONST. amend. I.
138. U.S. CONST. art. I, § 6.

apply due to the narrow circumstances in which Speech and Debate Clause issues arise. However, workability through absurdity should not suffice.[139]

D. THE DISRUPTIVE EFFECT ON OTHER AREAS OF LAW

A precedent that has distorted other legal doctrines is more suitable for overruling.[140] Although achieving substantially similar results, the closing off of incorporation via the Privileges or Immunities Clause caused jurists who did not want to overrule *Slaughter-House* to distort the Fourteenth Amendment's Due Process Clause in order to incorporate the Bill of Rights against the states.[141] Due Process Clause distortion caused two nasty ailments.

First, the incrementalist incorporation route required Justices to inquire whether a provision of the Bill of Rights was "fundamental to our scheme of ordered liberty" with "dee[p] root[s] in [our] history and tradition."[142] Part of the rationale for Constitution-related precedent being weaker is the high bar for amending the Constitution.[143] When a provision of the Constitution enumerates a right, it is self-evident that a great majority of American voters considered the provision sufficiently fundamental to make it part of the nation's foundational legal document. Judicial inquiry into whether a provision is important enough to be elevated to fundamental status is improper. The entire Bill of Rights is fundamental to liberty. The Anti-Federalists who pressed for a bill of rights in the Constitution did so partly because they believed some liberties were so fundamental that their inclusion in the nation's founding document was necessary.[144]

Second, the absorption of unenumerated-rights analysis into substantive due process[145] let the Ninth Amendment wither on the vine. Justices rarely

139. *Cf. Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part) (admitting a precedent was workable but overruling it due to its disastrous consequences).

140. *See Dobbs*, 142 S. Ct. at 2275.

141. *Cf.* Bogen, *supra* note 52, at 337 (explaining that the Due Process Clause, rather than the Privileges or Immunities Clause, has incorporated much of the Bill of Rights against the states).

142. Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019) (citation omitted).

143. Agostini v. Felton, 521 U.S. 203, 235 (1997); *see* U.S. CONST. art. V (describing the process for amending the Constitution).

144. *See, e.g.*, Pennsylvania Minority, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 237, 247 (Ralph Ketcham ed., 1986) (describing a bill of rights as "ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty"). "There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed . . . ." The Federal Farmer, *Letters from the Federal Farmer*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 256, 266 (Ralph Ketcham ed., 1986).

145. The current substantive due process analysis for unenumerated rights is the same as the analysis for enumerated rights. The inquiry has two prongs: (1) whether the right is "objectively, deeply

refer to the Amendment. In *Griswold v. Connecticut*, Justice Goldberg penned a concurrence that examined the Ninth Amendment at length.[146] But aside from this single concurrence and occasional fleeting references,[147] the Court has ignored a provision of the Constitution that is no less deserving of interpretation and application than any other.[148] The absence of the Ninth Amendment in the Court's unenumerated-rights jurisprudence is a consequence of the growth of substantive due process and neglect of the Privileges or Immunities Clause.[149]

In sum, *Slaughter-House* has had the disruptive effect of implicitly disparaging some provisions of the Bill of Rights as nonfundamental while stunting the growth of Ninth Amendment jurisprudence. Those two consequences have damaged the Constitution and counsel in favor of overruling *Slaughter-House*.

E. DEVELOPMENTS SINCE THE CASE WAS DECIDED

A precedent is significantly weakened when the grounds for the decision have been "eroded" by the Court's subsequent decisions.[150] A crucial aspect of the reasoning in *Slaughter-House* was its result-oriented approach that did not want incorporation to transform the Constitution into a "perpetual censor"[151] of state legislatures.[152] However, the majority's fear has already been realized due to substantive due process's subsequent metastasis. The vast majority of the Bill of Rights is already incorporated against the states.[153] At the 2018 oral argument for *Timbs*, Justice Gorsuch and Justice Kavanaugh were incredulous that Indiana's solicitor general was contesting incorporation of any part of the Bill of Rights.[154] The subsequent

rooted in this Nation's history and tradition"; and (2) whether the right is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citation modified) (citations omitted).

146. *See* Griswold v. Connecticut, 381 U.S. 479, 486–99 (1965) (Goldberg, J., concurring) (analyzing the Ninth Amendment's text, history, and meaning).

147. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (plurality opinion) (citing the Ninth Amendment).

148. *Cf.* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 225 (2014) (claiming the Court has treated the Ninth Amendment as "lost").

149. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259–60 (2022) (analyzing unenumerated rights under substantive due process instead of the Ninth Amendment); *cf. Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 213 (2018) (statement of Judge Brett M. Kavanaugh) (describing the Ninth Amendment, the Privileges or Immunities Clause, and substantive due process as three ways of achieving similar results).

150. United States v. Gaudin, 515 U.S. 506, 521 (1995).

151. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873).

152. *See supra* Section III.B.1.

153. *See* CHEMERINSKY, *supra* note 51, at 565–66.

154. During oral arguments, Justice Gorsuch said to Indiana's solicitor general, "[M]ost of these

legal developments of near-total incorporation have obliterated the result-oriented reasoning that grounded the *Slaughter-House* majority opinion. The ensuing legal developments counsel strongly in favor of overruling *Slaughter-House*.

F. THE ABSENCE OF CONCRETE RELIANCE

People have concrete reliance on the rights that substantive due process preserves, but this reliance is separate from reliance on the procedural mechanism itself. Their reliance would only be concrete if abrogating substantive due process would also mean that the Bill of Rights was not incorporated against the states. Adoption of the PI + 9 Framework would avoid such issues.

The primary concrete reliance interests that would be upset by *Slaughter-House* being overruled would be those that rely on the unincorporated parts of the Bill of Rights remaining unincorporated. Today, the Third Amendment, the Fifth Amendment's Grand Jury Clause, and the Seventh Amendment are the only enumerated rights that remain unincorporated.[155]

The Third and Seventh Amendment present inconsequential reliance interests. The Third Amendment's incorporation would be the least substantial because situations that lead to Third Amendment litigation are exceedingly rare.[156] Similarly, the Seventh Amendment's incorporation would change little. Only three states lack a right to a civil jury trial in their state constitutions: Colorado, Louisiana, and Wyoming.[157] However, the right to a civil jury trial can be found elsewhere in those three states. The rules of civil procedure for Colorado,[158] Louisiana,[159] and Wyoming[160] allow

incorporation cases took place in like the 1940s . . . . And here we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really? Come on, General." Transcript of Oral Argument at 32–33, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091). Shortly after, Justice Kavanaugh added, "Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?" *Id.* at 33.

