



PRIVILEGES, IMMUNITIES, AND SUBSTANTIVE DUE PROCESS

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INTRODUCTION

For only the second time in recent memory, the U. S. Supreme Court has chosen to address the meaning of the Fourteenth Amendment's Privileges or Immunities Clause.¹ That clause, which most scholars now agree was intended as the centerpiece of the Amendment, was famously mutilated by the 1873 *Slaughter-House Cases*,² when a 5-4 Supreme Court ruled against a group of Louisiana butchers who argued that a state-created monopoly in the slaughtering industry deprived them of constitutionally protected economic freedom. The decision entombed, if it did not actually kill, the Privileges or Immunities Clause, rendering it for all intents and purposes void.³ Now that the Court appears prepared to reconsider

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¹ *McDonald v. Chicago*, 567 F.3d 856 (7th Cir. 2009), cert. granted, 130 S. Ct. 48 (U.S. 2009). The other was *Saenz v. Roe*, 526 U.S. 489 (1999).

² 83 U.S. (16 Wall.) 36 (1873).

³ See, e.g., *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) ("The Privileges and Immunities Clause has been largely dormant since the *Slaughter-House Cases* . . .").

that decision, it is important that we understand the complexities of the *Slaughter-House* error, lest future courts also be led astray. It is equally important to understand what effect reviving the Privileges or Immunities Clause would have on the neighboring Due Process Clause.

In this article, I wish to explore these two questions. First, why was *Slaughter-House* wrongly decided? Although there are many flaws in that decision, I contend that the most fundamental explanation, and the one that accounts for the case's other errors, involves important abstract principles of federalism and sovereignty. In short, Justice Samuel Miller and his colleagues failed to give effect to the concept of "paramount national citizenship" that the Amendment's authors sought to constitutionalize.

Second, is it true, as some scholars and judges contend, that restoring vitality to the Privileges or Immunities Clause would warrant abandoning the theory of substantive due process? If so, then the Court's forthcoming decision could herald an even more far-reaching revolution of law than it would at first appear. But as we will see, substantive due process is not a mere substitute for the lost Privileges or Immunities Clause, and overruling *Slaughter-House* should not coincide with an abandonment of the doctrine of "substantive due process." Rather, both constitutional provisions are independent, constitutionally valid sources of protection against excessive state power.

I. THE HISTORY OF *SLAUGHTER-HOUSE*

The 1873 *Slaughter-House Cases* were the Supreme Court's first opportunity to interpret the freshly enacted Fourteenth Amendment. The case involved a Louisiana law that required the butchering of cattle in New Orleans parish—formerly carried on by independent butchers working for themselves—to be conducted at a single abattoir, owned by a private corporation called the Crescent City Company.⁴ This law established a monopoly that benefited the

⁴ The only full-length book on *Slaughter-House* is RONALD LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES* (2003). Unfortunately, the book provides little discussion of the legal issues involved, and what discussion it does provide is shallow and unreliable. See Timothy Sandefur, *Slaughtering the Fourteenth Amendment*, 4 CLAREMONT REV. OF BOOKS 39 (2004), available at http://www.claremont.org/publications/crb/id.1381/article_detail.asp.

private owners of a single business at the expense of the many small firms that had previously enjoyed the freedom to engage in the slaughtering trade. Notably, the law did *not* simply set health and safety regulations—already recognized as a legitimate government interest.⁵ Instead, it required that all slaughtering be done at a single private corporation. A modern analogy might be if the California legislature were to order that all automobiles in Los Angeles County were to be repaired at Aamco and nowhere else, with the result of shutting down hundreds of small car repair businesses. The 1869 Slaughterhouse statute—“An Act to Protect the Health of the city of New Orleans, to Locate the Stock Landings and Slaughter Houses, and to Incorporate ‘The Crescent City Live Stock Landing and Slaughter House Company’”⁶—was not merely a routine exercise of the police power, but was what Professor Cass Sunstein has called a “naked preference”: namely, “the distribution of resources or opportunities to one group rather than another solely on the

However, it provides helpful historical details on the background of the lawsuit. Also helpful is PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 118–28 (1997).

⁵ See, e.g., *Metropolitan Bd. of Health v. Heister*, 37 N.Y. 661 (1868) (upholding the constitutionality of sanitary regulation of slaughterhouses). Justice Field, who dissented in *Slaughter-House*, emphasized this point. See *Slaughter-House*, 83 U.S. (16 Wall.) at 87 (Field, J., dissenting) (Government’s “power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society With this power of the State and its legitimate exercise I shall not differ from the majority of the court. But under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.”). Years later, he repeated this point. See *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 766 (1884) (Field, J., concurring). None of the *Slaughter-House* dissenters, he wrote, “denied that the states possessed the fullest power ever claimed . . . to prescribe regulations affecting the health, the good order, the morals, the peace, and the safety of society.” *Id.* at 754. If the Louisiana Slaughterhouse Act simply prescribed such rules, “there would have been no dissent,” but the law also “created a corporation, and gave to it an exclusive right for twenty-five years to keep, within an area of 1,145 square miles, a place where alone animals . . . could be . . . slaughtered It is difficult to understand how in a district embracing a population of a quarter of a million, any conditions of health can require that the preparation of animal food should be intrusted to a single corporation for twenty-five years, or how in a district of such extent, there can be only one place in which animals can, with safety to the public health, be sheltered and slaughtered.” *Id.* at 755.

⁶ Act of Mar. 8, 1869, No. 117, 1869 La. Acts 170.

ground that those favored have exercised the raw political power to obtain what they want.”⁷ Small-scale butchers in New Orleans were legally deprived of economic freedom and potential income to benefit the owners of one private, politically influential corporation. Relying on centuries of legal precedent guaranteeing the individual’s right to earn a living without the interference of government monopolies,⁸ many of the butchers challenged the constitutionality of the slaughterhouse monopoly, arguing, among other things, that their right to economic freedom was one of the “privileges or immunities” of their citizenship, and that the Louisiana law abridged that right.⁹

The Court rejected this argument in an opinion written by Justice Samuel F. Miller. In the Court’s view, the law was a health and safety regulation “aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city.”¹⁰ Miller viewed the butchers’ attempt to invoke federal protection against the acts of their own state legislature as constituting a vast, unwarranted expansion of federal power. He believed that the Amendment distinguished between two kinds of citizenship—federal and state—and that it protected only those rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws,”¹¹ not rights that attach to or derive from citizenship in a *state*. Miller identified the short list of rights that he believed attached to federal citizenship: the right to travel to the seat of government,¹² the right to demand federal protection when on the high seas,¹³ the right to peaceably assemble for a redress of grievances,¹⁴ the right to use

⁷ Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

⁸ See generally Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 207-34 (2003).

⁹ See Supplemental Brief and Points of Plaintiffs in Error, *Slaughter-House*, 83 U.S. (16 Wall.) 36 (1873), 1871 WL 14607 (claiming a privilege in labor that has “been diminished and impaired, that this corporation shall have a monopoly”).

¹⁰ *Slaughter-House*, 83 U.S. (16 Wall.) at 64.

¹¹ *Id.* at 79.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

navigable waters,¹⁵ the right of citizens to change their state of residence,¹⁶ and “the rights secured by the thirteenth and fifteenth articles of amendment.”¹⁷ But although Miller recognized that the butchers’ had a common law right to pursue their trade, he held that it and other common law rights “belong[ed] to citizens of the States as such,” and that the Fourteenth Amendment did not “place[]” that right “under the special care of the Federal government.”¹⁸ The Privileges or Immunities Clause afforded that right no protection because that right only inhered in state, and not federal, citizenship.

Justices Stephen J. Field, Joseph Bradley, Noah Swayne, and Morrison Waite dissented. Field, writing the longest of the dissenting opinions, observed that the decision rendered the Privileges or Immunities Clause redundant of the Supremacy Clause. If the new Amendment “only refers...to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States,” then it did nothing, because the Supremacy Clause already forbids the states from interfering with federal authority.¹⁹ Such an interpretation rendered the clause “a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.”²⁰ Field complained that the majority ignored the legislative history leading to the Amendment’s adoption,²¹ and ignored the precedent defining the phrase “privileges or immunities” — specifically, *Corfield v. Coryell*,²² in which Justice Bushrod Washington observed that the Privileges or Immunities Clause of Article IV protected certain inalienable and universal human rights,²³ and that “among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally

¹⁵ *Id.*

¹⁶ *Id.* at 80.

¹⁷ *Id.*

¹⁸ *Id.* at 78.

¹⁹ *Id.* at 96 (Field, J., dissenting).

²⁰ *Id.*

²¹ *Id.* at 91–92.

²² 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

²³ *Id.* at 551–52.

affects all persons.”²⁴ Thus, unlike the *Slaughter-House* majority, Field believed that the privileges or immunities protected by the Amendment had long been recognized as either natural rights or common law rights. Centuries of common law precedent made clear that “monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness,” and these common law rights were included in the privileges or immunities of national citizenship.²⁵

Many scholars have noted that *Slaughter-House* signaled the Supreme Court’s abandonment of Reconstruction efforts aimed at protecting the rights and advancing the economic situation of former slaves.²⁶ Indeed, the precedent quickly wreaked havoc on the constitutional rights of the politically vulnerable. First, in *Bradwell v. Illinois*,²⁷ the Court ruled against Myra Bradwell’s argument that she had a constitutionally protected right to practice law on the same terms as a man. Among other arguments, Bradwell contended that the state’s refusal to allow her to practice law deprived her of the right to pursue her calling, guaranteed by the Privileges or Immunities Clause. But Justice Miller, writing for the majority, concluded that “[t]he opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary,” because that decision meant that “the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government.” Three years later, in *United States v. Cruikshank*,²⁸ the Court threw out the prosecution of a state official who led a white mob to murder more than 100 black Louisianans; although the victims had been peaceably assembling to protest grievances, and exercising other federal constitutional rights, the Court expanded on *Slaughter-House’s* dual-citizenship theory to conclude that these rights were not actually federal in nature, but “remain[ed] . . . subject to State jurisdiction.”²⁹ Thus, although the First

²⁴ *Slaughter-House*, 83 U.S. (16 Wall.) at 97–98.

²⁵ *Id.* at 101–02 (citing *Darcy v. Allein* (The Case of Monopolies), (1602) 77 Eng. Rep. 1260 (Q.B.)).

²⁶ See, e.g., ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 224 (1990).

²⁷ 83 U.S. (16 Wall.) 130 (1872).

²⁸ 92 U.S. 542 (1875).

²⁹ *Id.* at 551.

Amendment—and even the *Slaughter-House* decision itself³⁰—specifies peaceable assembly as a right of federal citizenship, the Constitution only protects that right “against encroachment by Congress . . . For their protection in its enjoyment, therefore, the people must look to the States.”³¹ After that, the Privileges or Immunities Clause languished in desuetude, with the single irrelevant exception of *Colgate v. Harvey*,³² a case overruled only five years later.³³

In the years since—and particularly in the years after the publication of Michael Kent Curtis’ pathbreaking book *No State Shall Abridge* in 1986, scholars have formed a consensus that *Slaughter-House* was wrongly decided, and that, as Justice Clarence Thomas has put it, the Privileges or Immunities Clause “does not mean what the Court said it meant” in that case.³⁴ But few of the discussions about *Slaughter-House* have focused on the philosophical and constitutional developments that led to the Fourteenth Amendment’s ratification, or how the Court undermined these crucial ideological developments.

II. WHY WAS SLAUGHTERHOUSE WRONG?

While scholars today generally agree that *Slaughter-House* got things wrong, there is less agreement on what precisely it got wrong.³⁵ Like Justice Field, many scholars argue that the *Slaughter-House* decision failed to address the legislative history behind the Privileges or Immunities Clause;³⁶ others, that it construed the list of rights protected by the Amendment too narrowly;³⁷ still others, that the majority rendered the Privileges or Immunities Clause redundant

³⁰ See *Slaughter-House*, 83 U.S. (16 Wall.) at 79 (“The right to peaceably assemble and petition for redress of grievances . . . [is a] right[] of the citizen guaranteed by the Federal Constitution.”). In *Cruikshank*, the Court explained that this really only meant the right to petition *Congress*. 92 U.S. at 552.

³¹ *Id.*

³² 296 U.S. 404 (1935).

³³ See *Madden v. Kentucky*, 309 U.S. 83 (1940).

³⁴ *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting).

³⁵ *Id.*

³⁶ See, e.g., Kimberly C. Shankman & Roger Pilon, *Reviving The Privileges or Immunities Clause to Redress The Balance Among States, Individuals, And The Federal Government*, 3 TEX. REV. L. & POL. 1, 30–31 (1998).

³⁷ See, e.g., Randy E. Barnett, *The Proper Scope of The Police Power*, 79 NOTRE DAME L. REV. 429, 464–75 (2004).

of the Supremacy Clause in violation of basic canons of construction.³⁸ But while these criticisms all have merit, they are only symptoms of the Court's more fundamental error. The *Slaughter-House Cases*' most basic flaw lies in the Court's refusal to breathe life into the conception of federal sovereignty and national citizenship shared by the Framers of the Fourteenth Amendment: a vision that, following constitutional scholar Jacobus tenBroek, I will call "paramount national citizenship."³⁹

A. Antebellum Debates Over Sovereignty

The Fourteenth Amendment is a monument to America's greatest constitutional crisis: the Civil War. That war had many cultural and economic causes, but its proximate cause lay in a constitutional controversy that began during the Antebellum Period, when two parties formed with competing visions of the nature of federal-state relations and of the rights enjoyed by federal citizens. These parties coalesced into the secessionist states' rights party on one hand, and the Free Soil party, later called the Republican party, on the other. When the war ended, Republican leaders amended the Constitution to put an end to slavery and to ensure that their theory of paramount national citizenship (which they believed to have always been part of the Constitution rightly understood) would be permanently preserved in the nation's supreme law. To understand what the Privileges or Immunities Clause was intended to do, therefore, it is necessary to understand the antislavery constitutional doctrine they developed in the era surrounding the Civil War.⁴⁰

³⁸ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22-23 (1980).

³⁹ JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 71 (1951). The best recent discussions of the antislavery constitutional theory that culminated in the Fourteenth Amendment's ratification are Richard L. Aynes, *On Misreading John Bingham And The Fourteenth Amendment*, 103 *YALE L.J.* 57 (1993), and Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights And John Bingham's Theory of Citizenship*, 36 *AKRON L. REV.* 717 (2003).

⁴⁰ See generally Randy Barnett, *Was Slavery Unconstitutional Before The Thirteenth Amendment? Lysander Spooner's Theory of Interpretation*, 28 *PAC. L.J.* 977 (1997); Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment (Part I)*, 1950 *WIS. L. REV.* 479; Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment (Part II)*, 1950 *WIS. L. REV.* 610; Louisa M. A. Heiny, *Radical*

The doctrine of paramount national citizenship had two components. First, Republicans⁴¹ believed that the whole people of the United States made up a single, sovereign nation, in contrast with states' rights advocates, who held that sovereignty lay primarily with each individual state and that the federal government's sovereignty was only delegated by the states. Second, Republicans held that citizens' natural and traditional common law rights appertained to their federal, and not to their state citizenship, while the states' rights theory held that states enjoyed almost limitless power to define, protect, and limit individual rights.

