

**THE BRILLIANCE IN *SLAUGHTERHOUSE*:
A JUDICIALLY RESTRAINED AND ORIGINAL UNDERSTANDING OF
“PRIVILEGES OR IMMUNITIES”**

*Lawrence Lessig**

There is anger among many at the growing recognition that this conservative Supreme Court is marching, not resting. That little of the past—like precedent—will constrain it. And that the decisions of the preceding terms—overturning *Roe v. Wade*,¹ expanding the “right to bear arms,”² ending affirmative action,³ among other extraordinary decisions—are just the beginning of a long and cold jurisprudential winter.

Many on the Left have responded by proposing ambitious strategies for resisting the Court. There are calls for court packing,⁴ and for the impeachment of faithless justices.⁵ Two of the most prominent among

* Roy L. Furman Professor of Law and Leadership, Harvard Law School. I am grateful to Niko Bowie, Jud Campbell, Richard Fallon, Jack Goldsmith, Charles Lane, Sanford Levinson, William Novak and Mark Tushnet for comments on earlier drafts, and for Professor Earl Maltz’s essay about an earlier draft on *The Originalism Blog*.

¹ 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

² N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022).

³ Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

⁴ See, e.g., Lauren Booker, *Ocasio-Cortez, Warren Call for More Justices, Federal Action On Abortion: ‘This Is a Crisis of Our Democracy.’*, BOSTON GLOBE (June 26, 2022), <https://www.bostonglobe.com/2022/06/26/nation/ocasio-cortez-warren-call-more-justices-federal-action-abortion-this-is-crisis-our-democracy/> [<https://perma.cc/3XLG-SX79>] (discussing calls by legislators to expand the court); Christopher Cadelago, *Biden Urged To Take a Blowtorch to the Court After Roe Ruling*, POLITICO (June 24, 2022), <https://www.politico.com/news/2022/06/24/biden-supreme-court-roe-00042376> [<https://perma.cc/6FYW-29FD>] (discussing President Biden’s resistance to proposed reforms to the Supreme Court); David Daley, *Republicans Have Hijacked the US Supreme Court. It’s Time To Expand It*, GUARDIAN (June 27, 2022), <https://www.theguardian.com/commentisfree/2022/jun/27/us-supreme-court-abortion-roe-v-wade-justices-expansion> [<https://perma.cc/4QRL-AGDY>] (arguing for balancing the Supreme Court through expansion and reform measures).

⁵ See, e.g., Kathryn Rubino, *The Game To Impeach Justices Kavanaugh And Gorsuch Is Afoot*, ABOVE THE LAW (July 12, 2022), <https://abovethelaw.com/2022/07/the-game-to-impeach-justices-kavanaugh-and-gorsuch-is-afoot/> [<https://perma.cc/5HP5-2JW2>] (advocating for impeachment hearings of Supreme Court justices who lied under oath about *Roe*); Ewan Palmer, *Impeach Justice Clarence Thomas Petition Jumps 150K in Two Days*, NEWSWEEK (July 12, 2022), <https://www.newsweek.com/impeach-justice-clarence-thomas-petition-abortion-1720297>

younger American law professors have declared the “need is not to reclaim the Constitution, as many would have it, but instead to reclaim America from constitutionalism.”⁶

This response is a mistake.⁷ The right strategy to answer people who believe that they are doing right is not to try to convince them their principles are wrong. It is to show them that they are not following their principles. The answer to the growing originalist majority on the United States Supreme Court is not to attack originalism, but to show how incomplete and inconsistent this Court’s originalism has become.

That is my aim in this essay. Not because arguments change minds. Necessarily. But because they set the predicate for what would be a principled and appropriate response by Congress. It is time for Congress to reclaim the role that the framers of our second Constitution—the Civil War

[<https://perma.cc/LP8U-WDNC>] (discussing an online petition urging the impeachment of Justice Thomas should he fail to resign); Jake Johnson, “*It’s Not Enough To Tell People To Vote*”: Omar Calls To Investigate Justices Who Lied Under Oath”, SALON (June 27, 2022), https://www.salon.com/2022/06/27/its-not-enough-to-tell-people-to-vote-omar-calls-to-investigate-justices-lied-under-oath_partner/ [<https://perma.cc/E458-JA2W>] (discussing Representative Ilhan Omar’s call for the House to launch impeachment probes into Justice Thomas).

⁶ Ryan D. Doerfler and Samuel Moyn, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html> [<https://perma.cc/U3JE-TLF8>].

⁷ *But see*, Ruth Marcus, *Originalism Is Bunk. Liberal Lawyers Shouldn’t Fall for It*, WASHINGTON POST (Dec. 1, 2022), <https://www.washingtonpost.com/opinions/2022/12/01/originalism-liberal-lawyers-supreme-court-trap/> [<https://perma.cc/Q6TM-SWUE>] (arguing that liberal justices abiding by originalist methods risks entrenching originalism as the one true method of Constitutional interpretation). And with respect to my friends who have taken the opposite tack, see, for example, Reva Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism — and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (forthcoming 2023) (discussing originalism as a political practice with the long term goal of abolishing abortion rights), one need not disagree with the history (she offers) in order to rely upon the legal argument (I offer). Law is a practice of presumptive good faith; even if you act in bad faith, I am allowed to rely upon the opposite presumption. Or more formally, you waive the right to object to my relying upon your arguments in good faith when you act in bad faith. My sense is that more is to be gained from presuming good faith than by condemning the bad faith. *See, e.g.*, Brief of Professors of History and Law as Amici Curiae in Support of Respondents, Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707), at *1–4 (contending that a faithful account of the Fourteenth Amendment’s history is at odds with race neutrality in college admissions). Laurence Tribe offers a similarly gloomy account in *Deconstructing Dobbs*, N.Y. TIMES REV. OF BOOKS (Sept. 22, 2022), <https://www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/> [<https://perma.cc/ADK8-DZ74>] (arguing that the Supreme Court’s *Dobbs* decision failed to provide legal analysis as to why the Fourteenth Amendment does not protect abortion).

Amendments—intended for it. Because a principled originalism could not resist that claim, and that claim, more than anything else, would liberate rights in America from their current, narrow judicial hold.

I.

The modern conservative judicial movement was grounded in judicial restraint.⁸ The only sanction, conservatives insisted, for a court overruling a legislature was a clear commitment in the Constitution that was inconsistent with some law. Absent such a commitment, no court, within a democracy, could legitimately interfere with the laws of a democratic legislature. “The judge must stick close to the text and the history,” Robert Bork famously wrote, “and not construct new rights.”⁹

Originalism complemented this theory of restraint with a theory of interpretation. To know the commitments of the Constitution, a court must read its words within their framing context. Early originalists sought “the

⁸ See Robert Bork, *Neutral Principles and some First Amendment Problems*, 47 IND. L.J. 1 (1971) (advocating judges apply politically neutral principles and judicial restraint); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 364–66 (1977) (discussing the importance of original intent in constitutional interpretation); William H. Rehnquist, *The Notion of A Living Constitution*, 54 TEX. L. REV. 693, 695–98 (1976) (arguing that judicial review has antidemocratic and antimajoritarian facets); Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, Address at The Tanner Lectures on Human Values 79, 98 (March 8–9, 1995) (arguing that judges have no right to pursue broader social purposes or write new laws through their rulings); *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting); Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States, 1 PUB. PAPERS 1054–55 (Oct. 21, 1971) (describing President Richard Nixon as a judicial conservative and stating the belief that judges should not interpret the constitution to perpetuate their social or political views); Bernard Weinraub, *Reagan Says He'll Use Vacancies To Discourage Judicial Activism*, N.Y. TIMES, (Oct. 22, 1985), <https://www.nytimes.com/1985/10/22/world/reagan-says-he-ll-use-vacancies-to-discourage-judicial-activism.html> [<https://perma.cc/4KCD-Q9S4>] (reporting on President Reagan's promise to appoint federal judges who practice judicial restraint); Edwin Meese III, U.S. Att'y Gen., Speech Before the American Bar Association: The Great Debate (Jul. 9, 1985), <https://fedsoc.org/commentary/publications/the-great-debate-attorney-general-ed-meese-iii-july-9-1985> [<https://perma.cc/C4UE-FDWH>] (arguing that the role of the Supreme Court is to protect a limited constitution and adjudicated according to how that document was ratified by the nation). For a powerful account of the importance of race to constitutional conservatives' development, see Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021).

⁹ Bork, *supra* note 8, at 8.

intent” of the framers.¹⁰ Later originalists reformed that standard, focusing instead on the original public meaning of the words the framers used.¹¹ Either way, the theory of meaning operationalized the theory of restraint. As Charles Fried, Ronald Reagan’s second Solicitor General, put it, “[t]he concept of originalism speaks to the most basic legal question: by what authority do judges impose their views on the people, even to the point of striking down laws made by the people’s elected representatives?”¹² If you believe, as the most prominent judicial originalists believed, that history constrains (Fried did not¹³), originalism was activism’s remedy.¹⁴ As Justice Scalia put it: “[t]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law.”¹⁵ “Nonoriginalism,” he insisted, “plays precisely to this weakness”; originalism fights against it. And though Scalia conceded that such history was “difficult,”

the question to be decided is not whether the historically focused method is a perfect means of restraining aristocratic judicial Constitution-writing; but whether it is the best means available in an imperfect world.¹⁶

From this perspective, *Dobbs v. Jackson Women’s Health Organization* was an easy case.¹⁷ Was there any clear commitment in the words of the Constitution, at least as originally meant or understood, for disabling a state from regulating abortion? Of course there was not. The assertion that there

¹⁰ See *id.* at 17 (identifying the “specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules” as a source of constitutional rights). See generally Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. L. FAC. PUBL’NS & OTHER WORKS 8 (2011) (“Bork, Rehnquist, Berger, and Meese did not develop anything that approaches a full-blown constitutional theory, but their views suggested something like the theory we now call ‘original intentions originalism,’ the view that the original intentions of the Framers should guide constitutional interpretation.”); RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 2–5 (2021) (discussing the intellectual origins of modern originalism).

¹¹ See generally BARNETT & BERNICK, *supra* note 10, at 4–5; Solum, *supra* note 10, at 15–21.

¹² CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRST HAND ACCOUNT* 62 (1991).

¹³ *Id.* at 65.

¹⁴ Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269–70 (2017) (noting that the two commitments of originalists are the “Fixation Thesis,” which imbues words with a fixed meaning, and the “Constraint Principle,” which restricts constitutional practice and interpretation).

¹⁵ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

¹⁶ *McDonald v. City of Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring).

¹⁷ 142 S. Ct. 2228 (2022).

was, from the view of originalism, was the simple usurpation of democratic authority by a judiciary.

Yet the difficulty in this confident conclusion—for originalism at least—is that its implications are far more radical than any modern Supreme Court has ever embraced. Since the Civil War, the Court has never limited the liberty protected by the Constitution to the precise scope of the rights articulated in its text. Instead, for good and for ill, judges have consistently defended a libertarian core—a space where government may not reach—within our constitutional tradition, grounded not in its text, but in the ideals, or Holmesian “felt necessities,”¹⁸ of the age. The real significance of *Dobbs*, penned by the conservative Justice Samuel Alito, is its aspiration to resolve—finally, the majority apparently believes—how this libertarian core within our tradition is to be defined.

Until *Dobbs*, the dominant method for limning this libertarian core had been inspired by another conservative justice, sixty years before. In a case involving the regulation of contraceptives, Justice John Marshall Harlan II outlined a method for determining this core.¹⁹ Following that case, Justice Harlan’s method increasingly guided the Court with practiced discipline and significant results (same-sex marriage most dramatically).

Harlan’s technique moved in two steps. First, he asked whether the liberty that was being infringed was “fundamental.”²⁰ And second, if it was, he asked whether the state had a sufficient interest in infringing it.²¹

To answer the first question, Harlan looked to the traditions standing behind our Constitution—“the traditions from which it developed as well as the traditions from which it broke.”²² But that “tradition,” he insisted, was “a living thing.”²³ The question was not just what Madison would have thought fundamental. It was instead what was fundamental at the time a case was decided. Tradition helped us see what was fundamental, but it did not determine it. Instead, there was an inherently presentist bias to the Harlan formula—which meant that as society changed, what seemed “fundamental” would change as well. Here again, Holmes “felt necessities”

¹⁸ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

¹⁹ *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan J., dissenting).

²⁰ *See id.* at 539–45.

²¹ *See id.*

²² *Id.* at 542.

²³ *Id.*

are present, framing how we understand tradition, if only because we can't conceive of it differently.

That was step one. And if the liberty so identified was deemed fundamental (step one), then the burden of defending the regulation shifted to the state. Ordinarily, when the state invades liberty, it need do nothing more than insist it is regulating for the public good. But on Harlan's account, when the liberty invaded is "fundamental," the burden on the state is much more significant. The question, as Harlan had crafted it, was not just whether the state had any reason for regulating liberty, but whether the state had a *good* reason. Or in his words, a "closer scrutiny and stronger justification" was required.²⁴ Indeed, as he would later specify, once the liberty had been deemed "fundamental," the state's justification would be subject to "strict scrutiny."²⁵

It is here that the real work gets done. Because if a justification for invading a fundamental liberty is contested, then almost by definition, it cannot be deemed compelling—at least not by a court committed to standing apart from that contest. The mere fact that some believe the reason to be important is not enough. Its importance must be conceded generally. Contestation would thus yield immunity from regulation, at least when the liberty is fundamental. Social division, at least for fundamental liberties, would thus increase the scope of the libertarian core.