155. *See* CHEMERINSKY, *supra* note 51, at 567.

156. The Supreme Court has yet to decide a case based on the Third Amendment, and there is only one significant federal court decision about the Amendment. Scott D. Gerber, *An Unavoidably Brief Historiography of the Third Amendment*, 82 TENN. L. REV. 627, 627–28 (2015). The one case involved tenants who sued on Third Amendment grounds after National Guard troops evicted them to use the tenants' residences for housing. Engblom v. Carey, 677 F.2d 957, 958–61 (2d Cir. 1982) (holding that national guardsmen are "Soldiers" for Third Amendment purposes and that the Third Amendment is applied to the states through the Fourteenth Amendment).

157. *See* COLO CONST.; LA. CONST.; WYO. CONST.

158. COLO. R. CIV. P. 38(b) (2025).

159. LA. CODE CIV. PROC. ANN. art. 1731 (2025).

160. WYO. R. CIV. P. 38(b) (2025).

a party to demand a jury trial. Accordingly, incorporating the Third and Seventh Amendment would change little for states or private parties.

Incorporating the Fifth Amendment's Grand Jury Clause presents the greatest reliance-interest issues of the amendments that prescribe enumerated rights. States without a grand jury requirement have reliance interests in preserving the finality of criminal judgments and avoiding the costs associated with implementing an institution for criminal prosecutions—the grand jury.[161]

The finality of criminal judgments in state courts would likely remain intact despite incorporation of the Grand Jury Clause. In *Edwards v. Vannoy*, the Supreme Court refused to retroactively apply the *Ramos* jury-unanimity rule on federal collateral review.[162] Given the refusal in *Edwards* to retroactively apply the unanimous jury verdict requirement from *Ramos* on federal collateral review,[163] it seems unlikely that the Court would rule differently if the Grand Jury Clause were incorporated. To apply the requirement retroactively, the Court would need to apply a rare exception that it described as "moribund" in 2021.[164]

A state's reliance interest in avoiding the costs associated with grand juries is the most significant reliance interest jeopardized by total incorporation of the Bill of Rights. However, reliance-interests analysis usually concerns the costs borne by private parties, not the government.[165] All but two states, Pennsylvania and Connecticut, still have grand jury indictment as part of their criminal procedure scheme—even if twenty-eight states do not require a grand jury indictment.[166] The familiarity with the grand jury as an institution and the existence of the institution in all but two states limit the extent to which incorporating the Grand Jury Clause would upset reliance interests. Moreover, the Court has repeatedly incorporated procedural protections against states despite the attendant costs.[167] Such decisions evince a belief in the relative unimportance of a state's reliance interest in maintaining criminal laws and procedures that are inconsistent with the Constitution. As Justice Gorsuch wrote in *Ramos*, the most essential reliance interests are "the reliance interests of the American people."[168]

161. *See* Robert W. Frey, Note, *Incorporation, Fundamental Rights, and the Grand Jury:* Hurtado v. California *Reconsidered*, 108 VA. L. REV. 1613, 1654 (2022).
162. Edwards v. Vannoy, 141 S. Ct. 1547, 1559 (2021).
163. *Id.* at 1552.
164. *Id.* at 1560.
165. Frey, *supra* note 161, at 1654.
166. *See id.* at 1654–55.
167. *See id.* at 1655.
168. Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) (plurality opinion).

Given the relatively meager reliance interests that would be affected by overruling *Slaughter-House*, the reliance interests factor weighs only slightly against overruling the precedent.

Weighing the stare decisis factors as a whole in a manner consistent with the Court's recent application of those factors, *Slaughter-House* should be overruled. Accordingly, the Fourteenth Amendment's Privileges or Immunities Clause should incorporate every right in the Bill of Rights against the states.

IV. SUBSTANTIVE DUE PROCESS MUST END

Substantive due process is a doctrine with severe flaws. As will be explained below, the doctrine cannot justify itself with anything but a result-oriented conclusion. However, even that justification is unsatisfying because substantive due process is not the best means to protect individual liberties against state infringement—the Privileges or Immunities Clause is. The result is a disjointed Fourteenth Amendment and an ineffectual Ninth Amendment.

A. SUBSTANTIVE DUE PROCESS FAILS TO JUSTIFY ITSELF WITH REASON AND IMPEDES A HARMONIOUS FOURTEENTH AMENDMENT

The Fourteenth Amendment's Due Process Clause seems, on its text's face,[169] to be an inapt mechanism to incorporate the Bill of Rights against the states. After all, the Due Process Clause describes process, not substance.[170] Over the years, several Supreme Court Justices have recognized the contradiction in terms for the folly that it is.[171] Other Supreme Court Justices have employed substantive due process without defending the mechanism itself.[172] Stranger yet, however, is when Justices who have

169. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

170. John Hart Ely famously quipped that "substantive due process is a contradiction in terms—sort of like green pastel redness." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (citation modified).

171. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting) (warning against continued expansion of substantive due process to strike down a city ordinance); City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) (describing incorporation of the Bill of Rights via the Due Process Clause as "judicial usurpation"); Timbs v. Indiana, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in the judgment) (explaining that the Due Process Clause involves only process, not substance).

172. *See, e.g.*, *Timbs*, 139 S. Ct. at 687 (majority opinion) (explaining the two-pronged test for substantive due process without defending substantive due process itself); McDonald v. City of Chicago, 561 U.S. 742, 759–66 (2010) (offering an overview of substantive due process precedents without defending the doctrine directly).

openly expressed their distaste for substantive due process have nonetheless approved its use in applying the Bill of Rights to the states.[173]

Despite substantive due process's status as the favored means to incorporate the Bill of Rights against the states, the method has failed to justify itself by any means other than a result-oriented approach. This approach would be more understandable if a more apt provision of the Constitution could not accomplish the same objectives. The Privileges or Immunities Clause can achieve those objectives and would do so with greater force, clarity, and efficiency.

Furthermore, revitalizing the Privileges or Immunities Clause while curtailing substantive due process would harmonize the Fourteenth Amendment's Due Process Clause, Equal Protection Clause, and Privileges or Immunities Clause. The Due Process Clause would consider only "procedural fairness."[174] The Equal Protection Clause would address equality alone.[175] The Privileges or Immunities Clause would set a baseline of substantive rights that no state may abridge.[176] The failure to harmonize the three above-mentioned Fourteenth Amendment clauses puts rights on weaker footing.