1. NATIONAL, NOT STATE SOVEREIGNTY

The authors of the Fourteenth Amendment believed that either the Declaration of Independence or the Constitution itself had made the people of the United States into a single unified nation.⁴² National sovereignty, within the limits of the Constitution's enumerated powers, therefore prevailed over the autonomy of states. This meant that states had no authority to secede from the union, but it also had important ramifications for federal protection of individual rights.

Republicans stood on sturdy ground in their view of national sovereignty. The most striking difference between the 1787 Constitution and the Articles of Confederation was that while the latter operated much like a treaty binding otherwise sovereign states, the former set out the framework of a government in the name of "the people of the United States." These words in the Constitution's preamble sparked a revealing exchange at the Richmond ratification convention, when Patrick Henry demanded to know "[w]ho authorized [the Constitutional Convention] to speak the language of *We the people*, instead of *We, the States*? States are the characteristics,

Abolitionist Influence on Federalism and the Fourteenth Amendment, 17 TEMP. POL. & CIV. RTS. L. REV. 155 (2007); TENBROEK, *supra* note 39.

⁴¹ I will use this term as shorthand for antislavery constitutionalists even though many of them were not members of the Republican Party as such; John Quincy Adams, for example, died before the formal organization of that Party.

⁴² See generally AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5-53 (2005); DANIEL FARBER, LINCOLN'S CONSTITUTION 26-91 (2003).

and the soul of a confederation."⁴³ James Madison coolly answered that this phrase reflected the most basic difference between the Constitution and the Articles. Under the Articles, Congress's power was "derived from the dependent derivative authority of the legislatures of the states," while under the Constitution, federal authority "is derived from the superior power of the people."⁴⁴ The Constitution did not consolidate the states in every way, but once adopted, "it will be then a government established by the thirteen States of America, not through the intervention of the Legislatures, but by the people at large."⁴⁵

Madison's collaborator on *The Federalist*, Alexander Hamilton, made a similar point when he observed that the "great and radical vice" of the Articles of Confederation was that it only allowed Congress to legislate "for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES"⁴⁶ and was therefore "a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for POLITICAL POWER AND SUPREMACY."⁴⁷ The 1787 Constitution would cure this defect by deriving its authority directly from the people of the United States, acting as a unified, sovereign whole.

Madison, Hamilton, and other delegates had debated the matter of federal sovereignty at the Philadelphia convention. On June 19, 1787, Maryland's Luther Martin told the Convention that he "considered that the separation from Great Britain placed the thirteen states in a state of nature towards each other . . . that they [*i.e.*, the states] entered into the Confederation on the footing of equality."⁴⁸ Martin believed that the states were politically independent units, each of which could choose whether or not to join a political union; later, he opposed ratification on the ground that "every thing which relates to the formation, the dissolution or the alteration of a *federal* government over States equally free, sovereign and independent is the *peculiar*

⁴³ 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 22 (Jonathan Elliot ed., 1836) [hereinafter, DEBATES].

⁴⁴ *Id.* at 94.

⁴⁵ *Id.*

⁴⁶ THE FEDERALIST No. 15, at 93 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁴⁷ THE FEDERALIST No. 33, at 207 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁴⁸ 5 DEBATES, *supra* note 43, at 213.

province of the *States* in their *sovereign* or *political* capacity.”⁴⁹ Uniting the whole people of America into a sovereign union was untenable in Martin’s eyes, and the derogation of state sovereignty intolerable.

Pennsylvania’s James Wilson disagreed. He answered Martin by saying that he “could not admit the doctrine that, when the colonies became independent of Great Britain, they became independent also of each other.”⁵⁰ Citing the Declaration of Independence, Wilson contended that “the *United Colonies* were declared to be free and independent states, and inferring, that they were independent, not *individually*, but *unitedly*, and that they were confederated, as they were independent states.”⁵¹ And at the Pennsylvania ratification convention, Wilson reiterated the point. Sovereignty under the Constitution “depends upon the supreme authority of the people alone . . . [who] are the source of authority.”⁵² This national authority was “the rock on which this structure will stand.”⁵³

Even many Anti-Federalists understood the Constitution as replacing the Confederacy’s league of sovereignties with a central, national sovereignty. “Brutus,” for instance, opposed the Constitution because “if it is ratified, [it] will not be a compact entered into by the States, in their corporate capacities, but an agreement of the people of the United States as one great body politic.” The federal union would not be “a union of states or bodies corporate,” but “a union of the people of the United States considered as one body.”⁵⁴ Likewise, the “Federal Farmer” warned that “when the people [of each state] shall adopt the proposed[,] . . . it will be adopted not by the people of New Hampshire, Massachusetts, &c., but by the people of the United States.”⁵⁵ And Patrick Henry acknowledged at the Richmond ratification convention that “[t]he question turns, sir, on that poor little thing—the expression, *We*, the *people*, instead of the

⁴⁹ Luther Martin, *The Genuine Information XII* (Feb. 8, 1788), reprinted in 1 *THE DEBATE ON THE CONSTITUTION* 658 (Bernard Bailyn ed., 1993).

⁵⁰ 5 *DEBATES*, *supra* note 43, at 213.

⁵¹ *Id.*

⁵² 2 *DEBATES*, *supra* note 43, at 444.

⁵³ *Id.*

⁵⁴ Brutus, “*Brutus XII*, N.Y. J. (Feb. 7 & 14, 1788), reprinted in 2 *THE DEBATE ON THE CONSTITUTION*, *supra* note 49, at 173–74.

⁵⁵ Federal Farmer, *Letter IV* (Oct. 12, 1787), reprinted in 1 *THE DEBATE ON THE CONSTITUTION*, *supra* note 49, at 275.

states, of America.”⁵⁶ If the preamble had said “We, the states . . . this would be a confederation.”⁵⁷ But “[i]t is otherwise.”⁵⁸ The preamble signaled an “alarming transition, from a confederacy to a consolidated government.”⁵⁹

Thus, at the time of ratification, there was a broad national consensus—a consensus that included the Constitution’s opponents—that the American people as a whole were sovereign, and that the federal government derived its limited powers directly from them, rather than acting as a coalition of sovereignties, as under the Articles. Perhaps no intellectual of the post-ratification period articulated this consensus more consistently and eloquently than Chief Justice John Marshall, who observed in *Gibbons v. Ogden*⁶⁰ that the Articles of Confederation created only “a league” of “allied sovereigns,” but the Constitution “converted their league into a government,” causing “the whole character in which the States appear” to “under[go] a change.”⁶¹ Likewise, in *McCulloch v. Maryland*,⁶² Marshall wrote that the federal government “proceeds directly from the people It required not the affirmance, and could not be negated, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.”⁶³

It was not until years later, under the influence first of Thomas Jefferson’s 1798 Kentucky Resolutions and then John C. Calhoun’s philippics in the Nullification Crisis of the 1830s, that southern political leaders contrived a states’ rights constitutional theory, arguing

⁵⁶ 3 DEBATES, *supra* note 43, at 44.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 22 U.S. (9 Wheat.) 1 (1824).

⁶¹ *Id.* at 187; *see also* *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793) (opinion of Jay, C.J.) (“the people, in their collective and national capacity, established the present Constitution”).

⁶² 17 U.S. (4 Wheat.) 316 (1819).

⁶³ *Id.* at 403–04. Justice Kennedy’s words almost two centuries later are apt: “The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal...each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

that, notwithstanding the prior consensus, the United States was only a league of sovereignties instead of a unified nation.⁶⁴ Jefferson, writing anonymously, made this argument explicitly, contending that “to this compact [*i.e.*, the Constitution] each State acceded as a State, and is an integral party,” so that each state “has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.”⁶⁵

States’ rights spokesmen argued that, upon separation from Great Britain in 1776, the states became “distinct, independent, and sovereign communities,”⁶⁶ and thus the basic sovereign units in the American federation of states. Upon declaring independence, sovereignty was transferred not from Parliament to the American union, as the Nationalists contended, but from Parliament to each separate state. Those states then ceded some power to the federal government by joining the union, but they remained principals of which the federal government was the agent,⁶⁷ and therefore enjoyed unrestricted power to define and to limit citizenship, and with it the sphere of individual freedom.⁶⁸ It was “a great and dangerous error to suppose that all people are equally entitled to liberty,” wrote John C. Calhoun, the most famous of the states’ rights theorists.⁶⁹ Instead, states gave people liberty as “a reward reserved for the intelligent, the patriotic, the virtuous and deserving.”⁷⁰ And it seemed to follow that if states retained their essentially sovereign character, as principals superior to the union, with power to dictate the nature of citizenship and expand or contract rights, then they must also have the power to secede from the union to defend their autonomy.⁷¹

⁶⁴ See generally WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836* (1965); MANISHA SINHA, *THE COUNTERREVOLUTION OF SLAVERY: POLITICS AND IDEOLOGY IN ANTEBELLUM SOUTH CAROLINA* (2000); Timothy Sandefur, *How Libertarians Ought to Think About The U.S. Civil War*, 28 *REASON PAPERS* 61 (2006).

⁶⁵ Thomas Jefferson, Draft of the Kentucky Resolutions (1798), in THOMAS JEFFERSON: WRITINGS, 449, 449 (Merrill D. Peterson ed., 1984).

⁶⁶ John C. Calhoun, *A Discourse on The Constitution And Government of The United States*, in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 79, 86 (Ross M. Lence ed., Liberty Fund 1992).

⁶⁷ FARBER, *supra* note 42, at 34.

⁶⁸ See John C. Calhoun, Speech on the Revenue Collection [Force] Bill (Feb. 15-16, 1833), in *UNION AND LIBERTY*, *supra* note 66, at 401, 443-44.

⁶⁹ John C. Calhoun, *A Disquisition on Government*, in *UNION AND LIBERTY*, *supra* note 66, at 42.

⁷⁰ *Id.*

⁷¹ See AMAR, *supra* note 42, at 38-53; FREEHLING, *supra* note 64, at 165-66.

Among the most eloquent opponents of this states' rights theory was Massachusetts Senator Daniel Webster, who in his famous 1830 debate with South Carolina Senator Robert Hayne, argued that federal authority was "not the creature of the State governments,"⁷² as states' rights theorists ingeniously argued; it was instead "made for the people, made by the people, and answerable to the people."⁷³ Although Webster did not emphasize the point, he also hinted at the implications of national sovereignty when he observed that, "if the whole truth must be told," the American people had created the federal government "for the very purpose, amongst others, of imposing certain salutary restraints on State sovereignties."⁷⁴

Webster's argument became a classic of American oratory, but it did not convince Hayne and his fellow states' rights theorists. Hayne continued to argue that states enjoyed "the right to the fullest extent, of determining the limits of their own powers," a right that was "full and complete," indeed, "plenary."⁷⁵ In 1832, when South Carolina issued its Ordinance of Nullification, it emphasized the most extreme form of the states' rights theory when it insisted that the states enjoyed "'irresistible, absolute, uncontrolled authority,'" "absolute control 'over the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the States.'" Indeed, it claimed that states had "the inherent power, to do all those acts, which by the law of nations, any Prince or Potentate may of right do" and could not "suffer any other restraint upon her sovereign will and pleasure, than those high moral obligations, under which all Princes and States are bound, before God and man, to perform their solemn pledges."⁷⁶

2. LIMITS ON SOVEREIGNTY

As this language of "plenary" authority suggests, there was a second, closely related component to the dispute between Republicans and states' rights theorists. They differed not only over the *location*, but

⁷² THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION 136 (Herman Belz ed., 2000) [hereinafter THE WEBSTER-HAYNE DEBATE].

⁷³ *Id.* at 126.

⁷⁴ *Id.* at 136.

⁷⁵ *Id.* at 174-75.

⁷⁶ Address to the People of South Carolina, by their Delegates in Convention (1832), reprinted in STATE PAPERS ON NULLIFICATION 37, 40-43 (1834).

also over the *nature and limits* of sovereignty. In the 1830s, as part of his efforts against Calhoun and other states' rights advocates,⁷⁷ the elderly James Madison composed an essay on sovereignty arguing that however the term might be defined, it could not justly penetrate the boundaries of the individual's natural rights: "the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, wherever vested or however viewed."⁷⁸ As the Declaration of Independence held, natural rights limited the power of any just sovereign.

Even more influential than Madison during these years—and a pivotal figure in the history of American constitutional law—was Congressman and former President John Quincy Adams. Like Madison, Adams believed that no legitimate sovereign could claim authority to intrude on natural rights, and this meant that state authority was also limited by the principles of justice articulated in the Declaration of Independence. In his 1848 pamphlet, *The Jubilee of The Constitution*, Adams emphasized that Americans' rights were protected not because they were citizens of states as such, but because they were Americans.⁷⁹ Because the colonies declared independence collectively, Adams contended,⁸⁰ whatever legitimate authority Parliament formerly possessed over American subjects—and whatever responsibility it had for their common law and natural rights—was transferred to the union, and not to individual states:

Independence was declared. The colonies were transformed into States. Their inhabitants were proclaimed to be *one people*, renouncing all allegiance to the British

⁷⁷ Madison's heroic struggle against Calhoun and his allies is described in Drew McCoy's outstanding book, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* (1989).

⁷⁸ James Madison, *Sovereignty* (1835), in 9 *WRITINGS OF JAMES MADISON* 568, 570–71 (Gaillard Hunt ed., 1910).

⁷⁹ *The Jubilee of The Constitution* was one of the most popular publications of the era, selling more than 8,000 copies in a matter of weeks. See PAUL C. NAGEL, *JOHN QUINCY ADAMS: A PUBLIC LIFE, A PRIVATE LIFE* 372 (1997).

⁸⁰ JOHN QUINCY ADAMS, *THE JUBILEE OF THE CONSTITUTION* 20 (1839).

crown; all co-patriotism with the British nation; all claims to chartered rights as Englishmen. Thenceforth their charter was the Declaration of Independence. Their rights, the natural rights of mankind. Their government, such as should be instituted by themselves, *under the solemn mutual pledges of perpetual union*, founded on the self-evident truths proclaimed in the Declaration.⁸¹

For Adams, the Declaration was not merely a statement of political rhetoric, but part of the binding, organic law of the United States; its legal effect was not only to separate the American nation from the British nation, but also to set limits on the powers of the state and national governments.⁸² American national identity was therefore conjoined with protections for individual rights. The southerners' argument for state sovereignty, Adams held, was based on a fallacy inherited from William Blackstone, "that *sovereign* must necessarily be uncontrollable, unlimited, despotic

⁸¹ *Id.* at 9.