In declaring Connecticut's law banning contraception unconstitutional, the Supreme Court did not embrace Harlan's test.²⁶ Yet in the dozen years between that decision and *Roe*, Harlan's method increasingly came to define the field. As the Joint Opinion in *Planned Parenthood v. Casey* would describe it, the Court had committed itself to a process of "reasoned judgment" in determining what rights, beyond those expressed in the Constitution's text, would be judged to be within the Constitution's libertarian core.²⁷

It was Harlan's method that Justice Harry Blackmun implicitly tracks in his opinion in *Roe v. Wade*.²⁸ Justice Potter Stewart tracks it expressly.²⁹ At

²⁴ *Id.* at 554.

²⁵ *Id.* at 548.

²⁶ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a right to privacy in the Bill of Rights).

²⁷ 505 U.S. 833, 834 (1992).

²⁸ 410 U.S. 113, 155 (1973).

²⁹ *Id.* at 168–69 (Stewart, J., concurring) (describing Justice Harlan's "thorough and thoughtful opinion").

the time of *Roe*, Americans proudly contrasted our “freedom” with “totalitarianism.” China became a target of our boasts. That nation, it was said, had begun to use abortion as a method of family planning. Women, it was reported in Congress, were being forced to abort a fetus if they already had one child. Many in Congress were outraged at the idea that in the name of *any* collective goal, the state would invade the individual liberty of a woman to decide whether or not to have a child. If anywhere, this was a place where one should have a “right to be left alone.”³⁰ In any free society, *this* liberty should be deemed fundamental.³¹

In the context of that debate, the first question in Harlan’s inquiry answered itself. As Blackmun wrote, was the liberty to choose “*whether* or not” to carry a child to term fundamental?³² Of course it was. We were not China. We left such decisions to the women alone.³³

That answer then shifted the inquiry to the second of Harlan’s questions: was there a compelling interest in regulating that liberty?³⁴

The only interest that Texas defended was the interest in life. Texas argued that at conception, the fetus was a “person.”³⁵ Texas, therefore, had the power, it insisted, to protect the life of that “person” by banning its abortion.³⁶

The Court would agree that Texas indeed had a compelling interest in protecting “potential life.”³⁷ But only when it became uncontested that life was indeed potential. That line, Blackmun insisted, was at viability—when the fetus would be viable outside the woman’s womb.³⁸ But before viability, the question was deeply contested. As he wrote,

³⁰ See Samuel D. Warren II and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (arguing that the common law right to life grew to include a right to privacy).

³¹ See e.g., *id.*; Judith Banister, *China’s Changing Population* 147–152 (Stanford, CA: Stanford University Press, 1987); William Lavelly & Ronald Freedman, *The Origins of the Chinese Fertility Decline*, 27.3 *Demography* 357, 357, 362–365 (1990); Judith Banister and Christina Wu Harbaugh, U.S. Census Bureau, U.S. Dep’t of Commerce, *China’s Family Planning Program: Inputs and Outcomes* 9–10 (1994).

³² 410 U.S. at 153 (emphasis added).

³³ Weirdly though, Blackmun’s actual characterization is that the decision is left to the woman and her “attending physician.” *Id.* at 163–64.

³⁴ *Id.* at 154–56.

³⁵ *Id.* at 156.

³⁶ *Id.*

³⁷ *Id.* at 163.

³⁸ *Id.* at 163–64.

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.³⁹

Thus, under Harlan's method of "reasoned judgment," having concluded the liberty was fundamental, the Court had no choice but to protect that liberty against an interest that was, at best, a contested justification for restricting it. Thus was the "right to abortion" born in America.

Yet from the start, the conservatives focused on judicial restraint were skeptical of the very idea of "reasoned judgment." Such "reason," they feared, would not actually constrain judicial discretion; such "reason," they feared, would be but a cover for judicial activism. Each step in Blackmun's argument may be understandable. But in an age of legal realism, when most had forgotten the power of Holmes' "felt necessities," judicial restraint conservatives feared that no particular conclusion would follow as a matter of logic from any of these "reasoned" steps.

Thus, rejecting "reasoned judgment," these judges would eventually craft a far less flexible rule. First fully articulated by Chief Justice Rehnquist in *Washington State v. Glucksberg*,⁴⁰ this was the rule that *Dobbs* deployed to overturn *Roe*:⁴¹ rather than "reasoned judgment," any limit to the state's power would be drawn at rights "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."⁴²

Glucksberg did not reject the idea of a libertarian core within our constitutional tradition. Instead, it narrowed that core to the *Glucksberg* standard. Legislatures were thus free to ban abortion, because the right to abortion was neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty."⁴³

As an initial matter, what is astonishing about the *Dobbs* rule is the suggestion that such a method would actually produce *any* libertarian core at all. Many Americans embrace a wholly ignorant view of our regulatory past,

³⁹ *Id.* at 159.

⁴⁰ *Washington v. Glucksberg*, 521 U.S. 716, 720–22, 727 (1997).

⁴¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2246–47, 2253–54, 2259–60, 2282–83 (2022).

⁴² 521 U.S. at 721.

⁴³ 142 S. Ct. at 2242.

imagining our founders as deeply committed libertarians, and America as an originally unregulated state. As the *New Republic* recently put it,

From the beginning of the republic until the Great Depression, America had a comparatively unregulated free-market economy, in the mold of the principles laid down by Adam Smith.⁴⁴

On this view, it might make sense to peer carefully into our past to discover rights “deeply rooted in this Nation’s history and tradition.” Who knows what the historians might uncover!

Yet this description of our past is just fiction. As many have noted, William Novak most prominently in recent years, ours was not a libertarian tradition. Our founding societies were instead very “well-regulated.” Rights were not trumps, blocking government from acting. Rights were good arguments, though subservient to the public welfare.⁴⁵ As he quotes an 1853 treatise,

Liberty is a relative term. Some persons regard it as a right in every individual to act in accordance with his own judgment. Such liberty is unknown to, and cannot be found in connection with or as a result of government, or of the law of society.⁴⁶

On this more historically accurate conception of rights, there would be no right that would trump an exercise of public-regarding legislation. No doubt, as Novak catalogs, there were judges who tried to craft such rights. But at the founding through the Civil War, those judges were a minority.

⁴⁴ Michael Tomasky, *Yes, the Inflation Reduction Act Is A Big Effing Deal*, *THE NEW REPUBLIC* (Aug. 8, 2022), <https://newrepublic.com/article/167332/senate-passes-inflation-reduction-act> [https://perma.cc/W2X4-L2S8].

⁴⁵ WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1 (Thomas A. Green & Hendrik Hartog eds., 1996). Novak continues his account of the evolving conception of regulation in WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* 1 (2022). Others have made the same point. See MAX EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* 43–46 (2003) (summarizing disagreements between Federalists and Anti-Federalists about the role of the central government in securing public welfare, including whether taxation to support a standing army impinges on individual liberty); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 24, 285–90, 294–99, 301 (2012) (arguing that the administrative landscape of nineteenth- and twentieth-century United States was far more expansive than most people believe); Ariel Ron and Gautham Rao, *Introduction: Taking Stock of the State in Nineteenth-Century America*, 38 *J. EARLY REPUBLIC* 61–63 (2018) (summarizing Novak’s thesis that the early American state was not “weak” and prioritized administrative action to build the country).

⁴⁶ NOVAK, *supra* note 45, at 11 (quoting CHARLES B. GOODRICH, *THE SCIENCE OF GOVERNMENT* 219 (1853)).

The dominant view within the American judiciary was not libertarian. It was instead that rights were limited by public regarding legislation.⁴⁷

Thus, on this view, there would be no libertarian core “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” On this view, the *Dobbs* rule would never constrain the acts of a democratic legislature. On this view, beyond the text of the constitution, we are always at the mercy of legislative whim. If not in theory, then in practice, our constitution would constrain only where the substantive text was read as a constraint.

This is more than a quibble about ancient history—or at least it should be for the principled originalist. Because the core claim within modern constitutional jurisprudence is that rights are trumps, and that, at the very least, to invoke a right is to impose upon the government a significant burden of justification. Modern jurisprudence makes courts the defenders of rights against errant or unthinking legislatures.

Yet what the judicial conservative should ask is this: when—and more importantly, *how*?—was that change made to our constitutional tradition? What made rights trumps? As Jud Campbell has described, at the founding, certainly natural rights were not trumps, even if positive rights began to take on that flavor.⁴⁸ So if “rights” were not conceived as trumps by our framers—of the Constitution certainly, and likely even by the framers of the Civil War Amendments—then how does an originalist justify striking down laws because they invaded certain protected rights? This is not to ask whether *Marbury v. Madison* was correct. The point is narrower: if unenumerated “rights” were originally conceived as interests to be balanced by a legislature, how does an originalist justify the Court overriding such a legislative balance? Or more precisely, how does an originalist justify

⁴⁷ See generally *id.*

⁴⁸ See, e.g., Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL’Y 569, 579 (2017) (“In short, with respect to *positive* rights, enumeration typically was a *sufficient* condition for judicial enforcement, but whether it was also a *necessary* condition is more in doubt. For rights that are not customarily recognized as fundamental, enumeration was clearly necessary.”); Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT 85, 98–99 (2017) (“In contrast to retained natural rights, some positive rights imposed firm obligations and constraints on governmental authority These rights operated more in the mode of ‘rights as trumps’ that is familiar to modern lawyers.”); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 253 (2017) (“Natural rights thus powerfully shaped the way that the Founders thought about the purposes and structure of government, but they were not legal ‘trumps’ in the way that we often talk about rights today.”).

reconceptualizing the nature of a right, in order to expand the power of the judiciary? Or more pointedly still: if originalism is a theory in the service of judicial restraint, how can it justify expanding the power of the judiciary over the power of that legislature at all?⁴⁹

Put that question to one side; an even more pressing one stands next to it. Whether there is no libertarian core under *Dobbs*, or only a sliver, the most important practical implication of *Dobbs* is this: whatever core there is, it is fixed. Or more precisely, whatever core there is, it was fixed by whatever liberty happened to be protected in 1868 or before. States may increase the scope of the liberty protected to the citizens of that state. But on this understanding, at the national level, our rights are locked in. They cannot grow or evolve or be modified except either indirectly, through, for example, the Commerce Power, or directly, through a constitutional amendment.⁵⁰

This is the implication that we should draw into focus. Because if true, it makes the framers of our Constitution look like amateurs. Maybe not the framers of the original constitution, which self-consciously left the protection of rights to the states, but certainly the framers of our second Constitution, forged in the amendments after the Civil War. If *Dobbs* is right, then those framers created a constitutional system that froze the rights of United States citizens as they were in 1868, and that demanded that any direct change in those rights be effected through a Constitutional amendment alone.

If this is true, then ours is indeed an embarrassing constitution. Because obviously, over time, the nature of the rights that need defending in any

⁴⁹ A similar notion framed more conceptually comes from my colleague Adrian Vermeule's conception of "common good constitutionalism." See ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 1 (2022) ("I argue for a view I will call common good constitutionalism. On this view, the classical tradition should be explicitly recovered and adapted as the matrix within which American judges read our Constitution, our statutes, and our administrative law."). Vermeule's administrative law framing of rights is close to Novak's description of 19th century practice. Both approaches mark the modern Court's activism as far from any historical precedent.

⁵⁰ This is often how originalists conceive of the consequence of the "fixation" a constitution is meant to effect. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269–70 (2017). But the only required "fixation" of originalism is to meaning, not application. As I've argued elsewhere, fixed applications across different context can plainly change original meaning. See LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 53–56, 60–62 (2019) (comparing the work of judges to that of interpreters and concluding that while interpretation begins with reading the text of the law or the Constitutional provision at issue, it also involves carrying forward the law's "meaning" to the contemporary context).

democratic society must evolve. What makes sense in a world without steam engines may make no sense in a world with the Internet. A democracy needs an efficient way to keep rights up to date. And while our federal constitution certainly affords a way to grant rights *indirectly*—a law passed according to the Commerce Clause, for example, can legitimately secure federal rights related to that law—the *Dobbs* rule makes it seem as if there is no way to grant federal rights *directly*, except again by amending the Constitution.

Is this the rule our Constitution entrenches? Is *Dobbs* *really* the limit to any libertarian core that we, as citizens of the United States, might claim?

II.

Though the Due Process Clause (“DPC”) has been the libertarian’s most reliable friend, there is growing attention among scholars and judges to a different original source for the protection against unwanted regulation: the Fourteenth Amendment’s Privileges or Immunities Clause (“POIC”). The original meaning of that clause, these writers insist, crafts a broad range of protected liberty, clearly grounded in the purposes of the ratifiers of that higher law. That should be the source, these writers argue, of any limit on the authority of democratic legislatures.

Justice Clarence Thomas has been the most prominent defender of this constitutional reset. In *McDonald v. City of Chicago*, Thomas concurred in a holding that bound the states to the limits of the Second Amendment,⁵¹ but based his agreement on the POIC.⁵² It was not because the Due Process Clause protected the right to bear arms indirectly, Thomas insisted. It was instead because the “Privileges or Immunities Clause” protected that right directly.