B. SUBSTANTIVE DUE PROCESS SHORTCHANGES THE NINTH AMENDMENT

Any construction that renders a constitutional provision superfluous is "inadmissible, unless the words require it."[177] Chief Justice Marshall's proscription against superfluous constructions was farsighted, and its logic extends to the wounds substantive due process has inflicted on the Ninth Amendment. The established doctrine the Court employs to evaluate whether the Constitution protects an unenumerated right is substantive due process.[178] The repeated[179] resort to the Due Process Clause to achieve

173. *Compare Morales*, 527 U.S. at 85 (Scalia, J., dissenting) (describing substantive due process as "judicial usurpation"), *with McDonald*, 561 U.S. at 791 (Scalia, J., concurring) (defending the application of substantive due process with respect to the Second Amendment).

174. ELY, *supra* note 170, at 24.

175. *See id.*

176. *See id.*

177. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

178. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259–60 (2022) (describing the current doctrinal framework for unenumerated rights).

179. Prior Supreme Court opinions have repeatedly used the Due Process Clause to protect unenumerated rights instead of using the Ninth Amendment. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481–86 (1965) (using the Due Process Clause to protect a right to contraceptives for married couples); Loving v. Virginia, 388 U.S. 1, 12 (1967) (using the Due Process Clause to protect a right to interracial marriage); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (using the Due Process Clause to protect a right to private sexual acts between consenting adults); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (using the Due Process Clause to protect right to same-sex marriage).

purposes for which it was never intended,[180] and to which it is ill-suited, shortchanges the Ninth Amendment and renders it superfluous.[181] Furthermore, to render the Ninth Amendment superfluous does more than flout one of Chief Justice Marshall's memorable axioms. The failure to ground unenumerated-rights jurisprudence in the constitutional provision most suited to that purpose puts jealously guarded individual liberties at risk.

The Ninth Amendment offers the protection that unenumerated rights deserve. Regarding one such precious unenumerated right, Chief Justice Warren wrote for a unanimous Court that, "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the state."[182] The right to interracial marriage is one of many precious unenumerated rights that deserves better protection than what a procedural clause can offer. The Ninth Amendment can secure those rights better than substantive due process. Any defense of substantive due process to defend an unenumerated right disserves the very rights the doctrine purports to protect. Substantive due process must be abrogated so that Ninth Amendment jurisprudence can become the sentinel of unenumerated rights.

V. UNENUMERATED RIGHTS: THE ELEPHANT IN THE ROOM

The biggest challenge to adopting an expansive construction of the Privileges or Immunities Clause may be getting Justices to agree on a test for whether the Constitution protects a particular unenumerated right. Fortunately, there is a consensus about protecting some unenumerated rights.[183] This Part argues that the Ninth Amendment should protect unenumerated rights and considers which test is appropriate for accomplishing that objective.

A. JUSTICES ACROSS THE SPECTRUM WANT TO PROTECT UNENUMERATED RIGHTS

The *Dobbs v. Jackson Women's Health Organization* majority was quick to emphasize that its elimination of an unenumerated constitutional right to abortion should not "be understood to cast doubt on precedents that do not concern abortion."[184] In his concurring opinion in *Dobbs*, Justice

180. *See supra* Section IV.A.

181. The Amendment has become so superfluous that the mere suggestion of employing it has become risible. *See* ELY, *supra* note 170, at 34 ("In sophisticated legal circles mentioning the Ninth Amendment is a surefire way to get a laugh.").

182. *Loving*, 388 U.S. at 12.

183. *See infra* Section V.A.

184. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–78 (2022).

Kavanaugh expressed support for Supreme Court precedents concerning marriage and contraception.[185] The *Dobbs* dissenters believed that it was not possible to decouple the precedents concerning marriage and contraception from the precedents concerning abortion.[186] The fact that both sides agreed in *Dobbs* that at least some unenumerated rights were protected by the Fourteenth Amendment's Due Process Clause is some evidence of the broad support for constitutional recognition of some unenumerated rights.

B. THE NINTH AMENDMENT IS THE BEST MEANS TO PROTECT UNENUMERATED RIGHTS

The Ninth Amendment shares at least two things in common with the Privileges or Immunities Clause. First, both have been mostly read out of the Constitution.[187] Second, substantive due process has haphazardly achieved some of each's overarching goals.[188]

There is a broad consensus that the Constitution protects some unenumerated rights.[189] And if the Constitution protects unenumerated rights, those rights ought to be safeguarded by a framework sturdier than the flimsy, contradictory substantive due process approach. Substantive due process's embrace of unenumerated-rights jurisprudence would be more understandable if no part of the Constitution dealt explicitly with the issue of unenumerated rights. Fortunately, this is not the case. A provision that discusses unenumerated rights exists, and that provision is the Ninth Amendment, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[190]

The decision to craft a jurisprudence about unenumerated substantive rights in a procedural clause is confounding in light of the Ninth

185. *See id.* at 2309 (Kavanaugh, J., concurring) (reiterating that overruling Roe v. Wade, 410 U.S. 113 (1973), did not weaken or threaten other precedents that protected unenumerated rights that did not concern abortion).

186. *See id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting).

187. CURTIS, *supra* note 17, at 173 (explaining that the Privileges or Immunities Clause had essentially been "read out of the Constitution" by the Supreme Court); *see* BARNETT, *supra* note 148, at 236–37 (explaining that "courts have rarely been willing to rely upon [the Ninth Amendment] when assessing the constitutionality of statutes").

188. Substantive due process has achieved, perhaps, more than the Privileges or Immunities Clause could have by itself. *See* Bogen, *supra* note 52 and accompanying text. The Supreme Court's unenumerated-rights jurisprudence has taken shape almost exclusively within the confines of the Fourteenth Amendment's Due Process Clause. *Cf.* Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (explaining that the Fourteenth Amendment's Due Process Clause also protects liberties pertaining to "personal choices central to individual dignity and autonomy").

189. *See supra* Section V.A.

190. U.S. CONST. amend. IX.

Amendment. The Supreme Court has traditionally declined to hold that the Ninth Amendment is the source of substantive rights.[191] Indeed, the Ninth Amendment does not specify which rights were retained by the people. The only body with the power and qualifications necessary to decide which rights are retained by the people is the federal judiciary. The "province and duty of the judicial department to say what the law is"[192] extends to expounding and interpreting which rights are "retained by the people"[193] under the Ninth Amendment.