⁸² See generally *id.* The thesis of *The Jubilee of the Constitution*, in fact, is that the Declaration of Independence is law, a point taken up by many other Republicans in the years leading up to the Civil War and the ratification of the Constitution. Compare Abraham Lincoln, Speech at Chicago, Ill. (July 10, 1858), reprinted in JOSEPH H. BARRETT, LIFE OF ABRAHAM LINCOLN 167 (1864) ("I should like to know, if taking this old Declaration of Independence, which declares that all men are equal upon principle, and making exceptions to it, where will you stop? . . . If that declaration is not the truth, let us get the statute book, in which we find it, and tear it out! Who is so bold as to do it! If it is not true, let us tear it out!" (emphasis added)), with John C. Calhoun, Speech on the Oregon Bill (June 27, 1848), in UNION AND LIBERTY, *supra* note 66, at 565-66 ("there is not a word of truth in [the Declaration] . . . All men are not created. According to the Bible, only two, a man and a woman, ever were, and of these one was pronounced subordinate to the other."). I discuss the role of the Declaration of Independence in constitutional interpretation in Timothy Sandefur, *Liberal Originalism: A Past for The Future*, 27 HARV. J.L. & PUB. POL'Y 489 (2003). Professor Lee Strang has recently contended that the Declaration of Independence is "not the 'interpretive key' to the Constitution because of the inconsistencies between the two documents, and because the Declaration cannot provide sufficient interpretive guidance," Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 479 (2006), but as I hope to show here, the Declaration is indispensable when interpreting certain constitutional provisions, and particularly the Fourteenth Amendment, which was drafted with the specific intent of constitutionalizing a particular interpretation of the Constitution explicitly rooted in the Declaration's national doctrine of sovereignty and liberal doctrine of rights.

power.”⁸³ But as far as the American polity was concerned, this was a “hallucination,”⁸⁴ because “sovereignty, thus defined, is in direct contradiction to the Declaration of Independence, and incompatible with the nature of our institutions.”⁸⁵ The states’ rights doctrines circulating in the 1830s would, if they prevailed, render the Declaration “a philosophical dream” and allow “uncontrolled, despotic sovereignties” to “trample with impunity, through a long career of after ages, at interminable or exterminating war with one another, upon the indefeasible and unalienable rights of man.”⁸⁶ Adams thus took literally Daniel Webster’s famous phrase, “Liberty and Union . . . one and inseparable!”⁸⁷ Political union and protection for individual liberty really were inseparable.

Adams’s influence on the rising generation of antislavery politicians and lawyers was crucial. William Seward, who published the first biography of Adams,⁸⁸ would become the leading antislavery candidate for president before ending up Secretary of State in the Lincoln Administration. Charles Sumner, Adams’s leading protégé,⁸⁹ became the greatest of all antislavery political leaders. And Abraham Lincoln, a Whig who served with Adams in Congress and was a devotee of his constitutional writings, became the President who presided over union victory in the Civil War.⁹⁰ Like Adams, they believed that the Declaration of Independence had created the American nation, a nation which superseded state autonomy in its powers and in its definition of citizenship, and that all Americans

⁸³ JOHN QUINCY ADAMS, AN ORATION ADDRESSED TO THE CITIZENS OF THE TOWN OF QUINCY ON THE FOURTH OF JULY, 1831, THE FIFTY-FIFTH ANNIVERSARY OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA 22 (1831). Adams is referring to Blackstone’s definition of sovereignty as “supreme, irresistible, absolute, uncontrolled authority,” which could “do every thing that is not naturally impossible,” and which “must, in all governments, reside somewhere.” WILLIAM BLACKSTONE, 1 COMMENTARIES *49, *156.

⁸⁴ ADAMS, *supra* note 83, at 23.

⁸⁵ *Id.* at 35.

⁸⁶ *Id.* at 37.

⁸⁷ THE WEBSTER-HAYNE DEBATE, *supra* note 72, at 144.

⁸⁸ See JOHN M. TAYLOR, WILLIAM HENRY SEWARD: LINCOLN’S RIGHT HAND 69–70 (1991).

⁸⁹ See DAVID HERBERT DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 152–53 (1960).

⁹⁰ See WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 378, 448–49 (1996).

were entitled by their membership in that body politic to protection of their common law and natural rights.

3. REPUBLICAN AND STATES' RIGHTS THEORIES OF FEDERAL PROTECTIONS FOR RIGHTS

The 1787 Constitution, wrote Charles Sumner during the war, "was framed to remove difficulties arising from State Rights."⁹¹ The Constitution recognized "but one sovereignty," and that was the sovereignty of the nation. States retained "that specific local control which is essential to the convenience and business of life," but the United States "as Plural Unit" held "that commanding sovereignty which embraces and holds the whole country within its perpetual and irreversible jurisdiction."⁹² States' authority was subordinate "[c]onstantly, and in everything."⁹³ This predominant federal sovereignty brought with it the power to protect the rights of federal citizens: "As Congress has the exclusive power to establish 'an uniform rule of naturalization,'" and therefore to "secure for its newly entitled citizens [*i.e.*, former slaves] 'all privileges and immunities of citizens in the several States,' in defiance of State Rights."⁹⁴

Sumner reiterated these arguments after the war in speeches supporting the Supplementary Civil Rights Act.⁹⁵ The Declaration of Independence "speaks of 'all men,' and not of 'all *white* men'; and the Constitution says, 'We the people,' and not 'We the *white* people.'"⁹⁶ States therefore have no authority to discriminate against racial minorities; "the whole pretension is a disgusting usurpation."⁹⁷ Without

⁹¹ Charles Sumner, *Our Domestic Relations: Power of Congress over the Rebel States*, 12 ATLANTIC MONTHLY 507 (Oct. 1863), reprinted in 7 THE WORKS OF CHARLES SUMNER 493, 507 (1873).

⁹² *Id.* at 508.

⁹³ *Id.* at 513.

⁹⁴ *Id.* at 514. Sumner was quoting, of course, the Article IV Privileges and Immunities Clause. U.S. CONST. art. IV, § 2, cl. 1.

⁹⁵ Eventually enacted in revised version as the Civil Rights Act of 1875, 18 Stat. 335 (1875) and invalidated in the *Civil Rights Cases*, 109 U.S. 3 (1883).

⁹⁶ Charles Sumner, *Equality Before the Law Protected by National Statute, Speeches in the Senate on his Supplementary Civil Rights Bill, as an Amendment to the Amnesty Bill* (Jan. 15, 17, 31, Feb. 5, & May 21, 1872), in 14 THE WORKS OF CHARLES SUMNER 355, 401 (1883); see also U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE, 1 Stat. 1 (1776).

⁹⁷ Sumner, *supra* note 96, at 402.

such authority, “[e]quality is ‘the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.’”⁹⁸ Since the word “white” did not appear in the Declaration or the Constitution—“our two title-deeds of Constitutional liberty”⁹⁹—it could have no legitimate operation in state or federal law. “Every statute and all legislation, whether National or State, must be in complete conformity with the two title-deeds. . . . Strange indeed, if an odious discrimination, without support in the original Common Law or the Constitution, and openly condemned by the Declaration of Independence, can escape judgment by skulking within State lines!”¹⁰⁰ Former slaves deserved to be recognized as fellow citizens, and with that federal citizenship came protection of common law and natural rights that belonged to all federal citizens:

No longer an African, he is an American; no longer a slave, he is a common part of the Republic, owing to it patriotic allegiance in return for the protection of equal laws. By incorporation within the body-politic he becomes a partner in that transcendent unity, so that there can be no injury to him without injury to all. Insult to him is insult to an American citizen. Dishonor to him is dishonor to the Republic itself. . . . Our rights are his rights; our equality is his equality; *our privileges and immunities are his great freehold*.¹⁰¹

Before the War, other antebellum lawyers and intellectuals, including Lysander Spooner,¹⁰² William Goodell,¹⁰³ Beriah Green,¹⁰⁴ Gerrit

⁹⁸ *Id.*

⁹⁹ *Id.* at 406.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 407 (emphasis added).

¹⁰² See generally LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (1860).

¹⁰³ See generally WILLIAM GOODELL, *SLAVERY AND ANTI-SLAVERY: A HISTORY OF THE GREAT STRUGGLE IN BOTH HEMISPHERES WITH A VIEW OF THE SLAVERY QUESTION IN THE UNITED STATES* (1852).

¹⁰⁴ See generally BERIAH GREEN, *THE CHATTEL PRINCIPLE: THE ABHORRENCE OF JESUS CHRIST AND THE APOSTLES; OR, NO REFUGE FOR AMERICAN SLAVERY IN THE NEW TESTAMENT* (1839).

Smith,¹⁰⁵ Joel Tiffany,¹⁰⁶ and Frederick Douglass,¹⁰⁷ had formulated an even more thorough antislavery Constitutional theory, arguing that slavery was already unconstitutional.¹⁰⁸ They began with the proposition that, in Douglass's words, "the Constitution knows all the human inhabitants of this country as 'the people,'"¹⁰⁹ and that black slaves were therefore citizens just like free whites.¹¹⁰ Because the Fifth Amendment provides that no *person* shall be deprived of life, liberty, or property without due process of law, laws supporting slavery—which provided no process of law whatsoever—must be unconstitutional.¹¹¹ The notion that the Constitution's authors intended its protections to apply only to whites, Douglass said, "is Judge Taney's argument, and it is Mr. Garrison's argument, but it is not the argument of the Constitution. The Constitution imposes no such mean and satanic limitations upon its own beneficent operation."¹¹² Federal citizenship entitled slaves, along with everyone else, to protection for their natural and common law rights.

¹⁰⁵ See generally GERRIT SMITH, LETTER OF GERRIT SMITH, TO HON. HENRY CLAY (1839).

¹⁰⁶ See generally JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT (1849).

¹⁰⁷ See generally Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Antislavery? (March 26, 1860), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 380 (Philip S. Foner & Yuval Taylor eds., 1999).

¹⁰⁸ See Barnett, *supra* note 37.

¹⁰⁹ Frederick Douglass, The Dred Scott Decision, Speech Before the American Anti-Slavery Society (May 14, 1857), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 107, at 357; see also SPOONER, *supra* note 102, at 188 ("[T]here is no legal ground for denying that the terms 'the people of the United States,' included the *whole* of the then people of the United States. And if the whole of the people are parties to it, it must, if possible, be so construed as to make it such a contract as each and every individual might reasonably agree to.").

¹¹⁰ See SPOONER, *supra* note 102, at 101 (arguing slaves were citizens).

¹¹¹ See Charles Sumner, Freedom National; Slavery Sectional, Speech in the U.S. Senate on His Motion for the Repeal of the Fugitive Slave Bill 52-53 (Aug. 26, 1852) (Buell & Blanchard 1852).

¹¹² Douglass, *supra* note 109, at 357. Although Douglass began his abolitionist career under Garrison's tutelage, they split over the latter's belief that the Constitution was a pro-slavery document and therefore corrupt. See HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 428 (1998); WILLIAM S. McFEELY, FREDERICK DOUGLASS 168-69 (1991). Most writers who have addressed this schism have regarded Douglass's arguments as weak or even disingenuous—unfairly, in my view. See, e.g., MAYER, *supra*, at 429 (describing Douglass's embrace of antislavery constitutionalism as "pragmatic" and "chimerical"). So far as I know, only Peter C. Myers and

Among the most penetrating of the antislavery constitutionalists was Joel Tiffany, who in his 1867 *Treatise on Government*, quoted Daniel Webster's argument about sovereignty from his debate with Robert Hayne, adding that "[s]overeignty, as an attribute of the people of the United States as a nation, excludes the like sovereignty of the people of a single State, as State citizens merely. Hence, the authority of a citizen as a constituent of the nation, is superior to his authority as a constituent of a mere State or territory."¹¹³ Neither state nor national sovereignty could include the power to override fundamental natural rights: society "must establish its foundations in natural justice," and "permit no necessary liberty or right of the individual to be abridged."¹¹⁴ A legitimate government "cannot restrain its subjects, as such, in the exercise of any individual right" or have any authority "not essentially in harmony with the rights of its individual members."¹¹⁵ The American nation, "in virtue of its inherent sovereignty, has ordained and established a constitutional government, which in its authority, as the representative of the nation, is supreme over all." Thus, every citizen of a state is "also a citizen of the nation" and "has national rights" that states must respect.¹¹⁶

Republican thinkers did not always agree on the details—Sumner, for example, did not contend that slaves were citizens¹¹⁷—but their basic doctrine was clear: federal authority trumped that of states, and states had no power to violate the fundamental principles of the American regime, as articulated in the Declaration of Independence. As John Quincy Adams put it, the Declaration "proclaims the natural rights of man, and the constituent power of the people to be the *only* sources of legitimate government. State sovereignty is . . . a mere reproduction of the omnipotence of the British parliament in

James A. Colaiaco in their outstanding works have even attempted a fair and thorough discussion of Douglass's constitutional views. See PETER C. MYERS, *FREDERICK DOUGLASS: RACE AND THE REBIRTH OF AMERICAN LIBERALISM* 83–109 (2008), and JAMES A. COLAIACO, *FREDERICK DOUGLASS AND THE FOURTH OF JULY* 163–87 (2006).

¹¹³ JOEL TIFFANY, *A TREATISE ON GOVERNMENT, AND CONSTITUTIONAL LAW, BEING AN INQUIRY INTO THE SOURCE AND LIMITATION OF GOVERNMENTAL AUTHORITY, ACCORDING TO THE AMERICAN THEORY* 50–51 (1867). Charles Sumner's personal copy of this book is in the Widener Library at Harvard University.

¹¹⁴ *Id.* at 26.

¹¹⁵ *Id.* at 27.

¹¹⁶ *Id.* at 372.

¹¹⁷ Sumner, *supra* note 96, at 409.

another form, and therefore not only inconsistent with, but directly in opposition to, the principles of the Declaration of Independence."¹¹⁸

By contrast, advocates of the states' rights view held that states were both the locus of American sovereignty and the entities responsible for defining and guaranteeing individual rights. One representative example of this approach was the 1853 decision of the Supreme Court of Pennsylvania in *Sharpless v. Mayor of Philadelphia*.¹¹⁹ When the United States declared itself independent of Britain, the Court explained, "[t]he transcendent [*sic*] powers of Parliament" were transferred to the states, who therefore enjoyed "supreme and unlimited" power.¹²⁰ Thus, "[i]f the people of Pennsylvania had given all the authority which they themselves possessed, to a single person, they would have created a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat."¹²¹ Although the Court conceded that the states had "delegated a portion" of their allegedly limitless power to the federal government,¹²² he concluded that state legislatures retained "a

¹¹⁸ ADAMS, *supra* note 80, at 30.

¹¹⁹ 21 Pa. 147 (1853). *Sharpless* is among the most fascinating of antebellum constitutional decisions. It illustrates the debate over the limits of sovereignty that echoed through American legal history up until the outbreak of the war. See TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA 64-67 (2006). The earliest and clearest example of this can be found in the debate between Justices Iredell and Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), as well as between the majority decision in *Sharpless* and the dissenters, see *Sharpless v. Mayor of Philadelphia*, 2 AM. L. REG. 80, 85 (Pa. 1854) (Lewis, J., dissenting); *Sharpless v. Mayor of Philadelphia*, 2 AM. L. REG. 27, 29 (Pa. 1854) (Lowrie, J., dissenting), and in the debate between Justices Murray and Terry in *Billings v. Hall*, 7 Cal. 1 (1857). See also Ellis L. Waldron, *Sharpless v. Philadelphia: Jeremiah Black And The Parent Case on The Public Purpose of Taxation*, 1953 WIS. L. REV. 48.

¹²⁰ *Sharpless*, 21 Pa. at 160.

¹²¹ *Id.* Justice Ellis Lewis, dissenting, rejected this position: "There is . . . no foundation whatever for the doctrine that the Legislature of the State possesses *all the powers of sovereignty not expressly withheld from them*. This notion is occasionally asserted by men who are not careful to distinguish between our FREE and LIMITED governments DERIVED FROM THE PEOPLE, and established by written constitutions, and those absolute despotisms of the old world, which have their foundations in secret fraud or open force, with no limitations of power except the arbitrary will of usurping tyrants. . . . The State . . . has no more right to abandon the liberty and prosperity of any portion of her citizens to the will of others than she would have to transfer them to a Russian or an Austrian Despot." *Sharpless*, 2 AM. L. REG. at 87, 97 (Lewis, J., dissenting).