To reach this conclusion, however, Thomas had to reject the modern understanding of the two critical Supreme Court opinions interpreting the POIC originally—the *Slaughterhouse Cases*,⁵³ and *United States v. Cruikshank*.⁵⁴ This is a strange move for an originalist to make. Ordinarily, courts, and especially originalist courts, look to the contemporaneous interpretation of a constitutional provision as perhaps the best reading of its original meaning.

⁵¹ *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010) (Thomas, J., concurring in part and concurring in the judgment).

⁵² *Id.* at 805–06.

⁵³ *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

⁵⁴ *United States v. Cruikshank*, 92 U.S. 542 (1876).

That is the ordinary practice with the original Constitution. Why not with these original cases too?

Thomas' disdain for these early cases is likely shared by every Justice on the Supreme Court today and by legal academics as well. Though not all the Justices have opined on the question, I would predict that every single Justice believes *Slaughterhouse* and *Cruikshank* to have been wrongly decided, but that most (maybe all but Thomas) believe there is no real reason to correct those mistakes. What's to be gained, those not committed to originalism insist, from trying to mine the meaning of the "privileges or immunities clause" rather than simply applying the developed doctrine of substantive due process? What are the "privileges or immunities" that a federal court is to defend? Where are they listed? The most cited opinion by a Supreme Court Justice that attempted a definition did so by listing a bunch of rights but prefaced the list with "What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate."⁵⁵ Seriously?! If only Justice Washington had not been so lazy!

Yet all these Justices—and the vast majority of lawyers and the legal academy—are missing a critical point about these original sources. Once that point is recognized, not only does the POIC become one of the most important clauses in the Fourteenth Amendment, but it also becomes absolutely clear that the modern conservative Supreme Court has radically misapplied the powers of Congress under this critical amendment. On this reading, the *Slaughterhouse Cases* are not wrong. The *Slaughterhouse Cases* are strategically, meaning institutionally, brilliant. And though *Cruikshank* is a more complicated story beyond the scope of this essay, with respect to the POIC, it only confirms the critical point made in *Slaughterhouse*. There is a libertarian core within our constitutional tradition. And properly interpreted, that core is far more vital than the twig scribed in *Dobbs*.

To understand the significance of this missing piece, we must first understand something central about the legal culture into which the Fourteenth Amendment was born. This aspect of that culture has disappeared from our own, which then forces us to decide how best to translate their legal structures into our radically different legal context.

⁵⁵ Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

A. THE WEIRD WORLD (JURISPRUDENTIALLY) OF THE
RECONSTRUCTION FOUNDERS

This is an essay grounded in originalism—in the original meaning of the words that the framers of the Fourteenth Amendment used. It is not, however, an essay of one-step originalism. The question in this essay is not just what they meant then—against the background of their view of the world and law within that world. The originalism in this essay is about how their meaning is best effected today.

This second step to the question of originalism is strangely absent from most originalist scholarship today. Most originalists today believe their job is simply to determine how words were used in an original context. Most write as if it is obvious that that original use should simply be transplanted into a modern context. Justice Antonin Scalia was often the quintessential one-step originalist. In his famous essay, *Originalism: The Lesser Evil*,⁵⁶ Scalia reported first that the framers of the Eighth Amendment would not have found flogging to be a “cruel” or “unusual” punishment. He then took it for granted that it followed from this originalist finding that fidelity required the same conclusion today—namely, that a law that required “flogging” not be found to violate the Eighth Amendment. Yet he acknowledged that he would be unlikely, as a judge, to apply that interpretation in an actual case. That made him, as he said, a “faint-hearted originalist.” But there was no doubt in his mind that the obvious thing for an originalist to do was to determine how a text would have been applied in an original context and then to apply that text in the same way today.

Yet from the beginning of modern scholarship about originalism, the originalist flaw in one-step originalism has been noted, and theorized, and then, apparently forgotten.⁵⁷ I don’t mean the question, “were the framers originalists?” I mean the more fundamental question, *how* does one preserve their meaning across time? From this perspective, the issue is not *whether* there is “fixation,” as originalist scholars focused on the “fixation thesis” put it. The question is *how* fixation is effected, consistent with a commitment to interpretive fidelity.

⁵⁶ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989).

⁵⁷ The best original work noting this need is Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 218-20 (1980) (describing interpreter’s need to “translate”).

The Fourteenth Amendment is a perfect text to evince the errors in one-step originalism. Because baked into the context of that framing text are ontological ideas—ideas about the very nature of law—that we now have simply rejected. By “we,” I mean originalists as well as non-originalists—and Scalia, especially. The texts they wrote presumed a jurisprudential world that is no more. And the challenge of interpretive fidelity is how to read their words in our world, preserving, as much as we can, their normative commitments.

Specifically, there is now a growing attention among scholars to the jurisprudential world their texts presumed—and importantly, to the way those framers thought about the sources of law.⁵⁸ Those sources, they believed, were not purely positivist. Indeed, the framers of the Fourteenth Amendment didn’t *read* fundamental law. They *reasoned* to fundamental law, through an application of social compact theory that had been central to American legal thought since the Revolution.

That theory was central because necessity had just mothered it. When the revolutionaries realized they needed a justification for stepping away from their founding nation, Britain, they recognized they needed a conceptual scheme that would give them that justification. Social compact theory was that conceptual scheme. “We take these truths to be self-evident,” the Declaration declares, and from those self-evident truths, a great deal of law got crafted. No book better describes this practice at the origin of the Republic than Mark Somos’ *American States of Nature*. But the practice is described by many, throughout the history of the American republic.

Such law is described in a recent essay by Will Baude, Jud Campbell, and Steve Sachs as “general law.”⁵⁹ Yet even those simple words are likely to be misunderstood by lawyers today. The term sweeps within it a wide range of practice. But the important part for our purposes might be more understandable if we called it “derived law,” as in derived from principles

⁵⁸ See, e.g., William Baude, Jud Campbell & Steve Sachs, *General Law and the Fourteenth Amendment* (Working Paper No. 2154, 2023) (describing “general law” as a distinct form of non-positivist law); MARK SOMOS, *AMERICAN STATES OF NATURE: THE ORIGINS OF INDEPENDENCE, 1761-1775* (2019) (describing state of nature theorizing in early American jurisprudence). The point has been made repeatedly throughout our history. See, e.g., Howard Jay Graham, *Our “Declaratory” Fourteenth Amendment*, 7 STAN. L. REV. 3, 4-5 (1954) (examining how the inclusion of the Fourteenth Amendment was initially regarded by its framers and ratifiers as “declaratory of the previously existing law and Constitution[.]” law grounded in natural, rather than positive sources).

⁵⁹ See Baude et al., *supra* note 58.

taken to be taken for granted—“truths” taken to be “self-evident,” fundamental, social compact principles about the presumed equality of citizens within a republic, and the kind of obligations such presumptively equal citizens could be thought to have assumed.

Baude, Campbell, and Sachs insist that the framers of the Fourteenth Amendment conceived of the substance of the “privileges or immunities clause” through such “general law,” or again, as I’ll call it, “derived law.” They conceived, that is, of the substance of the “privileges or immunities clause” as the sort of thing well-trained or well-practiced lawyers could reason to. That’s why Justice Washington thought it “tedious” to imagine enumerating privileges and immunities. If you have the capacity to reason to the conclusion, there’s no need to list all possible conclusions to that reasoning.

This point is fundamental to the argument that follows. Let me unpack it with an analogy. If you remember pre-algebra, you may recall the Fibonacci sequence—a sequence of numbers in which each number is the sum of the two preceding numbers, starting from 0 and 1. Thus the sequence begins 0, 1, 1, 2, 3, 5, and so forth.

Imagine someone had the ability to reason to a particular number in that sequence. “What’s the 4th number in the sequence?” “2.” “What’s the 20th?” “4181.” Imagine further that this person can do this because she has internalized the recursive function that yields that number.

Now imagine you asked this savant to write the sequence down. It would not be surprising if she responded, as Justice Washington did to the suggestion he list all “privileges and immunities,” that such a task would “perhaps be more tedious than difficult.” More “tedious” because for her, it is a relatively simple problem to name any particular number without being forced to list all the numbers that come before it. She can “see” the 100th number; she doesn’t have to run through a list to get to it.

Something analogous was true of lawyers within the classical legal tradition. As Adrian Vermeule has most recently described it, such lawyers had a capacity to reason to legal conclusions from general principles, applied to particular circumstances. This reasoning, as he names it, is the process of making “determinations.” As Vermeule describes it, determination is

the process of giving content to a general principle drawn from a higher source of law, making it concrete in application to particular local circumstances or problems.⁶⁰

This is a process, learned and tested. Some are better at it than others. Great practitioners become better known.

Sociologically, we might imagine that similar sorts, similarly and sufficiently trained, could make such “determinations” consistently. Whether they do so consistently or not (and importantly, in what legal contexts can they do so⁶¹) is not important for our purposes. What is important is that they are engaged in an enterprise where they believe that their determinations will be, in this sense, consistent and that the legal culture is filled with people who also believe so.

It is this legal culture that makes “general law” possible. What makes that culture possible is a topic beyond the scope of this essay. For our purposes, I will assume such a culture existed, that it did indeed believe, as Baude, Campbell and Sachs insist, that the substance of the POIC was so “derived” or “determined,” and that the only purpose of the Fourteenth Amendment was to enable federal courts to enforce such “privileges or immunities” when they were “abridged.” Or again, as they put it,

Crucially, the drafters did not have to create any rights against state governments. Those rights already existed. The problem, rather, was the insufficient enforcement of those rights in practice. On the general-law view, Sections One and Five of the Fourteenth Amendment were principally forum-shifting provisions, substituting federal-level rights enforcement for deficient state-level rights enforcement.⁶²

The substance of this law, Baude, Campbell, and Sachs argue, was found, having been formed, through reason, elsewhere. The purpose of the Fourteenth Amendment was to add the federal government (courts and Congress both) to the arsenal devoted to protecting these found rights.

⁶⁰ ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 21 (2022).

⁶¹ See LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 225–26 (2019) (discussing the rise of West Publishing which put pressure on the presumption of the consistency within the common law).

⁶² Baude et. al, *supra* note 58, at 23.

B. THE SUBSTANCE OF THESE FOUND RIGHTS: WHAT PRIVILEGES DID THEY ACTUALLY SECURE?

To answer that question, I begin with the POIC—and specifically, with a puzzling piece (for us, today) in the history of that clause.

1. *Missing Pieces*

Eight years ago, a student note in the Harvard Law Review offered a contribution to the history of antebellum American law. The world can be forgiven for overlooking the contribution of a student note, at least when it is not yet clear that its author would become a tenured professor at Harvard just six years later. But the significance of the Note is unavoidable today, if only it were more generally understood.

In 2015, Niko Bowie argued that we misunderstand what the framers of the “privileges or immunity clause” meant because we read that clause with a modern, judge-centric, crystal ball-like (think judges peering into a crystal ball to discover rights) prejudice built-in.⁶³ For us, constitutional rights are the sort of things that courts divine. We expect them to look to vague and mysterious texts, and report back to us what the substance of the rights built into those texts is.⁶⁴ This is constitutional law via Ouija board, with a majority of five finding the “unalienable” rights that the Constitution will be read to defend.

Yet the framers of the POIC, Bowie argues, had a very different conception of “privileges or immunities.” For them, the content of “privileges or immunities” was also *legislatively*, not just judicially, determined. As Bowie put it, in “the eighteenth and nineteenth centuries, privileges and immunities were widely understood as the products of legislation, to be defined by courts and legislatures.”⁶⁵ For them, it was within the power of legislatures to pass laws to determine the content of the things called “privileges or immunities.” They didn’t trust unelected judges to make that determination, or at least, they didn’t trust them alone. Instead, the constant

⁶³ Niko Bowie, Note, *Congress’s Power to Define the Privileges & Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1207–08 (2015) (arguing instead that in the eighteenth and nineteenth centuries, privileges and immunities were understood to be defined by courts and legislatures).

⁶⁴ This is the clear sense suggested (critically) by William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 52 (2018).

⁶⁵ Bowie, *supra* note 63, at 1207.

backstop to their work was the actions of a legislature. And the only effective check on abuse, the framers insisted, was democratic, not judicial.⁶⁶

In the context of the Fourteenth Amendment, what that meant is that the substance of the “privileges or immunities of citizens of the United States” could be determined, in part at least, by the Congress of the United States, and not just by the judges of the United States Supreme Court. And to make that power clear, the framers of the Fourteenth Amendment expressly gave Congress, in Section 5, the power “to enforce, by appropriate legislation, the provisions of this article.”⁶⁷

On Bowie’s understanding, the most important example of such congressional determining was the Civil Rights Act of 1866. 1866, of course, is two years before the ratification of the Fourteenth Amendment. But in the view of some, doubts about the constitutionality of the Civil Rights Act of 1866, enacted under the authority of fundamental law, and the Thirteenth Amendment, led Congress to propose the Fourteenth Amendment. And shortly after the Fourteenth Amendment was ratified, Congress reenacted the Civil Rights Act of 1866 to ensure its constitutionality. If the Fourteenth Amendment can be said to have authorized anything, it authorized the Civil Rights Act of (now) 1870. (And to make this point clear, I will refer to it as the Civil Rights Act of 1870.)⁶⁸

⁶⁶ For the most powerful recent account undermining fully the idea that the framers imagined judges fixing democracy, see JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 15 (2018) (finding that examinations of the judiciary’s decisions “have often presupposed a false affinity between constitutional worlds past and present”).