C. FINDING THE RIGHT TEST FOR IDENTIFYING PROTECTED UNENUMERATED RIGHTS

The Supreme Court must choose a proper, workable rule of law for lower courts to apply when deciding Ninth Amendment cases if the Court were to adopt the PI + 9 Framework. The Ninth Amendment seems so open to interpretation that it could create Pandora's box concerns that may produce workability problems.[194] Indeed, the Court has recently cited unworkability in both constitutional[195] and statutory[196] cases as a key reason for overruling precedents. However, substantive due process raises the same Pandora's box predicaments,[197] yet the Court has had little trouble applying substantive due process in recent years.[198] Indeed, when the Court overruled *Roe* and *Casey*, the Court insisted on being guided by "history and tradition" in order to avoid the "freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*."[199]

However, if the Court were to hand down a landmark Ninth Amendment decision, it would have ultimate authority to say what the law is and could choose any test it desired. The Court ought not to be frozen by

191. "The Court does not use the Ninth Amendment as a tool for incorporating independent unenumerated rights or as an independent source of rights . . . ." Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 188 (2003).

192. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

193. U.S. CONST. amend. IX.

194. *See* ELY, *supra* note 170, at 34.

195. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2272 (2022) (criticizing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), for the poor workability of the "undue burden" standard).

196. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270 (2024) (criticizing and overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) for the unworkability of the "ambiguity" standard).

197. *See* ELY, *supra* note 170, at 34.

198. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2245–46 (analyzing whether there is a right to abortion under substantive due process); Timbs v. Indiana, 139 S. Ct. 682, 687–89 (2019) (using substantive due process to analyze whether the Eighth Amendment's Excessive Fines Clause is incorporated).

199. *Dobbs*, 142 S. Ct. at 2248; *see* Lochner v. New York, 198 U.S. 45, 64 (1905).

a fear of political backlash or public outcry when deciding the cases and controversies that it has the power to decide under Article III.[200] In 2022, the Court acknowledged the importance of deciding cases based on principles, "not social and political pressures."[201] A wise Justice once said of the Court, "We are not final because we are infallible, but we are infallible only because we are final."[202] The Court ought to trust itself enough to exercise the power vested in it by the Constitution to interpret and construe the Ninth Amendment. Several options abound—ranging from ignoring the Ninth Amendment to presuming liberty—for the Court if it adopts the PI + 9 Framework.

1. The Ink Blot Approach: Disregarding the Ninth Amendment

Judge Robert H. Bork infamously compared the Ninth Amendment to an "ink blot" that the Court should not interpret.[203] Judge Bork's conception should be rejected because it underestimates the judiciary's abilities, ignores history, and is impractical.

Judge Bork's interpretation should be rejected because it ignores a provision of the Constitution due to its potential for being difficult to interpret. Judge Bork underestimated the Court. The "task of translating the majestic generalities of the Bill of Rights" is daunting.[204] However, this task is the province and duty of the judges who comprise the federal judiciary.[205] There is no exception to this province and duty in cases that raise complex and profound questions.

Furthermore, Judge Bork's conception is not historically defensible from any conceivable originalist perspective.[206] For Anti-Federalists, enumerating any rights was dangerous because doing so could be construed to imply the nonexistence of other rights.[207] James Madison acknowledged

200. *See* U.S. CONST. art. III.

201. *Dobbs*, 142 S. Ct. at 2278 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992)).

202. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

203. *Nomination of Robert H. Bork to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) (statement of Judge Robert H. Bork).

204. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

205. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

206. For a pithy primer on the Ninth Amendment's origin, see BARNETT, *supra* note 148, at 236–44. For more expansive reading on the Ninth Amendment's history, see generally Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 BYU L. REV. 331 (2017) (explaining the Clause's Anti-Federalist side and its application to procedural, positive, and natural rights); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983) (detailing the historical evidence of the Ninth Amendment's meaning for unenumerated federal rights).

207. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 8 (2006).

this criticism when he defended the Constitution's ratification and offered a provision, which became the Ninth Amendment, that expressly guaranteed protection for unenumerated rights.[208] Although Ninth Amendment scholars have come to vastly different conclusions—from natural-rights readings[209] to readings emphasizing control for local governance[210]—it appears there was more underneath the ink blot than Judge Bork thought.

Finally, Judge Bork's conception is impractical. Some unenumerated-rights protections, including those for contraception and same-sex marriage, enjoy support from Justices across the ideological spectrum. The differences are in degree, not kind. For example, the *Dobbs* majority opinion, a concurring opinion, and the joint dissenting opinion all claimed to stand for unenumerated rights other than abortion.[211] The idea of stripping all unenumerated rights of constitutional protection is simply unthinkable. For example, the right to interracial marriage is unenumerated.[212] However, any prominent person who suggests that it is not a right protected by the Constitution is instantly and vociferously rebuked.[213] Aside from its indefensibility as a matter of history and principle, the idea that all unenumerated rights would be summarily stripped of constitutional protection is beyond the realm of realistic possibilities.

2. The Presumption of Liberty Approach: Ninth Amendment Maximalism

Randy E. Barnett has written extensively on the Ninth Amendment[214] and has his own grand Ninth Amendment theory. Under Barnett's theory of

208. 5 JAMES MADISON, *Amendments to the Constitution*, *in* THE WRITINGS OF JAMES MADISON 384–85 (Gaillard Hunt ed., 1904).

209. *See generally* Barnett, *supra* note 207 (arguing that the Ninth Amendment at enactment meant to say that unenumerated natural rights should be treated in the same manner as enumerated natural rights in the Bill of Rights).

210. *See generally* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) (bringing to light previously missed or unrecognized evidence regarding the original meaning of the Ninth Amendment).

211. *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280 (2022) ("[W]e have stated unequivocally that [n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." (citation modified) (alteration in original) (citation omitted)), *and id.* at 2309 (Kavanaugh, J., concurring) ("I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of [precedents involving contraception or marriage], and does *not* threaten or cast doubt on those precedents."), *with id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting) (criticizing the majority for undermining unenumerated rights to same-sex intimacy, marriage, and contraception).

212. The word *marriage* is not explicitly mentioned anywhere in the Constitution. *See* U.S. CONST.

213. In 2022, Senator Mike Braun (who is now Indiana's governor) said interracial marriage ought to be left to the states, but he walked back his comments almost immediately after uttering them. *Indiana Sen. Braun Walks Back Interracial Marriage Comments*, ASSOCIATED PRESS (Mar. 23, 2022, at 11:48 AM PST), https://apnews.com/article/ketanji-brown-jackson-us-supreme-court-race-and-ethnicity-racial-injustice-lifestyle-091656750d8685dbe19d3d5493785595 [https://perma.cc/9XLF-SHLF].