¹²² *Sharpless*, 21 Pa. at 160.

vast field of power . . . full and uncontrolled,” and that “[t]heir use of [that power] can be limited only by their own discretion.”¹²³ States were therefore free to “do whatever is not prohibited.”¹²⁴

The author of the *Sharpless* opinion was Jeremiah Sullivan Black, who left his seat as Pennsylvania’s Chief Justice when he was appointed Attorney General by his fellow Pennsylvanian dough-face,¹²⁵ James Buchanan. As Attorney General, he reiterated his states’ rights position in an article criticizing the views of Senator Stephen Douglas. “Sovereignty” wrote Black, “is in its nature irresponsible and absolute Mere moral abstractions or theoretic principles of natural justice do not limit the legal authority of a sovereign. No government *ought* to violate justice; but any supreme government, whose hands are entirely free, *can* violate it with impunity.”¹²⁶ After the war, he continued to argue that the states “were sovereign before they united,” and that they gave the federal government its “national character . . . reserv[ing] to themselves all the sovereign rights not granted in the [Constitution].”¹²⁷ The notion that national citizenship was paramount to state citizenship and that states could not trample on natural or common-law rights, was “inserted in the creed of the abolitionists because they supposed it would give a sort of plausibility to their violent intervention with the internal affairs of the states.”¹²⁸

¹²³ *Id.* at 161. In fact, Black contradicted himself on this point. Contrary to his assertion that states possessed “full and uncontrolled power” except where specifically denied by the state constitution, Black accepted the existence of unwritten limits on state power: “The whole of a public burden cannot be thrown on a single individual, under the pretence of taxing him,” for example, even though no written provision of the Constitution forbids this; such a prohibition “was not necessary,” because such a legislative act “would not be a law, but an attempt to pronounce a judicial sentence, order or decree.” *Id.* at 168. This, as Waldron observes, is the theory later called “substantive due process.” Waldron, *supra* note 119, at 75. Black did not seem to recognize his self-contradiction. *Id.* at 64.

¹²⁴ *Sharpless*, 21 Pa. at 160.

¹²⁵ “Doughface” was a nineteenth century slang term for “northern men of southern principles” — *i.e.*, Yankee defenders of slavery and states’ rights.

¹²⁶ JEREMIAH S. BLACK, OBSERVATIONS ON SENATOR DOUGLAS’S VIEWS OF POPULAR SOVEREIGNTY, AS EXPRESSED IN HARPER’S MAGAZINE, FOR SEPTEMBER, 1859 at 18 (2d ed. 1859).

¹²⁷ Open letter from Jeremiah S. Black to Hon. James A. Garfield, in *ESSAYS AND SPEECHES OF JEREMIAH S. BLACK*, 292 300-01 (Chauncey F. Black ed., 1886).

¹²⁸ *Id.* at 301.

After the war, Black's hostility to the principle of paramount national citizenship, and to federal efforts to enforce that doctrine through civil-rights legislation, led him into a personal crusade against Reconstruction. He viewed military occupation of the South as a travesty on par with the English occupation of Ireland or the Russian occupation of Poland¹²⁹ and considered Reconstruction responsible for "[t]he infamous combination of Yankee and negro thieves who now have the government of the Southern States in their hands."¹³⁰ Indeed, as advisor to President Andrew Johnson, Black drafted the veto of the 1867 Reconstruction Act,¹³¹ and after that veto was overridden, devoted his considerable legal talents to defeating federal civil rights laws in court.¹³² He challenged the constitutionality of civil rights legislation in *Ex Parte McCordle*,¹³³ *Ex Parte Milligan*,¹³⁴ and *Bylew v. United States*,¹³⁵ and helped defend Johnson at his impeachment trial.¹³⁶

Thus when he was asked to represent the state of Louisiana in the *Slaughter-House Cases*, Jeremiah Black saw a unique opportunity to attack Reconstruction. As his fawning biographer acknowledged, the Fourteenth Amendment had "[u]ndeniably" been "written with the deliberate intention to nationalize all civil rights, [and] to make Federal power supreme over the States." But Black sought a way to evade the provision: "suppose the Supreme Court should rule that the slaughterhouse dealers of Louisiana could secure no redress under this Amendment? The effect of such a decision would be a lasting thing, cutting out bodily this part of the Amendment. It would smash the intent of the Radicals."¹³⁷ A Supreme Court decision fatally undercutting the Amendment's strength "would leave

¹²⁹ See, e.g., *id.* at 299.

¹³⁰ Letter from Jeremiah S. Black in reply to the Hon. Charles Francis Adams, Sr.: The Character of Mr. Seward, in *ESSAYS AND SPEECHES*, *supra* note 127, at 134, 147.

¹³¹ Waldron, *supra* note 119, at 55.

¹³² MARY BLACK CLAYTON, *REMINISCENCES OF JEREMIAH SULLIVAN BLACK* 128 (1887).

¹³³ 74 U.S. (7 Wall.) 506 (1868); see also WILLIAM NORWOOD BRIGANCE, *JEREMIAH SULLIVAN BLACK: A DEFENDER OF THE CONSTITUTION AND THE TEN COMMANDMENTS* 171-79 (Wallace D. Fardham ed., Da Capo Press 1971) (1934).

¹³⁴ 71 U.S. (4 Wall.) 2 (1866); see also BRIGANCE, *supra* note 133, at 145-57.

¹³⁵ 80 U.S. (13 Wall.) 581 (1871); see also BRIGANCE, *supra* note 133, at 198-200.

¹³⁶ BRIGANCE, *supra* note 133, at 180-96.

¹³⁷ *Id.* at 200-01.

Louisiana free to deal with Carpetbaggers in her own way as soon as military force should be removed.”¹³⁸

B. Paramount National Citizenship and the Privileges or Immunities Clause

The states’ rights theory that Black would articulate on behalf of Louisiana in 1872 was the opposite of the doctrine of paramount national citizenship; indeed, it was precisely the states’ rights theory that Republicans sought to repudiate in 1868 when they drafted the Fourteenth Amendment. Republicans did not believe that they were changing the Constitution so much as rescuing it from the misconstruction of states’ rights theorists and the Taney Court. A decade before he wrote the Privileges or Immunities Clause, Congressman John Bingham had explained his “belie[f] that the rights of citizenship had a national character.”¹³⁹ States, he told Congress, had no authority to “restrict the humblest citizen of the United States in the free exercise of any one of his natural rights; those rights common to all men, and to protect which, not to confer, all good governments are instituted.”¹⁴⁰ Indeed, he believed that if states did violate these rights, the people had “sufficient cause” for the “reconstruction of the political fabric on a juster basis, and with surer safeguards.”¹⁴¹ Now, with the end of the War, Bingham and his allies would make good that reconstruction, adding surer federal safeguards for those natural and common law rights to which all persons were entitled by virtue of their participation in the American body politic.

The amendment they drafted would permanently settle the disputed understanding of the federal-state relationship and of national protections for the rights of American citizens.¹⁴² It would, in Bingham’s words, “take[] from no State any right that ever pertained to it,” because “[n]o State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or

¹³⁸ *Id.* at 201.

¹³⁹ Zietlow, *supra* note 39, at 722.

¹⁴⁰ CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859) (statement of Rep. John Bingham).

¹⁴¹ *Id.*

¹⁴² TENBROEK, *supra* note 39, at 72 (the Fourteenth Amendment “fit and encompass[ed] the basic nationalistic implications of the abolitionist movement.”).

to abridge the privileges or immunities of any citizen of the Republic."¹⁴³ States had often done so anyway, leading to "flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever."¹⁴⁴ But the new amendment would provide that remedy, by furnishing the federal government "power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."¹⁴⁵ Unsurprisingly, Bingham and his fellow Republicans tended to reject *Barron v. Baltimore*.¹⁴⁶ As Professor Amar notes, these "*Barron* contrarians" believed that the 1789 Bill of Rights did or should restrict the power of the states,¹⁴⁷ and they intended the Amendment to overturn *Barron* so as to provide federal protection against state actions that deprived individuals of their natural and civil rights.¹⁴⁸ This, Bingham believed, would permit "the speedy restoration to their constitutional relations of the late insurrectionary States, under such perpetual guarantees as will guard the future of the Republic by the united voice of a united people."¹⁴⁹

Republicans therefore shared a vision of the Constitution rooted in the Declaration of Independence. From it, they derived their inter-related conceptions of national sovereignty and of the moral limits on political authority.¹⁵⁰ The "one people" in whose name the Declaration had been issued had pledged their belief in the "self-evident truths" it articulated. The country's national identity was therefore inseparable from its political doctrines. They believed this to be the philosophical foundation of the American Constitution even before the Civil War, and in the Fourteenth Amendment, they hoped to clarify what they believed to already be the nation's highest law. They

¹⁴³ CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. John Bingham).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 32 U.S. (7 Pet.) 243 (1833).

¹⁴⁷ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 148-49 (1998).

¹⁴⁸ MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 83 (1986).

¹⁴⁹ CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. John Bingham).

¹⁵⁰ Shankman & Pilon, *supra* note 36, at 24.

asserted that Americans were Americans first and citizens of states only second. Citizens' rights were vested by virtue of their national, rather than their state citizenship just as the Revolution transferred sovereignty from the crown to the nation as a whole. This theory was hotly disputed throughout the early nineteenth century, but Republicans expected the Fourteenth Amendment to settle that dispute.

The structure of the Amendment's first section testifies to this intent. It begins by defining American citizenship, a matter on which the original Constitution was silent,¹⁵¹ and then proclaims that national citizenship is primary, and state citizenship is secondary and derivative; persons to whom it applies "are citizens of the United States and of the State wherein they reside." The next clause then asserts that states shall not make or enforce laws that abridge the rights appertaining to federal citizenship. The Privileges or Immunities Clause was "the primary vehicle through which [the Amendment's Framers] intended to force the states to obey the commands of the bill of rights."¹⁵² But the premise on which the Amendment's authors based that effort was their belief that the American Revolution had transferred sovereign power from Parliament to the American nation and not to the individual states—and at the same time, limited that power in conformity with individual natural rights. In this sense, then, the Fourteenth Amendment provides not only substantive guarantees, but also a rule of construction, much like the Ninth Amendment. Where the Ninth Amendment instructs us not to construe the list of specified rights as exclusive, the Fourteenth Amendment instructs us how to interpret the federal-state relationship and the nature of American citizenship.

C. *Slaughter-House's* Errors

This background of political philosophy helps clarify the most fundamental error in *Slaughter-House*: the majority embraced the states' rights theory of federalism and citizenship that the Fourteenth Amendment was expressly crafted to overturn. The Court denied that the Amendment was written for the purpose of "radically

¹⁵¹ AMAR, *supra* note 42, at 381.

¹⁵² CURTIS, *supra* note 148, at 130; *see also* Shankman & Pilon, *supra* note 36, at 25 (the Amendment's authors "said repeatedly that the purpose of the amendment was not simply to define United States citizenship but to include under that privilege, for blacks and whites alike, a broad array of rights against state interference.").

chang[ing] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people"¹⁵³ when, as the legislative history shows, that was *exactly* the Amendment's purpose: to constitutionalize the Republican theory of paramount national citizenship and the rights attendant to that citizenship.¹⁵⁴

In its *Slaughter-House* brief, Louisiana argued that a ruling against the state "would break down the whole system of confederated State government" by curtailing state autonomy.¹⁵⁵ The *Slaughter-House* majority echoed this concern when warning that enforcing a federal check on state autonomy would "degrade the State governments by

¹⁵³ The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1872).

¹⁵⁴ An intriguing parallel to what happened in *Slaughter-House* can be found in the California Supreme Court decision *People v. Brady*, 40 Cal. 198 (1870). In an earlier case, *Billings v. Hall*, 7 Cal. 1 (1857), the California Supreme Court had rejected the notion of absolute state sovereignty such as articulated in the *Sharpless* decision, concluding that "the spirit of free institutions is at war" with the notion of unlimited state sovereignty, *id.* at 13, because "this [would be] to put themselves in a worse condition than a state of nature, wherein they had the liberty to defend their rights against the injuries of others [B]y supposing that they have given up themselves to the absolute, arbitrary power of the legislator, they have disarmed themselves, and armed him to make a prey of them when he pleases." *Id.* at 11–12. But in 1870, shortly before *Slaughter-House* was decided, the Court reversed itself. Echoing *Sharpless*, the Court held that after declaring independence, "legislative power was . . . as complete in each American as in the British Parliament," *Brady* at 219. "The Federal Government was created by the compact of sovereign States, and their continued existence in the uncontrolled exercise of their powers, is an essential element of the system," the court continued. States enjoyed "[t]he absolute right of uncontrolled local legislation upon all subjects most intimately connected with individual rights and most essential to the maintenance of personal liberty" *Id.* at 220. And, as *Slaughter-House* would do three years later, the *Brady* court concluded that the Fourteenth Amendment was not "intended to strike from the Constitution the fundamental idea upon which the Union was constructed—to rob the Government of its crowning glory and most beneficent principle." *Id.* If the Amendment had meant to provide federal protections against the power of state governments, "we should regard it as we would a law apparently legalizing murder or robbery." *Id.*

Another parallel between *Slaughter-House* and *Brady* is the effect each had on racial minorities. While *Slaughter-House* signaled a retreat from Reconstruction efforts to protect former slaves, *Brady* rejected a constitutional challenge to a state law that prohibited Chinese immigrants or Chinese Americans from testifying against whites in court. Being denied the chance to testify against whites meant that the Chinese had virtually no protection against violence from white mobs. See generally JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 52 (2007).

¹⁵⁵ Brief of Defendants in Error at 15, *Slaughter-House*, 83 U.S. (16 Wall.) 36.

subjecting them to the control of Congress," which it considered too "great a departure from the structure and spirit of our institutions."¹⁵⁶ But whatever validity these concerns might have, they were hardly a good reason for denying effect to constitutional language. As one contemporaneous critic of the decision wrote: "[i]f such was to be the effect of the [A]mendment, it was so because the American people had so decreed, and it was not the province of the court to defeat their will."¹⁵⁷ Moreover, the *Slaughter-House* Court's concerns for federalism were exaggerated. Legitimate state autonomy was not threatened by the Amendment's change to federalism; the Amendment still left states with the bulk of routine government power. It simply required states to exercise that power consistently with individual rights.¹⁵⁸

The Court's refusal to acknowledge that the Fourteenth Amendment constitutionalized the theory of paramount national citizenship led the Justices to their second error: limiting the list of rights that constitute the "privileges or immunities of citizens of the United States." It is true that, as the Court observed, "there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such," and that the Privileges or Immunities Clause protected "only the former."¹⁵⁹ But according to the majority, the rights attaching to federal citizenship included only the rights to travel to the seat of government; to demand federal protection on the high seas; to peaceably assemble for redress of grievances; to use navigable waters; to change one's state of residence; and to "the rights secured by the thirteenth and fifteenth articles of amendment."¹⁶⁰ The list did not include such other common law rights as the right to pursue a gainful occupation free from the interference of state-imposed monopolies. The majority did not deny the legal existence of this right, supported by more than two centuries of

¹⁵⁶ 83 U.S. (16 Wall.) at 78.

¹⁵⁷ William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S.L. REV. 558, 579-80 (1879).

