

THE SHADOW CONSTITUTION: RESCUING OUR INHERITANCE FROM NEGLECT AND DISUSE

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The United States Constitution is the foundation of American law and one of the most venerated documents in the American political community. Although most constitutional scholarship focuses on the meaning of the more heavily litigated provisions, such as the equal protection clause and the due process clause, prior scholarship has also identified and pressed for the revival or re-interpretation of many neglected or largely overlooked provisions of the United States Constitution. Much of this prior scholarship, however, is narrowly focused on a particular provision or small set of interrelated provisions. This article surveys twelve constitutional provisions characterized in prior scholarship as “lost” or “forgotten,” and summarizes the arguments advanced in prior scholarship for their revival or resurrection.

When viewed collectively rather than in isolation, these twelve provisions are more than the sum of their parts. This Article argues that, taken together, these overlooked or neglected provisions constitute a ‘shadow’ constitution within the prevailing one. This article deconstructs the organizational structure and key component elements of the U.S. Constitution and demonstrates how the dormant or neglected provisions interlock and complement to form a coherent but operationally absent constitutional structure. This absence, through disuse and neglect, has not only vitiated our constitutional inheritance, but would, if fully reincorporated into the prevailing constitution and accompanying body of constitutional enforcement and interpretation, afford far greater protection and security to marginalized groups while holding more powerful elements of society to account.

INTRODUCTION

The United States Constitution is one of the most venerated documents in American society. It is circulated like Gideon Bibles, its excerpts are recited in town halls and classrooms alike, and it is revered by organizations and political actors across the political spectrum, often held up on political stages as a symbol and a prop.¹ Despite its esteemed

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² The Globe and Mail, *Khizr Khan Offers Donald Trump His Copy of the Constitution at the DNC*, YOUTUBE (July 28, 2016), https://www.youtube.com/watch?v=7ASv_z6fUzk [perma.cc/4KGK-U3CH].

status, the Constitution is not an uncontested object of affection or adulation. There are intense roiling debates and deep conflicts over the meaning or interpretation of key provisions, and there have been many serious, well-organized efforts to amend it, yielding twenty-seven amendments to the Constitution since 1791.

Dissatisfaction with prevailing interpretations of the Constitution or controversial constitutional pronouncements from the high court scarcely fails to prompt a proposal for amendment.² The Supreme Court's decision deeming flag burning a constitutionally protected form of expression under the First Amendment precipitated proposals to prohibit such activity through amendment.³ In California, a clutch of realtors briefly pushed the idea of a constitutional amendment enshrining the right to discriminate as a property right following the Supreme Court's *Shelley v. Kraemer* decision, which curtailed the use of racially restrictive covenants.⁴ More recently, the Move to Amend effort sought to enshrine limits on corporate contributions to political campaigns, following Supreme Court decisions striking down certain statutory spending limits as a violation of the First Amendment.⁵ Constitutional amendments were floated following both the Supreme Court's *Roe v. Wade* decision and the more recent decision overturning *Roe*.⁶

² For a comprehensive catalogue of proposed amendments, see AMEND PROJECT, <https://amendmentsproject.org/> [perma.cc/EQ9F-TXFZ] (last visited Sept. 27, 2023). Some might argue that the Constitution itself was regarded as a broad redesign (or serial amendment) of a prior instrument that was ultimately regarded as a failure, the Articles of Confederation. MICHAEL I. MEYERSON, *LIBERTY'S BLUEPRINT: HOW MADISON AND HAMILTON WROTE THE FEDERALIST PAPERS, DEFINED THE CONSTITUTION, AND MADE DEMOCRACY SAFE FOR THE WORLD* 50 (2009).

³ *Texas v. Johnson*, 491 U.S. 397, 417–20 (1989).

⁴ Gene Slater, *Freedom to Discriminate: How Realtors Conspired to Segregate Housing and Divide America* (2021).

⁵ MOVE TO AMEND: END CORPORATE RULE. LEGALIZE DEMOCRACY., <https://www.movetoamend.org/> [perma.cc/D9NK-AV3T] (last visited Sept. 27, 2023).

⁶ See *Human Life Amendment*, HUMAN LIFE ACTION, <https://www.humanlifeaction.org/issues/human-life-amendment/> [https://perma.cc/D6FS-7H5F] (last visited Sept. 25, 2023) (calling for an amendment that would reverse the *Roe* decision). Since *Dobbs*, some states have sought to enshrine abortion rights in their own constitutions. See Nicole Nixon, *California Leaders Vow a Constitutional Amendment to Enshrine Abortion Rights if Roe v. Wade Is Overturned*, CAPRADIO (May 3, 2022), <https://www.capradio.org/articles/2022/05/03/california-leaders-vow-a-constitutional-amendment-to-enshrine-abortion-rights-if-roe-v-wade-is-overturned/> [https://perma.cc/Q89E-BBZF].

Although supplemented with twenty-seven amendments, the U.S. Constitution is organized into seven main articles containing twenty-four sections, totaling 7,591 words, 160 sentences, and hundreds of clauses.⁷ Yet, only a small fraction of those provisions predominate political debate, legal contestation, and scholarly analysis.⁸ The Free Speech Clause, the Equal Protection Clause, and the Due Process Clause, among a few others, constitute a vast and disproportionate number of constitutional claims filed in ordinary suits, covering a wide breadth of cases and issues, from political blockbusters like *Bush v. Gore*, which perhaps settled the 2000 presidential election, to challenges to state sodomy statutes.⁹ These clauses, and a few others, have metastasized in scope and importance, gradually building an ever-larger body of precedent for study in casebooks or application by attorneys.¹⁰

As a corollary to the fraction of clauses that receive outside attention, a number of provisions have fallen into desuetude or been rendered nugatory, interpreted so narrowly that they have now all but been forgotten. While there may be clauses that have effectively become moot through the passage of time, like the 1808 Clause,¹¹ or those that have been explicitly repealed, like the 18th Amendment (Prohibition) or

⁷ Since these clauses are not labeled by the authors, they are widely cited by their more popular names. Devotion Garner & Cheryl Nyberg, *Popular Names of Constitutional Provisions*, UNIV. WASH. SCH. L. (Sept. 30, 2013), <https://web.archive.org/web/20230421011758/https://lib.law.uw.edu/ref/constclauses.html>. It should be noted that the amendments were not necessarily intended to be listed as separate from or supplemented appendages to the original Constitution. The framers of the Bill of Rights had initially proposed that some of them be inserted into Article I, Section 9 or as new articles within the existing Constitution. See Randy E. Barnett & Louis Michael Seidman, *The Ninth Amendment: Common Interpretation* NAT'L CONST. CTR. (last visited Sept. 25, 2023) (summarizing prominent scholarly views of the Ninth Amendment and its drafting history).

⁸ RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 16 (2021) (“Controversies tend to arise around a handful of provisions . . . Two of these provisions appear in Section I of the Fourteenth Amendment: the Due Process of Law and Equal Protection of the Laws Clauses.”).

⁹ *Bush v. Gore*, 531 U.S. 98 (2000); *Bowers v. Hardwick*, 478 U.S. 186, 187–90 (1986); *Lawrence v. Texas*, 539 U.S. 558, 562–64 (2003).

¹⁰ Casebooks tend to use the case law method which relies on precedent: prior established interpretative meanings or legal conclusions. The Supreme Court’s jurisprudence plays an outsized role in how these provisions are presented or discussed in classrooms and course materials. Provisions that receive little or no appellate court attention are unlikely to be the focus of legal education or bar review study and receive scant attention in casebooks.

¹¹ U.S. CONST. art. 1, § 9, cl. 1. This clause prevented Congress from prohibiting the slave trade until 1808.

superseded, like the original procedure for electing U.S. Senators (Article I, Section 3), there are many others that have lost their vitality and operational meaning through neglect and disuse.

Some of this can be blamed on timidity and lack of political courage. Congress has frequently been reluctant to invoke or apply provisions as a matter of first instance, especially if there may be an unpredictable backlash or political consequence. In most cases, however, the courts are to blame. Either courts have ignored the provisions, and consistently rejecting claims based upon them, or they have rendered overly parsimonious or circumspect (and, in such cases, frequently dubious) interpretations. Whatever the cause, the result is that surprisingly wide swaths of our constitutional inheritance reside in a state of torpor, desuetude and lethargy.

This Article canvasses constitutional provisions that have been characterized or described as “lost,” “forgotten,” “dormant,” “moribund,” and the like—provisions that have been mostly ignored or neglected by the national councils.¹² This Article draws upon a fascinating body of disparate and often obscure scholarship covering these “lost” and “forgotten” provisions. This prior scholarship not only identifies these various provisions, but it also helps reveal how these provisions have fallen into such disuse and why they remain neglected by our polity and legal community.

Virtually all of this previous scholarship takes the form of an article or note focused on a particular provision or specific set of related provisions.¹³ This Article is original in that it examines many of these provisions collectively, holistically and together, taking a broader view of how they may interrelate, rather than narrowly focusing on a single provision or small set of related provisions.

This Article surveys twelve provisions of the Constitution that have fallen into desuetude or have never or only very rarely been used or successfully litigated before. This Article argues that these moribund, dormant, or neglected provisions collectively constitute something more than the sum of their parts. When seen individually or analyzed in

¹² By the “national councils,” I am referring to the main branches of the Federal Government: the judiciary, the Congress, and the executive branch.

¹³ Numerous citations to examples can be found herein. *See, e.g., infra* notes 42, 60, 177.

isolation, it is easy to dismiss them as anomalies, errors, or exceptional omissions in the practice of American constitutional law or its prevailing interpretation. When viewed collectively, however, a different view emerges. The number of these provisions is surprising, and the potential significance of these provisions is much greater than is generally appreciated. From this lens, they appear complementary, even coherent, in ways that are obscured by the analytic approach of examining provisions independently and in isolation.¹⁴

The main argument of this Article is that there exists within the text of the existing United States Constitution a shadow constitution, an interlocking or reinforcing set of provisions that have fallen into disuse, been neglected, or so badly misinterpreted as to have been functionally read out of the Constitution. These provisions create rights, protections, and rules that address pressing or longstanding societal problems. When viewed together, they afford a new gloss on the overall Constitution, reflecting a strength and vitality that is assumed to be absent in relation to many of these problems.

In that regard, this Article is partly responsive to concerns about the Constitution's apparent inability to address critical problems in our society, and the frequently accompanying call for constitutional amendments.¹⁵ This Article is not written to suggest that amendments to the Constitution should be deflected or avoided, but rather to suggest that the text of the Constitution offers far more than we may currently appreciate in the way of providing mechanisms, tools and potential solutions to address many pressing problems. These are provisions that are ripe for revival and renewed application, and their neglect or disuse has vitiated the constitutional design.

To make this argument, this Article proceeds in three steps. First, in Part II, it describes the nature of a constitution and what a formal, written constitution is intended to do, relating to the distribution of powers and relations between branches of government and the extension of rights and

¹⁴ By "analytic approach," I refer to the tendency to view things in isolation by deconstructing the whole into its constitutive parts rather than regarding them holistically.

¹⁵ Ryan D. Doerfler & 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> [perma.cc/MK5G-L96Z]; see also Jill Lepore, *How to Stave Off Constitutional Extinction*, N.Y. TIMES (July 1, 2023), <https://www.nytimes.com/2023/07/01/opinion/constitutional-amendments-american-history.html> [perma.cc/88AB-Y6XG] (describing methods of changing the Constitution).

protections to individuals in society. Second, in Part III, it surveys prior scholarship on neglected, moribund, overlooked or forgotten provisions within the existing constitutional text. Then, in Part IV, it demonstrates how these provisions relate to each of the core functions of the U.S. Constitution, and how they complement or reinforce each other, while offering a new gloss on the overall Constitution itself. Specifically, the twelve provisions canvassed in this Article vindicate rights of American citizens and residents, principles of equality, and democratic and republican governance. In particular, these provisions appear to be threaded by a solicitous regard for the marginalized and least powerful segments within the polity.