214. *See* BARNETT, *supra* note 148, at 236–44 (explaining how the Ninth Amendment paired with the Privileges or Immunities Clause justifies a "[p]resumption of [l]iberty" for individuals to act freely

unenumerated rights, one could first conduct an originalist analysis to determine which unenumerated rights get constitutional recognition.[215] However, Barnett conceded that originalist materials would be insufficient to recognize all the rights worthy of Ninth Amendment protection, so the sphere of unenumerated rights would be even more expansive than originalism could contemplate.[216] Barnett advocated a framework that presumes liberty for unenumerated rights.[217] Presuming liberty would place the burden on the government to establish why any government infringement on individual freedom is both necessary and proper, rather than assuming constitutionality when possible.[218] In determining when liberty should be presumed, Barnett's dividing line is a rightful/wrongful conduct distinction.[219]

Barnett's contributions to Ninth Amendment scholarship are admirable, but his solutions are quixotic. First, to presume liberty would be to undo fundamental canons of construction. Established canons of constitutional construction dating back to the early nineteenth century demand that "[n]o court ought, unless the terms of an act rendered it unavoidable, to give a construction to [a statute] which should involve a violation, however unintentional, of the constitution."[220] To reverse the paradigm to one in which the federal judiciary seeks to strike down laws that touch so-called "rightful activity"[221] would be catastrophic. The current Court's desire to take more issues out of constitutional law and insert them into the democratic process is at odds with Barnett's framework.[222]

Aside from the current Court's probable unwillingness to adopt the kind of radical shift that Barnett supports, workability concerns are sufficient to reject Barnett's framework. In recent years, the Court expressed frustration with unworkable rules of law and overruled precedents on that basis.[223] The idea that the Court would adopt a rightful/wrongful conduct test for trial and appellate courts to apply to every piece of legislation is fantasy.

unless the government can justify a restriction); Barnett, *supra* note 207, at 3 (arguing that the Ninth Amendment should be interpreted to presume liberty); Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937, 939–40 (2008) (criticizing Kurt Lash's "[t]extual-[h]istorical" interpretation of the Ninth Amendment).

215. *See* BARNETT, *supra* note 148, at 257.

216. *See id.* at 261.

217. *See id.* at 262.

218. *Id.*

219. *See id.* at 264–68.

220. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830).

221. BARNETT, *supra* note 148, at 264.

222. *Cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022) (criticizing prior decisions for removing the issue of abortion from the democratic process).

223. *See, e.g.*, *id.* at 2272–74; Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270–71 (2024).

To be sure, Barnett's theory is far from the only Ninth Amendment framework. Many theories abound.[224] For example, Kurt T. Lash's theory considers the Ninth Amendment through a federalism prism that emphasizes retained powers in addition to retained rights.[225] In any event, Barnett's presumption-of-liberty theory represents the opposite of Judge Bork's ink-blot theory. Between Barnett's Ninth Amendment maximalism and Judge Bork's Ninth Amendment ignorance lie too many possibilities to ponder in this Note.

An ideal rule for the Court to adopt in inaugurating its Ninth Amendment jurisprudence would be one that is workable, in line with current precedents, and moored by "respect for the teachings of history."[226] A workable rule of law would promote consistency and predictability to a constitutional provision that many may fear due to its unpredictability.[227] A rule of law in line with current precedents regarding unenumerated rights would prevent the instability that a brand-new rule might invite. A rule of law grounded in respect for history and tradition would avoid the open-ended judicial activism of the *Lochner* era.[228]

3. *Glucksberg*'s Goldilocks Test

Fortunately, there is an established test that is workable and guided by history. Further, this test is more than merely consistent with current precedents—it *is* current precedent.

The Court adopted a sensible unenumerated-rights framework in *Washington v. Glucksberg*.[229] The framework requires a "careful description" of the asserted liberty interest.[230] The careful description provides a buffer against broad assertions of a liberty interest that could mean anything and everything. Additionally, adopting an approach that describes a liberty interest rather than a retained right[231] is appropriate because *liberty* and *right* have been used interchangeably since the American Revolution.[232] Then, there is a two-pronged test for deciding whether the Due Process

224. Lochlan F. Shelfer provided a thoughtful and expansive survey of Ninth Amendment scholarship that is better to cite than to imitate. *See* Shelfer, *supra* note 206, at 337–43.

225. *See* Kurt T. Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 STAN. L. REV. 969, 976–77 (2008).

226. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment).

227. *See supra* note 194 and accompanying text.

228. *See Dobbs*, 142 S. Ct. at 2248.

229. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

230. *Id.* at 721 (citation omitted).

231. The Ninth Amendment mentions "rights" but not liberties. U.S. CONST. amend. IX. The Fourteenth Amendment's Due Process Clause speaks of "liberty" but not rights. U.S. CONST. amend. XIV.

232. *See* CURTIS, *supra* note 17 and accompanying text.

Clause protects a right, and this framework applies to evaluating unenumerated rights.

> 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 ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[233]

The above framework gets at the heart of the Ninth Amendment, even though it brands itself as a Due Process Clause analysis. The language about a right needing to be "objectively, deeply *rooted* in this Nation's history and tradition"[234] is appropriate for evaluating which rights have been "retained by the people."[235] For a right to be retained, the right could not have recently come into existence—thus the *deeply rooted* phrasing. This approach shows proper respect for history's teachings, prefers judicial restraint and caution,[236] and averts the unrestrained judicial activism of the *Lochner* era.[237] The history-and-tradition prong also ensures that the Ninth Amendment would preserve an existing right. Any analysis that claims the Ninth Amendment is not the source of substantive rights[238] is telling a lawyerly half-truth. The nation's history and tradition are the source of the rights retained by the people in the Ninth Amendment.

The *Glucksberg* test also scores high in workability when lower courts have applied the test to purported unenumerated rights in various contexts.[239] For example, not long after the Court decided *Glucksberg*, the Fourth Circuit Court of Appeals applied the two-pronged test to reject a petitioner's asserted unenumerated right to be free from unjust or arbitrary incarceration.[240] In another case, the Eighth Circuit Court of Appeals had no difficulty applying *Glucksberg* to uphold an Iowa statute limiting where sex offenders could reside.[241] In 2024, a federal district court judge in *Murphey v. United States*

233. *Glucksberg*, 521 U.S. at 720–21 (citations omitted) (citing another source).

234. *Id.* (emphasis added) (citation modified) (citations omitted).

235. U.S. CONST. amend. IX.

236. Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law*, 6 AVE MARIA L. REV. 61, 66 (2007).

237. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022).