¹⁵⁸ *Id.* at 40-41.

¹⁵⁹ *Slaughter-House*, 83 U.S. (16 Wall.) at 74-75.

¹⁶⁰ *Id.* at 79-80.

precedent at the time that *Slaughter-House* was decided,¹⁶¹ but it held that this right “belong[ed] to citizens of the States as such, and . . . [was] left to the State governments for security and protection.”¹⁶² This was a reiteration of the states’ rights theory that, just as sovereignty was transferred in 1776 from Parliament to the individual states, common law protections for individual freedom also were the province of the states, and not the federal government.

The authors of the Fourteenth Amendment, however, believed all Americans possessed natural and common law rights by virtue of their *federal* citizenship and that the Amendment would protect all unenumerated individual rights.¹⁶³ They frequently cited *Corfield v. Coryell*,¹⁶⁴ the 1823 decision in which Justice Bushrod Washington defined the phrase “privileges or immunities” in broad terms of natural and common law rights belonging “of right, to the citizens of all free governments.”¹⁶⁵ *Corfield* did not define the privileges or immunities of *state* citizenship, but of federal citizenship, and four decades later, Republicans cited it as the primary reference for defining the rights that would be protected by the Amendment.¹⁶⁶ Senator Jacob Howard, for example, quoted from the decision when he explained that the Privileges or Immunities Clause would provide for “protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety” as well as “the personal

¹⁶¹ See *id.* at 65–66 (citing *Darcy v. Allein* (The Case of Monopolies), (1602) 77 Eng. Rep. 1260 (Q.B.)).

¹⁶² See *id.* at 78.

¹⁶³ Senator John Sherman, for example, explained that the Privileges or Immunities Clause would protect the “privileges, immunities, and rights (because I do not distinguish between them, and cannot do it,) of citizens of the United States, such as are recognized by the common law, such as are ingrafted in the great charters of England, some of them ingrafted in the Constitution of the United States, some of them in the constitutions of the different States, and some of them in the Declaration of Independence.” Courts applying the clause would “look first at the Constitution,” and “[i]f that does not define the right they will look for the unenumerated powers [*sic*] to the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England . . . There they will find the fountain and reservoir of the rights of American as well as of English citizens.” CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872).

¹⁶⁴ 6 F.Cas. 546, 551–52 (C.C. Pa. 1823).

¹⁶⁵ *Id.* at 551.

¹⁶⁶ AMAR, *supra* note 42, at 176–80; CURTIS, *supra* note 148, at 168.

rights guaranteed and secured by the first eight amendments of the Constitution.”¹⁶⁷ The new Privileges or Immunities Clause, like the Article IV clause interpreted in *Corfield*, would protect natural and common law rights precisely because they were attendant upon federal, not state citizenship.¹⁶⁸

The *Slaughter-House* majority referred to none of this history. Instead, it resorted to a weak rhetorical question: “Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?”¹⁶⁹ But the right answer to this question is *yes*. Justice Field, who never stopped reiterating his belief that *Slaughter-House* was wrongly decided,¹⁷⁰ was right when he argued that the Fourteenth Amendment “recognized, if it did not create, a National citizenship” and “declared that their privileges and immunities, which embrace the fundamental rights belonging to citizens of all free governments, should not be abridged by any State. This National citizenship is primary, and not secondary” and entitled all Americans—“or would do so if not shorn of its efficiency [sic] by construction”—to seek federal protection against the violation of individual rights by their states of residence.¹⁷¹

If there were any doubt that the Court had washed its hands of the Republican theory of paramount national citizenship, the Court made it clearer two years later in *Cruikshank*,¹⁷² when it threw out federal prosecution of the perpetrators of the Colfax Massacre. Because the victims had been peaceably assembling to protest grievances, as well as bearing arms and exercising other Bill of Rights freedoms, the officials were charged with depriving citizens of their federally guaranteed rights under the Privileges or Immunities Clause.¹⁷³ But the Court rejected this argument. The right to petition

¹⁶⁷ CONG. GLOBE 39th Cong., 1st Sess. 2765 (1866) (quoting *Corfield*, 6 F.Cas. at 551-52).

¹⁶⁸ See also Sumner, *supra* note 96, at 386 (citing *Corfield*, 6 F.Cas. 546, in explaining the privileges or immunities of citizenship).

¹⁶⁹ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872).

¹⁷⁰ See, e.g., *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 756-59 (1884) (Field, J., concurring).

¹⁷¹ *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 140-41 (1873) (Field, J., concurring).

¹⁷² 92 U.S. 542 (1875).

¹⁷³ See generally CHARLES LANE, *THE DAY FREEDOM DIED* (2008).

Congress was “an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States,”¹⁷⁴ but the right to assemble to petition *state* government was not such a right. Likewise, the right to bear arms, the Court concluded, “is not a right granted by the Constitution,” but a pre-existing common law right which is not “in any manner dependent upon [the Constitution] for its existence.”¹⁷⁵ It may be true that “[t]he rights of life and personal liberty are natural rights of man” and that “[t]he very highest duty of the States” is to protect such rights.¹⁷⁶ But “[s]overeignty, for this purpose, rests alone with the States That duty was originally assumed by the States; and it still remains there.”¹⁷⁷ Because the Court held, in accordance with the obsolete states’ rights theory, that most individual rights appertained to state, rather than national, citizenship, people seeking protection for that right “must look to the States.”¹⁷⁸ Sadly, this meant that citizens were abandoned to the hands of the very state governments that were oppressing them—in direct contravention of the intent of the Fourteenth Amendment’s framers.¹⁷⁹

Jeremiah Black’s victory in *Slaughter-House* warranted his niece’s assertion that “the modification and at length the practical abandonment” of Reconstruction “was in no small measure due to the merciless assaults of Judge Black”¹⁸⁰ By withdrawing the

¹⁷⁴ *Cruikshank*, 92 U.S. 542 at 552.

¹⁷⁵ *Id.* at 553.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 553–55.

¹⁷⁸ *Id.* at 552.

¹⁷⁹ Senator Howard, for example, specifically identified “the right of the people peaceably to assemble and petition the Government for a redress of grievances” and “the right to keep and to bear arms” as rights protected under the privileges or immunities clause. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

¹⁸⁰ CLAYTON, *supra* note 132, at 125. Labbé and Lurie, *supra* note 4, argue that the butchers’ attorney, John Campbell, exploited the case to advance an “agenda” attacking Reconstruction. *Id.* at 183. In their view, Campbell—a former United States Supreme Court Justice who resigned his seat in 1861 to join the Confederate government—used the case to publicize the alleged corruption of the Louisiana legislature, and thereby attack integration. *See id.* at 192. This may indeed be part of the story. Compare Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign against Louisiana’s Republican Government, 1868-1873*, 49 CIV. WAR HIST. 235 (2003), with ROBERT SAUNDERS, JR., JOHN ARCHIBALD CAMPBELL, SOUTHERN MODERATE, 1811–1889 (1997). But we must not overlook Black’s efforts on the other

federal protection for individual rights that the Fourteenth Amendment had promised, the *Slaughter-House* decision “had a devastating effect on human rights under the Constitution. Our basic liberties were placed at the mercy of state laws and state officials.”¹⁸¹

III. THE RELATIONSHIP BETWEEN PRIVILEGES AND IMMUNITIES AND SUBSTANTIVE DUE PROCESS

A number of scholars and judges,¹⁸² including most notably Justice Clarence Thomas,¹⁸³ have claimed that the theory of substantive due process originated in response to *Slaughter-House’s* abandonment of the Privileges or Immunities Clause, and that restoring vitality to that clause would warrant eliminating the concept of substantive due process. But this view is wrong on both theoretical and historical grounds. Substantive due process is a legitimate part of our constitutional law, one for which there is substantial theoretical

side. Portraying the legislature of Louisiana as corrupt, as counsel for the butchers did (and, again, with much plausibility) doubtless served the interests of Reconstruction’s opponents, but neutering the most crucial part of the Fourteenth Amendment, as the state’s attorneys managed to do, served that purpose even more. Whatever Campbell’s motives in prosecuting the case against the Louisiana legislature, his interpretation of the Amendment was at least consistent with that of its framers. As one of his biographers wrote, Campbell “took a larger view of their purpose [*i.e.*, the authors of the Fourteenth Amendment] and caught a larger vision of the scope of its accomplishment. To his mind every person then within the jurisdiction of the United States and every child born, or person naturalized, was lifted, as it were, into the status of National citizenship, with the power of the National Government pledged to the protection of his rights, privileges, and immunities, and every State prohibited from making or enforcing any law abridging such rights and privileges. The singular spectacle is presented of the States Rights, Southern Democratic lawyer urging the broadest, largest National view and the Northern-Nationalist Republican Judge enforcing a much narrower application of the language, in ascertaining the intention of those who framed the Amendment.” HENRY G. CONNOR, JOHN ARCHIBALD CAMPBELL 222–23 (1920).

¹⁸¹ Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1079 (2009).

¹⁸² See, e.g., *Lutz v. City of York*, 899 F.2d 255, 264 (3d Cir. 1990); *Mitchell v. State*, 659 N.E.2d 112, 115 (Ind. 1995); DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 106 (2003); Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197, 211–13 (2000).

¹⁸³ *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (“We should also consider whether the [Privileges or Immunities Clause] should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.”).

support, and one with a substantial historical pedigree that reaches back to long before *Slaughter-House*. A revival of the Privileges or Immunities Clause would *not* warrant abandoning substantive due process jurisprudence.

A. How Substantive Due Process Works

There has been so much foolish, misguided, politically biased, intentionally misleading nonsense written about substantive due process that it is very hard for any newcomer to even get an accurate view of what the theory actually holds. Indeed, even the very name “substantive due process,” a term not devised until the 1940s,¹⁸⁴ is misleading, because it leaves out the most significant word in the Due Process Clause. That clause forbids the government from depriving individuals of life, liberty, or property, except through due process *of law*. The words “of law” are crucial, because the authors of both the Fifth and Fourteenth Amendment’s Due Process clauses believed that not everything government does qualifies as “law.” Just as form cannot exist except when composed of a substance, and substance cannot exist except in some specific form, a government action qualifies as law only if it meets both formal and substantive criteria to qualify it as law. When a government action does not meet these standards, that action does not qualify as “law,” and thus to enforce it in a way that deprives individuals of life, liberty, or property would by definition deprive them of these rights without due process *of law*.

For example, if Congress were to pass a bill, and the President to sign it, establishing a religion for the United States, that legislation would contradict the First Amendment, and would therefore have no validity or force. The Establishment Clause explicitly deprives Congress of the power to “make [any] law” on this subject, and Article VI says that only those legislative enactments which are made “in pursuance” of the Constitution, shall be the supreme law

¹⁸⁴ G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 245 (2000). White’s is one of the very few fair discussions of the concept of substantive due process. See also James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *CONST. COMMENT.* 315, 319 (1999) (“It bears emphasis that the phrase ‘substantive due process’ is anachronistic when used to describe decisions rendered during the nineteenth and early twentieth centuries.”).

of the land. Therefore any enactment which establishes a religion for the United States, even if it passes through all of the *formal* channels cannot be regarded as a “law.” Being without constitutional authority, such an enactment might be called a pronouncement, declaration, resolution, or assertion, but it cannot be called “law.” It follows, then, that any attempt by government officials to enforce that pronouncement by depriving persons of life, liberty, of property—jailing persons who refuse to attend mandated church services, for example—would violate the due process *of law* requirement.

The same rule applies even when the enactment does not violate some explicit provision of the Constitution’s text: for example, if an enactment violates the separation of powers (a phrase not found in the Constitution) or if the government acts arbitrarily (a term also not found in the Constitution). If they violate these constitutional principles, such legislative enactments cannot enjoy the force of law. Mere formal approval through the procedures laid out in the Constitution does not suffice to make an enactment a law, any more than the substance of a bill can make it law before it goes through the requisite formal procedures. This is where the name “*substantive* due process” is derived: the theory recognizes the indivisibility of form and substance. As the Court held in *Cummings v. Missouri*,¹⁸⁵ six years before the *Slaughter-House* decision, “what cannot be done [by government] directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.”¹⁸⁶

In short, the due process of law requirement mandates that the government act through *law*, as opposed to acting arbitrarily, or in excess of its authority. The concept of “law” includes certain elements—both formal and procedural elements—and a legislative enactment which lacks these elements cannot qualify as law. Law is the use of government’s coercive powers in the service of some general principle;

¹⁸⁵ 71 U.S. (4 Wall.) 277 (1867).

¹⁸⁶ *Id.* at 325. *Cummings* was written by Justice Field.

that is, under some intelligible theoretical regularity,¹⁸⁷ and not based on the mere *ipse dixit* of the legislating body. Law is the use of coercion for public purposes, not for the personal interest of the lawmaking authority.¹⁸⁸ Government may not act against a particular group or individual simply because they are disfavored. Finally, as a consequence of these generality and publicness requirements, law must also be procedurally comprehensible and regular: *ad hoc* proceedings are not law because “[l]aw is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case”¹⁸⁹ The requirement of basic regularity encompasses a requirement that the government be procedurally fair: in other words, procedural due process is only a *subset* of “substantive due process.”

The most famous early articulation of what would later be called “substantive due process” theory came in 1819, in Daniel Webster’s oral argument before the Supreme Court in the *Dartmouth College* Case.¹⁹⁰ His summation of the meaning of “law of the land”—a phrase synonymous with “due process of law”¹⁹¹—was repeatedly quoted by the Court in the decades that followed:¹⁹²

[Law] “is a rule; not a transient sudden order . . . to or concerning a particular person; but something permanent, uniform and universal. . . .” By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen

¹⁸⁷ See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 21 (2d ed. 1994); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 209 (1960).

¹⁸⁸ Cf. ARISTOTLE, *Politics* 1279a, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1185 (Richard McKeon ed., Random House 1941) (“governments which have a regard to the common interest are constituted in accordance with strict principles of justice, and are therefore true forms; but those which regard only the interest of the rulers are all defective and perverted forms, for they are despotic, whereas a state is a community of freemen.”).

¹⁸⁹ *Hurtado v. California*, 110 U.S. 516, 535 (1884).

¹⁹⁰ *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581–82 (1819) (argument of Mr. Webster).

¹⁹¹ Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 950 (1990).

¹⁹² See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Hovey v. Elliott*, 167 U.S. 409, 418 (1897); *Hurtado*, 110 U.S. at 535–36; *Ex parte Wall*, 107 U.S. 265, 289 (1883); *Beckwith v. Bean*, 98 U.S. 266, 295 (1878).

shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, . . . decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions, of the highest importance, completely inoperative and void. . . . There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony.¹⁹³

Webster paraphrased a passage from Edmund Burke to clarify his meaning: “‘Is that the law of the land,’ said Mr. Burke, ‘upon which, if a man go to Westminster Hall, and ask counsel by what title or tenure he holds his privilege or estate, according to the law of the land, he should be told, that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed, he will then know what the law of the land is?’”¹⁹⁴ When government acts according to no rule but its own discretion—when the citizen can only know what the rule of law is after the ruler promulgates it—the citizen cannot be said to live under a rule of law. Instead, the citizen is subject to arbitrary rule and is therefore deprived of due process *of law*. This is equally true when the arbitrary power is wielded by a monarch as when it is wielded by the voting public.¹⁹⁵

¹⁹³ *Dartmouth College*, 17 U.S. (4 Wheat.) at 580–82 (argument of Mr. Webster) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *44).