This Article is unique and original in that it is specifically and exclusively focused on provisions that have been mostly ignored or neglected, rather than provisions that have been arguably misinterpreted or misunderstood. This Article, then, is not yet another entry into—and should not be conflated or filed with—the voluminous scholarship on ‘wrong turns,’¹⁶ or the frequently overlapping literature pressing an overarching alternative interpretation or interpretative methodology for understanding or applying constitutional text.¹⁷ Such scholarship is either primarily focused on the aforementioned more heavily litigated provisions, with less attention paid, if at all, to the ‘lost’ or ‘forgotten’ provisions, or it encompasses both ‘wrong turns’ and ‘lost or forgotten’ provisions, with a focus on correcting what its authors regard as error

¹⁶ See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470–78 (2004); ANDREW P. NAPOLITANO, *THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND* (2010); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 1–6 (2013).

¹⁷ See, e.g., Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* 1–31 (2022) (understanding the Constitution as reflecting an anti-oligarchic philosophy); see also Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1280–86 (2011) (calling attention to a perspective some justices have adopted in equal protection cases, but was not adopted by the Supreme Court); see also Lysander Spooner, *The Unconstitutionality of Slavery* 1–15 (1860) (arguing that the U.S. Constitution prohibits slavery); see also Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* (1994) (presenting a view of the Fourteenth Amendment that contrasts with those held by the Supreme Court).

rather than neglect and disuse.¹⁸ The only resemblances to that body of literature are that this Article sees a connecting thread running through these provisions, and often provides a new gloss on the Constitution, and that this Article covers some (although not much) of the same territory.¹⁹

The provisions discussed herein, which are centuries old, have either no Supreme Court mention, a single mention, or sparingly few mentions, and even fewer applications. In a few cases, there are but a handful of applications by upper-level federal or state courts. Therefore, this Article is not about provisions that have been wrongly interpreted *per se*, but about provisions that have been ignored, neglected or fallen into desuetude. Only some of that neglect can be blamed on erroneous judicial construction or interpretation, where they have been so badly construed as to have been effectively nullified. In other cases, as noted, the political branches are to blame for their disuse.

There is enormous untapped potential within American jurisprudence by reviving these defunct, dormant, forgotten, and neglected provisions. In each case, this Article will review the constitutional text and meaning, describe how courts interpreted the provision (or not), how scholars have regarded it, and then suggest various alternative interpretative possibilities.

The United States Constitution contains within it a set of tools, mechanisms and protections that are currently neglected and overlooked. We must not continue to view these as isolated errors, but rather as a hidden or obscured constitutional vestment—a shadow constitution within the prevailing constitution—waiting to be revived. If the Constitution were a many-roomed mansion, an important wing has been cordoned off,

¹⁸ Like Barnett and Bernick who focus on four provisions in the Fourteenth Amendment: the Privileges or Immunities Clause, the Equal Protection Clause, the Due Process Clause, and the Enforcement Clause. Only the Privileges or Immunities Clause, among the four, has received scant judicial guidance. *See generally* BARNETT & BERNICK, *supra* note 8.

¹⁹ One apparent superficial similarity is that this Article is rooted neither in textualist or originalist methodologies. It is textualist only in the most literal sense that it is foregrounding provisions of the constitutional text that have been fallen into disuse, but this article does not advance, explicitly or implicitly, any methodology that is conventionally regarded as ‘textualist’ beyond a recognition that these provisions exist within the four corners of the constitution and should be accorded more significance than they currently receive. That is not to say that this Article *rejects* textualism or originalism, either. Rather, debates regarding those interpretive methodologies are mostly beyond the scope of this Article except insofar as prior scholarship touching on the surveyed provisions is directly implicated.

shuttered, and covered up. We should consider whether it is time to re-open those wings and the rooms it contains for broad use and enjoyment.

I. WHAT CONSTITUTES A CONSTITUTION?

To demonstrate the existence of a ‘shadow’ constitution within the prevailing United States Constitution, we must first examine the structure and key components of the U.S. Constitution. This review will show how many of the dormant and neglected provisions of the forgotten or obscured ‘shadow’ constitution relate to the core functions of the prevailing one.

A. ORGANIZATION OF THE UNITED STATES CONSTITUTION

Although the reader is likely familiar with the organization and content of the Constitution, it is worth briefly reviewing its organizational structure and substantive content for the discussion that follows. Aside from a brief preamble containing a statement of purpose, the United States Constitution is organized into seven articles, supplemented with twenty-seven amendments.

The first three articles pertain to the three major branches of the federal government, respectively. Article I covers the legislative branch, describing the mode and manner of the composition, powers and requirements for members of the House (Section 2) and the Senate (Section 3), the elections thereof (Section 4), the proceedings of the chambers (Section 5), the powers of the Congress (Section 8),²⁰ and restrictions on those powers (Section 9), as well as restrictions on the legislative powers of the states (Section 10), among other matters.

Article II covers the executive branch, specifying the powers and duties of the President, the original manner of electing the President, and the grounds for impeachment and removal (Section 4).

²⁰ It should be noted that while various Congressional powers are specifically enumerated in Article I, Section 8, there are numerous other places within the Constitution that endow Congress with power and authority to act. For example, Section 2 of the Thirteenth Amendment, and Section 3 of the Twentieth Amendment, provide authorization for Congress to pass laws as described therein. By my count, there are at least sixteen additional provisions in the Constitution *outside* of Article I that provide Congressional power to act (or pass laws).

Article III covers the federal judiciary, establishing the Supreme Court, empowering Congress to establish additional courts, specifying the cases that fall within the judicial power of the United States, and clarifies a few issues relating to criminal and civil law.

Article IV, organized into four sections, contains a set of miscellaneous provisions regarding the relations between the federal government and the states, including public records (Section 1), the rights and protections of citizens in states (Section 2), the procedure for the admission of new states (Section 3), the regulation of federal territories (second paragraph of Section 3), a guarantee that each state shall have a republican form of government (Section 4), and a process for responding to insurrections and invasions by states (also Section 4).

Article V provides two separate procedures for amending the Constitution, as well as specifies several provisions that cannot be amended.²¹ The first amendment procedure involves proposals originating in Congress which then must be ratified by three-fourths of the state legislatures. The second procedure involves a constitutional convention called for by two-thirds of the state legislatures, resulting in proposed amendments that can be ratified either by three-fourths of the state legislatures or conventions in the states.

Article VI, just three paragraphs, deals with various technical legal matters, including issues of public debt, treaties, and a requirement that all public officials uphold the Constitution.

Finally, Article VII establishes the basis for ratification and conditions for bringing the Constitution into force.

It is not easy to summarize the content of the amendments, but many of the provisions within them broadly fall into a few categories. Several Amendments relate to election procedures (17th), especially for President (12th, 20th, 22nd). More than a few specify additional fundamental rights (1st, 2nd, 10th, 14th), property rights (3rd, 4th, 5th), and even more protect voting rights (15th (race), 19th (sex), 24th (class), 26th (age)). Several amendments relate to criminal procedure and rights

²¹ Or, at least, not before 1808, in the case of Article I's section 9, first and fourth clauses, pertaining to the importation of slaves. The other provision that cannot be amended is the provision of equal representation in the Senate between states, unless they consent otherwise.

in criminal proceedings (4th, 5th, 6th, 7th, 8th).²² Multiple amendments deal with racial inequality and slavery (13th, 14th, 15th, 24th), and a pair deal with alcohol (19th and 21st). There are also amendments defining citizenship (14th), relating to the incapacity of the President (25th), compensation for representatives (27th), limiting judicial power (11th), and definitively establishing the constitutional authority to impose an income tax (the 16th Amendment).

B. KEY FUNCTIONS OF A CONSTITUTION

Given the multiplicity of provisions, there are many ways of understanding or making sense of the structure and design of the U.S. Constitution. In oral argument in *Dobbs*, for example, Supreme Court Justice Sonia Sotomayor offered this sagacious but extemporaneous observation:

As I see the structure of the Constitution, the body of it is the relationship of the three branches of government, and then there is the relationship of the federal government to the state, and, through our incorporation of the Fourteenth Amendment, of the state vis- à-vis the individual, it's the federal government and the states' relationship to individuals.

And I see the Bill of Rights, including the Fourteenth Amendment, as basically setting the limits, giving individual freedom to do certain things and stopping the government from intruding in those liberties, in those Bill of Rights, correct?"²³

As noted, this is not the only way to understand the U.S. Constitution or its structure, but the preceding review is hopefully suggestive in that regard. Among the key functions of the Constitution are: 1) establishing the powers and authority of each branch of government, 2) establishing the procedures that must be used to populate the membership of those branches, 3) establishing the relationships between those branches (and preventing encroachments), 4) establishing the limitations and constraints on the power and authority of each of those branches, and, perhaps most

²² It is difficult to read these five amendments in their entirety and not feel that they would have been well placed in Article III as limitations or duties upon the judicial power, much as Article I does the same for the powers and limitations of the legislative power.

²³ Transcript of Oral Argument at 88, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

importantly, 5) establishing the fundamental rights and protections of individuals in society that cannot be amended by ordinary legislation. In short, a constitution creates authority, processes that legitimate that authority, rules that constrain that authority, and then rights and protections of people beyond or encompassed by that authority.

This summary describes what the U.S. Constitution does, or, more precisely, what it contains. In brief, it defines and delineates the powers of government, the fundamental rights of citizens that should not be abridged by ordinary legislation, and the processes and procedures that govern the people and the government. This may be true of most or all written constitutions. The United States Constitution contains provisions that relate to each.²⁴

But even more than that, a constitution, in a sense, constitutes the polity and the law itself. It does this by using itself as the basis for law, the legitimate grounds upon which law is made or applied, and by defining the entities and institutions in society, the government, the people, and their relations.

It is notable that a constitution—in both of the senses just noted—is not generally an appropriate place for ordinary legislation or matters best subject to ordinary legislation. In this regard, the United States Constitution doesn't set federal tax rates, define the rules of commerce, establish criminal codes and penalties (except in a few cases, such as Treason), or direct investments in people or infrastructure (although it gives Congress the power to make such investments, such as the U.S. Postal Service in Article I, Section 8). Instead, it delegates the powers to make such rules and adopt such policies to the democratic branches.

In a democratic system of government, *most* matters are supposed to be regulated by the people or their representatives. Only those that absolutely cannot or should not be left up to the legislative processes are supposed to be enshrined in a constitution. In this regard, there is a fundamental tension between democracy as a system of legislating the preferences of the majority and the extent to which a constitution removes those matters beyond the reach of ordinary legislation. This tension is

²⁴ It is notable, however, that the provisions relating to processes and procedure are often very clear and specific whereas provisions relating to rights and protections are open-textured and ambiguous. I will return to this point later.

perhaps most obvious in cases in which written constitutions have been proposed that are far more extensive or detailed in defining fundamental rights, especially so-called ‘positive rights.’²⁵

The tension between democratic governance procedures through legislation and fundamental rights and protections contained in a constitution is a frequent source of political conflict and legal contestation, and has precipitated several constitutional amendments. It was most obvious in the antebellum and Jim Crow South where state legislatures routinely enacted oppressive or discriminatory legislation. Although these legislatures did so, in part, by disenfranchising citizens, much of this oppressive legislation could have been adopted over the opposition of fully enfranchised citizens. It is possible that a political majority can oppress a minority even if there are fair procedures by simply outvoting them consistently and as a bloc.

Discovering or drawing the appropriate line between the democratic exercise of majority will and the necessary protection of individual or group rights in a liberal democracy is an extremely difficult matter. It may be the most fundamental paradox at the crux of what is generally denoted as ‘liberal democratic governance.’²⁶ Democracy implies a degree of political equality, but establishing and protecting this equality through the extensive articulation and enforcement of rights can trammel or circumscribe the ordinary scope of legislative prerogative or authority.²⁷

There is a powerful desire—especially among those who advocate on behalf of marginalized social groups—to seek to place many objects of legislation beyond the reach of a legislature by constitutionalizing it.