238. *See* Schmidt, *supra* note 191 and accompanying text.

239. For a broader survey of federal courts applying *Glucksberg*'s two-pronged test to unenumerated rights, see Alexander E. Hartzell, Comment, *Implied Fundamental Rights and the Right to Travel with Arms for Self-Defense: An Application of* Glucksberg *to Anglo-American History and Tradition*, 69 AM. U. L. REV. F. 69, 83–87 (2020).

240. *See* Hawkins v. Freeman, 195 F.3d 732, 747–50 (4th Cir. 1999) (applying *Glucksberg*'s two-pronged analysis).

241. *See* Doe v. Miller, 405 F.3d 700, 713–14 (8th Cir. 2005) (applying *Glucksberg*'s two-pronged analysis to reject petitioner's argument that the right "to live where you want" is a protected unenumerated

had little issue applying *Glucksberg*'s two-pronged test to reject a plaintiff's asserted right to grow, possess, and use psychedelic and other drugs.[242] Additionally, in the district court's application of the test in *Murphey*, the court looked to Supreme Court decisions that counseled against recognizing additional rights because "guideposts for responsible decisionmaking in this unchartered area [were] scarce and open-ended."[243] Lower courts have proven *Glucksberg* to be workable.

The second prong allows judges to ensure that sordid practices do not get constitutional protection merely for existing long enough to be deeply rooted in the nation's history and tradition. As Justice Stevens observed in *Bowers v. Hardwick*, "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[244] However, the right to interracial marriage is beyond doubt implicit in the concept of ordered liberty.[245] Moreover, there may be "room for play in the joints"[246] between the first prong and second prong.[247] The first prong may act as a nonabsolute constraint on the second prong. Regarding the relationship between the prongs, Justice Kennedy wrote, "History and tradition guide and discipline [the second prong] but do not set its outer boundaries."[248]

To be sure, the second prong requires courts to "exercise reasoned judgment."[249] But the exercise of reasoned judgment is inherent to the judicial power. It is "emphatically the province and duty of the judicial department to say what the law is."[250] Neither political branch has the power to identify constitutional rights.[251] Thus, the proper body for identifying rights in the context of the Ninth Amendment is the judicial branch.[252] Through its substantive-due-process jurisprudence, the Court has already

right).

242. *See* Murphey v. United States, 726 F. Supp. 3d 1039, 1053–54 (D. Ariz. 2024).

243. *Id.* at 1052 (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

244. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

245. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

246. Walz v. Tax. Comm'n of N.Y., 397 U.S. 664, 669 (1970).

247. Chief Justice Burger described the tension between the Free Exercise Clause and Establishment Clause in this manner, and the tension between *Glucksberg*'s first and second prongs is somewhat analogous. *Id.* at 669–70.

248. Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (citation omitted).

249. *Id.*

250. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

251. *See* City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (ruling that Congress has no power to interpret the Constitution or declare rights).

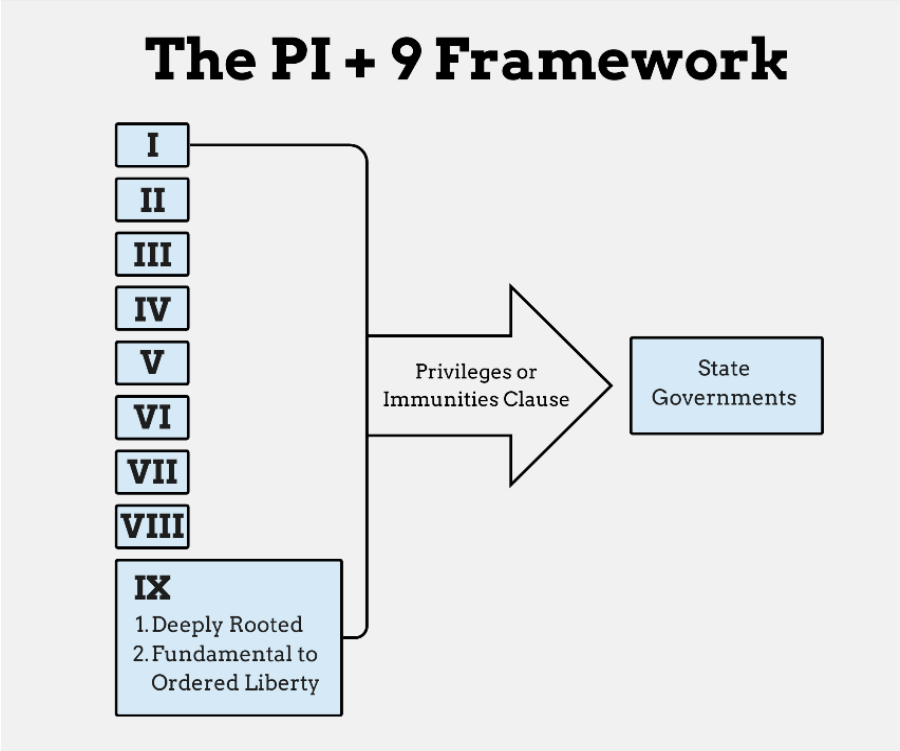
252. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . .").

recognized a number of unenumerated rights deemed to be fundamental.[253] If it continues to do so, it ought to do so through the proper means: the Ninth Amendment. Doing so gives unenumerated rights a place in law that is more secure than substantive due process.

VI. THE FRAMEWORK APPLIED

The PI + 9 Framework would apply amendments one through nine to the states through the Privileges or Immunities Clause and conduct its unenumerated-rights inquiry under the Ninth Amendment by using the two-pronged *Glucksberg* test. Figure 1 shows how amendments one through nine would apply to state governments under the PI + 9 Framework.

FIGURE 1. The PI + 9 Framework



253. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (protecting the right to interracial marriage); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (protecting the right to private sexual acts between consenting adults).