¹⁹⁴ *Id.* at 582. Burke’s actual wording was: “The properties of law are, first, that it should be known; secondly, that it should be fixed and not occasional. . . . No man in . . . any court upon earth, will say that is law, upon which, if a man going to his counsel should say to him, ‘What is my tenure in law of this estate?’ he would answer, ‘Truly, sir, I know not; the court has no rule but its own discretion: they will determine.’” Edmund Burke, Speech on Parliamentary Incapacitation (Jan. 31, 1770), reprinted in 2 WRITINGS AND SPEECHES OF EDMUND BURKE 235 (Paul Langford ed., Oxford University Press 1981).

¹⁹⁵ See THE FEDERALIST NO. 51, at 352 (James Madison) (Jacob E. Cooke ed., 1961) (“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger.”); see

Only two years after *Slaughter-House*, the Court decided the first of the great post-Civil War substantive due process cases, *Loan Association v. Topeka*.¹⁹⁶ In that case, citizens challenged the decision by city officials to use taxpayer money to invest in a privately-owned railroad. The Court ruled in their favor, concluding that government action transferring wealth from A to B merely to benefit B is inherently arbitrary and unlawful. For the government to take away a person's property and "bestow it upon favored individuals to aid private enterprises and build up private fortunes" is "robbery," even if "it is done under the forms of law."¹⁹⁷ Such an arbitrary action is "not legislation," but "a decree under legislative forms."¹⁹⁸ To deprive a person of money by "decree" instead of a law is, of course, to deprive that person of property without due process of law. Again, in 1877, five years after *Slaughter-House*, the Court reiterated the point in *Davidson v. New Orleans*:¹⁹⁹ a state cannot "make any thing due process of law which, by its own legislation, it chooses to declare such," because this would mean "that the prohibition to the States is of no avail."²⁰⁰ And, again, in 1884, in *Hurtado v. California*: "Arbitrary power . . . is not law The enforcement of [constitutional] limitations by judicial process is the device of self-governing communities to protect the rights of Individuals . . . against the violence of public agents transcending the limits of lawful authority"²⁰¹

The timing of these decisions—not to mention Webster's *Dartmouth College* argument—indicates how unlikely it is that this doctrine was devised simply in reaction to the *Slaughter-House* decision. But more importantly, the theories themselves differ. While the Privileges or Immunities Clause prohibits states from a specific category of legislative action—from making any law that abridges the privileges or immunities of citizenship—the Due Process Clause prohibits the legislature from acting arbitrarily. The latter prohibition is not dependent on the former; they are independent legal

also *Hurtado*, 110 U.S. at 536 ("Arbitrary power . . . is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.").

¹⁹⁶ 87 U.S. (20 Wall.) 655 (1874).

¹⁹⁷ *Id.* at 664.

¹⁹⁸ *Id.*

¹⁹⁹ 96 U.S. 97 (1877).

²⁰⁰ *Id.* at 102.

²⁰¹ 110 U.S. 516, 536 (1884).

theories. They do overlap, of course,²⁰² because certain legislative acts are so inherently unfair or arbitrary that, notwithstanding their formal legislative enactment, they can never substantively conform to the definition of law.²⁰³ But they are distinct concepts, and the doctrine of substantive due process does not depend in any way on the meaning of the Privileges or Immunities Clause or the outcome in *Slaughter-House*.

B. The Due Process Clause's Substantive Dimension was Well Understood before The Slaughter-House Cases.

Even if substantive due process did depend on an erroneous interpretation of the Due Process Clause, its historical pedigree reaches back farther than the decision in *Slaughter-House*. We have already seen that the leading substantive due process cases of the post-Civil War era—*Loan Association*, *Davidson*, and *Hurtado*—were issued within only a few years of *Slaughter-House*, which alone casts doubt on the narrative by which substantive due process was concocted to patch up the *Slaughter-House* Court's error.²⁰⁴ If we add to that history Daniel Webster's *Dartmouth College* argument, we see that substantive due process theory predates *Slaughter-House* by nearly half a century—and, in fact, several American courts had already adopted the doctrine of substantive due process long before the ratification of the Fourteenth Amendment.²⁰⁵

²⁰² As Richard Aynes observes, the charge that the Privileges or Immunities Clause would render the Due Process Clause surplusage, or vice versa, "presupposes that the framers had an aversion to redundancy when, in fact, they saw it as providing increased security." Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges And/Or Immunities*, 11 U. PA. J. CONST. L. 1295, 1306 n.59 (2009).

²⁰³ My approach to these questions therefore differs from that of Randy E. Barnett, who has proposed a different reconciliation of the apparently overlapping Due Process and Privileges or Immunities clauses. See Barnett, *supra* note 37, at 471.

²⁰⁴ The myth that substantive due process was simply a substitute for privileges or immunities is ubiquitous. See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 129–32 (1960); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 554 (2d ed. 1988); Bradley P. Jacob, *Griswold and the Defense of Traditional Marriage*, 83 N.D. L. REV. 1199, 1211 (2007).

²⁰⁵ See Ely, *supra* note 184, at 320–45; Riggs, *supra* note 191, at 948–99; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 622–68 (2009).

Probably most famous today is the 1856 New York decision *Wynehamer v. People*,²⁰⁶ in which Justice George Comstock explained that word “law” cannot refer to “the very act of legislation which deprives the citizen of his rights,” because this would make the clause “mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away.”²⁰⁷ The proper meaning of the due process of law restraint was that “where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away”²⁰⁸—that is, that the legislature may not simply dispossess a person of vested rights simply as an act of political will. There were similar decisions predating *Wynehamer*.²⁰⁹ In 1868, the same year that the Amendment was ratified, and five years before *Slaughter-House*, Thomas Cooley’s famous treatise *Constitutional Limitations* quoted Webster’s *Dartmouth College* argument as the most common definition of the term “due process of law,” concluding that the Due Process Clause protected substantive rights against unprincipled or arbitrary legislation.²¹⁰

²⁰⁶ 13 N.Y. 378 (1856).

²⁰⁷ *Id.* at 393.

²⁰⁸ *Id.*

²⁰⁹ See, e.g., *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1855) (the due process clause makes it “manifest that it was not left to the legislative power to enact any process which might be devised.”); *Parham v. Justices*, 9 Ga. 341, 354 (1851) (property rights are “fundamental principle[s]” which legislatures may not disregard; thus “[i]f the Legislature should pass a law to transfer the property of A to B, under pretext of public necessity and utility, when no such necessity or utility exists in fact, there can be no doubt but that it would be the right and duty of the Judiciary to set it aside.”); *Concord R.R. v. Greely*, 17 N.H. 47 (1845) (“a law providing merely that the property of A should be taken from and given to B, either with or without a consideration, would be repugnant to the constitution. Not indeed to the letter of any particular clause contained in it, but to its spirit and design, which, throughout the whole, discountenance the idea that the property of the citizen is held by any such uncertain tenure as the arbitrary discretion of the legislature”); *Norman v. Heist*, 5 Watts & Serg. 171, 172–74 (Pa. 1843) (“It was deemed necessary to insert a special provision in the Constitution to enable [the legislature] to take private property even for public use, and on compensation made; but it was not deemed necessary to disable them specially in regard to taking the property of an individual, with or without compensation, in order to give it to another...because it was expected that no Legislature would be so regardless of right as to attempt it.”).

²¹⁰ THOMAS COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 353 (1868).

The Fourteenth Amendment's framers were familiar with the concept of substantive due process and mentioned it during the ratification debates.²¹¹ When asked to explain the "due process of law" clause in the new amendment, Congressman Bingham replied that referred to "law in its highest sense, that law which . . . is impartial, equal, exact justice; that justice which requires that every man shall have his right."²¹² When asked to define "due process of law," he and Congressman William Lawrence responded by pointing to established case law.²¹³ Indeed, Lawrence cited several famous cases by name—including *Wilkinson v. Leland*,²¹⁴ *Terrett v. Taylor*,²¹⁵ *People v. Morris*,²¹⁶ *Taylor v. Porter & Ford*,²¹⁷ and *Fletcher v. Peck*²¹⁸—for the

²¹¹ Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 *DRAKE L. REV.* 911, 934 (2008) (leading Republicans "read the Due process clause as protecting substantive rights.").

²¹² *CONG. GLOBE*, 39th Cong., 1st Sess. 1094 (1866); see also *id.* at 2459 (statement of Rep. Thaddeus Stevens) (Due Process Clause prevents states from "unlawfully depriving [persons] of life, liberty, or property"); *id.* at 340 (statement of Sen. Edgar Cowan) (due process of law meant that "the rights of no free man, no man not a slave, can be infringed in so far as regards any of the great principles of English and American liberty"); *id.* at 1294 (statement of Rep. James Wilson) (due process included the "great civil rights" referred to in the Civil Rights Act of 1866); *id.* at 1833 (statement of Rep. William Lawrence) (due process means that "there [are] rights which are inherent, and of which a State cannot constitutionally deprive him").

²¹³ *Id.* at 1089 (statement of Rep. John Bingham); *id.* at 1833 (statement of Rep. William Lawrence).

²¹⁴ 27 U.S. (2 Pet.) 627 (1829). Lawrence pointed to page 657 of the *Wilkinson* decision, which addresses substantive due process theory: "In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter...as an exercise of transcendental sovereignty before the revolution, it can scarcely be imagined that that great event could have left the people of that state subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."

²¹⁵ 13 U.S. (9 Cranch) 43 (1815).

²¹⁶ 13 Wend. 325 (N.Y. 1835). Lawrence cited page 328 of this case, *CONG. GLOBE*, 39th Cong., 1st Sess. 1833, which refers to "natural and inherent rights of the citizens, which they cannot part with or be deprived of by the society to which they belong . . . It is now considered an universal and fundamental proposition, in every well

proposition “every citizen has ‘absolute rights’” that legislatures may not violate.²¹⁹ Thus, while Reconstruction-era Republicans did intend the Privileges or Immunities Clause as the “substantive heart of the amendment,”²²⁰ they also correctly understood that the “due process of law” clause of its own force would prohibit government from arbitrary actions that violate individuals’ natural and civil rights.

C. The Modern Critique of Substantive Due Process

We have seen that what is now called substantive due process is far more complicated than is generally recognized by contemporary discussions of that theory. Indeed, the very name is misleading, since eighteenth and nineteenth century courts did not use that term and would not have recognized it: they believed they were simply applying the due process of law requirement—that is, protecting individual rights against arbitrary government actions. That understanding of due process of law was widespread when the Fourteenth Amendment was written, and even when the Fifth Amendment was written. Substantive due process therefore has a strong “originalist” basis.

regulated and properly administered government . . . private property cannot be taken for strictly private purposes at all, nor for public without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired [I]f any rights vested under the National or State Constitutions, or others inherent and inalienable and, therefore, also vested, have been violated by any provision of the Revised Statutes, such provision is inoperative and void.”

²¹⁷ 4 Hill 140 (N.Y. 1843). Lawrence cited page 147 of the *Taylor* decision, CONG. GLOBE, 39th Cong., 1st Sess 1833 which is a classic of substantive due process theory: “The words ‘by the law of the land’ . . . do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the [legislature] . . . ‘You shall not do the wrong, unless you choose to do it.’ The section was taken with some modifications from a part of the 29th chapter of Magna Charta The meaning of the section then seems to be, that no member of the state shall be . . . deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation.” 4 Hill at 145–46.

²¹⁸ 10 U.S. (6 Cranch) 87 (1810).

²¹⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

²²⁰ Shankman & Pilon, *supra* note 36, at 26.

Ironically, however, many of those who describe themselves as originalists are among the most strident critics of substantive due process. These critics, Robert Bork for example, argue that the Framers understood the Due Process Clause to guarantee only some sort of regular procedural mechanism prior to depriving a person of life, liberty, or property. The irony turns into tragedy when we realize that this “process-only” approach, under which the Due Process Clause imposes no limit on what kind of deprivations the state may ultimately impose, was formulated, not by the framers of the 1787 Constitution or the authors of the Fourteenth Amendment, but by the intellectual leaders of the Progressive movement during the first half of the twentieth century. These thinkers dramatically rearranged the intellectual order of American constitutionalism. In particular, they abandoned the natural-law concepts that underpinned both the doctrine of due process of law and the Constitution itself.

1. PROGRESSIVES AND SUBSTANTIVE DUE PROCESS

During the Progressive era, lawyers and judges like Oliver Wendell Holmes²²¹ and Louis Brandeis threw off the notion that there were any prepolitical standards of right and wrong by which political society might be judged.²²² In place of the classical liberal theory that there are universal principles of human nature which limit what the state may rightly do, the Progressives substituted a collectivist and relativist vision, according to which right and wrong are determined by social consensus, and have no deeper foundation than aggregated personal preferences.²²³ Justice and injustice are simply whatever the group chooses to define that way,

²²¹ See generally ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF OLIVER WENDELL HOLMES* (David Bemelmans ed., 2000).

²²² See, e.g., LOUIS MENAND, *THE METAPHYSICAL CLUB* 439 (2000) (Progressive thinkers “helped put an end to the idea that . . . there exists some order, invisible to us, whose logic we transgress at our peril.”); CHARLES EDWARD MERRIAM, *A HISTORY OF AMERICAN POLITICAL THEORIES* 311 (1920) (1903) (“The present tendency . . . in American political theory is to disregard the once dominant ideas of natural rights and the social contract . . . [R]ights are considered to have their source not in nature, but in law.”).

²²³ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) (“Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way.”)

and therefore, in Holmes's words, "more or less arbitrary."²²⁴ The idea that there are limits to what the state may do to us was, in his eyes, nothing more than subjective sentiment backed by the will to do violence in the service of that sentiment. This readiness to fight for one's irrational preferences may gradually transform those "emotions" into "general rules," but they have no deeper philosophical basis than "a dog[s] will [to] fight for his bone."²²⁵ Arguing

²²⁴ Letter from Oliver Wendell Holmes to Lady Pollock (Sept. 6, 1902), in 1 THE HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 104, 105 (Mark DeWolfe Howe ed., 1961).

²²⁵ Holmes, *supra* note 223, at 42. In fact, Holmes seems to have underestimated dogs. Dogs presumably do not fight for bones out of mere subjective preference, but because, like all of us, they are mortal beings in a world of limited resources and limited time. Since, unlike human beings, dogs cannot create wealth, it is natural and rational for them to fight for bones if they have to—and, indeed, it is *right* for them to do so, according to the understanding of natural goodness embraced by the Aristotelian tradition. See PHILIPPA FOOT, NATURAL GOODNESS 15-16 (2001); JOHN HERMAN RANDALL, JR., ARISTOTLE 250-53 (1960). Human beings, as rational animals, have a much different method of survival, but, like dogs, they have a nature, and therefore a natural (*i.e.*, not merely subjective, conventional, or socially constructed) standard of goodness.