²⁵ See, e.g., Catherine Osborn, *How Chile’s Constitution Revolution Missed the Mark*, FOREIGN POL’Y (Sept. 9, 2022), <https://foreignpolicy.com/2022/09/09/chile-constitution-referendum-results-reject-boric/> [perma.cc/A8D7-PCFK] (describing the rejection of a proposed progressive constitution in Chile). This proposed constitution runs contained more than 170 pages with and has 388 articles and would have enshrined more than 100 constitutional rights. See Jack Nicas, *Chile Says ‘No’ to Left-Leaning Constitution After 3 Years of Debate*, N.Y. TIMES (Sept. 6, 2022), <https://www.nytimes.com/2022/09/04/world/americas/chile-constitution-no.html> [perma.cc/8VVT-7QD4]. The proposed European Constitution, also never adopted, similarly has over 100 pages and numerous articles. 47 Draft Treaty Establishing a Constitution for Europe 1 (2004), https://publications.europa.eu/resource/cellar/7ac3fd7e-8820-413e-8350b85f9daab0c.0005.02/DOC_1 [https://perma.cc/RPH5-36TU].

²⁶ Francis Fukuyama, *Liberalism and Its Discontents* 47–98 (2022).

²⁷ The opposite is also true: extensive legislative prerogative with few or limited rights means that it is also easy for legislature to trammel over the rights of people. Therefore, the challenge is striking the optimal balance between legislative power with the rights of people in a democracy.

Thus, for example, the fight over marriage equality in the Supreme Court, culminating in the *Obergefell* decision, was not about whether Congress had the power to regulate marriage generally, but whether the Defense of Marriage Act (DOMA) and similar state statutes defining marriage as a legal union between different-sex persons only violated the Equal Protection Clause.²⁸ By ruling that it did, the Supreme Court removed that issue beyond the regulation of state legislatures and the democratic policy they represent.²⁹ A similar thing occurred with *Roe v. Wade*.³⁰

Although there were many advocates pushing for marriage equality in state legislatures, the litigation in the Supreme Court may have short-circuited democratic debate in the legislative arena. Advocates for marginalized social groups argue that their rights and standing in society should not be subject to legislation or democratic whim.³¹ Insofar as these rights are the precondition for equal citizenship, this argument has force. But taken to a logical extreme, such an argument could potentially constitutionalize every important issue. That would create or lead to a *kytocracy*, a government ruled by judges, not a democracy.³²

One way to resolve this dilemma is to focus on *procedures* and *processes* rather than subject matter or substantive rights. A constitution, in this way, should seek as an overriding objective to establish fair procedures and processes that allow all members of social groups to fully participate in the political system. Thus, there must be some protections established to protect and ensure fair participation for political minorities. This is the essence of the famous *Carolene Products* footnote 4, with its emphasis on access to the political process and the capacity to organize to oppose or repeal oppressive or noxious legislation.³³

But even this may not suffice. Even if a minority group is able to fully access and participate in the political system, they could still be

²⁸ 576 U.S. 644 (2015).

²⁹ *United States v. Windsor*, 570 U.S. 744, 769 (2013); *Obergefell v. Hodges*, 576 U.S. 644, 672–73 (2015).

³⁰ 410 U.S. 113, 129 (1973).

³¹ Some scholars have argued that the U.S. Constitution should encompass more rights, but protect those rights less stringently. JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* xxviii–xxxvi, 248–251 (2021).

³² Alex Ussia, *The American Kytocracy: The Role of Judges Throughout American History* (2010) (B.A. thesis, American University), available at <http://dra.american.edu/islandora/object/0910capstones%3A52/datastream/PDF/view>.

³³ 304 U.S. 144, 152 n.4 (1938).

consistently and categorically outvoted by the majority or indirectly impeded. One additional step should be addressed by a constitution. It should also include provisions that create fundamental capacities necessary to political participation and protect against impositions that might impede that participation.³⁴ Thus, it is not enough to create fair processes. If one group is denied access to essential capacities—such as education (and literacy), physical security, or the like—then the constitution should try to guarantee those capacities as well in order to ensure a fair procedure.

Regardless of where we draw the line in terms of addressing or resolving any of these constitutional dilemmas, we can hopefully now better appreciate the function of a constitution, its most vital purposes and perhaps where a constitution should be delimited. With this in mind, let us now review various provisions of the U.S. Constitution that have fallen into dormancy or have been subject of neglect and disuse. This Article will show that these provisions relate to each of the key functions specified above, with implications for how our constitutional jurisprudence has resolved many of these dilemmas.

II. DORMANT AND NEGLECTED PROVISIONS

Drawing on prior scholarship, this section surveys twelve constitutional provisions that have fallen into disuse, or been neglected, forgotten, or construed so narrowly by courts as to have been effectively read out of the Constitution. Although the courts have played a large role in this process, in some cases the problem is political, and the lack of political will or courage to invoke them. The twelve provisions surveyed here are organized into two broad categories: those relating to governance and those relating to fundamental rights, reflecting the broad taxonomy developed in Part II of this Article.

³⁴ Capacities or ‘capabilities’ here is a term of art, reflecting the philosophy of the Capabilities Approach. See MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* ix–xii, 186–87 (2011) (arguing for improving people’s lives by focusing on their actual capabilities and real opportunities).

A. GOVERNANCE

1. *Emoluments*

Article I, Section 9, Clause 8 of the Constitution provides as follows: “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” Until very recently, there was very little analysis or even awareness of these provisions. This paragraph is a sterling example of disuse and neglect.

These provisions, much like the Disqualification Clause, discussed herein, provide an important check on power. Specifically, they hold abuse of power accountable. Yet, the lack of application or precedent under this provision has left unresolved many questions and ambiguities. Nearly all scholars agree that the Emoluments Clause applies broadly to all federal officeholders, appointed or elected, up to and including the president. But that is pretty much where the consensus ends.

In a pair of articles, Zephyr Teachout contends that this Clause constitutes part of a general anti-corruption mechanism built into the Constitution.³⁵ Her argument emphasizes a broad and motivating concern among the Framers of the Constitution with corruption and the potential for corruption.³⁶ In her view, this paragraph was intended as an important safeguard and constitutional check on corruption.³⁷

Although essentially a dormant provision for several centuries, these debates acquired a practical significance under the presidency of Donald J. Trump, whose prior and ongoing businesses and real estate dealings introduced new questions about gifts and benefits during a presidency. Many legal scholars, including Lawrence Tribe and Zephyr Teachout,

³⁵ See Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. 30, 30–31, 34–35, 48–54 (2012) (responding to Seth Barrett Tillman’s critique of Teachout’s previous work that argued that corruption of public officials was one of the Framers’ central anxieties); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 346–72 (2009) (arguing that an anticorruption principle, like the separation of power and federalism principles, is a central part of the Constitution).

³⁶ Zephyr, *Gifts, Offices, and Corruption*, at 34–35.

³⁷ *Id.* at 359.

argued that Donald Trump's presidency presented grave risks in this regard.³⁸ These risks were more than theoretical.

Plaintiffs filed lawsuits against President Trump, alleging that he violated the Constitution's emoluments clause by accepting payments from foreign and domestic officials who stay at the Trump International Hotel and patronize other businesses owned by the former president and his family. However, shortly after the inauguration of Joe Biden, the U.S. Supreme Court threw out these suits as "moot" before they could be heard and decided.³⁹ As a result, this provision continues to languish in a state of disuse. It remains to be seen how and when it could be revived, or what construction or defenses could be developed upon application and interpretation.

2. *The Exceptions Clause*

Although Article III principally concerns the judiciary, Article III, Section 2, Clause 2, Sentence 2 of the Constitution provides for an additional congressional power. It states that "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." In other words, Congress can withdraw appellate jurisdiction from the Supreme Court. This is no small thing. As the journalist Jamelle Bouie points out, "If Congress can regulate the appellate jurisdiction of the Supreme Court, then it can determine which cases it can hear, the criteria for choosing those cases and even the basis on which the court can make a constitutional determination."⁴⁰

³⁸ See, e.g., Norman L. Eisen, Richard Painter, & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS 13-21 (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf [<https://perma.cc/KMX9-J94Z>] (arguing "Mr. Trump's business holdings present significant problems under the Emoluments Clause.")

³⁹ *Trump v. Citizens for Resp. and Ethics in Wash.*, 971 F.3d 102 (2d. Cir. 2020), *vacated as moot* 141 S. Ct. 1262 (2021); *Trump v. District of Columbia*, 959 F.3d 126 (4th. Cir. 2020), *vacated as moot* 141 S. Ct. 1262 (2021).

⁴⁰ Jamelle Bouie, *This Is How to Put the Supreme Court in Its Place*, N. Y. TIMES (Oct. 14, 2022), <https://www.nytimes.com/2022/10/14/opinion/supreme-court-reform.html> [<https://perma.cc/4ZZZ-W9WK>]. It should be noted that his conclusion is not *quite* technically accurate, as the Court still has agency to accept cases arising out of its original jurisdiction, even if Congress were to invoke this power.

Although the Exceptions Clause power has been used by Congress at the insistence of the Court itself to help the Court manage its docket,⁴¹ this power has never been applied to strip the Supreme Court of appellate authority over a particular issue. In 1868, in response to a series of cases that outraged them, the so-called ‘radical’ Republicans who controlled the Reconstruction-era Congress debated a bill that would have required “a concurrence of two-thirds of all the members necessary to a decision adverse to the validity of any law of the United States.”⁴² Although Democrats fiercely opposed the bill, it passed the House and the Senate, only to be vetoed by Andrew Johnson.⁴³ And John Bingham, author of the 14th Amendment, endorsed the constitutionality of the measure.⁴⁴

This was the only near-successful application of this power for this purpose. There have been many less noteworthy attempts to similarly circumscribe the Supreme Court’s authority to hear appeals, especially on hot button issues such as school prayer, school desegregation, abortion, but various political and legislative concerns appear to have inhibited the legislature from adopting such measures.⁴⁵

One apparent concern explaining Congress’s disuse of this provision is the danger of a retaliatory cycle: if Congress in one session would adopt such a rule on an issue of concern to one party, then it could trigger a retaliatory effort on another issue in a subsequent session. There are also fears among legislators that such efforts could exacerbate political polarization or be viewed as further politicizing the independent judiciary and the Supreme Court.⁴⁶ As one scholar observed: “The mere idea of

⁴¹ See, e.g., Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 948–78 (2013) (explaining how the 1875 Judiciary Act prompted a massive uptick in the Court’s workload, which prompted the Court to seek relief from Congress).

⁴² *Chronicling America: Historic American Newspapers*, LIB. OF CONG.: N. Y. HERALD, Jan. 14, 1868, at 4, <https://chroniclingamerica.loc.gov/lccn/sn83030313/1868-01-14/ed-1/seq-4/> [<https://perma.cc/44ZZ-W9WK>].

⁴³ *The Supreme Court Bill*, TIMESMACHINE: N.Y. TIMES (Jan. 16, 1868) at 5, <https://www.nytimes.com/1868/01/16/archives/the-supreme-court-bill.html> [perma.cc/NEM8-D2KY]; see also Jamelle Bouie, *This is How to Put the Supreme Court in its Place*, N. Y. TIMES (Oct. 14, 2022), <https://www.nytimes.com/2022/10/14/opinion/supreme-court-reform.html> [<https://perma.cc/Q79H-46F8>].

⁴⁴ Jamelle Bouie, *This is How to Put the Supreme Court in its Place*, N.Y. TIMES (Oct. 14, 2022), <https://www.nytimes.com/2022/10/14/opinion/supreme-court-reform.html>.

⁴⁵ Brian Kulp, *Counteracting Marbury: Using the Exceptions Clause to Overrule Supreme Court Precedent*, 43 HARV. J.L. & PUB. POL’Y 279, 283–84 (2020).

⁴⁶ *Id.*

invoking such a drastic option for short-term political gain—even if fully consonant with the constitutional text—may be repugnant to participants in the two-party system.⁴⁷

In the aftermath of the *Dobbs* decision, this concern may prove less of an inhibiting factor. More generally, this power could prove the basis of important reforms to the Supreme Court or to curb perceived excessive power in the Supreme Court or the danger of kryptocracy. It would probably be more palatable politically than court-packing,⁴⁸ with its inherently pejorative connotation, or, on the other hand, organized and willful defiance of the Court, which is a risky alternative which undermines respect for the Court and the Constitution itself. And it would be an easier lift than trying to impose term limits, which would require a constitutional amendment, or indirect term limits by some other means.⁴⁹

Regardless of the wisdom of applying this provision, the important point here, as will be repeatedly demonstrated, is that the Constitution contains a mechanism for correcting what is perceived to be a major problem or set of problems relating to the increasing politicization of the Supreme Court, Supreme Court appointments, and the deleterious effects of highly consequential Supreme court decisions by a narrowly divided court on hot button issues. If only it were tried.