A. THE FRAMEWORK FOR ENUMERATED RIGHTS

The PI + 9 framework has the benefit of simplicity, especially as the framework applies to enumerated constitutional rights, such as the right to bear arms.[254] Under the PI + 9 Framework, the Second Amendment would apply to the states via the Privileges or Immunities Clause. There would be no need to consider whether the Second Amendment is implicit in the concept of ordered liberty because it would automatically be incorporated via the Privileges or Immunities Clause. A judge would only consider whether the state law violates the Second Amendment, which would get to the heart of the issue more quickly than a gratuitous rehashing about the wisdom or foolishness of substantive due process. Under the PI + 9 Framework, the state law would be analyzed in accordance with pertinent Second Amendment precedents, such as *New York State Rifle & Pistol Association v. Bruen*[255] and *District of Columbia v. Heller*.[256]

In any opinion concerning a state law's alleged abridgment of the Second Amendment, the Court would quickly state what is clear from the text, legislative history, and original intent,[257] which is that the Privileges or Immunities Clause applies every right in the Bill of Rights to the states. Then, the Court would decide whether the state law at issue violates the Second Amendment. In the Second Amendment context, the prevailing test remains the test from *Bruen*.[258] Any difficulties arising from applying *Bruen*[259] could be hashed out purely within the confines of the Second Amendment. Full incorporation takes distracting debates about substantive due process off the table and decreases judicial discretion as it relates to incorporation. The focus would be more on the right itself rather than the procedure by which the right in question is incorporated.

254. U.S. CONST. amend. II.

255. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

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

257. *See supra* Section II.B.

258. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2129–30.

259. "Courts have struggled with this use of history in the wake of *Bruen*. One difficulty is a level of generality problem." United States v. Rahimi, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring).

1. PI + 9 Applied to a Hypothetical About an Enumerated Right

Assume the following hypothetical factual scenario:

After increasing pressure from the public, Iowa enacts Statute One,[260] *which criminalizes the "carrying, transportation, or possession of any firearm on the grounds of any public school in the state of Iowa." After Statute One's enactment, Tina attends a parent-teacher conference at a public school in Marion, Iowa, with a loaded Glock 17 pistol in a holster on her hip. After seeing the holstered pistol, a student at the school calls the police, and the police arrive at the school and arrest Tina. Tina is charged with violating Statute One, and a jury convicts her in Linn County District Court. The Iowa Court of Appeals affirms the conviction. Tina petitions for a writ of certiorari to the Supreme Court of the United States, challenging her conviction and alleging that Statute One violates the Second Amendment to the United States Constitution. The Supreme Court of the United States grants certiorari.*

Under these facts, a Court using the PI + 9 Framework would state that the Second Amendment applies to the states through the Fourteenth Amendment's Privileges or Immunities Clause.[261] No inquiry would occur into whether the Second Amendment right is deeply rooted or implicit in the concept of ordered liberty. Once incorporated, the Second Amendment would operate "identically to both the Federal Government and the States."[262] Given that, the Court would apply the pertinent Second Amendment precedents.

The Court would apply *Bruen*'s inquiry and make the government "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[263] Here, the Court could look to a precedent like *Heller*, which held that forbidding firearms in "sensitive places such as schools" was permissible and consistent with historical restrictions.[264] The Court could also conduct a historical analysis to confirm or reject the view set forth in *Heller* about the presumptively lawful nature of prohibitions against guns in schools.[265] Under the hypothetical set of facts, the Privileges or Immunities Clause would mandate that the Second Amendment be applied to the Iowa government. The Supreme Court's precedents on the

260. Statute One is modeled after IOWA CODE § 724.4B (2025).
261. *See* U.S. Const. amend. XIV, § 1.
262. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) (citation omitted).
263. *Bruen*, 142 S. Ct. at 2126.
264. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).
265. *Id.* at 627 n.26.

Second Amendment would control, and the petitioner's conviction would likely be upheld.

B. THE FRAMEWORK FOR UNENUMERATED RIGHTS

The PI + 9 Framework for unenumerated rights requires just a few more steps than the PI + 9 Framework for enumerated rights. First, the Court would incorporate the Ninth Amendment against the states via the Fourteenth Amendment's Privileges or Immunities Clause.[266] Then, the Court would carefully describe the liberty interest at stake in accordance with *Glucksberg*'s "careful description" mandate.[267] After formulating a careful description of the asserted unenumerated right at issue, the Court would analyze under the Ninth Amendment[268] whether (1) the right is "deeply rooted in this Nation's history and tradition";[269] and (2) whether the right is "implicit in the concept of ordered liberty."[270] If the Court answered yes to those two questions, the Ninth Amendment would protect the right from infringement by the federal government and state governments.

1. PI + 9 Applied to a Hypothetical About an Unenumerated Right

Assume the following hypothetical factual scenario:

After a public campaign against homeschooling, California enacts Statute Two, which mandates, "No parent may homeschool their child, and all children must attend an accredited private or public school. Parents who violate this statute are guilty of a felony." Tom is a parent in Los Angeles, California who homeschools his son. After Statute Two's enactment, Tom continues homeschooling his child because he believes he can provide a better education for his son than any nearby public or private school. After a neighbor reports Tom to the police for homeschooling, Tom is arrested and charged with violating Statute Two. Tom is convicted of violating Statute Two in the Los Angeles County Superior Court and appeals to the California Second District Court of Appeal, which affirms his sentence. Tom petitions for a writ of certiorari to the Supreme Court of the United States, challenging his conviction and alleging a violation of his Ninth Amendment right to homeschool his child. The Supreme Court of the United States grants certiorari.

266. U.S. CONST. amend. XIV, § 1.
267. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citation omitted).
268. *See supra* Figure 1.
269. *Glucksberg*, 521 U.S. at 720–21 (citation omitted).
270. *Id.* at 721 (citation omitted).

Under these facts, a Court using the PI + 9 Framework would first note that the right at issue here is not enumerated in the Constitution. Thus, a Ninth Amendment inquiry is apt. The Court would quickly explain that the Privileges or Immunities Clause applies the Ninth Amendment to the states. Then, the Court would carefully describe the right at issue in the instant case, which is the right to homeschool one's child. After carefully describing the right, the Court would answer each *Glucksberg* prong: (1) whether the right is deeply rooted in the nation's history and tradition; and (2) whether the right is implicit in the concept of ordered liberty.

Under the first prong, the Court would be free to conduct an independent historical analysis. Homeschooling in America predates the American Revolution.[271] Many colonies passed laws in the seventeenth century that required parents to educate their children.[272] Colonial fathers were expected to teach their children reading and religion.[273] Abigail Adams homeschooled her children, and the Adams family was not unique among New Englanders in this respect.[274] Before the Civil War, enslaved people used home education as a means to defy racist anti-literacy laws.[275] Today, homeschooling is legal in all fifty states,[276] except for the fictitious California in the hypothetical.