⁶⁷ For a powerful account of the framing understanding of Section 5, see James W. Fox, Jr., *Re-Readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 67 (2002) (finding that the “historical background of the framing and the early application of the Fourteenth Amendment reveal an intimate and arguably essential connection between the proper interpretation of the Privileges or Immunities Clause and congressional enforcement powers under Section Five[.]”).

⁶⁸ On the conventional account, the Civil Rights Act of 1866 was authorized in the eyes of most by Section 2 of the Thirteenth Amendment. Skepticism about that position, however, led Congress to propose the Fourteenth Amendment, with a clearer “privileges or immunities” hook for that critical legislation. In my view, Kurt Lash has effectively rebutted this understanding of the relationship between the 1866 law and the Fourteenth Amendment. As I describe more below, on his view, the 1866 law was determining the scope of “due process,” not “privileges or immunities.” Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1389–90 (2018). Though I believe Lash’s view will eventually prevail, it is currently a minority view. I, therefore, frame the argument of this essay in the alternative—either you view the 1866 act as speaking to privileges or immunities or to due process; either way, the same conclusion will follow.

To modern readers, however, there is only one clause in the Fourteenth Amendment that might have provided a grant of power to support the congressional determination that was the Civil Rights Act of 1870—the POIC. On the modern view, Section 5 does not give Congress that power. As the modern Court has insisted, Section 5 gives Congress the power “to enforce . . . the provisions of” the Fourteenth Amendment. “To enforce” cannot mean “to create.”⁶⁹ And likewise, it cannot be Sections 2-4, which are powerful and interesting, but unrelated to the Civil Rights Act of 1866. Instead, if the amendment is providing any power to enact the Civil Rights Act of 1870, it must be in Section 1, the “privileges or immunities” clause, on the understanding, as Bowie advances it, that Congress shares with the courts the ability to determine the privileges or immunities of United States citizens.

And why wouldn’t they? If indeed privileges or immunities were general law, and if general law was the sort of thing that well-trained lawyers could determine, why couldn’t Congress, like the courts, make that determination? If Bowie is right that legislatures during the antebellum period, in fact, did, then it seems clear that the language of the Fourteenth Amendment read in context would have contemplated that they would continue to have that power still.

Yet critically, this power didn’t mean that either Congress or the courts could recognize just anything as a “privilege or immunity.” I’m not a Fibonacci savant, but if you said that the 100th number in a Fibonacci sequence was 6, I’d know you were wrong. Likewise, while there may be hard cases in determining the privileges or immunities of United States citizens, there are easily wrong cases as well. While Justice Harlan was certainly right that the privileges protected by the Civil Rights Act of 1875 were not “social rights,” *if* they were, as the majority of the Court in the *Civil Rights Cases* presumed, then they plainly (on the understanding of the time, and as Justice Harlan conceded) would not have been among the “privileges or immunities” of citizens of the United States. Put differently, as Bowie describes it, “Congress does not have plenary power to define the substantive

⁶⁹ Another student note, predating Bowie’s by 16 years, finds in *McCulloch* the inspiration for reading Section 5 more broadly. That burden is less necessary if Congress’ role in defining the scope of privileges or immunities is accepted. See Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment*, 109 YALE L.J. 115, 154 (1999) (noting that the Fourteenth Amendment granted Congress the discretion to determine the civil liberties “worthy of national protection.”).

scope of the Fourteenth Amendment.”⁷⁰ It only has the power to *determine*, not to decide. Following the Fibonacci metaphor, it has the power to determine what the 50th number in the sequence *is*, not what the 50th number in the sequence *should be*.

Bowie understood he was making an important contribution to a historical debate. I don’t think he realized just how important his insight was. Because when married with the scholarship about the legal culture at the framing of the Fourteenth Amendment, his understanding shows why the Court’s initial interpretation of the POIC—in the *Slaughterhouse Cases*—was so wise. More importantly, his understanding also shows why the Court’s modern interpretation of the POIC so fundamentally betrays the commitment of the framers—and the commitment of at least the originalists committed to judicial restraint. Bowie’s understanding shows us—at least with a little work from legal theory—just why it is indefensible, especially for originalists, that the Supreme Court insists that it is it, and it alone, that gets to tell America what the “privileges or immunities” of American citizens are.

Yet before we consider how Bowie’s point helps explain *Slaughterhouse*, we must first consider the most important, in my view, alternative account of the POIC. On its face, this account seems to obviate the interpretive struggles that Bowie’s account invites. It certainly makes unnecessary the strange (to modern ears) power that Bowie ascribes to Congress. But in the end, this alternative too evinces the strong role of Congress in determining the scope of privileges protected under the Fourteenth Amendment. Indeed, this alternative returns us to the constitutional source for the modern libertarian core—the Due Process Clause of the Fourteenth Amendment.

2. *The Lashian Alternative*

The most powerful dissent to the view that the POIC protects anything beyond a determinant set of rights expressed in the original constitution was offered fully a decade ago by Professor Kurt Lash. In his *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship*, Lash describes a clear and determinate meaning for the POIC, one that does not admit of

⁷⁰ Bowie, *supra* note 63, at 1223.

any power in Congress to directly craft new rights beyond those expressed in the constitutional text.⁷¹

Lash frames his account around a powerful articulation of the views of the architect of Section 1 of the Fourteenth Amendment, Congressman John Bingham. Bingham, Lash argues, crafted Section 1 of the Fourteenth Amendment to secure its passage in a Congress where radicals were not the majority. Though many of the Republicans in Congress in 1866 were radical, no law could achieve the supermajority that both a constitutional amendment and presidential veto override required without respecting the views of Republican moderates.

Bingham's draft did this, Lash argues, by distinguishing clearly (in the language of the times) between the "privileges and immunities" spoken of in Article IV—"Privileges and Immunities of Citizens in the several States"—and the "privileges or immunities" spoken of in the Fourteenth Amendment. While the former were properly described by Justice Washington ("those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states"⁷²), the latter had nothing to do with Justice Washington's account. Instead, the "privileges or immunities" that the Fourteenth Amendment was speaking of were those the Constitution "expressly" identified, but which the original constitution had not made enforceable against the states. Thus, for example, the Fourth Amendment constrained Congress. But as *Barron v. Baltimore*⁷³ had held, it did not constrain the states. The purpose of the POIC, Lash argues Bingham insisted, was to assure that Congress could assure that that privilege, and every other privilege "expressly" articulated in the Constitution, could be enforced against the states.⁷⁴

The difficulty in Lash's account, on the conventional understanding, is the Civil Rights Act of 1866, reenacted after the Fourteenth Amendment in 1870. If the only "privileges or immunities" that Congress has the power to protect under the Fourteenth Amendment are those expressly identified in

⁷¹ KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014).

⁷² *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

⁷³ 32 U.S. (7 Pet.) 243, 247–48 (1833) (“[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.”).

⁷⁴ LASH, *supra* note 71, at 104.

the Constitution, how did Congress get the power to protect the freedom to contract or to sue or be sued in court? Nothing in the express terms of the Bill of Rights, or anything else in the original constitution, purports to protect those state-regulated rights. And it is that fact that suggests to many that the POIC was not meant to be limited to the rights expressly protected in the original constitution. Or, more simply, that fact shows that Lash must be wrong.

Lash has a powerful response to the argument grounded in the Civil Rights Act of 1870, again tracking the views of Bingham. Bingham did not support the original Civil Rights Act of 1866, because he did not believe Congress had the power to regulate such civil rights directly. Yet Bingham did believe the Fourteenth Amendment did give Congress that power elsewhere—not through the POIC, but instead, the Due Process Clause. And indeed, in a point missed by many, that alternative source for congressional authority shows why the reenacted Civil Rights Act of 1870 protected the rights of “persons,” not just “citizens.” The POIC gave Congress the power to protect “citizens” only; it, therefore, must be a different clause, Lash reads Bingham to argue, that gave Congress the power to protect the rights of “persons.”⁷⁵

Lash’s account is compelling. I predict that it will become the dominant account of the POIC, and especially the Civil Rights Act of 1870. But for our purposes, its conclusion simply reinforces the conclusion reached under the POIC. Because here too, if the Civil Rights Act of 1870 is a manifestation of Congress’s power to “enforce” the Due Process Clause, then that points to a more general power in Congress to keep the protections of “due process” up to date. Specifically, just as the Court had historically crafted the contours of a libertarian core within our constitutional tradition, Lash’s point about the Civil Rights Act of 1870 suggests that Congress should have the same power to determine the scope of the protections under Due Process. Put most directly: if the source of power that authorized the Civil Rights Act of 1870 is the DPC, then Congress should be free to exercise its power to determine the scope of “due process,” even if the Supreme Court has decided that it will not.

⁷⁵ LASH, *supra* note 71.

Pulling these two arguments together, then: Bowie shows us the framing conception of Congress's power vis-a-vis the POIC. Lash shows us the framing conception of Congress' power vis-a-vis the DPC. Both reveal a congressional power to determine the scope of federal rights that does not depend upon the Court.

And both accounts also reveal the brilliance in the *Slaughterhouse Cases*, to which I now turn.

3. *Slaughterhouse*

The story of *The Slaughterhouse Cases*⁷⁶ has been endlessly retold. The essential facts are simple enough. Louisiana had passed a statute regulating the slaughtering of animals. The law confined slaughtering to a single slaughterhouse located below New Orleans, thus keeping offal out of the city's water.⁷⁷ The statute was completely unremarkable. It stood within a long tradition of health and safety regulations.⁷⁸ There was no judicial precedent for challenging the law whatsoever.

But a former Justice of the Supreme Court, John Campbell, who had resigned from the Court at the start of the Civil War to join the Confederacy, thought he had a strategy for using the recently ratified Thirteenth and Fourteenth Amendments to undo the promise of Reconstruction.⁷⁹ Inherent

⁷⁶ 83 U.S. 36 (1873).

⁷⁷ *Id.* at 57.

⁷⁸ See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (adjudicating the constitutionality of a Kansas law curtailing the sale of liquor); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (determining the constitutionality of a Massachusetts law permitting local governments, among other entities, to require vaccinations); *Holden v. Hardy*, 169 U.S. 366 (1898) (considering the constitutionality of a Utah law that limited the maximum number of hours minors could work).

⁷⁹ See RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* 183 (2003) (explaining that former Supreme Court Justice John Campbell hoped to use the new "constitutional realities of Reconstruction" as a legal strategy to "bring about [Reconstruction's] ultimate demise"); see generally ROBERT SAUNDERS, JR., JOHN ARCHIBALD CAMPBELL, *SOUTHERN MODERATE, 1811–1889*, at 216 (1997) (noting that Campbell interpreted the Fourteenth Amendment to mean that "section 1 applied not merely to former slaves but to all Americans, being fundamentally an extension of federal authority over civil rights legislation"); WILLIAM J. NOVAK, *PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1 (1996) (disputing the commonly held belief that nineteenth-century governmental entities in the United States were largely absent and arguing instead that U.S. social and economic policymaking from 1787 to 1877 reveal widespread regulations governing public safety, the economy, and social norms and morals); *John A. Campbell*,

in our tradition, Campbell argued, and standing behind these constitutional texts was the right of every man to labor freely, without the restraint of regulations by the state. This “right of free labor,” at least for “common callings,” was the core idea behind the 13th Amendment, Campbell argued, and within the core of the “privileges or immunities” protected by the Fourteenth Amendment as well. The United States Supreme Court should therefore give voice, Campbell insisted, to this unenumerated constitutional right, by striking down the regulations of Louisiana.⁸⁰

It was not surprising that John Campbell would try to throw a monkey wrench into the laws of Reconstruction. Campbell was a leader of the cabal of Southern lawyers who had resolved to continue the Civil War in the civil courts. Across a range of cases, they were remarkably successful.⁸¹ His most important victory would come four years later, when the Supreme Court would affirm the reversal of the convictions of three of the hundred white terrorists who had perpetrated the bloodiest massacre in the Reconstruction Period, the Colfax Massacre.⁸²

What *was* surprising was that four justices of the Supreme Court would follow his lead. In their opinions, these justices birthed the modern project of judicially limning a libertarian core within our Constitution. Not from any

OYEZ, https://www.oyez.org/justices/john_a_campbell [<https://perma.cc/3FB3-H2A7>], (last visited Jul. 18, 2022) (summarizing Campbell’s biography with emphasis on his life before the Supreme Court); Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana’s Republican Government, 1868-1873*, 49 CIV. WAR HIST. 235 (Sept. 2003) (discussing Campbell’s leadership of Louisiana lawyers who “waged an extraordinarily effective legal campaign” to obstruct Reconstruction).

⁸⁰ See LABBÉ & LURIE, *supra* note 79, at 193 (arguing that Campbell’s representation of the butchers in *The Slaughterhouse Cases* revealed a dual agenda—achieving victory for his clients and undermining Reconstruction).

⁸¹ See Cynthia Nicolette, *Strategic Litigation & Reconstruction*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 265, 275 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (discussing the legal vulnerability of the Civil Rights Act).