3. *The Guarantee Clause*

Article IV, Section 4 states that “The United States shall guarantee to every state in this Union a Republican Form of Government. . . .” But what exactly is meant by this provision, including how the federal government should ensure or enforce this guarantee, is unclear. Unfortunately, Supreme Court precedent bars federal courts from entertaining claims brought under the Guarantee Clause and therefore developing answers to these questions.

⁴⁷ *Id.* at 283.

⁴⁸ Andrea Alexander, *What Is Court Packing?*, RUTGERS TODAY.

⁴⁹ *See, e.g.*, PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT 136-37 (2021) (providing “an account of the current debate over the ‘role and operation of the Supreme Court in our constitutional system’ and an ‘analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals’”).

In 1849 and again in 1946, the Supreme Court ruled that claims under this clause are non-justiciable.⁵⁰ By the early 1960s, scholars were dubbing the clause a “study in desuetude.”⁵¹ The Supreme Court precedent rendering this clause non-justiciable was before, however, the Court’s revolution on voting jurisprudence in the 1960s allowed federal courts to entertain voting claims like *Baker v. Carr*.⁵² This explains why, nearly a generation ago, constitutional scholar Erwin Chemerinsky wrote an article entitled “Why Cases Under the Guarantee Clause Should Be Justiciable.”⁵³

Although rarely invoked or analyzed, the prevailing consensus is that this Clause requires majority rule and that representatives serving in state governments be selected by elections.⁵⁴ In other words, it is a guarantee to the citizens of those states that each state government must be republican in form. From this view, this clause might be the basis for challenges to features of various state governments that are anti- or undemocratic.

This is not a fanciful notion. There are structural hints and persuasive judicial opinions that support this view. The Guarantee Clause was placed in the article of the Constitution governing the relationship between the federal government and states, and should be theoretically applicable or operative to constrain problematic or extreme behavior by states. Justice Harlan, in his *Plessy* dissent, would have held that the

⁵⁰ See *Luther v. Borden*, 48 U.S. 1, 46–47 (1849) (applying the political questions doctrine to cases arising under the Guarantee Clause); see also *Colegrove v. Green*, 328 U.S. 549, 552, 556 (1946) (“Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.”).

⁵¹ See, e.g., Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 513 (1962) (urging the Supreme Court to reconsider its position that all claims raised under Article IV, Section 4 are nonjusticiable).

⁵² See, e.g., *Baker v. Carr*, 369 U.S. 186, 208–10 (1962) (arguing that claims of political discrimination arising under the Equal Protection Clause do not “rest[] upon or implicate[] the Guarantee Clause” and that they are thus justiciable).

⁵³ See generally Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994) (arguing that claims under the Guarantee Clause should be justiciable since the clause serves to protect fundamental political rights and holding such claims to be nonjusticiable renders “a constitutional provision a nullity”).

⁵⁴ Gabriel J. Chin & Erin M. Hawley, *Common Interpretation: The Guarantee Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-iv/clauses/42> [<https://perma.cc/GJC9-Y9KZ>] (last visited Sept. 25, 2023).

separate railway car statute adopted by the state of Louisiana violated this provision.⁵⁵

Not only could this be used to challenge extreme political gerrymandering,⁵⁶ but it would also prove a forceful rejoinder to the so-called “independent state legislature” doctrine, the idea that a state legislature could overturn the results of a duly held election.⁵⁷ This very notion, no matter how well-founded it might be on Article I text, is arguably repugnant to the Guarantee Clause. Again, the Constitution contains a potential solution to a problem, if only it were operative and applied rather than defunct and moribund.

4. *Shall Be Reduced*

The 14th Amendment to the Constitution was an omnibus amendment, attempting to address multiple simultaneous problems arising out of the aftermath of the Civil War. Section 1 clarifies the definition and acquisition of both state and federal citizenship and then generates critical protections against state imposition or intrusion.⁵⁸

Section 2 builds on that foundation, but extends, gingerly, into the electoral sphere. It specifies that congressional apportionment, contrary to the infamous Three-Fifths Clause, must be conducted according to the whole number of people. The last sentence of that section, however, introduces a penalty for disenfranchising male voters. Specifically, it states that “when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”⁵⁹

⁵⁵ 163 U.S. 537, 564 (1896) (Harlan, J., dissenting).

⁵⁶ See, e.g., Stephen Menendian, *Race and Politics: The Problem of Entanglement in Gerrymandering Cases*, 96 S. CAL. L. REV. 301, 346–52 (2023) (arguing that a revival of the Guarantee Clause is one way to potentially combat extreme cases of gerrymandering).

⁵⁷ See, e.g., Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY’S L.J. 445, 448–449 (2022) (aiming to debunk two theories that have been used to justify the “independent state legislature” doctrine).

⁵⁸ U.S. CONST. amend. XIV, § 1.

⁵⁹ U.S. CONST. amend. XIV, § 2.

In short, if a state denies the right to vote, it is supposed to lose representation in proportion to that denial. This provision—known more widely as the Penalty or Reduction Clause—has never been applied. As one scholar memorably quipped, “Section 2 of the Fourteenth Amendment has the unfortunate privilege of being dead as long as it has been alive.”⁶⁰ In 1965, one scholar even called this clause a “neglected weapon.”⁶¹ A more recent scholar dubbed it the “forgotten” clause.⁶²

There has never been a serious effort by Congress to use this provision to penalize a state, and the only judicial attempt was rebuffed.⁶³ This is all the more remarkable because the boosters of the 14th Amendment regarded this provision as among its most important. Senator Thaddeus Stevens called it such, and representative George Miller called it the “cornerstone of the stability of our government.”⁶⁴ This is not exclusively an ancient view. As one commentator in the beltway online magazine *Politico* described this provision, it “may well be the Constitution’s most important lost provision.”⁶⁵

Unlike other voting protections that have subsequently been adopted, one reason that this provision could be useful—even important—is that the operation of the clause is left to Congress rather than the courts. The Voting Rights Act of 1965, among other laws, is largely left to the management and enforcement of the courts (although the Department of Justice and other executive branch entities play a role).⁶⁶ In contrast, the Penalty Clause is a potentially complementary but more immediate cudgel or weapon to protect voting rights, and it would do so in a way that is—theoretically—less intrusive or meddling than a set of provisions that

⁶⁰ Franita Tolson, *What Is Abridgement?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 434 (2015).

⁶¹ See, e.g., Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 W. RES. L. REV. 965, 965 (1965).

⁶² Delaram Takyar, “The Cornerstone of the Stability of Our Government”: The Forgotten Penalty Clause and Electoral Reform in the Aftermath of the 2020 Election, 39 YALE L. & POL’Y REV. INTER ALIA 1, 1–3 (2021).

⁶³ See *Saunders v. Wilkins*, 152 F.2d 235, 237 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946).

⁶⁴ George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 93 (1961).

⁶⁵ Joshua Geltzer, *The Lost 110 Words of Our Constitution*, POLITICO (Feb. 23, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/02/23/the-lost-constitutional-tool-to-protect-voting-rights-116612> [<https://perma.cc/5QXK-P7X4>].

⁶⁶ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

essentially federalize voting processes and procedures, which is what many critics maintain of the John R. Lewis Voting Rights Advancement Act of 2021 and the Freedom to Vote Act of 2022.⁶⁷

Instead of waiting years or even the better part of a decade for a case to wind its way through the federal courts, the Penalty Clause could be immediately invoked in response to any state law, process, or procedure that Congress finds has reduced access to the ballot, even inadvertently. In theory, measures such as purging of voting rolls, exclusionary or overly-restrictive ID rules, closures or relocation of voting booths or locations, could all provide a basis for action.

And this is yet another advantage of this clause: not only is it a political, rather than legal, process, but it does not require intent. The trigger is one of effects, not motives. This also means that there is no basis for a defense, except what the provision provides. The only caveat is that there would probably need to be a finding of fact to provide a basis for invoking this provision.

But this is apparently exactly what a House select committee attempted to do in the 1870s. As part of the 9th census, it documented a list of state laws that the committee regarded as infringing on voting.⁶⁸ The committee's report would have directed the Secretary of the Interior to use that information to make an assessment of how much representation should be abridged.⁶⁹ A Senate bill was being developed along similar lines.⁷⁰ Opponents complained that these bills would make the Secretary of the Interior the ultimate judge of representation, and the bills stalled out.⁷¹

The machinery of the census is far more sophisticated than it was in the Reconstruction era. This is why plaintiffs in the mid-1960s tried to get federal courts to enlist the Bureau into the machinery of Penalty

⁶⁷ See, e.g., Brian Naylor, *The Senate Is Set to Debate Voting Rights. Here's What the Bills Would Do*, NPR (Jan. 18, 2022) (stating that many Republicans see the recently proposed as a federal power grab).

⁶⁸ Zuckerman, *supra* note 64, at 108.

⁶⁹ *Id.* at 109.

⁷⁰ Zuckerman, *supra* note 64, at 108.

⁷¹ *Id.*

Clause enforcement, which the courts predictably rebuffed.⁷² But the sophistication of data collection and analysis is beyond the imaginations of the framers of the 14th Amendment and even that of 1960s jurists, due to computer advances, GIS technology, and improved statistical analytical techniques.

If properly charged, the census could easily compute the likely statistical effects of various voting provisions on access to the ballot as part of its ordinary data collection processes, and with much greater precision, gauge the effects of various laws and statutes. Even if not used as the basis for penalizing or reducing representation, the mere investigation into these issues by the Census Bureau could be useful, not only to the states themselves, but to Congress as it considers how best to strengthen voting rights, guard against nefarious state action, or to assist the Department of Justice as it brings suits in federal court under statutory authority, or even to private plaintiffs who might do the same in state or federal forums.

There are many unanswered questions raised by the application or invocation of this clause.⁷³ But the difficulties in answering or resolving those questions should not be a deterrent from faithful adherence to the text of the Constitution nor the duty to wrestle with them in the same manner as any other challenging bit of constitutional text.⁷⁴

5. *Insurrection or Rebellion*

Section 3 of the 14th Amendment addresses yet another problem that arose in the aftermath of the Civil War—the election of insurrectionists and rebels to Congress by former confederate states. Specifically, this section states:

⁷² See, e.g., *Lampkin v. Connor*, 360 F.2d 505, 506–08 (D.C. Cir. 1966) (refusing to grant a determination under the Declaratory Judgement Act, 28 U.S.C. §§ 2201–2202, that the Director of the Census and the Secretary of Commerce are required to implement Section 2 against states that disenfranchise voters); see also *Sharrow v. Brown*, 447 F.2d 94, 95–98 (2d Cir. 1971) (denying plaintiff’s efforts to obtain a series of judicial order that would require the Director of the Census to keep records on the number of disenfranchised men in each state in order to properly enforce Section 2).

⁷³ See, e.g., *Geltzer*, *supra* note 65, for a discussion of some of them.

⁷⁴ For a discussion of possible implementation approaches, see generally Takyar, *supra* note 62, at 8–11.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.⁷⁵

Aimed as it was at the aftermath of the rebellion and Civil War, the Clause became effectively moot after the 1872 Amnesty Act.⁷⁶ Most Confederates were once again deemed to be qualified for office, and the Clause lost its original purpose. As a result, in the words of one commentator, “despite its clarity and good sense, the provision has rarely been invoked.”⁷⁷

This so-called “Disqualification Clause” has only been invoked a single time to prevent someone from being seated for office since the Civil War. In 1919, a special House of Representatives committee concluded that the socialist Victor Berger, because of his opposition to the United States joining World War I, was “not entitled to the seat to which he was elected.”⁷⁸

In the wake of the attack on the Capitol Building on January 6, 2021, there have been noted attempts to revive this clause against both members of Congress and state legislatures.⁷⁹ A New Mexico judge invoked Section 3 against Couy Griffin, a county commissioner who had been convicted of entering the Capitol grounds as part of the Jan. 6 mob, to remove him

⁷⁵ U.S. CONST. amend. XIV, § 3.

⁷⁶ Amnesty Act of 1872, Pub. L. No. 42-193, 17 Stat. 142.