Additionally, early-twentieth-century Supreme Court cases decided issues related to the right of parents to make decisions about their child's education. If the Court decided that the early twentieth century was early enough to inform the history-and-tradition inquiry, the Court could cite *Pierce v. Society of Sisters*[277] and reaffirm *Pierce*'s proposition that parents have a right "to direct the upbringing and education of children under their control."[278] The Court could also rely on *Meyer v. Nebraska*, which held that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."[279] The cases recognizing a right of parents to control the upbringing of their children are more than one hundred years old. Those cases, in addition to historical evidence, buttress the proposition that the right to homeschool one's children is deeply rooted. The Court would answer (1) in the affirmative and move

271. *See* Tanya K. Dumas, Sean Gates & Deborah R. Schwarzer, *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, 16 WIDENER L. REV. 63, 68 (2010).
272. MILTON GAITHER, HOMESCHOOL: AN AMERICAN HISTORY 6 (2d ed. 2017).
273. *Id.* at 11.
274. *See id.* at 25–26.
275. *Id.* at 46.
276. Dumas et al., *supra* note 271, at 68.
277. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
278. *Id.* at 534–35.
279. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

on to answering whether the right to homeschool one's children is implicit in the concept of ordered liberty.

The Court would likely also answer (2) in the affirmative and hold that the right to homeschool one's child is implicit in the concept of ordered liberty. In *Meyer*, the Court held that the right to "establish a home and bring up children" was protected by the Constitution.[280] Additionally, the right to homeschool one's child could be drawn within the sphere of "related rights of childrearing, procreation, and education" that the Court has recognized.[281] Under sufficiently analogous precedents and the exercise of reasoned judgment, the Court would hold that the right to homeschool one's children is implicit in the concept of ordered liberty. After carefully describing the right at issue and satisfying *Glucksberg*'s two prongs, the Court would hold that the Ninth Amendment protects the right to homeschool one's children and would void Statute Two.

VII. ADVANTAGES OF THE PI + 9 FRAMEWORK

The PI + 9 Framework has three main advantages: (1) it provides a stronger mechanism for protecting individual rights; (2) it is a more efficient, clear, and appropriate means by which to incorporate the Bill of Rights; and (3) it could lead to the development of Ninth Amendment jurisprudence.

A. PUTTING INDIVIDUAL RIGHTS ON STRONGER FOOTING

The primary advantage of the PI + 9 Framework is that it puts the precious civil liberties enshrined in the Constitution on stronger footing. Every single right recognized by substantive due process is always somewhat in doubt because of the dubious, wobbly nature of the doctrine. Why risk it? Those alarmed by Justice Thomas's concurrence in *Dobbs*,[282] which suggested that all substantive due process precedents ought to be reconsidered, have nobody to blame but themselves if they previously championed a flawed doctrine like substantive due process. Individual substantive rights are too important to leave behind the unlocked door of a process-related clause. The PI + 9 Framework gives substantive rights the defense they deserve by providing power to the text, history, and intent of the Privileges or Immunities Clause.

280. *Id.* at 399.

281. Obergefell v. Hodges, 576 U.S. 644, 667 (2015).

282. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring).

B. EFFICIENCY, CLARITY, AND RESPECT FOR THE PEOPLE'S AMENDMENTS

The PI + 9 Framework offers a better approach to incorporation than substantive due process. *Glucksberg*'s application to enumerated rights is inappropriate, inefficient, and unclear. It is inappropriate because a judge should not answer whether an amendment to the Constitution is sufficiently important to qualify as a sort of "super right" to be incorporated against the states. Each provision of the Bill of Rights was important enough for two-thirds of Congress and three-fourths of the states[283] to add the provision to the nation's founding document. Furthermore, it is inefficient because it requires a two-pronged analysis for provisions that were clearly fundamental enough to liberty to be included in the Constitution and are part of the nation's history and tradition since 1791. Finally, there is a lack of clarity as to why some amendments in the Bill of Rights are more vital to liberty than others. As Justice Thomas wrote in *McDonald*, a Privileges or Immunities Clause analysis is "far more likely to yield discernible answers" than substantive due process.[284] If the Court were to adopt the PI + 9 Framework, there would be no more ink spilled or time wasted defending substantive due process. The Court could instead get to the business of interpreting what each provision of the Bill of Rights means and how it ought to be construed and applied to the facts of a case.

C. DEVELOPMENT OF NINTH AMENDMENT JURISPRUDENCE

Another benefit of the PI + 9 Framework is the development of Ninth Amendment jurisprudence. In carrying out its duty to "say what the law is,"[285] the judicial branch ought to tell the American people what the Ninth Amendment means. Scholars may argue about the proper interpretation and construction of the Ninth Amendment, and this Note advocates *Glucksberg*'s two-pronged approach. Such words are wind. Only the judiciary can give meaning to the Constitution's text. Perhaps this will mean freezing the American people's rights as of 1791 or 1868.[286] Perhaps this will mean a presumption of liberty that would drastically curtail the role of government in Americans' lives.[287] Perhaps this will mean adopting *Glucksberg*'s two-pronged approach. However, the first Court opinion that grounds itself in the Ninth Amendment could give birth to a new age of Ninth Amendment

283. *See* U.S. CONST. art. V.

284. McDonald v. City of Chicago, 561 U.S. 742, 855 (2010) (Thomas, J., concurring in part and concurring in the judgment).

285. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

286. *Contra Dobbs*, 142 S. Ct. at 2306 (Kavanaugh, J., concurring) ("[T]he Constitution does not freeze the American people's rights as of 1791 or 1868.").

287. *See supra* Section V.C.2.

scholarship and jurisprudence aimed at discovering the proper meaning and construction of the Ninth Amendment. Each time the Court is tempted to defer interpretation of the Ninth Amendment and choose the more well-trodden path of substantive due process, the Court instead ought to heed the words of Chief Justice Marshall: "It cannot be presumed that any clause in the [C]onstitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[288]

CONCLUSION

The PI + 9 Framework secures rights in a more robust, efficient, and clear manner than substantive due process does. Substantive due process is worse than a mere contradiction in terms. The ever-expanding reach of substantive due process has robbed two provisions of the Constitution—the Privileges or Immunities Clause and the Ninth Amendment—of the importance they deserve. Any stare decisis issues would be more well-founded if most of the Bill of Rights had not already been incorporated. Moreover, the substantive changes that replacing substantive due process with the PI + 9 Framework would cause are the incorporation of the Third Amendment, the Fifth Amendment's Grand Jury Clause, and the Seventh Amendment, and using the current controlling framework for unenumerated rights. Thus, adopting the Framework would not cause a significant expansion or diminution in substantive rights. Far from an expansion or diminution, the PI + 9 Framework offers enumerated and unenumerated rights the durable, efficient, and clear protection that American privileges and immunities deserve.

288. *Marbury*, 5 U.S. (1 Cranch) at 174.