Another one of Holmes's dogs also had a better understanding of natural law than did Holmes. In THE COMMON LAW 3 (1923), he wrote that "even a dog distinguishes between being stumbled over and being kicked." Yet this suggests that the difference between these two things is not purely conventional. After all, as Adam Smith recognized, dogs do not have conventions. See 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26 (Oxford University Press 1976) (1776) ("Nobody ever saw a dog make a fair and deliberate exchange of one bone for another with another dog."). But if there is a *natural* difference between intentional wrongs (kicking) and accidental injuries (tripping), then why cannot a human society recognize distinctions of justice based not on convention but on nature, when formulating its code of laws? Holmesian positivism is incapable of distinguishing between *malum prohibitum* and *malum in se* wrongs. Kicking dogs, as Simon Blackburn has observed, is not *malum prohibitum*:

It is not because of the way we form sentiments that kicking dogs is wrong. It would be wrong whatever we thought about it Suppose someone said 'if we had different sentiments, it would be right to kick dogs', what would he be up to? Apparently, he endorses a certain sensibility: one which lets information about what people feel dictate its attitude toward kicking dogs. But nice people do not endorse such a sensibility. What makes it wrong to kick dogs is the cruelty or pain to the animal.

SIMON BLACKBURN, SPREADING THE WORD: FOUNDINGS IN THE PHILOSOPHY OF LANGUAGE 217-18 (1984).

Actually, there is some evidence suggesting that dogs have a sense of "fair play" that includes mores of exchange. See, e.g., Marc Bekoff, *Wild Justice And Fair Play*:

that there are such things as natural standards of right and wrong is like “churning the void in the hope of making cheese.”²²⁶

If this is the case, there can be no principled distinction between law and force. Law is simply the command of the coercive authority. There can be no test of a law’s validity except the fact that it was enacted and enforced. Arguing that a law violates individual rights cannot render the law invalid because under this theory, rights are recast as socially constructed permissions: spheres of individual autonomy created by the state’s willingness to intervene on the individual’s behalf.²²⁷ “All my life I have sneered at the natural rights of man,” wrote Holmes.²²⁸ To speak of individual rights valid against the state was, to him, “like shaking one’s fist at the sky, when the sky furnishes the energy that enables one to raise the fist.”²²⁹ Rights are created by the state, and exist only insofar as the state chooses to create and defend them.

Because they had abandoned the idea that law could be judged by comparison to pre-political standards of right and wrong, the Progressives also blinded themselves to any difference between law and arbitrariness. Where previous generations of lawyers believed that the difference resided in whether the rule at issue consisted with the broader purposes of the state—thus, whether it was bounded by the natural rights of individuals—Progressives saw political power as *merely* authoritarian and therefore inherently subjective. There could be no limits on government sovereignty (in fact, many contemporary observers noted that Progressives appeared to

Cooperation, Forgiveness, and Morality in Animals, 19 *BIO. & PHILO.* 489 (2004). But there is much stronger evidence showing that animals closer to man have some sense of “fairness.” See Sarah F. Brosnan & Frans B. M. de Wall, *Monkeys Reject Unequal Pay*, 425 *NATURE* 297 (2003); Sarah F. Brosnan, *Nonhuman Species’ Reactions to Inequity and Their Implications for Fairness*, 19 *SOC. JUST. RES.* 153 (2006); Keith Jensen, et al., *Chimpanzees Are Rational Maximizers in an Ultimatum Game*, 318 *SCIENCE* 107 (2007). Holmes’ flippant notion that moral views are mere conventional preferences must be rejected as untenable.

²²⁶ Letter from Oliver Wendell Holmes to Alice Stopford Green (Aug. 20, 1909), in *THE ESSENTIAL HOLMES* 115, 116 (R. Posner ed., 1992).

²²⁷ See MENAND, *supra* note 222, at 409 (Progressives believed that “rights are created not for the good of individuals, but for the good of society. Individual freedoms are manufactured to achieve group ends.”).

²²⁸ Letter from Oliver Wendell Holmes to Harold Laski (Sept. 15, 1916), in 1 *HOLMES-LASKI LETTERS* 18, 19 (Mark DeWolfe Howe ed., 1953).

²²⁹ Letter from Oliver Wendell Holmes to Harold Laski (Jan. 29, 1926), in *THE ESSENTIAL HOLMES*, *supra* note 226, at 234, 235.

be reviving the states' rights approach to sovereignty)²³⁰ or any universal standards by which political regimes could be judged as objectively good or bad. As today's leading acolyte of Holmes has put it in discussing the prosecution of the twentieth century's paradigm violation of natural justice, "[i]t was right to try the Nazi leaders [at Nuremberg] rather than to shoot them out of hand But it was not right because a trial could produce proof that the Nazis really were immoralists; they were, but *according to our lights, not theirs.*"²³¹ That is, even the Holocaust was only "wrong" in the sense that it offended the aggregated subjective preferences of the Allies.²³²

If the mere enactment is criterion of lawfulness, there can be nothing left of the "due process of law" requirement than that the legislature observe certain procedural formalities.²³³ Even where the consequences are arbitrary, or even irrational, governments actions must be considered "lawful," and under the Progressive jurisprudence that now prevails—that is, the "rational basis" test—such laws have withstood constitutional challenges so long as the government agency that acts arbitrarily does so through the proper

²³⁰ See, e.g., PHILEMON BLISS, OF SOVEREIGNTY 95-96 (1884); CHARLES EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 300-03 (1903); CHARLES EDWARD MERRIAM, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU 112-18 (1900); John A. Jameson, *National Sovereignty*, 5 POL. SCI. Q. 193 (1890).

²³¹ Richard Posner, *Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1644-45 (1998) (emphasis added).

²³² But see RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM 75-83 (2003) (rebutting this point).

²³³ Actually, this point is fallacious. The position that a rule's rightfulness is determined by promulgation cannot account for the rules of promulgation themselves. If an action is lawful whenever it follows the procedures, then any rule that sets forth procedures is valid. Without some higher-order rule to distinguish just procedures from unjust procedures, this approach is simply incapable of accounting for government actions in terms of justice. If rules of promulgation are self-justifying, there would not only be no grounds for choosing a constitution that implements democratic procedures over one that implements monarchical, fascist, or communist procedures, see HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 85-86 (1994), but there would not even be a reason to prefer a legislature that obeys the rules of promulgation over one that breaks those rules. After all, by exceeding those limits, the legislature is merely creating a new rule of promulgation! For an example of just this phenomenon, see Timothy Sandefur, *A Private Little Bush v. Gore, Or, How Nevada Violated the Republican Guarantee and Got Away With It*, 9 TEX. REV. L. & POL. 105 (2004).

procedural formalities.²³⁴ For example, although early American judges regarded it as the paradigm case of unlawful and arbitrary government for the legislature to take property from A and give it to B,²³⁵ courts now hold that “[o]n urban renewal condemnations . . . the whole scheme is for a public agency to take one man’s property away from him and sell it to another. The founding fathers may have never thought of this . . . but under all modern federal decisions our hands are tied – *if the book on the procedure is followed.*”²³⁶

The Progressives reversed the Founders’ constitutional priorities: where the Founders viewed liberty as the primary good to be promoted by the American constitutional order and imposed stringent limits on democratic lawmaking to protect liberty, Progressive intellectuals saw democracy as the ultimate political good and liberty as a product, as well as the servant, of democratic society: liberty was created by the collective’s agreement to allow freedom to the individual, and it existed only to promote democratic decision-making.²³⁷ Indeed, as Herbert Croly admitted in 1915, the goal of Progressivism was “the emancipation of the democracy from continued allegiance to any specific formulation of the Law, and its increasing ability to act upon its collective purposes.”²³⁸ The value of “an ideal of social justice”²³⁹ must be “as widely and as persistently inculcated in a democracy *as the worship of the Constitution formerly was*, for it is the foundation not only of the liberty of the American people, but of their ability to convert civil and political liberty into a socially desirable consummation.”²⁴⁰

²³⁴ See MENAND, *supra* note 222, at 432 (Progressives “shift[ed] the totem of legitimacy from premises to procedures. We know an outcome is right not because it was derived from immutable principles, but because it was reached by following the correct procedures [I]f the legal process was adhered to, the outcome is just [J]ustice is whatever result just procedures have led to.”).

²³⁵ See John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337 (1997).

²³⁶ *Government of Guam v. Moylan*, 407 F.2d 567, 568–69 (9th Cir. 1969) (emphasis added).

²³⁷ See also Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1, 19–29 (2006).

²³⁸ HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 154 (1915).

²³⁹ *Id.* at 212.

²⁴⁰ *Id.* at 215 (emphasis added).

This revolution in the concept of lawfulness is evident in the majority and dissenting opinions in *Lochner v. New York*.²⁴¹ There, the majority concluded that a law depriving bakers of the opportunity to work for more than 10 hours a day violated the due process of law requirement, because it was fundamentally arbitrary. Their reasoning was that a limit on the worker's freedom to make his own economic choices could be justified only if it served some broader public good—and indeed, the Court at this time tolerated a wide variety of limits on economic liberty when those limits were backed by some plausible explanation in terms of protecting the public health, safety, and welfare.²⁴² But no such justification appeared in the *Lochner* case because there was no evidence that the general public or the bakers themselves were endangered by bakers working long hours.²⁴³ Rather, the limit on working hours appeared to have no other justification than that the majority of legislators voted for it—it was, in the Court's eyes, a mere act of force with no deeper principle. It was therefore arbitrary and deprived the bakers of liberty without due process of law.²⁴⁴ In dissent, Holmes argued for an extreme degree of judicial deference to whatever acts the legislature chose to undertake. The word liberty is "perverted," he wrote, when it is "held to prevent the natural outcome of a dominant opinion."²⁴⁵ Any theoretical distinctions between lawful uses of government power and

²⁴¹ 198 U.S. 45 (1905).

²⁴² *Id.* at 56 ("[T]here is a limit to the valid exercise of the police power by the State Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.").

²⁴³ *See id.* at 58 ("There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.").

²⁴⁴ *See id.* at 61 ("Statutes . . . limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual . . . unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees.").

²⁴⁵ *Id.* at 76 (Holmes, J., dissenting).

unlawful ones were mere abstract fantasies—“shibboleths,” one might say²⁴⁶—that deserved the scorn of all true sophisticates.

The judicial deference for which the Progressives contended became constitutional law thirty years later in *Nebbia v. New York*,²⁴⁷ when the Supreme Court sustained a Depression-era New York statute prohibiting grocers from charging low prices for milk. Such price floors, of course, were hardly a blessing to the poor, and as Justice McReynolds pointed out in his dissent, the statute was as rational as pouring oil on the roof of a burning house, hoping thereby to extinguish the flames.²⁴⁸ Nevertheless, the Court upheld the law, concluding that virtually anything the legislature did would qualify as “law” for purposes of the “due process of law” requirement. *Nebbia* signaled the beginning of the end of substantive due process theory, at least until its revival during the Warren Court era, when the Court began protecting rights of intimate privacy against state legislation.

2. INTIMACY RIGHTS AND THE PROGRESSIVE/CONSERVATIVE CRITIQUE OF SUBSTANTIVE DUE PROCESS

Today’s conservatives have embraced the modern critique of substantive due process—a critique generated during the Progressive era as part of an overall renovation of American constitutional law.²⁴⁹ Most obvious among these is Bork, whose book *The Tempting of America* consists of a lengthy attack on substantive due process. In his account, that doctrine has no warrant in constitutional history and serves as nothing more than a trick whereby judges can enforce their personal policy preferences in the form of constitutional

²⁴⁶ *Id.* at 75.

²⁴⁷ 291 U.S. 502 (1934).

²⁴⁸ *Id.* at 556 (McReynolds, J., dissenting) (“this Court . . . must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power If a statute to prevent conflagrations should require householders to pour oil on their roofs as a means of curbing the spread of fire when discovered in the neighborhood, we could hardly uphold it. Here, we find direct interference with guaranteed rights defended upon the ground that the purpose was to promote the public welfare by increasing milk prices at the farm. Unless we can affirm that the end proposed is proper and the means adopted have reasonable relation to it, this action is unjustifiable.”).

²⁴⁹ Timothy Sandefur, *The Wolves And The Sheep of Constitutional Law: A Review Essay on Kermit Roosevelt’s The Myth of Judicial Activism*, 23 J.L. & POL, 1, 17 (2007).

law.²⁵⁰ But Bork's account is rooted, not in the views of the Founders,²⁵¹ but in the views of Progressive era lawyers and judges; indeed, Bork frequently invokes Holmes as a model of the "judicial restraint" that he advocates.²⁵² It is not surprising to find liberals such as Justice David Souter²⁵³ and John Hart Ely²⁵⁴ sharing Bork's narrative of substantive due process. In their rejection of natural rights and their embrace of a "process-only" approach to due process, Bork and his allies are working well within the parameters of Progressive jurisprudence—and well outside the tradition of the Founders' classical liberalism.²⁵⁵ At bottom, they share the Progressive belief that promulgation by the ruling authority is sufficient to make a law lawful. The lawmaking body may do whatever it pleases, so long as it abides by procedural formalities.

It is not difficult to see why conservatives have embraced these Progressive views; the modern Supreme Court has employed substantive due process to uphold abortion rights and other rights of sexual

²⁵⁰ See ROBERT BORK, *THE TEMPTING OF AMERICA* 32 (1990).

²⁵¹ See generally HARRY V. JAFFA, *STORM OVER THE CONSTITUTION* (1999).

²⁵² In fact, Bork at one point criticizes Holmes for not being deferential enough to legislative power. See BORK, *supra* note 250, at 45 ("[Holmes] spoiled it all" by allowing some realm for judicial review, showing that he "after all, did accept substantive due process.").

²⁵³ *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring).

²⁵⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14–19 (1980).

²⁵⁵ Categorizing Bork as a Progressive is counterintuitive, given his strong insistence on the importance of a morally authoritarian state. See, e.g., JEFFREY C. ISAAC, *THE POVERTY OF PROGRESSIVISM* 23 (2003) (contrasting Bork's "militant moralism" with Progressive liberalism). But the apparent differences between Bork and Progressives dissolve when two factors are considered. First, the Progressive movement was actually quite moralistic and authoritarian. See generally MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA 1870–1920* (2003). Second, while he is an authoritarian, Bork does not actually defend a transcendental moral dimension along the lines of ancient political philosophy. In his account, the morality on which politics should be based is not a permanent universal law, something he regards as a chimera on the order of a perpetual motion machine. See BORK, *supra* note 250, at 255–56. Instead, like Holmes, Bork defines morality as whatever the majority dictates. *Id.* at 256–57 ("our public moral debates . . . have been interminable and inconclusive because we start from different premises That is why . . . we should vote about these matters rather than litigate them There is going to be no moral philosophy that can begin to justify courts in overriding democratic choices where the Constitution does not speak.").

privacy against state interference.²⁵⁶ Thus conservatives hope that by overthrowing substantive due process, they could take the next step of abolishing abortion and other privacy rights. In *Griswold v. Connecticut*,²⁵⁷ the Supreme Court struck down a state law barring doctors from advising married couples about birth control. This statute deprived persons of liberty without due process of law because it intruded on constitutionally protected privacy rights without having any real connection to a general public purpose; it was arbitrary because it had no other support than the fact that a legislative majority had enacted it. Yet because the Justices were keen to avoid the specter of “substantive due process,” the majority struggled to adopt a vocabulary distinguishing the case from *Lochner*.²⁵⁸ It therefore employed a confusing language of “emanations” and “penumbras” that has invited ridicule ever since. Justice Hugo Black, in dissent, was not fooled. The decision, he rightly saw, was actually in the footsteps of *Lochner*.²⁵⁹ Indeed, “beyond the disguises of the rhetoric, the judges were speaking again in the logic of natural rights.”²⁶⁰ As this right to privacy became the foundation for the Court’s later protection of abortion rights, conservatives opposed to abortion adopted Black’s argument and attacked natural rights as the inevitable route to abortion rights. As Dean John Eastman has put it, “[m]any conservatives have what might be called a ‘Justice Brennan Problem.’ They are not willing to give any credence to a natural rights jurisprudence . . . lest it become the departure point for Justice Brennan’s, or now Justice Stevens’s, liberalism.”²⁶¹

²⁵⁶ As Harry Jaffa has shown, however, embracing the Progressivist view of law-as-promulgation holds only false hope for opponents of abortion, since that critique would render them impotent to criticize a legislature that democratically provided for abortion rights. JAFFA, *supra* note 251. Indeed, Justice Antonin Scalia has acknowledged this explicitly: “[i]f the people, for example, want abortion the state should permit abortion.” Ralph A. Rossum, *The Textualist Jurisprudence of Antonin Scalia*, in *HISTORY OF AMERICAN POLITICAL THOUGHT* 787, 792 (Bryan-Paul Frost & Jeffrey Sikkenga, eds., 2003) (quoting Antonin Scalia, *Of Democracy, Morality and the Majority*, Address at Gregorian University (May 2, 1996), in 26 *ORIGINS* 82, 88 (1996)).