⁷⁷ See Jesse Wegman, Opinion, *Is Donald Trump Ineligible to be President?*, N.Y. TIMES (Nov. 24, 2022), <https://www.nytimes.com/2022/11/24/opinion/trump-14th-amendment.html> [https://perma.cc/A48U-48DT].

⁷⁸ Michael S. Rosenwald, *There's an Alternative to Impeachment or 25th Amendment for Trump, Historians Say*, WASH. POST (Jan. 12, 2021, 9:20 PM), <https://www.washingtonpost.com/history/2021/01/11/14th-amendment-trump-insurrection-impeachment/> [https://perma.cc/3VZ6-3XLY].

⁷⁹ See, e.g., Caroline Sullivan, *How the 14th Amendment Could Disqualify Trump and His Allies*, DEMOCRACY DOCKET (June 6, 2022), <https://www.democracymocket.com/analysis/how-the-14th-amendment-could-disqualify-trump-and-his-allies/> [https://perma.cc/2T4K-VCTB].

from office.⁸⁰ Although a judge declared that the riot was an insurrection within the meaning of that phrase and barred Mr. Griffin from holding office,⁸¹ other applications, so far, have not been successful, although litigation is ongoing.⁸²

In 2022, a group of North Carolina voters living in the district represented by Rep. Cawthorn filed a challenge with the North Carolina board of elections, relying on the Insurrection Clause to claim that Rep. Cawthorn was disqualified from further service in Congress.⁸³ Although the federal district court ruled that the 1872 Amnesty Act lifted any such disability, the Fourth Circuit Court of Appeals reversed, although it did not reach the merits of whether Rep. Cawthorn in fact engaged in “insurrection or rebellion.”⁸⁴

The most interesting and politically explosive possibility is the argument, floated by some pundits, that this provision could be invoked to bar Donald Trump from running for the presidency again.⁸⁵ Donald Trump was impeached by the House of Representatives on exactly this ground,⁸⁶ but was fewer than ten votes in the Senate from being convicted

⁸⁰ See, e.g., Luke Broadwater & Alan Feuer, *Judge Unseats Official Who Trespassed at Capitol on Jan. 6*, N.Y. TIMES (Sept. 6, 2022), <https://www.nytimes.com/2022/09/06/us/politics/jan-6-griffin-insurrection.html> [<https://perma.cc/A3Y2-4VBF>]; see also N.M. *ex rel.* White, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, at *61–63 (N.M. Cir. Ct. Sept. 6, 2022).

⁸¹ N.M. *ex rel.* White, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, at *6–7, 43–45 (N.M. Cir. Ct. Sept. 6, 2022); see also Noah Bookbinder & Donald K. Sherman, *Why Our 14th Amendment Lawsuit Against a Trump Fanatic Sets a Key American Precedent*, NBC NEWS (Sept. 11, 2022, 7:00 AM), <https://www.nbcnews.com/think/opinion/cowboys-trump-fanatic-lawsuit-wins-sets-big-precedent-rcna46946> [<https://perma.cc/J4MD-KHCF>].

⁸² See, e.g., Hannah Demissie & Laura Gersony, *14th Amendment, Section 3: A New Legal Battle Against Trump Takes Shape*, ABC NEWS (Aug. 25, 2023), <https://abcnews.go.com/Politics/14th-amendment-section-3-new-legal-battle-trump/story?id=102547316> [<https://perma.cc/MFD5-Z4H9>].

⁸³ Cawthorn v. Amalfi, 35 F.4th 245, 248–49 (4th Cir. 2022).

⁸⁴ See *id.* at 261.

⁸⁵ See, e.g., Jesse Wegman, *Is Donald Trump Ineligible to Be President?*, N.Y. TIMES (Nov. 24, 2022), <https://www.nytimes.com/2022/11/24/opinion/trump-14th-amendment.html> [<https://perma.cc/4V6M-DMDT>] (arguing that Section 3 of the Fourteenth Amendment can be used to make Donald Trump ineligible to run for office).

⁸⁶ See H. Res. 24, 117th Cong. (2021) (impeaching Donald Trump for incitement of an insurrection).

and removed.⁸⁷ And at least some of the senators who voted against his impeachment did so because he had mere days left in his term.⁸⁸

Constitutional law scholar Bruce Ackerman argues that this provision can be used for that purpose.⁸⁹ Some scholars argue that applying the Disqualification Clause in this manner could violate other constitutional provisions, such as the prohibition against bills of attainder, or would be inconsistent with the standards required for presidential impeachment.⁹⁰

This debate has become a more serious and pressing matter in light of the launch of the 2024 presidential campaign by Donald Trump for a second term, and in the wake of a pair of well-respected originalist scholars making a lengthy and careful argument that Donald Trump is automatically disqualified from running.⁹¹ They concluded that “Donald Trump ‘engaged in’ ‘insurrection or rebellion’ and gave ‘aid or comfort’ to others engaging in such conduct, within the original meaning of those terms as employed in Section 3 of the Fourteenth Amendment.”⁹²

Some legal scholars, however, argue that the provision cannot be applied to the office of the presidency, because it does not explicitly

⁸⁷ Megan Ziegler, *Trump Acquitted: With 10 Votes Shy of Conviction, Senate Acquits for Incitement of Insurrection*, FOX 5 (Feb. 13, 2021), <https://www.fox5dc.com/news/closing-arguments-begin-in-trump-impeachment-trial-after-senate-reaches-deal-to-skip-witness-testimony> [<https://perma.cc/VL65-ME9X>].

⁸⁸ Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans’ Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SECURITY (Feb. 15, 2021), <https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/> [<https://perma.cc/Y7SH-VCBN>].

⁸⁹ See Bruce Ackerman & Gerard Magliocca, *Criminal Prosecution Is the Wrong Idea. Use the 14th Amendment on Trump*, WASH. POST (Dec. 27, 2022, 1:52 PM), <https://www.washingtonpost.com/opinions/2022/12/27/trump-jan6-constitution-fourteenth-amendment/> [<https://perma.cc/TE46-JHRW>] (arguing that the Fourteenth Amendment prevents individuals who betrayed their oath by joining an insurrection to run for office).

⁹⁰ See, e.g., Nicholas Creel, *The 14th Amendment Isn’t a Legally Sound Option to Bar Trump from Office*, NEWSWEEK (Dec. 2, 2022, 11:29 AM), <https://www.newsweek.com/14th-amendment-isnt-legally-sound-option-bar-trump-office-opinion-1764261?amp=1> [<https://perma.cc/F5NU-YMJW>] (arguing that using the Fourteenth Amendment to bar Trump from holding office would equate to Congress legislatively declaring guilt and that legislation on the matter would be questionable given the slim majorities in Congress and the precedent that would be set by the measure).

⁹¹ See William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 [<https://perma.cc/Z8B8-SQK7>] (forthcoming 2024) (arguing that individuals who engage in insurrection are automatically disqualified to run for office and that the role Donald Trump played on January 6 constituted engagement in an insurrection).

⁹² *Id.* (utilizing manuscript at 122).

mention that office, or that the president is not an “officer” of the United States.⁹³ This is an argument that would ultimately have to be resolved by the courts. But at least one Senator in a position of power admitted “queasiness” about applying this provision in that regard,⁹⁴ reflecting, again, that the disuse and neglect of these provisions is as much a matter of timidity as error. As some pundits have pointed out, invocation of this clause might lead to the abuse or misuse of this provision by political opponents in less than extraordinary circumstances.⁹⁵ And even if these scholars are correct, someone in the political branch or a court has to enforce it.⁹⁶

There are many unresolved questions relating to the application of this clause, beyond whether it can be invoked against a candidate for the presidency. Questions include: Who initiates such a challenge, a legislature or a plaintiff? Who manages the process? What standards should be applied? Some suggest that the Attorney General could invoke the provision,⁹⁷ perhaps in addition to the Congress. That raises serious political questions, especially if an Attorney General is viewed as an arm of the presidency.

⁹³ See Michael B. Mukasey, *Was Trump ‘an Officer of the United States’?*, WALL ST. J. (Sept. 7, 2023, 12:59 PM), <https://www.wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26> [<https://perma.cc/UF7K-CR28>] (arguing that the term “officer” only refers to individuals who are appointed, not elected to office); see also Josh Blackman & Seth Barrett Tillman, *Is the President an ‘Officer of the United States’ for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1, 3–4, 31–33 (2021) (explaining that Section 3 does not mention presidents, only members of Congress, state legislatures, executive or judicial officers of a state, or officers of the United States).

⁹⁴ See Wegman, *supra* note 77.

⁹⁵ See Eugene Volokh, *Prof. Michael McConnell, Responding About the Fourteenth Amendment, ‘Insurrection,’ and Trump*, VOLOKH CONSPIRACY (Aug. 12, 2023, 6:58 PM), <https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/printer/> [<https://perma.cc/S4SM-WHUR>] (describing how Section 3 of the Fourteenth Amendment may turn into a politicized tool once one party invokes it).

⁹⁶ See, e.g., Eric Segall, *Of Insurrections, Presidents, and the Utter Failure of Constitutional Law to Address the Real Issues*, DORF ON L. (Aug. 14, 2023), <https://www.dorfonlaw.org/2023/08/of-insurrections-presidents-and-utter.html> [<https://perma.cc/Q6AZ-2Y24>].

⁹⁷ See, e.g., Merrill Matthews, *Could Merrick Garland Use the Fourteenth Amendment to Bar Trump From the Presidency?*, THE HILL (Nov. 23, 2022, 10:00 AM), <https://thehill.com/opinion/white-house/3747383-could-merrick-garland-use-the-fourteenth-amendment-to-bar-trump-from-the-presidency/> [<https://perma.cc/K3N6-EANB>] (arguing that Attorney General Merrick Garland can invoke the Fourteenth Amendment to prevent Donald Trump from running for office again).

Petitions have already been brought to try to bar Donald Trump from getting on the ballot in states like New Hampshire.⁹⁸ Although election officials have generally been wary of taking this step without prior court authorization, the Maine Secretary of State, Shenna Bellows, ruled that Donald Trump was disqualified from seeking office under this provision.⁹⁹ And although several state courts, such as those in Michigan¹⁰⁰ and Minnesota, have declined to apply this provision to bar Trump from running, the Colorado Supreme Court is the first to rule otherwise.¹⁰¹ In a 4-3 decision, it held that Trump engaged in insurrection in violation of this provision, although it stayed its ruling pending an appeal to the United States Supreme Court, which may provide the first authoritative guidance and resolve at least some of the latent questions regarding its use.

Scholars have chronicled various technical aspects associated with the clause,¹⁰² but the lack of precedent or interpretative guidance is as much a hindrance as the political challenges of invoking it. Disuse gives way to neglect and ultimately dormancy.

⁹⁸ See, e.g., Nick Corasaniti & Jonathan Weisman, *Is Trump Disqualified? Republicans Prepare to Fight Long-Shot Legal Theory*, N.Y. TIMES (Aug. 30, 2023), <https://www.nytimes.com/2023/08/30/us/politics/trump-14th-amendment.html> [<https://perma.cc/P5BH-PZVK>] (detailing efforts by citizens in a state to prevent Donald Trump from appearing on the ballot for his role in the January 6 insurrection).

⁹⁹ *Maine Sec'y of State Decision in Challenge to Trump Presidential Primary Petitions* (Dec. 28, 2023), <https://www.maine.gov/sos/news/2023/BellowsDecisionChallengeTrumpPrimaryPetitionsDec2023.html> [<https://perma.cc/5UQ7-WT4A>].

¹⁰⁰ Isabella Murray & Alexander Hutzler, *Michigan Supreme Court Rejects 14th Amendment Election Challenge to Trump*, ABC (Dec. 27, 2023, 10:38 AM), <https://abcnews.go.com/Politics/michigan-supreme-court-rejects-14th-amendment-challenge-trump/story?id=105938024> [<https://perma.cc/UA7P-VLYA>].

¹⁰¹ Melissa Quinn, *Colorado Supreme Court rules Trump is disqualified from presidency for Jan. 6 riot*, CBS (Dec. 21, 2023, 9:49 AM), <https://www.cbsnews.com/news/trump-colorado-supreme-court/> [<https://perma.cc/DMQ8-XCJ9>]; *Anderson v. Griswold*, No. 23-CV-02291-PAB, 2023 WL 5938828 (D. Colo. Sept. 12, 2023).