⁸² The case was *United States v. Cruikshank*, 92 U.S. 542 (1876). I say “apparent” because I agree with Pamela Brandwein that while the case appeared to signal the retreat of northern enforcement of civil and voting rights in the South, it actually provided a template that would guide the DOJ and courts for the next fifteen years, until the Democrats succeeded in repealing the Enforcement Act. See PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 103 (2011) (explaining that Bradley’s *Cruikshank* opinion “steer[ed] between the radical Republican position, which would permit congressional enforcement regardless of behavior, and the Democratic position, which would bar federal interventions unless state laws discriminated on their face”). For a brilliant and hauntingly compelling account of the case, see CHARLES LANE, *THE DAY FREEDOM DIED 189–214* (2008) (providing a detailed narrative of the *Cruikshank* case at the trial, appeal, and Supreme Court levels).

text in the Constitution directly, but from their understanding of the ideals standing behind that text. Those ideals informed the meaning of “privileges or immunities.” These justices proposed to elevate those ideals as bars on conflicting legislation.

They were not wrong about the ideals. The fight for free labor—most pronounced in the fight against slavery but not just slavery—was a central and animating ideal of the Civil War period and just after.⁸³ As Lincoln described it, free labor was

the just and generous and prosperous system [in which the] prudent, penniless, beginner in the world labors for wages for a while, saves a surplus with which to buy tools or land for himself; then labors on his own account for another while, and at length hires himself another new beginner to help him.⁸⁴

But these Justices, Bradley especially,⁸⁵ were quite radical in the project that they were imagining the Supreme Court launching itself upon. Had they prevailed, and had the Supreme Court actually struck down a state law as common as mud, based upon an unenumerated right said to stand behind the newly minted Civil War Amendments, it would have certainly opened the floodgates to endless litigation, all of which would have eventually ended up in the United States Supreme Court.

That flood was precisely what Justice Samuel Miller, the author of the Court’s opinion in *Slaughterhouse*, feared most. As he wrote, the Supreme Court was already burdened with appeals raising a wide range of previously unheard-of constitutional questions. By the time of *Slaughterhouse*, the Supreme Court’s docket had quadrupled from its 1860s level. Overworked and without clerks, Miller had no desire to increase the scope of the Supreme Court docket even more.⁸⁶ If his opinion had any purpose, it was to close the floodgates and protect the Court.

Most today read that closing as absolute. Justice Thomas, for example, rejects *Slaughterhouse*, but he doesn’t doubt that Miller meant to neuter the clause. Thomas reads Miller to hold that the POIC “did not protect any of

⁸³ See LESSIG, *supra* note 50, at 106–09, 111.

⁸⁴ LESSIG, *supra* note 50, at 107 (quoting JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900*, at 47 (2007)).

⁸⁵ See Pamela Brandwein, *The Slaughter-House Dissents and the Reconstruction of American Liberalism*, *AMERICAN POLITICAL SCIENCE REVIEW* 1, 9–12 (2023).

⁸⁶ See LESSIG, *supra* note 50, at 294 (citing Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 *CHI.-KENT L. REV.* 627, 663 (1994)).

the rights of state citizenship . . . [That] the two sets of rights [are] mutually exclusive.” The opinion does, he writes, “arguably [leave] open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship.”⁸⁷ This was Bingham’s purpose, as Lash effectively argues. Yet even that opening was closed, Thomas contends, in “later cases.”

Miller’s language does suggest a pretty barren field for “privileges or immunities of Citizens of the United States.” As he writes,

Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of **all the civil rights** which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress **the entire domain** of civil rights hereto-fore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion **any of them** are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on **all such subjects**.⁸⁸

But I have added highlights to the passage to suggest an obvious question: has the POIC made possible, on Miller’s view, the federalization of any civil rights? Or more precisely, has it given Congress the power to federalize *any* civil rights?

Miller answers that question directly three paragraphs later in his opinion. As he writes,

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, **or its laws**.⁸⁹

Notice something important about the character of each of these potential sources for “such privileges and immunities.” The first three (“their existence to the federal government,” “its National character,” “its

⁸⁷ McDonald v. City of Chicago, 561 U.S. 742, 808 (2010) (Thomas, J., concurring).

⁸⁸ The Slaughterhouse Cases, 83 U.S. 36, 77–78 (1873) (emphasis added).

⁸⁹ *Id.* at 79 (emphasis added).

Constitution”) are the sort of sources that a Court would define, or interpret; the last of these three was the clearest suggestion from the Supreme Court that the POIC had federalized, or to use a term that would become common later, “incorporated” the Bill of Rights into the Fourteenth Amendment, thereby rendering them enforceable against the states. This is the part that Thomas said the Court had “arguably left open.”⁹⁰ And indeed, lower federal courts had expressly concluded that those rights were plainly now part of the Fourteenth Amendment’s “privileges or immunities” clause.⁹¹

But it is the fourth head of potential POIC authority—“its laws”—that is most interesting for our purposes. Miller is plainly describing a grant of power to Congress. This is what Bowie was describing as well. Miller had just said that Congress has no jurisdiction over *all* civil rights. But in this critical clarification, he is plainly saying that Congress has jurisdiction over *some* civil rights. Miller asserts that Congress has the power to add to the “privileges or immunities of Citizens of the United States.” How, and how much, then becomes the critical question.

In our time, such a capacity would not be terribly surprising. Today, Congress adds to the “privileges or immunities” of citizens all the time—through, for example, its Commerce Power. But in 1872, no one was thinking about broad commerce authority defining the civil rights of United States citizens. So what might Miller have meant by the ability of Congress, through “its laws,” to add to the “privileges or citizens of Citizens of the United States”?

The simplest—and brilliantly institutionally most sensible—way to read these words is to understand the Court to be deferring to Congress the power to determine federal privileges or immunities first. Beyond rights that may have been enumerated within the Constitution (“its Constitution”), Miller is shifting to Congress the obligation to articulate privileges beyond those enumerated, before the Court would count those “privileges or immunities” as rights to be enforced against the states.

As Congress had done, on this understanding, with the Civil Rights Act of 1870 a paradigm for understanding the framing of the Fourteenth Amendment. For our purposes, that law does three critical things: first, it

⁹⁰ 561 U.S. at 808.

⁹¹ See *United States v. Hall*, 26 Fed. Cas. 6, 82 (1871) (determining that the Fourteenth Amendment’s Privileges or Immunities Clause encompasses rights delineated in the Bill of Rights).

determines a range of rights that it considers to be the “privileges or immunities” of citizens. Second, it remedies the easiest case of “abridging” for the framers of that Act—that those rights must be secured to all as they are secure to “white persons.” Third, by so specifying both the “privileges” and the way that they may be “abridged,” the law federalized the protection of those rights. They became “privileges or immunities of citizens of the United States,” and consistent with the argument of Baude, Campbell and Sachs, they then became enforceable, federally, against those denying the rights protected.

The same is true under Lash’s interpretation as well. Recall that Lash argued that the Civil Rights Act of 1870 was grounded in the Due Process Clause of the Fourteenth Amendment. That, on this understanding, was its source of authority. It thereby created certain rights for citizens (a subset of the “persons” the act spoke of). Those rights were now enforceable as part of the POIC.

But what about the free labor right? If it was, as Justices Field and Bradley believed, within the scope of the “privileges or immunities” of citizens, then why didn’t the Court recognize that? If we presume (charitably) that all the justices could do the math just as well as each other, why didn’t the majority reach the same conclusions as the four?

Here is the brilliance in Miller’s approach: Yes, in principle, at least if Bowie is right, either courts or legislatures could determine the rights that the POIC will protect. But Miller’s approach gives Congress primary jurisdiction. If Congress recognizes a “privilege or immunity,” then the Supreme Court could enforce it. (“it’s laws”). But without Congress acting first, the Supreme Court is not going to declare a right as protected under the POIC—at least if it is not otherwise enumerated in the Constitution.

And again, the same is true under Lash’s understanding as well. As Bradley had argued in the next slaughterhouse case, *Butchers’ Union Slaughter House*,⁹² there could be no general purpose in a law limiting the right of free labor. Such a law, many believed, was, therefore, an improper “taking from A and giving to B.” Under a developing conception of “due process,” Congress could well deem such a law a violation of Due Process. Exercising the same power that grounds the Civil Rights Act of 1870, it could therefore

⁹² *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 764–766 (1884) (Bradley, J., concurring).

declare laws violating free labor as contrary to Due Process. But here again, Congress is the first mover. That inference the Court does not draw.

The genius in this reflects not fidelity to meaning, but fidelity to role.⁹³ Miller is avoiding a jurisprudence that would have imposed upon the Court an endless duty to determine the rights protected under the POIC. Already the docket was full. If rights could be rendered enforceable through a simple declaration by courts, there would be an endless line of petitioners begging the Court to recognize their right. Let those petitions begin in Congress. And if they succeed in getting Congress to affirm a right as a “privilege or immunity”—directly, under the POIC, or indirectly, through the DPC, then the Court would enforce it.

Again, such an approach does not mean the Court would accept *any* right as a “privilege or immunity.” Some “determinations” could be erroneous. That truth was made clear in the *Civil Rights Cases*⁹⁴, when Congress had tried (or so the Court believed) to protect a “social right” rather than a civil right. At the very least, the *Civil Rights Cases* mean that the Court will intervene if it believes Congress has gotten its sums wrong, or at least clearly wrong. But there’s nothing inconsistent in a judicial practice that would correct Congress’s mistakes but not itself do the original work. For good fidelity to role reasons, the Court will wait for Congress to assert that something is a “privilege or immunity of citizens of the United States.” And for good fidelity to meaning reasons, the Court will intervene if it believes that Congress has gone too far.

This argument will be resisted by those embracing the traditional understanding of *Slaughterhouse*. On that understanding, Miller was not just waiting to correct Congress’s mistake. Miller was insisting there was no work for Congress in the first place.

But not only does this argument ignore the hedge in the language Miller deploys—as described above, the distinction between saying there’s nothing for Congress to do, and that there’s no limit on what Congress can do—it also ignores the one fact that must be central to *any* understanding of their conception of the power of Congress under the POIC: the Civil Rights Act of 1870.⁹⁵ No doubt, from their perspective, the right recognized under the

⁹³ LESSIG, *supra* note 50, at 17 (describing “fidelity to role”).

⁹⁴ 109 U.S. 3 (1883).

⁹⁵ Or at least as conventionally understood. As I have described, Lash’s view does not rely upon this Act.

Civil Rights Act of 1870 were within the proper domain of “privileges or immunities” of citizens—either directly, or indirectly, through the Due Process Clause. No doubt, Congress had effectively federalized those rights, by making them enforceable through the mechanisms erected by the Fourteenth Amendment. And no doubt, the Supreme Court allowed such federalization. Put differently, *Slaughterhouse* cannot be read to say Congress has no power to federalize privileges or immunities—else the Civil Rights Act of 1870 was unconstitutional—even if Congress doesn’t have the power to say that *anything* is a privilege or immunity—see, for example, *The Civil Rights Cases*.

On this understanding, the defenders of free labor had an obvious response to *Slaughterhouse*. If the Court was waiting for Congress to do the sums, and if Congress then did the sums, and determined that free labor was indeed a privilege or immunity of citizens of the United States, or, following Lash, denying it was a violation of Due Process, then on this account, the Supreme Court would simply evaluate whether Congress was right or not. And if Bradley and Field were right in their determinations, the Court should have upheld such a law. But of course, Congress had not passed a Free Labor Rights Act; and so obviously, the Court did not need to review Congress’s determination. It was enough for Miller in *Slaughterhouse* that Congress had not acted, and so neither would the Supreme Court.

For a judicial conservative, focused especially on judicial restraint, Miller’s approach makes enormous sense. First, it makes sense of the public meaning of the POIC at the time the clause was enacted. That’s Bowie’s argument. Or it makes sense of the DPC at the time. That’s Lash’s point. But second, it makes sense of the conservative objective to minimize judicial discretion as well. Miller’s approach largely removes the judges from the task of weighing the significance or importance of unenumerated rights within our constitutional tradition. He focuses them instead on constitutional and congressional texts. Had the Reconstruction Congress decided to protect Lincoln’s free labor right, by passing the Free Labor Rights Act of 1870, then no doubt, Miller would have had to determine whether that right was within the scope of Congress’s POIC or DPC power. But as there was no such statute, there was no such question for the Supreme Court to address. The judges were left instead with the quotidian task of reading legal texts and applying them to the facts of a case. Without a Free Labor Rights Act, or a

Free Labor Clause within the original Bill of Rights, there was no remedy for the traitor, John Campbell.

The next critical Fourteenth Amendment case decided by the Supreme Court is perfectly consistent with this understanding, though in dicta it seemingly resolves a question Miller had left open. *United States v. Cruikshank*⁹⁶ reviewed the prosecution of white terrorists from Colfax, Louisiana, responsible for the largest slaughter of African Americans in the Reconstruction period.⁹⁷ An absence of support from the federal government—as well as united white support in Louisiana for white terrorists across the South—made prosecution of the defendants impossibly difficult. The Supreme Court ultimately reversed the prosecution, finding the indictments insufficient for failing to properly allege race as the motive behind the crimes. Yet along the way to reaching this holding, the Court, in dicta, seemingly rejected the idea that the Bill of Rights had been made enforceable via the POIC.