²⁵⁷ 381 U.S. 479 (1965).

²⁵⁸ *See id.* at 481–82 (“Overtones of some arguments suggest that *Lochner* . . . should be our guide. But we decline that invitation.”).

²⁵⁹ *See id.* at 511–12 (Black, J., dissenting).

²⁶⁰ HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* 29 (1994).

²⁶¹ John C. Eastman, *Re-evaluating The Privileges or Immunities Clause*, 6 *CHAP. L. REV.* 123, 136 (2003).

Consider, for example, *Lawrence v. Texas*,²⁶² in which the Supreme Court invalidated a Texas statute imposing criminal penalties on sodomy and other “deviate” sexual behavior. Seen from the perspective of substantive due process, the first question in *Lawrence* is whether the Texas anti-sodomy statute deprives people of their liberty. Clearly it does, since it interferes with a person’s voluntary action when that action does no harm to any non-consenting third person. The second question would then be whether the Texas anti-sodomy statute had those elements that make it a “law.” Here the Court rightly answered no: because there was no legitimate overarching public justification for a law controlling only private behavior without any genuine effect on the public. The sexual activity involved was consensual, private, non-commercial conduct between adults that did not affect any other person in any way. There was no serious indication that such conduct would injure public health, safety, or morals—indeed, the purported moral justification was simply an *ipse dixit* by the legislative majority.²⁶³ But such majoritarian say-so is not a serious argument that the activity is harmful to the general public; it is merely an assertion of power—a proscription, “rather a sentence than a law”²⁶⁴—and, being justified by no principle except that a majority voted for it, then it was inherently arbitrary, and not “law.” Thus the act at issue deprived the defendants of liberty without due process of law. In the Court’s simpler phrasing, “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”²⁶⁵ And if it furthered no legitimate state interest, it was not

²⁶² 539 U.S. 558 (2003).

²⁶³ See Peter M. Cicchino, *Reason And The Rule of Law: Should Bare Assertions of “Public Morality” Qualify As Legitimate Government Interests for The Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 177-78 (1998) (“Bare assertions of public morality, like sectarian theological assertions, fail the test of public reasonability precisely because they are unrelated to human experience and are independent of any observable effects on public welfare [B]are public morality arguments support the legal enforcement of private bias, casting lawmaking as a kind of Nietzschean struggle of will, with various moral interest groups trying to gain legal enforcement of their beliefs without having to give reasons for those beliefs other than saying, ‘we believe it.’”).

²⁶⁴ *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 518 (1819) (argument of Mr. Webster) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *44).

²⁶⁵ *Lawrence*, 539 U.S. at 578.

“law” and deprived John Geddes Lawrence and Tyron Garner of their liberty without due process of *law*.

One outspoken conservative critic of *Lawrence* is Professor Nelson Lund, whose embrace of the Progressive myth of due process is total and emphatic. In a co-authored 2004 article attacking the decision Lund begins, like Bork, with a straw man argument, describing substantive due process as simply “judicial disobedience”²⁶⁶—a curious phrase to use in a nation where the constitutional separation of powers does not contemplate an “obedient” judiciary. Ignoring the history as well as the content of substantive due process jurisprudence, Lund repeats the untruth that it first appeared in *Dred Scott*,²⁶⁷ and resorts to a horse-laugh argument: substantive due process theory is merely the notion that “the Fifth Amendment contain[s] some kind of secret message telling judges that no person shall be deprived of life, liberty, or property except when judges find the deprivation sufficiently inoffensive to their moral and political sensibilities.”²⁶⁸ As we have seen, the generations of lawyers and judges who employed what is now called “substantive due process” never claimed this. Lund is offering a straw man caricature of a serious legal argument that, where the legislature exceeds its legitimate authority, its actions cannot qualify as “law,” and therefore cannot satisfy the due process of law requirement. To this argument—an argument well over two centuries old—Lund “respond[s] with dead silence.”²⁶⁹ Indeed, elsewhere, Lund has claimed that “the Supreme Court has never in its entire history tried to derive [substantive due process] from the text of the Constitution”²⁷⁰—an assertion that, as we have seen, is simply false.

To interpret the Due Process Clause, Lund turns not to the views of its authors, but to Oliver Wendell Holmes, criticizing him only for *not deferring enough* to legislatures.²⁷¹ In their view,

²⁶⁶ Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004).

²⁶⁷ *Id.* at 1559. Lund and McGinnis also repeat the myth that substantive due process was essentially devised to make up for the error in *Slaughter-House*. See *id.* at 1561.

²⁶⁸ *Id.* at 1559.

²⁶⁹ *Cf. id.*

²⁷⁰ Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J.L. & POL. 1, 3 (2009).

²⁷¹ Lund & McGinnis, *supra* note 266, at 1564.

legislatures “have always been adjusting the substantive contours of [fundamental] rights, and must continue to do so.”²⁷² Rights are not to be regarded as immutable and universal protections of human dignity; they are simply subjective matters of collective opinion. Since “[p]olitical philosophers have engaged for centuries in sharp and unsettled debates”²⁷³ about these rights, there must therefore be no truth of the matter, and the issue is to be left in the hands of the majority. Indeed, Lund “den[ies] that the existence of natural or inherent rights is self-evident, no matter how strongly we may desire it to be true.”²⁷⁴ This, of course, is precisely the argument advanced by the Progressives; an argument that transforms rights into permissions²⁷⁵ and erases the dividing line between law and arbitrariness. Intriguingly, they describe judges who employ substantive due process as “lawless,”²⁷⁶ without explaining why a judge who exceeds his powers is “lawless,” while the acts of a legislature that exceed its legitimate authority are nevertheless to be regarded as “lawful” as that term is used in the “due process of law” clause. Lund’s approach would essentially eliminate any meaningful restraint on the power of the majority.²⁷⁷

Some conservatives are not as quick to jettison constitutional protections for natural rights, but they find themselves in the ticklish position of trying to reconcile natural rights protections for

²⁷² *Id.* at 1565.

²⁷³ *Id.* at 1591.

²⁷⁴ Nelson Lund, *Rousseau and Direct Democracy (With A Note on the Supreme Court’s Term Limits Decision)*, 13 *J. Contemp. Legal Issues* 459, 466 (2004); see also *id.* at 472 (“Hobbes . . . does not seem to establish, by adequate argument or evidence, the claims about natural or inherent rights that we find in the Virginia Declaration of Rights and the Declaration of Independence.”); *id.* at 474 (“Locke appears not to have established what the Declaration of Independence says is self-evident. Like the Declaration, Locke just asserts it.”).

²⁷⁵ *Id.* at 466 (“The rights that we actually see enforced—especially but not only legal rights—arise from human institutions”).

²⁷⁶ Lund & McGinnis, *supra* note 266, at 1560.

²⁷⁷ Lund does contend that *Slaughter-House* was wrongly decided and accepts that the Privileges or Immunities Clause was intended to restrain government power. But he rejects Justice Washington’s opinion in *Corfield*—the foundation stone for interpreting the privileges or immunities clause. See Nelson Lund, *Have Gun, Can’t Travel: The Right to Arms Under the Privileges And Immunities Clause of Article IV*, 73 *UMKC L. REV.* 951, 954–56 (2005).

property rights and economic liberty with a renunciation of constitutional security for privacy rights. No figure is more obviously in this uncomfortable spot than Justice Clarence Thomas, who has often articulated a natural-rights understanding of the Constitution²⁷⁸ and repeatedly called for the revival of the Privileges or Immunities Clause,²⁷⁹ but who is an opponent of abortion rights and a critic of substantive due process.²⁸⁰ To hold that such intimacy rights as the right of a parent to raise a child are constitutionally protected natural rights, as Justice Thomas did in *Troxel v. Granville*,²⁸¹ while at the same time denying that the right to sexual intimacy is a constitutionally protected natural right, as he did in his brief dissenting opinion in *Lawrence*, is inconsistent, confusing, and unwarranted.

Justice Thomas dissented, joining in Justice Scalia's decision that the majority may prohibit acts simply because it disapproves of them. Scalia's opinion was unsurprising, given that he subscribes to the Progressive critique of substantive due process.²⁸² But in his

²⁷⁸ See, e.g., Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989); see also SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999).

²⁷⁹ *Saenz v. Roe*, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting); see also *Troxel v. Granville*, 530 U.S. 57, 80 n.* (2000) (Thomas, J., concurring in judgment).

²⁸⁰ Justice Thomas, for instance, joined Justice Scalia's opinion in *United States v. Carlton*, 512 U.S. 26, 39 (1994), stating that "the Due process clause guarantees no substantive rights, but only (as it says) process." *Id.* at 40.

²⁸¹ 530 U.S. at 80 (2000).

²⁸² See generally JAFFA, *supra* note 251. Scalia shares Bork's majoritarian view that legislatures may punish actions solely because the legislative majority asserts that those acts are wrong, even if there is no basis for such an assertion. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574-75 (1991) (Scalia, J., concurring) (citations omitted) ("Our society prohibits . . . certain activities not because they harm others but because they are considered . . . immoral . . . [A]bsent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate 'morality.'"). The roots of Scalia's views are, like Bork's, to be found in Holmes. Compare *id.* at 574-75 ("the dissenters believe that 'offense to others' ought to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal") with *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by [various institutions] The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

separate dissent, Justice Thomas added that he regarded the law at issue as “uncommonly silly,” and that if he were a member of the legislature, he would have voted to repeal it.²⁸³ He did not say that he merely disagreed with the statute for policy reasons: he considered it “uncommonly silly.” But a law that is “uncommonly silly” cannot be said to be “rational,” and thereby to survive rational basis review. Indeed, the “rational basis” test is often analogized to the “laugh test,” so that just about the only things that fail it are laws that are “uncommonly silly.”²⁸⁴

Thomas went on to say that “punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.”²⁸⁵ A lot is hidden in the word “worthy.” In what sense is it *unworthy* to spend law enforcement resources enforcing a valid statute? Is it merely a matter of budgetary priorities, or is it because using coercive power for such purposes is improper? *Either way*, the word “worthy” reflects a normative calculation—that is, determining the “worthiness” of enforcement requires the judge to consider whether or not the state *ought* to be doing this thing, which is to say, one must ask what are the appropriate boundaries government must respect when limiting individual choice. Yet that is precisely the question at the heart of “substantive due process.” The due process of law clause forbids the government from doing things that, for pre-political reasons, are *unworthy* of a civilized government.

Finally, Justice Thomas concluded that the Constitution does not protect “a general right of privacy.”²⁸⁶ This claim is a common one, but it cannot be defended from the standpoint of the natural rights originalism to which Justice Thomas otherwise subscribes. The Constitution expressly protects all rights in the most general of

²⁸³ *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting).

²⁸⁴ According to one increasingly popular formulation, to fail the rational basis test, a law must strike judges “as wrong with the force of a five-week-old, unrefrigerated dead fish.” *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (quoting *United States v. Searan*, 259 F.3d 434, 447 (6th Cir. 2001); *United States v. Perry*, 908 F.2d 56, 58 (6th Cir. 1990)).

²⁸⁵ *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting).

²⁸⁶ *Id.* at 605–06 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting)).

terms: that is, it protects “liberty”—an undifferentiated range of action freely to be chosen by individuals without undue government interference. This simply *is* a general right of privacy. *All rights are rights to privacy.* To say someone has a right to choose in some field of action is to say that she may act *privately*—that her choice is not a *public* matter and may not be overruled by *public* authorities. The freedom of religion means, for example, the right to make religious decisions *privately*, without the interference of the public. Liberty (which *is* an enumerated right) does not come in discrete quanta; it is by definition a “general right of privacy” from government interference. The Ninth Amendment reinforces this fact by emphasizing that the rights enumerated in the Bill of Rights are not the only rights. Thus, even aside from the question of whether the right to liberty or privacy should be construed as including the freedom to do any particular thing, like engage in homosexual sex or have an abortion, the Constitution certainly *does* protect a “general” right of privacy while allowing the legislature a limited discretion to set boundaries around that right. It protects a sea of liberty—both economic liberty and liberty of personal intimacy²⁸⁷—in which are situated islands of specified government power.²⁸⁸

In short, the effort by some conservatives to reconcile a natural rights approach to the Constitution with the type of deference necessary to allow for legislative intrusion into intimate privacy is a doomed one. Either the Constitution means what it says about protecting individual freedom, or it does not. Either there are rights that no state may justly take from us, as the authors of the Constitution and of the Fourteenth Amendment believed, or rights are permissions which may be contracted or expanded to meet the needs of the collective. And the same time, of course, liberals who endorse strong judicial protection for privacy rights cannot continue to deny the importance of protecting economic liberty and private property rights. “[T]he categorical and inexplicable exclusion of so-called ‘economic rights’” from protection

²⁸⁷ As Glenn Harlan Reynolds has observed, “original understanding philosophy, conscientiously and rigorously applied, actually supports the decision in *Griswold*.” *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1085 (1990).

²⁸⁸ See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

under the due process of law requirement “unquestionably involves policymaking rather than neutral legal analysis.”²⁸⁹

CONCLUSION

The authors of the Fourteenth Amendment intended to protect a broad range of natural and common law rights against interference by states and to put an end to the states’ rights theory of the Constitution that had prevailed before the Civil War. The centerpiece of the Amendment’s protections was to have been the Privileges or Immunities Clause, although they also intended the Due Process Clause to provide strong “substantive” protection for individual rights. Sadly, the Privileges or Immunities Clause was deprived of its force in the *Slaughter-House Cases* when the Supreme Court embraced the very states’ rights conception of federalism and citizenship that the Amendment’s authors intended to abandon. In the years that followed, the Court did continue to protect individual rights under the Due Process Clause, but it was not until the Progressive era that lawyers and judges began to attack the Due Process Clause’s substantive dimension. It is this Progressive critique of substantive due process, and not the original intent of the framers, that modern conservatives embrace when they seek to overthrow substantive due process. Rightly understood, both the Privileges or Immunities Clause *and* the Due Process Clause provide “substantive” protection for individual rights against intrusions by the states.

²⁸⁹ *United States v. Carlton*, 512 U.S. 26, 41–42 (1994) (Scalia, J., concurring).