¹⁰² See Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 93-99 (2021) (describing the implication that senators, representatives, and electors do not hold offices according to the text of Section 3, substantive limits on the state's authority under Section 3, the root of the Section's language, and more); see also Josh Blackman & S.B. Tillman, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, N.Y. TIMES (Apr. 20, 2022), <https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html> [<https://perma.cc/6RN6-TQFX>] (explaining how, despite voters calling for their states to bar individuals from running for office for engaging in an insurrection, only the federal government can disqualify candidates from running).

6. *The Validity of the Public Debt*

Section 4 of the Fourteenth Amendment pertains to another problem stemming from the Reconstruction era, but again with broader implications and other potential applications. It states that “[t]he validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”¹⁰³ Although specifically referring to expenditures made to suppress the rebellion, this 1868 provision—known as the “Public Debt Clause”—is broader in scope. Although this provision was intended primarily to prevent repudiation of Civil War debts, in 1935 the Supreme Court held that all federal debt is covered: The constitutional text “indicates a broader connotation.... [I]t applies as well to the government bonds in question, and to others duly authorized by the Congress.”¹⁰⁴

Once again, scholarship has often referred to this clause as a “lost” or “forgotten” provision.¹⁰⁵ The Supreme Court has only alighted on it once, and lower courts are deeply divided on how it should be interpreted.¹⁰⁶ The result is not only a lack of case law and precedent, but a dormant provision that could, in theory, be used to address a real and recurring problem. In particular, some scholars, historians, law students and even a Congressional staff member have argued that this provision should be invoked to address the perennial problem of the ‘debt ceiling’ limit.¹⁰⁷

¹⁰³ U.S. CONST. amend. XIV, § 4.

¹⁰⁴ *Perry v. United States*, 294 U.S. 330, 354 (1935).

¹⁰⁵ *See generally* Daniel Strickland, *The Public Debt Clause Debate: Who Controls This Lost Section of the Fourteenth Amendment?*, 6 CHARLESTON L. REV. 775 (2012); *see also* Stuart McCommas, *Forgotten but Not Lost: The Original Public Meaning of Section 4 of the Fourteenth Amendment*, 99 VA. L. REV. 1291 (2013).

¹⁰⁶ *See Id.* at 786, 789 (explaining that the Supreme Court has only heard one Section 4 case and the lower courts have not been consistent with their decisions in Section 4 cases).

¹⁰⁷ *See, e.g.*, Jacob D. Charles, Note, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L.J. 1227, 1265–66 (2013); Kierra Frazier, *What You Need to Know About the 14th Amendment and the Debt Ceiling*, POLITICO (May 19, 2023), <https://www.politico.com/news/2023/05/19/14th-amendment-biden-debt-ceiling-00097932> [https://perma.cc/84FQ-E7Y7]; .MSNBC, *Two Experts Debate 14th Amendment and the Debt Limit*, YOUTUBE (May 18, 2023), https://www.youtube.com/watch?v=hgdW_XCHWVA [https://perma.cc/FT9Q-8ZGB]; Andy Sullivan & Jacqueline Thomsen, *Could Biden Use the 14th Amendment to Raise the Debt Ceiling?*, REUTERS (May 22, 2023), <https://www.reuters.com/world/us/could-biden-avert-debt-default-by-using-14th-amendment-2023-05-02/>; Mike Lofgren, Opinion, *Biden Can End Debt-Ceiling Sabotage Once and for All*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/10/07/opinion/biden-debt-ceiling.html> [https://perma.cc/WQQ5-S4Q9].

In the course of running the federal government, Congress has had to borrow money to make expenditures to carry out policy or fund critical services. The Treasury does not always have sufficient funds on hand. Until 1917, Congress approved each instance of borrowing required to make such expenditures (under its' Article I, section 8 authority). That year, Congress instead crafted a new approach with the Second Liberty Bond Act, passed during World War I.¹⁰⁸ Under this Act, Congress gave the Treasury Department authority to borrow up to a pre-specified limit, and this limit has been periodically raised over time.¹⁰⁹

In recent decades, however, the public debt limit has become a political football—a piece of leverage between a Congress and a Presidency controlled by members of different parties, or by minority parties seeking to extract concessions from the majority. Some journalists now call it a ‘political cudgel.’¹¹⁰ This has happened under Democratic and Republican administrations.

One notable occurrence was the so-called public debt crisis of 2011. Republicans gained control of the House in the 2010 midterm elections, and a political disagreement with the Obama Administration led the House to vote down a bill that would have raised the debt ceiling.¹¹¹ This introduced the real possibility that the US government might default or

¹⁰⁸ See Second Liberty Bond Act, Pub. L. No. 65-43, § 1, 40 Stat. 288 (1917) [needs a parenthetical once comment is resolved].

¹⁰⁹ See generally *The Debt Limit Through the Years*, BIPARTISAN POL’Y CTR., <https://bipartisanpolicy.org/debt-limit-through-the-years/> [https://perma.cc/CVH8-VDYT] (last visited Sept. 27, 2023) (detailing the evolution and use of the debt limit over time).

¹¹⁰ See Clay Risen, *How the Debt Ceiling Came to Be a Political Cudgel*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/09/28/us/politics/debt-ceiling-democrats-republicans-history.html> [https://perma.cc/4K88-FS99] (describing how the debt ceiling has come to be used as a partisan political weapon).

¹¹¹ Colleen Curtis, *President Obama: Both Parties Have a Responsibility to Solve This Problem*, OBAMA WHITE HOUSE BLOG, (July 25, 2011, 9:20 PM), <https://obamawhitehouse.archives.gov/blog/2011/07/25/president-obama-deficit-reduction-requires-tackling-entitlements-and-tax-reform> [https://perma.cc/E6VE-64QT].

partially default on its obligations.¹¹² Fortunately, a last-minute compromise was worked out, and the threat of default averted.¹¹³

In 2013, however, the crisis was renewed, and the government shut down for 16 days.¹¹⁴ Again, a compromise deal was reached at the last minute that prevented a government default.¹¹⁵ The costs of the shutdown both to the economy and to the government were far from trivial. Parks were shuttered, over a million workers were furloughed, and many additional expenses were incurred.¹¹⁶

This was merely a prelude to a more serious and longer government shutdown in 2018-19, which lasted 35 days.¹¹⁷ The main point of contention was a disagreement on spending priorities between Congress and the Trump administration. The Congressional Budget Office estimated that this shutdown cost the government \$3 billion in back pay for furloughed workers, plus \$2 billion in lost tax revenues.¹¹⁸

In light of these crises, and threat of future ones, a growing chorus of scholars, pundits, and politicians have pressed the argument that the Public Debt Clause could be invoked to ensure that the federal government pays its debts and to circumvent such episodes. In 2011, members of the Democratic Party in the House of Representatives, including leadership, claimed that this provision could be invoked for that

¹¹² See, e.g., Annie Lowrey, *It's Not "Default,"* SLATE (July 27, 2011, 5:10 PM), <https://slate.com/business/2011/07/debt-ceiling-crisis-the-u-s-won-t-default-after-aug-2-something-much-weirder-will-happen.html> [https://perma.cc/LT6U-2ZZ2] (describing what will happen if the debt ceiling does not get raised).

¹¹³ *Here's What Happened the Last Time the Government Shut Down*, ABC News (Nov. 18, 2014), <https://abcnews.go.com/Politics/heres-happened-time-government-shut/story?id=26997023> [https://perma.cc/GH4M-4JG4].

¹¹⁴ *Id.*

¹¹⁵ Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, N.Y. TIMES (Oct. 16, 2013), <https://www.nytimes.com/2013/10/17/us/congress-budget-debate.html>.

¹¹⁶ See, e.g., Josh Hicks, *How Much Did the Shutdown Cost the Economy?*, WASH. POST (Oct. 18, 2013, 6:00 AM), <https://www.washingtonpost.com/news/federal-eye/wp/2013/10/18/how-much-did-the-shutdown-cost-the-economy/> [https://perma.cc/L4DN-NBUN] (describing the economic impact of the 2013 shutdown).

¹¹⁷ See, e.g., Andrew Restuccia et al., *Longest Shutdown in History Ends After Trump Relents on Wall*, POLITICO (Jan. 25, 2019, 12:27 PM), <https://www.politico.com/story/2019/01/25/trump-shutdown-announcement-1125529> [https://perma.cc/XMV7-RFBH] (describing how the 35-day government shut down led to two missed paychecks for employees, travel delays, and other negative effects).

¹¹⁸ CONG. BUDGET OFF., *The Effects of the Partial Shutdown Ending in Jan. 2019* 4, 6 (2019), <https://www.cbo.gov/system/files/2019-01/54937-PartialShutdownEffects.pdf> [https://perma.cc/E36U-LSGH].

purpose, and urged the Obama administration to do so.¹¹⁹ A House committee considered a resolution simply stating that the administration could rely on Section 4 to pay debts that come due in order to avoid default.¹²⁰

Although former President Clinton publicly averred that, were he still in office, he would simply invoke the provision as recommended, the Obama Administration declined to do so, in part because of the uncertain legality and lack of precedent around the provision.¹²¹ The Obama administration affirmed this stance in the 2013 crisis as well, explaining that, given the legal doubts, it preferred to have the Congress resolve the matter, and based upon the concern that the constitutional questions could only be resolved afterward.¹²² These are also matters that the Biden Administration contemplated during debt ceiling negotiations in the spring of 2023, but ultimately came to the same conclusion as previous administrations, although Biden stated he believed it was within his powers to invoke the clause to that end.¹²³

¹¹⁹ See Associated Press, *Democrats Call on Obama to Invoke Little-Known Provision*, PORTLAND PRESS HERALD (July 28, 2011), https://www.pressherald.com/2011/07/28/democrats-call-on-obama-to-invoke-little-known-provision_2011-07-28/ [<https://perma.cc/6UD6-ADQJ>] (describing arguments by congressional leaders, including Senator Clyburn and Congressman Larson, for the Obama Administration to invoke the Fourteenth Amendment to prevent the government shut down).

¹²⁰ H.R. Con. Res. 69, 112th Cong. (2011) (“Expressing the sense of Congress that the President should ensure that the United States does not default on its debt . . . should use his authority under section 3 of article II of the United States Constitution to uphold section 4 of the 14th Amendment . . . to pay all debts of the United States as they come due.”).

¹²¹ Mike Lillis, *House Democrats Urge Obama to Invoke the 14th Amendment in Debt Fight*, THE HILL (July 27, 2011, 3:26 PM), <https://thehill.com/homenews/house/97589-house-democrats-urge-obama-to-invoke-the-14th-amendment-in-debt-fight/> [<https://perma.cc/F6TU-KTX9>]; Alister Bull, *White House Rules Out Constitution Debt Option*, REUTERS (July 26, 2011, 2:53 PM), <https://www.reuters.com/article/usa-debt-constitution/white-house-rules-out-constitution-debt-option-idUSN1E76P1TI20110726> [<https://perma.cc/DBQ7-LWRK>] (describing former President Bill Clinton and Barack Obama’s perspectives on the constitutionality of a president using the Fourteenth Amendment to raise the debt limit).

¹²² See, e.g., Evan Puschak, *President Obama Backs Away from Invoking 14th Amendment on Debt Ceiling*, MSNBC (Jan. 14, 2013, 9:23 PM), <https://www.msnbc.com/the-last-word/president-obama-backs-away-invoking-14th-msna17784> [<https://perma.cc/5TGT-G6NV>] (“If [Congress] wants to put the responsibility on me to raise the debt ceiling, I’m happy to take it . . . [b]ut if they want to keep this responsibility, then they need to go ahead and get it done.”).

¹²³ Andy Sullivan & Jacqueline Thomsen, *Could Biden Use the 14th Amendment to Raise the Debt Ceiling?*, REUTERS (May 22, 2023, 5:27 AM), <https://www.reuters.com/world/us/could-biden-avert-debt-default-by-using-14th-amendment-2023-05-02/> [<https://perma.cc/7R6J-E2PW>] (stating that President Biden asserted his legal right to invoke the 14th amendment to raise the debt ceiling).