Cruikshank is vilified by modern lawyers and the Supreme Court. My own reading is closer to Pamela Brandwein's,⁹⁸ who argues powerfully that the case did not end prosecutions of white terrorism, but simply channeled them to track more precisely the “war on race,” as Justice Bradley had characterized it in his circuit court opinion.⁹⁹

Yet the opinion does confirm the constitutionality of the Civil Rights Act of 1870.¹⁰⁰ And it suggests that a federal right of assembly might indeed have been implicated if the trigger for the massacre had been a federal election—which it plainly was not.¹⁰¹ But the Court went on to opine that the Second Amendment had not been made applicable to the states under the POIC.¹⁰² That holding would staunch efforts to find applicable to the states the other rights within the Bill of Rights, at least under the POIC. Two generations

⁹⁶ 92 U.S. 542, 543 (1876).

⁹⁷ See generally Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (2009) (describing the background of *Cruikshank*).

⁹⁸ Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* 101–107 (2011).

⁹⁹ *United States v. Cruikshank*, 25 F. Cas. 707, 714 (C.C.D. La. 1874) (No. 14,897).

¹⁰⁰ *United States v. Cruikshank*, 92 U.S. 542, 555 (1876).

¹⁰¹ See *id.* at 552. Bizarrely, the government's defense of the prosecution in the Supreme Court relied exclusively on Article I, Section 4. By murdering Republicans, the government claimed, the Defendants were interfering with their right to vote for Congress in future federal elections. The Court didn't even acknowledge this argument. See Brandwein, *supra* note 96, at 116.

¹⁰² 92 U.S. at 553.

later, the Court would resume the process of applying the Bill of Rights to the states, but under the Due Process Clause, not the POIC.¹⁰³

Thus, at most, *Cruikshank* holds that the Bill of Rights is not to be *judicially* incorporated against the states—though again, even that is ambiguous. But more importantly, *Cruikshank* says nothing against (what we might anachronistically call) “legislative incorporation,” or specifically, legislative determination of the scope of the Privileges or Immunities Clause or Due Process Clause. And indeed, the complexity of applying the rights within the Bill of Rights to the states suggests just why that conclusion may, for a judicial conservative at least, make more sense.

We can see this point in the Court’s most recent Second Amendment case, *New York State Rifle & Pistol Association v. Bruen*.¹⁰⁴ That case continues the extraordinary line of judicially-crafted Second Amendment rights begun in *District of Columbia v. Heller*.¹⁰⁵ *Heller* had held that the Second Amendment protected an individual’s right to have a gun within her home, federal regulations to the contrary notwithstanding. *McDonald v. City of Chicago* had applied that same right to the states. *Bruen* then extended that right to include the right to carry weapons outside the home—at least under certain regulations.

What those regulations could be, however, is a difficult question. The lower courts had been applying a means-ends test to distinguish appropriate from inappropriate gun regulation. The Supreme Court rejected that test¹⁰⁶ and insisted instead on a historical measure for appropriate regulation. The Court conceded that such an inquiry was difficult: conditions have changed, weapons have changed, and finding the appropriate historical analog would therefore require significant judicial work.¹⁰⁷

Yet it is here that the instincts of a judicial conservative should have kicked in: rather than giving *judges* the power to distinguish appropriate gun

¹⁰³ See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (applying the First Amendment’s free speech protections against the states); *Near v. Minnesota*, 283 US 697, 707 (1931) (applying the First Amendment’s freedom of press protections against the states); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (applying the Sixth Amendment’s guarantee of counsel against the states).

¹⁰⁴ 142 S. Ct. 2111, 2122 (2022).

¹⁰⁵ 554 U.S. 570, 635 (2008).

¹⁰⁶ 142 S. Ct. at 2126.

¹⁰⁷ *Id.* at 2130. Will Baude and Robert Leider promote this effort at “applying old law in new times” in their analysis of *Bruen*. See *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024). One might hope this signals a new embrace of two-step originalism.

regulation from inappropriate, based upon a fuzzy, judicially made-up historical-analog test, with obvious health and safety consequences, let Congress craft the appropriate scope of the Second Amendment right. That power would not be unlimited. The law must be, as Section 5 states, “appropriate.” But so long as Congress respects the core, Congress is the better institution for striking the balance. In this light, *Cruikshank’s* reluctance to enlist the Court in the act of defining the right directly makes sense, given the difficulty of this inherently discretionary judgment.

What these cases and the Civil Rights Act of 1870 confirm is an original reading of the POIC and DPC that solves two critically important problems:

First, it solves the problem of time: Congress retains the power, under this reading, to continue to determine the rights that will constitute the “privileges or immunities of citizens of the United States,” or the rights of “due process”? Those rights can now evolve as society evolves. How broadly they evolve is a difficult question. Can Congress do more than nationalize privileges already existing within the states? That’s what the Civil Rights Act of 1870 had done. Are all rights subject to elevation by Congress? That’s what the *Slaughterhouse Cases* had denied. Can Congress reach beyond “civil rights” to “social rights”? That’s what the *Civil Rights Cases* denied. At the very least, a reading of the POIC must permit Congress to federalize existing but inconsistently protected privileges or immunities in the states. And it would recognize, now under the POIC, the bill of rights now protected under substantive due process.

Second, this reading solves the problem of judicial discretion: the Court can put away its Ouija board. Under this understanding, the Court is no longer in the business of conjuring up the rights thought to be implicit in the ideas of “ordered liberty,” or “rooted” within our tradition. The job of the courts would be to find rights (“privileges and immunities”) by reading statutes written by Congress, or the constitutional text adopted by “We the People.”

On this account—and let’s call it an anti-activist, originalist account—it is not for judges to divine an evolving libertarian core for our federal constitution. Any such determination is a task for Congress. On this account, the framers of our second Constitution did not freeze federal rights as they stood in 1868. Instead, they vested in Congress an ongoing responsibility to evolve those rights as times demanded.

III.

There are two strong criticisms of this argument and the approach it entails. First, to cede to Congress the power to determine either “privileges or immunities” or the scope of “due process” is to grant it, or so the fear goes, an authority without limit. Whatever capacity—for us, a magical power—the framers of the Fourteenth Amendment may have had to determine the scope of “privileges or immunities” or “due process” by reasoning from principles to constitutional results, in this legal culture, that capacity is gone. And second, to give to Congress the power to determine either “privileges or immunities” or “due process” is to make such rights too vulnerable. If rights are determined by Congress, then a right given by Congress this year could be a right taken away by Congress next year.

Both fears are correct, and the first is fundamental: it reveals a critical point that modern originalists reviving the original meaning of the Reconstruction Amendments must account for, but so far haven’t. I consider each fear in turn.

A. THAT CONGRESSIONALLY DETERMINED RIGHTS MEANS UNLIMITED CONGRESSIONAL POWER

There is a striking way in which the scholars who are working to reeducate us about the jurisprudential capacity of the framers of the Civil War Amendments fail to take seriously the significance of their own work. Baude, Campbell, and Sachs do a masterful job recreating an account of the understanding that jurists in the antebellum and Civil War periods had about the nature of general law. More importantly, they describe powerfully the capacity those jurists had to determine that law through a process of reasoning. The same is true of Adrian Vermeule, who, though no originalist, essays to teach us about the capacity that judges had across our history, and especially at the founding, to determine results using the practice of the classical tradition. In both cases, the claim is that those jurists could do something special, and their special abilities yielded a particular kind of law.

Yet what’s striking in both cases is the suggestion that though we don’t do law the way these mid-19th century jurists did it, we could. That somehow, if we just read enough Bradley or Aquinas, or focused on the practice of antebellum judges as they determined general law, we could do the same today. And by “we,” I don’t mean particular jurists or legal

scholars: no doubt, there are extraordinary sorts who could train themselves to replicate the thinking of practically any period in American history. But it's not the exception these authors are arguing for. It is the norm. The suggestion is that the methodology of the classical lawyer—the jurist who could engage in the practice of determining general law—could be recovered. That we could go back to a world in which judges reported to us on how fundamental principles determined critical questions of justice or right.

Yet this is, jurisprudentially speaking, crazy talk. What distinguishes us from mid-19th century jurists is not that we are playing one game and they were playing another. Or to liquidate the metaphor, it's not that we're playing chess while they were playing Go!, and so, the suggestion is, that we could just learn Go! and then play it. Instead, the 19th-century jurists lived in a different conceptual universe. And while I don't doubt that in principle, we could institute a Chinese-like (as in Mao) reeducation program for lawyers, punishing them for any realist tendencies, banishing talk about positivism, and shaming them for doubting the integrity and good faith of judges as they “determine” federal law, there is just no possible way to imagine such reeducation occurring. We are not going back to the world of Justice Bradley or Justice Story. We are not going to train our law students to be budding natural lawyers.

The simplest way that this point gets expressed is to point to the extraordinary decision of the Supreme Court in *Erie v. Tompkins*.¹⁰⁸ “[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it,” Brandeis told us.¹⁰⁹ By contrast, general law rests upon the assumption that there is ‘a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,’ that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts ‘the parties are entitled to an independent judgment on matters of general law.’¹¹⁰

This “assumption,” Brandeis wrote for the Court, rests upon a “fallacy.”¹¹¹ That fallacy had been identified by many, none more vigorously than Justice Holmes. Yet this way of speaking was a “fallacy” not because

¹⁰⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁰⁹ *Id.* at 79.

¹¹⁰ *Id.*

¹¹¹ *Id.*

Holmes had called it that. Instead, Brandeis was remarking upon a changed understanding within the legal culture. It was Holmes and practically every other thinking soul who had lost the *ability* to see law the way the general law(yers) saw it. And with that new way of seeing (or without that old way of seeing), the practice of federal general common law addressed in *Erie* amounted to “an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.”¹¹²

Erie's conclusion is embraced by the most important originalist in American legal history, Justice Antonin Scalia. In *Sosa v. Alvarez-Machain* (2004), the Court had to determine the scope of the Alien Tort Statute, enacted originally in 1789.¹¹³ When that statute was first enacted, jurists were still engaging the practice of general law-making. Part of that general law-making including the general law of customary international law. The question in *Sosa* was: given that the substance of customary international law had changed dramatically in the 213 years since the Founding, did the federal courts have an ever-growing list of wrongs that the Alien Tort Statute was meant to right?¹¹⁴ Was it the job of the courts, following the certain practice of the framers, to permit customary international law to control the scope of a federally enforced right?

These issues raised the anxiety that Brandeis had felt in *Erie* to a whole new level. Customary international law—or more specifically, as it was implicated in *Sosa*, the customary law of human rights—now evolved mainly as law professors write ever more compelling law review articles arguing for its never-ending expansion. It may well be that the community of human rights lawyers comes to view some wrong as a violation of a human right. But can it really be that such a judgment by law professors translates into a federal cause of action?

The very thought was inconceivable to Justice Scalia (and the other conservatives). And thus the only conceivable result was one that rejected the law as (Scalia thought) Story saw it and embraced the law as Brandeis had described it. The Court, in an opinion by Justice Souter, had rejected the idea that the law would evolve automatically, through what might have

¹¹² *Id.*

¹¹³ 542 U.S. 692 (2004).

¹¹⁴ *Id.*

been called “general law” reasoning. But Souter had left open the possibility that some new wrong could be recognized, if the facts demanded it.

For Scalia, that was a loophole too far. As he wrote in *Sosa*:

Because today’s federal common law is not our Framers’ general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law. The Court masks the novelty of its approach when it suggests that the difference between us [members of the Court] is that we would “close the door to further independent judicial recognition of actionable international norms,” whereas the Court would permit the exercise of judicial power “on the understanding that the door is still ajar subject to vigilant door keeping.” The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. Federal common law is a new door. The question is not whether that door will be left ajar, but whether this Court will open it.¹¹⁵

Here is the originalist Justice Scalia recognizing a change in our conception of law (“law in the sense in which courts speak of it today”¹¹⁶), but rather than resisting that change, he is arguing that we adapt federal practice to that changed understanding. Given how we *see* law today, the scope of the federal practice applying that law must change.

This isn’t the only place where Scalia made such a move. Indeed, though this is beyond the scope of this essay, I suggest this move accounts for Scalia’s Article II jurisprudence generally. Here’s just a glimpse at the structure of that argument: while an appellate court judge, Scalia sat on the three-judge panel that struck down the Graham-Rudman-Hollings Act. As he wrote (or so it is reported;¹¹⁷ the opinion was *per curiam*),

These cases reflect considerable shifts over the course of time, not only in the Supreme Court’s resolutions of particular issues relating to the removal power, but more importantly in the constitutional premises underlying those resolutions . . . Justice Sutherland’s decision in *Humphrey’s Executor*, handed down the same day as *A.L.A. Schechter Poultry* . . . is stamped with some of the political science preconceptions characteristic of its era and not of the present day . . . It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely ‘independent’ regulatory agencies . . . or, indeed, that the decisions of such agencies so clearly involve scientific judgment

¹¹⁵ *Id.* at 746 (Scalia, J., dissenting).

¹¹⁶ 304 U.S. at 79.

¹¹⁷ Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1674 n.50 (1991).

rather than political choice that it is even theoretically desirable to insulate them from the democratic process.¹¹⁸

“[P]reconceptions characteristic of its era and not of the present day”: this is the operative idea. We find ourselves in a world with certain “preconceptions”; we have to apply the law, *given* those preconceptions. One might imagine an originalist would resist those preconceptions, at least if they are different from the preconceptions at the relevant founding. But not this originalist: Scalia embraces the change. His originalism does not require that he resist it.