These episodes, and the novel constitutional questions they raised, however, elicited a wide variety of opinions among constitutional law experts, historians and scholars. Some constitutional experts claimed that the Public Debt Clause could not be invoked by the President or the Executive Branch in the manner suggested by House Democrats. Erwin Chemerinsky, for example, wrote an opinion piece in a leading paper that “there is no plausible way to read this provision as providing the president the ability to increase the debt ceiling without congressional action.”¹²⁴ Constitutional scholar Lawrence Tribe came to a similar conclusion.¹²⁵ Chemerinsky and Tribe emphasize that the Constitution places the spending power exclusively in the hands of Congress, including the power to borrow money.

On the other hand, another constitutional law expert, Jack M. Balkin, formulated the counter-argument, that the “President has the right to act without further Congressional authorization because the money is already appropriated.”¹²⁶ In other words, the money has already been borrowed when Congress authorized the initial expenditure. Failure to pay the debt owed would be arguably unconstitutional. Combined with the Take Care Clause, Balkin also posited that the invocation of the Public Debt Clause might be conceivably part of the President’s emergency powers.¹²⁷

A 2013 student note in the Duke Law Journal emphasized the element of “obstructionism” in the 2011 and 2013 crises, and sought to highlight that this was the type of problem that Section 4 was attempting

¹²⁴ Erwin Chemerinsky, *The Constitution, Obama and Raising the Debt Ceiling*, L.A. TIMES (July 29, 2011, 11:41 AM), <http://opinion.latimes.com/opinionla/2011/07/erwin-chemerinsky-on-why-obama-cant-raisethe-debt-ceiling.html>.

¹²⁵ Laurence H. Tribe, *A Ceiling We Can’t Wish Away*, N.Y. TIMES (July 7, 2011), <https://www.nytimes.com/2011/07/08/opinion/08tribe.html> [https://perma.cc/972D-JM3G] (“Nothing in the 14th Amendment or in any other constitutional provision suggests that the president may usurp legislative power to prevent a violation of the Constitution.”). Professor Tribe, however, apparently changed his opinion subsequently. See Laurence H. Tribe, *Why I Changed My Mind on the Debt Limit*, N.Y. TIMES (May 7, 2023), <https://www.nytimes.com/2023/05/07/opinion/debt-limit.html> [https://perma.cc/746R-J97V] (describing how the president can ignore one law, the 1917 borrowing limit, to uphold all other laws that create bills that must be paid).

¹²⁶ Jack Balkin, *Why Bill Clinton Would Invoke Section 4 of the Fourteenth Amendment (and Obama Won’t)*, BALKINIZATION (July 19, 2011, 3:59 PM), <https://balkin.blogspot.com/2011/07/why-bill-clinton-would-invoke-section-4.html> [https://perma.cc/7AJH-PQYX].

¹²⁷ *Id.*

to address.¹²⁸ In such a situation, the President, the note argued, has a duty to pay debts incurred in order to avoid creating ‘doubts’ about the public debt.¹²⁹ More recently, a congressional staffer has argued that this provision should be invoked to “end the charade of the debt-limit vote and stop legislative terrorism on it for all time” relating to the perennial problem in Congress relating to the debt-limit.¹³⁰

The historian Eric Foner, perhaps the nation’s leading expert on Reconstruction, also endorsed the view that the Public Debt Clause could be invoked to avoid default of the nation’s debts, although he prefers that the Congress invoke the clause.¹³¹ Relying on Article II’s responsibility that the laws be faithfully executed, it is not utterly unreasonable to think that the President should pay debts that Congress has borrowed money to pay for, even if Congress refuses to raise the debt ceiling. Section 4 might require that.¹³²

There are many possible nuances and unresolved questions here,¹³³ but most of them are theoretical until the section is actually invoked. One conservative commentator concluded that, despite the disagreement (across, and not between, the ideological spectrum), “there is one subject on which legal scholars seem to agree: Nothing good can come from an

¹²⁸ See Jacob D. Charles, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L.J. 1227, 1255–65 (2013) [needs a parenthetical once the comment is resolved].

¹²⁹ *Id.*

¹³⁰ Mike Lofgren, *Biden Can End Debt-Ceiling Sabotage Once and for All*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/10/07/opinion/biden-debt-ceiling.html> [<https://perma.cc/6QZA-4TWV>].

¹³¹ See Eric Foner, *The Constitution Has a 155-Year-Old Answer to the Debt Ceiling*, N.Y. TIMES (Jan. 23, 2023), <https://www.nytimes.com/2023/01/23/opinion/fourteenth-amendment-debt-ceiling.html> [<https://perma.cc/HN8E-VSFR>] (explaining that the Fourteenth Amendment empowers Congress, but that if Congress fails to use their power, the President should act on his own).

¹³² See, e.g., Janelle Bouie, *You Can Let Republicans Destroy the Economy, or You Can Call Their Bluff*, N.Y. TIMES (Jan. 20, 2023), <https://www.nytimes.com/2023/01/20/opinion/debt-limit-congress-biden-mccarthy.html> [<https://perma.cc/V8V5-KBMV>] (arguing that the Constitution “directs the president to ‘take care that the laws be faithfully executed,’ implying that the President has the power to pay debts even without a raised debt ceiling by Congress).

¹³³ See, e.g., Robert A. Levy, *Defaults, Debt Ceilings and the 14th Amendment*, CATO INST. (July 7, 2011), <https://www.cato.org/commentary/defaults-debt-ceilings-14th-amendment> [<https://perma.cc/RBY3-3VVZ>] (“Still, that leaves several unanswered questions: First, what constitutes ‘public debt . . . authorized by law’? Second, is default comparable to repudiation in its effect on the debt’s ‘validity’? Third, even if default is unconstitutional, does that mean a debt ceiling is also unconstitutional?”). Another issue is “who controls” the provision. See, e.g., Strickland, *supra* note 105, at 777–78 (asserting that the President cannot control the purse).

attempt to invoke the Public Debt Clause.”¹³⁴ There is at least one thing this pundit overlooks: that a provision of the constitution has been possibly rendered nugatory relative to its full potential because of these fears or concerns. This provision is part of our inheritance, and should be treated as such. Even if the skeptics are correct, a determination one way or the other would settle the matter. But such a determination is only possible if someone attempts to apply it.

B. RIGHTS AND PROTECTIONS

1. *Petition and Assembly*

The final two clauses of the First Amendment guarantee “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹³⁵ These two clauses constitute what is known as the “Assembly and Petition Clauses.” Although technically distinct clauses, scholarship has generally analyzed them in tandem. Like the other provisions reviewed in this Article, scholars have characterized these provisions as having “fallen into desuetude.”¹³⁶

The Supreme Court first considered the Right to Assembly Clause in 1876 in *United States v. Cruikshank*.¹³⁷ In this pivotal case, the Court reviewed federal prosecutions of white vigilantes and terrorists under the 1870 Enforcement Acts (also known as the KKK Acts), who had been intimidating citizens in the exercise of their constitutional rights. Specifically, the indictment argued that the defendants were impeding the exercise of the right to assembly. The Court decided that the indictment was inadequate because it did not allege a violation of a right to assemble for a purpose related to the *federal* government.¹³⁸ Nonetheless, the Court sketched out the contours of how it viewed this right:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national

¹³⁴ *Id.*

¹³⁵ U.S. CONST. amend. I.

¹³⁶ Ronald J. Krotoszynski, Jr., *Common Law Constitutionalism and the Protean First Amendment*, 25 U. PA. J. CONST. L. 1, 19 (2023).

¹³⁷ *United States v. Cruikshank*, 92 U.S. 542, 548–49 (1875).

¹³⁸ *Id.*

citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States.¹³⁹

It is notable that the Court interweaves both the right to petition and assembly in its analysis here, although it is arguably dicta. This helps explain why, in 1937, the Supreme Court held that “[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”¹⁴⁰ Although implying equal standing, this phrasing seemed to have rendered the clause subsidiary to the other two clauses. In 1960, the Supreme Court held that freedom of association is protected by both the Freedom of Speech and Assembly Clauses.¹⁴¹

Although the Supreme Court has heard several cases under these provisions,¹⁴² it has yet to provide a decisive ruling on the basis of them which clarifies the nature of the rights provided by these clauses and the scope of those rights. The one exception is a 1972 antitrust case in which the Court held that the right of petition allows companies “to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.”¹⁴³

For this reason, scholarly analysis has called for the revival of these provisions. In 2012, John Inazu published a magisterial treatise entitled “Liberty’s Refuge: The Forgotten Freedom of Assembly.”¹⁴⁴ One of the main threads of his argument is that the Court’s parsimonious and

¹³⁹ *Id.* at 542.

¹⁴⁰ *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937).

¹⁴¹ *See Bates v. City of Little Rock*, 361 U.S. 516, 527–28 (1960) (Black, J. and Douglas, J., concurring) (“We concur in the judgment and substantially with the opinion because we think the facts show that the ordinances as here applied violate freedom of speech and assembly guaranteed by the First Amendment . . .”).

¹⁴² *See, e.g., Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387–88 (2011); *McDonald v. Smith*, 472 U.S. 479, 481–82 (1985); *United States Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 221–23 (1967); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969); *De Jonge v. Oregon*, 299 U.S. 353, 364–66 (1937); *Coates v. Connecticut*, 402 U.S. 611, 614 (1971); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–52 (1969).

¹⁴³ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972).

¹⁴⁴ John D. Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* 1–19 (2012).

generally silent treatment of this provision has undermined the autonomy and expressive power of marginalized groups. In the words of a reviewer writing under the article title “Recovering the Assembly Clause,” “[p]rivate, nonconforming groups would gain a fuller measure of autonomy from a recovered freedom of assembly.”¹⁴⁵

Just as these scholars argue that the Assembly Clause has been buried within a synthetic or holistic First Amendment jurisprudence, other scholars have argued that the Petition Clause has been buried by the Assembly Clause, and therefore that “current Supreme Court First Amendment jurisprudence has virtually forgotten the Petition Clause.”¹⁴⁶ Rather than a subsidiary right, one scholar argues that “[h]istorically, the right to petition was a distinct right, superior to the other expressive rights.”¹⁴⁷ Despite the importance of this provision, there have been very few, if any, Supreme Court decisions squarely resting on this provision. As the same scholar observes, “[t]he only context in which the Supreme Court has been willing to find First Amendment Petition Clause protection is civil actions in which collective activity is undertaken to secure legal advice and initiate legal proceedings.”¹⁴⁸ This parsimonious interpretation, and refusal to extend the provision into other contexts, has rendered it largely nugatory.

Complaining that the Petition Clause has been virtually ignored for decades,¹⁴⁹ Carol Rice Andrews has argued, intriguingly, that the Petition Clause might be a vehicle for accessing federal courts in cases where no substantive due process right exists.¹⁵⁰ In the 1970s, the Court recognized that access to the courts was a due process right, but the Petition Clause could provide a clearer textual basis.¹⁵¹ In a subsequent article, Andrews examined possible standards or basis for claims, with a particular focus

¹⁴⁵ Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 402 (2012).

¹⁴⁶ Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 16 n.3 (1993).

¹⁴⁷ *Id.* at 17.

¹⁴⁸ *Id.* at 45.

¹⁴⁹ Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO STATE L.J. 557, 575 (1999).

¹⁵⁰ *Id.* at 559–60 (“It is time to consider and define the right of court access under the Petition Clause.”).

¹⁵¹ *Id.* at 557.

on Supreme Court opinions discussing, but failing to resolve, these uncertainties.¹⁵²

2. Fees and Fines

The Eighth Amendment prohibits the imposition of “excessive fines,” without specifying what exactly constitutes a fine, what counts as ‘excessive,’ and who shall enforce this prohibition.¹⁵³ Although the context for this provision, based upon the rest of the amendment, appears to be criminal law punishment, that is not specified. By its text, the clause appears to be generally and universally applicable.