Sometimes we discover that changes in such “preconceptions” implicate democratic values. So, for example, if you lose the ability to see independent agencies as “genuinely ‘independent,’” because you have moved beyond the “political science preconceptions” that would allow you to see them as genuinely independent, you face a democratic challenge. What do we do when we recognize, given how we view the world today, that certain critical governmental actors are no longer constrained by principle or by the law, but are instead simply engaging in “political choice,” dressed up as law?

Scalia’s answer—here, and throughout—was clear: when the way we now view the world *yields* the conclusion that a governmental actor is no longer constrained to some determinate rule or principle, the law will be interpreted, or constructed, or, in my preferred vernacular, *translated*, to assure that that actor is democratically accountable. That was Scalia’s move with the Special Counsel—given the policy choices inherent in any prosecutor’s decisions, the counsel must be accountable to the President.¹¹⁹ And that, I suggest, was Scalia’s move throughout his separation of powers jurisprudence.

Twenty-five years ago, I tried to give this dynamic a name—the *Erie*-effect.¹²⁰ An *Erie*-effect described the “reallocation of institutional authority among legal actors, brought about by a change in the interpretive context of this institutional authority.”¹²¹ By “context,” I mean the set of understandings or, in Scalia’s terms, the “preconceptions” that ordinary legal actors bring to the legal context. As those understandings change, allocations

¹¹⁸ *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986).

¹¹⁹ *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

¹²⁰ Lawrence Lessig, *The Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1785–86 (1997).

¹²¹ *Id.*

of governmental power must change as well, if only to preserve the democratic accountability implicit within a democracy. Here at least, there is a kind of general law-making—interpret the Constitution (or lesser normative structures) to assure a minimum of democratic accountability at least.

In each of the contexts in which Scalia’s “preconceptions” might be said to have changed, we could imagine someone arguing, “just conceive of it differently.” In particular, in the context of *Synar*, we could imagine someone saying to Justice Scalia, “yes, you’re right, we are much more skeptical, or you might say, ‘realist’ about ‘scientific policy-making.’ But just adopt the framework of jurists from 1930. They could believe that scientific policymaking was scientific. So too could we.”

Anyone who ever had the privilege of knowing Justice Scalia will almost hear his response: “Get out of here!” There’s no way to imagine us imagining ourselves back into the mindset of “scientific policymakers” from the turn of the last century. Neither is there a way to imagine us imagining ourselves back into the mindset of the mid-19th century general lawyer. There are things you can’t unsee. And once you’ve seen, or practiced, the life of a legal realist, you can’t just flip a switch and become a natural lawyer.

This truth these modern general law scholars—in particular, Baude et al, and Vermeule—simply ignore. *Erie* is not even cited in Vermeule’s masterful book, *Common Good Constitutionalism*. And Baude, Campbell and Sachs try to dismiss these modern “preconceptions” with quips dissing Justice Holmes.¹²²

But the point can’t just be ignored. Either the general lawyers explain to us how we are going to recreate the legal culture that supported general law-making, or they tell us how we “reallocate institutional authority” in light of this fundamental change in how we understand the law.

Put more directly, and directly tied back to the POIC and the DPC: even if we concede the point Baude, Campbell and Sachs so powerfully make—that jurists in the mid-19th century had a capacity for determining general law, and that it was that capacity that they expected to deploy in understanding the scope of the POIC or DPC—what do we do today, now that that capacity is gone?

There are three possible responses to this particular *Erie*-effect:

¹²² Baude, *supra* note 58, at 75 (“In this field, as in so many, the rejection of *Erie* is the beginning of wisdom.”).

First, we could imagine reeducating our legal culture to embrace again the practice of the general law lawmaker. I'm going to just assume that's not possible.

Second, we could acknowledge that general law lawmaking is dead, and simply embrace the set of liberties declared or protected at the time of its death.

Third, we could acknowledge that general law lawmaking is dead, but recognize—as our framers would certainly have recognized—that the “privileges or immunities” of federal citizenship, just like the “process” that is “due” needs evolving, as society and conditions evolve. They may well have imagined that evolution progressing through the reasoning of general law lawmaking. But if we can't imagine courts evolving the law in this manner, then we could reallocate the responsibility to evolve those rights to a democratically accountable institution. This is the equivalent to what Scalia did in the separation of powers cases—given there was no guidance from the law, reallocate control to a democratically accountable actor. In Article II cases, that was the President. The same result should follow here: if the power that must be allocated is the power to keep rights up to date, the *Erie*-effect question is which institution should possess that power—the judiciary or Congress?

This is a critically important step that we should pause to emphasize. Bowie is not an originalist. But he draws from his understanding of original practice the conclusion that Congress should have power to determine the “privileges or immunities of citizens of the United States.” I agree with that conclusion, but I think the argument omits a few critical steps. What the framing context may well evince is a power in Congress to *determine* “privileges or immunities” and the “process” that is “due.” That power, all acknowledge, is not unlimited, because it is constrained (and this part Bowie doesn't argue) by the practice of general law-making. But if *our* capacity to engage in general law-making dies—if we lose the ability to engage that practice honestly—then we need to decide which institution will determine the “privileges or immunities of citizens of the United States,” or the scope of “due process,” now that neither is protected by a (taken to be relatively) objective legal practice.

It would make no sense of that original practice to simply lock in the rights as they would have existed when our capacity to engage in general law lawmaking died. Instead, we need to decide among the most relevant

institutional actors *which* should now hold this power, consistent with democratic principles.

That question should answer itself—at least for us, in this legal culture—if only because we have been so effectively trained by the conservative legal movement to be skeptical of judges. Judges have no democratic pedigree to be “determining” the scope of “privileges or immunities” or the contours of “due process.” It should fall to Congress to make that determination.

And so yes, to return to the top, the consequence of this understanding is that Congress has broad power to define the scope of “privileges or immunities” or “due process”—not because the framers intended it like that, but because the worldview of the framers has died, and we must now translate their practice into our world. Against the background of our “preconceptions,” we can’t accept *either* the conclusion that “privileges or immunities” or “due process” stop evolving, *or* that courts should be in the business of evolving them for us. Instead, we should locate the proper place for their evolution within the only institution that could make those changes consistent with the ideals of democracy—Congress.

No doubt, that translation is not perfect. No *Erie*-effect translation is. Instead, in every case, the reallocation that both translation and Scalia insisted upon is one that achieves as much fidelity as possible, subject to the constraint of role—both judicial and democratic.

B. THAT CONGRESSIONALLY DETERMINED RIGHTS MEANS VULNERABLE RIGHTS

Consider now the second concern: that if we recognize in Congress the power to determine “privileges or immunities,” or the scope of “due process,” then the rights Congress grants at one time it could take away at another.

The fear is correct. The fear is exaggerated.

First, Congress would have no power to remove rights found explicitly in the constitutional text. Those should include the Bill of Rights—as lower courts before *The Slaughterhouse Cases* had held, as *Slaughterhouse* itself had hinted at, as Lash effectively argues Bingham and the framers intended, and

as the Supreme Court has, since the early 20th century, effectively held, albeit under the Due Process Clause.¹²³

But second, and yes, the rights determined legislatively beyond those explicit in the constitution's text would indeed be vulnerable legislatively. One Congress' granting protection to rights could be overturned by a subsequent Congress removing them. Such is the nature of legislatively determined rights.

At least, in theory. In practice, this is a harder question. There are no modern examples of a fundamental right given by Congress later removed by Congress.¹²⁴ Obviously, that's not true with the Supreme Court, as *Dobbs* makes clear. Congress might be slower to act; but once it secures a right, it becomes politically very difficult to imagine that right removed.

Yet of course, it is possible—with both institutions. Thus, the question is not whether rights can be removed. The question instead is which institution should do the removing. From this perspective, it is, in my view, better for an elected branch to remove rights than a Court. I don't agree with the *Dobbs* decision. But I don't support mounting protests at the Supreme Court or at the homes of Justices—both for reasons of principle and pragmatics: does a protest sway an opinion or entrench it? But were Congress to remove a right,

¹²³ The First Amendment was fully incorporated in *Everson v. Board of Education*, 330 U.S. 1 (1947) (establishment of religion), *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion), *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech), *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press), and *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly). The Second Amendment was fully incorporated in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (right to keep and bear arms). The Fourth Amendment was fully incorporated in *Mapp v. Ohio*, 367 U.S. 643 (1961) (search and seizure) and *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrants). *Aguilar* was overruled by *Illinois v. Gates*, 462 U.S. 213 (1983). The Fifth Amendment was partially incorporated in *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy), *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination), and *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897) (takings). The Sixth Amendment was partially incorporated in *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to speedy trial), *In re Oliver*, 333 U.S. 257 (1948) (right to public trial), *Parker v. Gladden*, 385 U.S. 363 (1966) (right to impartial jury), *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witnesses), *Washington v. Texas*, 388 U.S. 14 (1967) (right to obtain defense), and *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel). The Eighth Amendment was fully incorporated in *Schillb v. Kuebel*, 404 U.S. 357 (1971) (excessive bail), *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (excessive fine), and *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishments). The Third, Seventh, Ninth, and Tenth Amendments have not been incorporated.

¹²⁴ The clearest earlier example is 1894, when Democrats in Congress succeeded in removing many of the voting rights protections enacted after Reconstruction. PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 184 (2014).

I would think it completely appropriate to use the full range of legitimate protest to challenge that political decision. Thus, yes, rights are vulnerable—generally. Yet rights defined by Congress could be defended politically more appropriately than rights determined by the Court.

Note again, however, that the power to determine either “due process” or the “privileges or immunities of citizens of the United States” is not unlimited—as again the *Civil Rights Cases* evince. The POIC relates to rights of “citizens.” It is the power to determine the scope of the rights of citizens. It could, therefore, potentially reach the privilege all pregnant citizens to choose whether to carry their pregnancy to term. That privilege is now protected in some places—Massachusetts, for example. It is not protected in other places—Mississippi, for example. Congress could, on this understanding, choose to nationalize it, by forbidding states from abridging it.

But Congress could not, under the POIC, vest in fetuses a right of life, as until they are “born,” according to the first clause of the Fourteenth Amendment, they are not “citizens.”¹²⁵ Perhaps Congress could “naturalize” all fetuses as citizens. After all, what is “birth” could evolve over time as well. But that, too, would depend upon them being “persons.” There’s strong evidence that the founders of the Fourteenth Amendment didn’t consider fetuses “persons” either.¹²⁶ Maybe this Court would consider that to be among the ideas that could evolve. Regardless, it would be a stretch under the Fourteenth Amendment, which demonstrates that the power to establish a right is thus not a plenary power to regulate behavior or preferences across the nation generally.

What that power is, though, is the opportunity to define what citizenship as an American means. It affirms the special status of United States citizens and gives a current and political body the power to define the nature and scope of that special status. We are who we are—and we defend the rights we defend—not because of some ancient gap in regulatory practice

¹²⁵ By contrast, on this understanding of Lash, Congress could vest fetuses with a right under the Due Process Clause.

¹²⁶ See Michael Rosin, *Congress Has Never Considered Fetuses Persons Within the Meaning of the 14th Amendment*, SLATE (June 2022), <https://slate.com/news-and-politics/2022/06/gop-abortion-constitution-fetuses-legal-persons.html> [<https://perma.cc/MS8L-XH3W>] (explaining how Congress has historically interpreted the word “persons”); see also Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, STAN. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4205139> [<https://perma.cc/7P7G-7K4G>].

(*Glucksberg*), but because of a modern living political process that defines and defends those rights. Such an approach would thus restore these essentially political questions to the political branches. It would give legislators a reason to fight over the scope of rights secured to Americans rather than punting those questions to the Supreme Court.

IV.

Is this regime better than the judicial equivalent it would replace?

Note first that whether one imagines rights crafted by Congress under the POIC or DPC, the shift I've described here is simply the move from the Court to Congress. *Dobbs*, perhaps rightly from a conservative perspective, removed the Courts from this process. The argument I've advanced here is just that Congress take its place.

Second, for anyone who embraces the idea of an evolving and growing libertarian core, this alternative is certainly better than the standard set by *Dobbs*. Whether or not one is motivated by the need for judicial restraint—and I am—a constitutional regime that effectively locks the rights of its citizens into its ancient history makes no sense. I am not talking about the rights of citizens in one state versus another. Again, those, of course, remain subject to the political process within each state. I mean instead the rights of “citizens of the United States,” or “persons” under the DPC. The *Dobbs* rule leaves us no effective way to keep *those* rights up to date, at least directly.¹²⁷ Yet no framer thought—and nor do their words in context mean—that they were establishing a requirement that every update to civil rights required a new constitutional amendment. The regime our framers gave us was a regime that depended upon Congress *determining* privileges or immunities under general law, or the scope of “due process.” No one imagined that general law was fixed or unchanging. And even if the practice of *determining* is gone, we should not permit the reality of evolution to disappear as well.

But third, whether this congressional regime is better than Harlan's “reasoned [judicial] judgment,” is a harder question.

I confess I liked an unintended but certainly clear implication of Harlan's method: that “reasoned judgment” would yield conclusions that were not

¹²⁷ It can indirectly, through, for example, the Commerce Clause, at least so long as a federalist-driven Supreme Court continues to permit indirect regulation of police power values through that clause.

originally obvious, and that are not now necessarily politically popular. The decisions by the Supreme Court protecting the rights of LGBTQ+ are a perfect example.¹²⁸ As the Court worked through the questions Harlan's standard pressed, it was driven, even if reluctantly, to recognize rights that would not themselves be seen as obvious or popular. Were decisions about with whom to share intimate relations fundamental? Obviously, they were, given the "felt necessities" of our time. And if fundamental, then what really was the interest of anyone in trying to regulate those decisions? A faithful application of Harlan's standard led even conservative justices (Kennedy and Souter most prominently) to support rights that, at the time, most politicians were keen to ignore.

We have lost that with *Dobbs*. And given the pathologies of Congress—especially the filibuster rules in the Senate that block any legislation that doesn't appeal to the most extreme in the Senate—it is hard to have faith that that institution would do as well to keep the rights of citizens of the United States up to date. "Reasoned judgment" was thus an effective second best, given the failed institution that Congress has become. And given that failed institution, the alternative I've sketched might well qualify as third best.

Yet it is impossibly difficult now to imagine this Court walking back the conclusions it has drawn in *Dobbs*. And even if it did, it is harder still to imagine it rejecting the foundation for *Dobbs*—*Glucksberg*—and returning to the practice of Harlan. We might well wish this were possible. I certainly do. But we should confront the reality that it is not.

V.

So what then stands in the way of this anti-activist, originalist rendering of the POIC or the DPC?

Only one of the most non-originalist precedents in the history of the United States Supreme Court. Because though the text, structure, and history of the Fourteenth Amendment should demonstrate conclusively that that amendment was meant to give Congress a role in determining the scope

¹²⁸ See, e.g., *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (ruling that a law prohibiting anti-discrimination protections for the LGBTQ+ community violates the Equal Protection Clause); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (ruling that the Due Process Clause includes a right to personal liberty); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (ruling that under the Fourteenth Amendment, states must issue marriage licenses to same-sex couples).

of “privileges or immunities of citizens of the United States” and “due process of law,” the Supreme Court has expressly rejected any such power in Congress. In *City of Boerne v. Flores*,¹²⁹ the Supreme Court held that Congress has no power “to decree the substance of the Fourteenth Amendment’s restrictions on the States.” Despite Congress doing precisely that with the Civil Rights Act of 1870, despite the *Slaughterhouse Cases* expressly acknowledging that a federal “privilege or immunity” could be the product of “its,” meaning Congress’, “laws,” despite the legislative role presumed by the words “privilege or immunity” originally, the Supreme Court has removed a power the framers gave Congress, and arrogated that power to itself, exclusively.

This is the inconsistency that I telegraphed at the start of this essay, and the inconsistency we should focus the conservatives of the Supreme Court upon. For there is no basis in either language or history for imagining that “we the people” vested in the Supreme Court an *exclusive* power to determine the scope and reach of federal privileges or immunities or due process. There could be no principled conservative justification for denying to Congress what the framers of the Fourteenth Amendment, in the language of their time, gave it.¹³⁰

As Bowie had argued in his Note, and Lash in his account of Bingham, that power precisely was the power Congress exercised when it reenacted the Civil Rights Act of 1866.¹³¹ In that instance, Congress observed that in some states, African Americans had certain privileges or immunities—such as the rights to buy and sell property, sue and be sued, testify in court, etc.—while in other states they did not. In passing the Civil Rights Act, Congress chose either to nationalize those privileges or immunities or, following Lash, to fill out the conception of “due process.” Where before these rights had been inconsistent across the nation, now they were consistent across the nation. Now, in other words, they were “privileges or immunities of citizens of the United States,” not just privileges or immunities of citizens of Massachusetts or New Hampshire. Likewise, today, the POIC should give Congress the

¹²⁹ 521 U.S. 507, 519.

¹³⁰ I am inconsistently overstating this conclusion. In *FIDELITY AND CONSTRAINT* (2019), I argue that *City of Boerne*, 521 U.S. 507 (1997) and other similar cases can be justified as a translation to limit the scope of Congress’s power, a limit necessitated by the changing scope of the Commerce Authority.

¹³¹ Bowie, *supra* note 63; LASH, *supra* note 71.

power to determine which “privileges or immunities” of citizens of particular states should become privileges or immunities of citizens of the United States.

Yet *Boerne* denies Congress this power. And the question for the judicial conservative is “By what authority?” In the language of judicial restraint, informed by a theory of originalism: what justification is there for federal judges to disable Congress from defining the scope of privileges or immunities of citizens of the United States, or alternatively, the scope of due process, when it is clear that the Congress that proposed the Fourteenth Amendment meant for it, and later Congresses, to have that power precisely?

Or at least, if not “precisely”—since they presumed there was a general law law-making capacity, and that presumption has died—then at least it is clear that among the institutions that could properly be charged with the duty to evolve those privileges, it is Congress, not the Court, that is the most sensible.

So what then should be done?

First, this example points to a more general strategic weakness now practiced by the government: arguments grounded in originalism cannot be conceded to conservatives. The Justice Department needs to develop an institutional commitment to build out a faithful and more complete originalism for the Civil War Amendments at least. It was the Justice Department that birthed originalism originally, in the years leading up to Ed Meese becoming Attorney General. It is for the Justice Department now to continue that work.

For there are many contexts in which this Supreme Court has reached politically conservative conclusions inconsistent with the original meaning of those amendments—the state action doctrine most prominently.¹³² To resist these conclusions, the government should be developing a more robust understanding of how the principles of originalism apply to real cases, and then press that less partial understanding of originalism vigorously in this Supreme Court. Not because anyone would necessarily pick originalism as the interpretive method that the Supreme Court should follow. But because

¹³² See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883). On the inconsistent practice of the Supreme Court’s originalism, see Richard Fallon, *Selective Originalism and Judicial Role Morality* (unpublished 2023).

the people who do get to pick the interpretive method of the Supreme Court—the Justices—have.¹³³

Second, the government should press for recognition in the Supreme Court that the Bill of Rights now incorporated against the states by virtue of the Due Process Clause are better understood as applicable to the states through the POIC. This understanding was common at the time of the founding. Lower courts had expressly held that the POIC had made the Bill of Rights applicable to the states. And while not every right within the Bill of Rights is now binding on the states, there is little reason to resist this clean judicial rule: that history has confirmed that the rights expressed in the Constitution apply against the states because the “privileges and immunities” clause says they do, even if it has taken us a century and a half to determine exactly how.

I do not mean this shift would be simple or without costs to some. The POIC right is restricted to citizens. The Due Process Clause is not. There would be some incorporated rights that are broader than they would be under the POIC. But Congress, under this understanding, would be free to fill out the contours of these rights. And nothing in this analysis would affect the rights that might be recognized under the DPC, or the direct application of the Equal Protection Clause.

Third, the government should press, on originalist grounds as well as grounds of justice, for a clear reversal of the precedent in the Supreme Court that purports to deny to Congress its Fourteenth Amendment powers. Congress should put the Court on notice that the Court is, in Congress’s view, acting without a principled basis in denying to it the power the POIC, DPC, and Section 5 describe. It must then call on the Court to conform its

¹³³ Liberal scholars, notably Akhil Reed Amar and Jack Balkin, have developed their own originalist theories, suggesting the potential for such an approach. *See, e.g.*, JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); Akhil Reed Amar, *America’s Lived Constitution*, 120 *YALE L.J.* 1734 (2011). These scholars have deployed these theories to reach substantive liberal conclusions. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007) (arguing that “the debate between originalism and living constitutionalism rests on a false dichotomy”); Vikram D. Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 *SUP. CT. REV.* 1 (2022) (denouncing *Bush v. Gore* and the Independent State Legislature Doctrine on originalist grounds); Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for conservatives and moderates, too)*, *SLATE* (Sep. 21, 2005) (discussing how originalist principles support the outcome in *Brown v. Board of Education*).

behavior to its principles. There is no legitimate originalist justification for denying Congress the power that it exercised in 1870. The Court should respect that fact, if indeed the Court is to be a principled conservative institution.

Fourth, and ultimately, most importantly: Congress should exercise its newly recognized Fourteenth Amendment powers to determine the rights protected by the Privileges or Immunities Clause, or Due Process. Expressly grounding its authority in that clause, it should declare the rights of United States citizens that it believes the courts have insufficiently—or wrongly—protected.

The most obvious example of such rights is the right protected in *Roe*. Until *Dobbs*, the Court had articulated well exactly why “due process” protected a woman’s right to choose whether to carry a pregnancy to term. Exercising the power Congress exercised in 1870 through the Civil Rights Act, Congress could reaffirm that understanding of “due process,” and make it enforceable throughout the nation. Alternatively, following *Bowie*, the POIC could be the foundation for re-establishing that right, and for making it effective against the states. On this understanding, just as Congress did in 1870, when, under the POIC, it elevated the rights of Black Americans from some states and made them national, Congress should in 2024 elevate the rights of women from some states and make them national too. Or in the language of the Clause, Congress should determine that right to be within the “privileges” of citizenship, and deny the power of the states to “abridge” that privilege.

Equally as important as making such rights federally enforceable, Congress should exercise its power to determine the scope of such “privileges” when that scope is more appropriately crafted by a legislative body. Consider again the right referred to in the Second Amendment—the “right to bear arms.” It is of course possible for the Court to follow Justice Thomas and read the POIC as incorporating that right against the states. But the scope of that incorporated right is not obvious or easy to define.¹³⁴

¹³⁴ In November 2022, Judge Carlton Reeves (ND-MS) appointed a historian to work through the history to help apply the standard set by the Court in *Bruen*. As the judge wrote,

The *Bruen* Court acknowledged only that “historical analysis can be difficult.” “[I]t sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.” That is an understatement. This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may

Instead, for judicially conservative reasons, it should be for Congress to specify the limits to that right. Congress should act strongly to remove the Second Amendment handwaving and value-laden judicial inquiry that the Court has now set the judicial branch upon, and instead set clear rules for the scope of any “right to bear arms” that citizens of the United States might claim against their own state.

Again, such limits are not without limit. Congress’ Section 5 power is to pass “appropriate” legislation to “enforce” a right. Laws which negate a right are not “appropriate.” If indeed the Second Amendment right is rightly read to be implicit in the POIC, then Congress cannot repeal it. But certainly, the Court should grant Congress wide deference in defining the scope of any right to be applied against the states.

No doubt, this is a lot to imagine Congress and the government doing. I get that. But it seems like a lot, only because we lawyers have, culturally, become so used to the judicial activism that follows inevitably from the Ouija board theory of constitutional law. The legislative muscle has weakened, because Congress has yielded to the Court for too long. That deference must end. And if it did, and if the Supreme Court continues to insist on its unprincipled and unjustified arrogation to itself of constitutional authority over the scope of any privileges or immunities of United States citizens, or the scope of due process, then there is one more step for Congress to take: Congress should remove the Court’s jurisdiction over the scope of any POIC or Due Process right crafted through its Fourteenth Amendment power. Having presented an argument grounded in principle and precedent, one that relies first on the plain language—as originally understood, now with the aid of Bowie—of the Fourteenth Amendment, and second on the clearest precedents from that founding period, Congress would then have full justification for holding the Court accountable for its continued and unprincipled behavior. Put differently, however principled the modern

be, are not trained historians. We lack both the methodological and substantive knowledge that historians possess. The sifting of evidence that judges perform is different than the sifting of sources and methodologies that historians perform. *See id.* at 2177 (Breyer, J., dissenting) (“Courts are, after all, staffed by lawyers, not historians.”). And we are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791. Yet we are now expected to play historian in the name of constitutional adjudication.

Order, *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) (citations omitted).

conservative judicial movement was at its birth, it would have lost that character today.

Jurisdiction stripping is an ugly solution.¹³⁵ It should only be deployed against a willful and unprincipled judicial branch. There is not yet the predicate for that judgment, because neither the executive branch nor Congress has been willing to embrace the principles standing behind the current Court's jurisprudence—originalism—and defend them as principles.

Once they have, and once they have given the Court the chance to do the right thing in light of its own principles, the consequence of the Court's failing to act in a consistent and principled manner should be swift and severe. The institution of Congress needs finally to stand up for itself, because no framer of our Constitution ever imagined denying it the power it should now assert.

¹³⁵ See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (holding that Congress can strip the Supreme Court's appellate jurisdiction granted by statute); *The Francis Wright*, 105 U.S. 381, 385 (1881) ("actual jurisdiction is confined within such limits as Congress sees fit to describe"); *Nat'l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) ("Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred."); *Volpe v. D.C. Fed'n of Civic Ass'ns*, 405 U.S. 1030, 1081 (1972) (Berger, J., concurring in the denial of certiorari) ("Congress may, of course, take any further legislative action it deems necessary . . . even to the point of limiting or prohibiting judicial review of its directives."). For recent commentary on how jurisdiction stripping would work, see Christopher Jon Sprigman, *Jurisdiction Stripping as a Tool for Democratic Reform of the Supreme Court: Written Testimony for The Presidential Commission on The Supreme Court of the United States*, N.Y.U., Pub. L. Rsch. Paper No. 21-34 (2021). For a deeply skeptical view about its potential, see Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 124 COLUM. L. REV. (forthcoming 2024).