As the title of Beth Colgan’s 2014 article “Reviving the Excessive Fines Clause” suggests, this provision has fallen into desuetude as a means of regulating the problem at which it was evidently aimed.¹⁵⁴ As Colgan notes, it was nearly two centuries until the Supreme Court even took a case interpreting this clause. Although it was asked to do so in 1866 and 1916, it was not until 1989 that the Court finally heard a case on this clause.¹⁵⁵ In that case, the Court rejected the claim that a fine was excessive, and three subsequent cases that decade have largely rendered the clause inert.¹⁵⁶

The Court applied the clause to challenge a forfeiture for the first time in 1998, but the test it provided has not produced a new wave of fines clause applications.¹⁵⁷ Unfortunately, the Court has been so parsimonious in interpreting this clause that it is essentially a defunct provision, although the Court has recently clarified that this protection does extend to the

¹⁵² See generally Carol Rice Andrews, *After BE & K: The “Difficult Constitutional Question” of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 5 (2003) (discussing, for example, *BE & K Constution Co. v. NLRB*, where the Supreme Court could have resolved the standard question under the Petition Clause yet did not).

¹⁵³ U.S. CONST. amend. VIII.

¹⁵⁴ See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 277–78 (2014) (describing how the Supreme Court narrowly defined the Excessive Fines Clause, rendering it unusable in many circumstances).

¹⁵⁵ *Id.* at 297; *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal*, 492 U.S. 257, 259–60 (1989).

¹⁵⁶ See *Austin v. United States*, 509 U.S. 602, 618 (1993) (holding that forfeiture falls under the Eighth Amendment since it is understood as punishment historically); see also *Alexander v. United States*, 509 U.S. 544, 558–59 (1993) (holding that forfeiture in the case at issue should be analyzed under the Eighth Amendment Excessive Fines Clause); see also *United States v. Bajakajian*, 524 U.S. 321, 328–33 (1998) (holding that a forfeiture violated the Excessive Fines Clause).

¹⁵⁷ 524 U.S. at 334–37.

states.¹⁵⁸ Colgan argues that the Supreme Court’s “narrow interpretation of the Clause is both methodologically and substantively suspect.”¹⁵⁹

A revived and more expansive interpretation of this clause could be tremendously salutary. There have always been various fiscal problems in the United States, but in the aftermath of the Great Recession, there was a tremendous collapse in local revenue streams followed by a burst in municipal bankruptcies.¹⁶⁰ Massive drops in revenues, combined with huge state budget deficits, created fiscal problems for many municipalities. Some responded by dissolving themselves. For example, between 2005 and 2015, eight Ohio municipalities elected to dissolve.¹⁶¹ These villages weren’t former industrial towns like Detroit, Flint or Youngstown that had lost much of their economic tax base, but rather rural communities that simply couldn’t afford the cost of maintaining local government or pay for upkeep and infrastructure.¹⁶²

Other municipalities responded by looking for new—and more predatory—sources of revenue. Perhaps the most shocking, although not the most well-known, was a city in Florida that essentially became a speed trap.¹⁶³ It so angered its neighbors with its tactics of fining non-local residents to pay for itself, that the state legislature ultimately sought to dissolve the municipality in an act some called a ‘mercy killing.’¹⁶⁴

While there are many egregious examples of such behavior, perhaps the most well-known is what happened in Ferguson, Missouri. In the wake of the police killing of Michael Brown, a major investigation by the Department of Justice found that the city was essentially farming its own

¹⁵⁸ German Lopez, *Why the US Supreme Court’s New Ruling on Excessive Fines Is a Big Deal*, VOX (Feb. 20, 2019), <https://www.vox.com/policy-and-politics/2019/2/20/18233245/supreme-court-timbs-v-indiana-ruling-excessive-fines-civil-forfeiture> [https://perma.cc/YGK2-WQ33].

¹⁵⁹ Colgan, *supra* note 154, at 283.

¹⁶⁰ Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1120–29 (2014) (exploring the ways municipalities nationwide managed fiscal insolvency from 2007–2013).

¹⁶¹ Jeremy Fugleberg, *Hit by Floods and Budget Cuts, Village to Vote on Disappearing*, CIN. ENQUIRER (Feb. 26, 2016), <https://www.cincinnati.com/story/news/politics/elections/2016/02/25/hit-floods-and-budget-cuts-neville-vote-disappearing/80458300/> [https://perma.cc/4TYV-NUMJ].

¹⁶² *Id.*

¹⁶³ See Lizette Alvarez, *A Dot on the Map, After Scandal, Could Be Wiped Off*, N. Y. TIMES (Mar. 10, 2014), <http://www.nytimes.com/2014/03/11/us/need-for-speeders-puts-tiny-florida-city-on-brink-of-erasure.html> (detailing how a rural Florida city utilized a 1,260 foot stretch of road to raise revenue by issuing thousands of speeding tickets in just a year).

¹⁶⁴ Ann O’Neill, *Speed Trap City Accused of Corruption, Threatened with Extinction*, CNN (Mar. 9, 2014), <http://www.cnn.com/2014/03/09/us/hampton-florida-corruption/>.

residents with fees and fines to fund not only the civil and criminal law enforcement, but even basic municipal operations.¹⁶⁵

The main finding was that the city's "law enforcement practices are shaped by the City's focus on revenue rather than public safety needs."¹⁶⁶ As one example, the Report noted that a woman spent six days in jail and paid more than \$1,000 because of an illegally parked car.¹⁶⁷ There were many examples of outrageous fees and fines, which often accumulated, trapping residents in cycles of debt, backed up by threat of incarceration or arrest warrants.

It does not take long to find shocking examples like this elsewhere in the country, of people paying thousands of dollars for minor violations, and much worse. It is to these problems that the Excessive Fines Clause should be applied. But the lack of precedent or serious application means that it is effectively a dead letter.

Some states have already taken proactive measures to reduce excessive fees and fines and reform municipal finance.¹⁶⁸ But having a constitutional backstop and spur to these reforms would give them greater force and momentum.

¹⁶⁵ U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/Q79K-LB2J].

¹⁶⁶ Shaila Dewan, "Driver's License Suspensions Create Cycle of Debt," *New York Times*, Apr. 14, 2015, <https://www.nytimes.com/2015/04/15/us/with-drivers-license-suspensions-a-cycle-of-debt.html>; Ethan Bronner, "Poor Land in Jail as Companies Add Huge Fees for Probation," *New York Times*, July 2, 2012, <https://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html> [https://perma.cc/6Y53-KX23].

¹⁶⁷ Mark Berman & Wesley Lowery, *The 12 Key Highlights from the DOJ's Scathing Ferguson Report*, WASH. POST (Mar. 4, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-doj-s-scathing-ferguson-report/> [perma.cc/AD3D-GR9K].

¹⁶⁸ Nick Shepack, *Nevada Ends Exploitative Incarceration Costs While Laying Groundwork for Future Misdemeanor Reform*, FINES & FEES J. CTR. (July 13, 2023), <https://finesandfeesjusticecenter.org/2023/07/13/nevada-ends-exploitative-incarceration-costs-while-laying-groundwork-for-future-misdemeanor-reform/>; *Press Release: New Mexico Legislature Approves Groundbreaking Bill to End Costly Court Fees in Legal System*, FINES & FEES J. CTR. (Mar. 18, 2023), <https://finesandfeesjusticecenter.org/2023/03/18/press-release-new-mexico-legislature-approves-groundbreaking-bill-to-end-costly-court-fees-in-legal-system/>; The California Legislative Analyst's Office has proposed recommendations to deal with this problem. See Mac Taylor, *Improving California's Criminal Fine and Fee System*, *Cal. Legis. Analyst's Off.* at 17-22 (2016), available at <http://lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf>.

3. *Badges or Incidents of Slavery*

The Thirteenth Amendment to the Constitution is the first Reconstruction Amendment, and the most direct and narrowly focused. It proscribes slavery and involuntary servitude throughout the United States (except as punishment for a crime), and provides Congress the power to enforce the article through legislation.¹⁶⁹ There are, however, several important nuances to this provision.

The first is that the Supreme Court has broadly interpreted the provision to mean that Congress may pass legislation not only to enforce it directly, but also “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”¹⁷⁰ What exactly is a ‘badge’ or ‘incident’ of slavery has been a matter of scholarly debate since the Court first used this memorable phrase in 1883.

The second important nuance is that the enforcement power is not limited to state action (unlike the 14th Amendment). This means that congressional authority under this provision may be used to regulate private discrimination, private conduct or a mixture of private or public action.¹⁷¹ This was the basis for a famous 1968 Supreme Court decision *Jones v. Alfred Mayer*, a case involving a private property developer who refused to sell a home to an interracial couple.¹⁷² The Court concluded that Congress was authorized to regulate private sphere conduct in this manner because of the 13th Amendment.¹⁷³

There is a vigorous scholarly debate on the precise meaning of this phrase,¹⁷⁴ but one possible reading is that it could extend to any stigmatic association that flows from racial slavery. This was one of the principal contentions in *Plessy v. Ferguson*.¹⁷⁵ In that case, the Louisiana railway statute required separate transportation accommodations for people of different races. The plaintiff, Homer Plessy, argued that the act violated

¹⁶⁹ U.S. CONST. amend. XIII.

¹⁷⁰ The Civil Rights Cases, 109 U.S. 3, 20 (1883).

¹⁷¹ See George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 U. VA. L. REV. 1367, 1367–70 (2008); H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* (1968).

¹⁷² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412–13 (1968).

¹⁷³ *Id.* at 413.

¹⁷⁴ Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 605–28 (2012).

¹⁷⁵ *Plessy v. Ferguson*, 163 U.S. 537, 542–51 (1896).

the 13th and 14th Amendments. The Court majority quickly dismissed his 13th Amendment claim.¹⁷⁶ In a famous (and hard to swallow) passage it wrote that “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”¹⁷⁷

However, Justice Harlan, in his now-famous dissent, reached a different conclusion on that point of law. Harlan maintained that the “Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country.”¹⁷⁸

Harlan further explained that, despite the prohibitory framing of the amendment, it contained as a ‘necessarily implication’ a positive immunity from discriminatory or unfriendly legislation “implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject race.”¹⁷⁹

This is obviously a much broader reading of the 13th Amendment than prevails, but if Harlan was right about the Equal Protection Clause claim (which the Court in *Brown* affirmed by overturning *Plessy*¹⁸⁰), then it is highly plausible that he was also right about the 13th Amendment point of law.

This interpretation means that any federal, state or local legislation which targets or has a tendency to disadvantage African-Americans could be constitutionally suspect as a ‘badge’ of slavery and could be violative of the Amendment. The basic idea is that stigmatic associations were created through the institution of racial slavery, and the extirpation of those associations, not just the institution of slavery, was part of the object

¹⁷⁶ *Id.* at 542.

¹⁷⁷ *Id.* at 551.

¹⁷⁸ *Id.* at 555 (Harlan, J., dissenting).

¹⁷⁹ *Id.* at 556 (Harlan, J., dissenting).

¹⁸⁰ *Brown v. Board of Ed.*, 347 U.S. 483, 495 (1954).

of this Amendment. Thus, policing practices that disproportionately target Black communities or motorists, criminal codes loaded with racial assumptions, predatory finance or credit practices, and the like, may all be regarded as possible violations. Any public or private conduct that could be conceivably based on racial associations or stigmatic meanings deriving from centuries of racial slavery could be challenged under the Amendment or serve as a basis for corrective legislation under it. Until these ideas are pursued, they remain only theoretical possibilities suggested by an authoritative interpretation of a major constitutional provision.

4. *The Citizenship Clause*

Remarkably, the original Constitution did not define either federal or state citizenship, nor how either was acquired. Nonetheless, this question was important because the original Constitution referred to citizenship twice. One of the vehicles for access to federal courts in Article III depended upon “diversity of citizenship” between the parties, and one of the prominently placed protections for individuals, contained in Article IV, depended upon state citizenship.¹⁸¹ Given the silence on this critical matter, there were several different theories developed and advanced on how citizenship should be acquired from the viewpoint of the Constitution, especially national citizenship, but no clear consensus or resolution until the infamous *Dred Scott* decision.¹⁸²

The *Dred Scott* decision actually rejected the prevailing southern theory that national citizenship was derivative of state citizenship, and instead declared that federal citizenship was fixed at the time of the founding and the adoption of the Constitution. The Fourteenth Amendment not only overruled *Dred Scott* in that regard (which held that persons of African descent were not United States citizens, and could never become such), it established a definitive basis upon which federal and state citizenship were to be acquired. As it declared: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

¹⁸¹ U.S. CONST. art. III, § 2, cl. 1; U.S. CONST. art. IV, § 2, cl. 1.

¹⁸² John A. Powell & Stephen Menendian, *Little Rock and the Legacy of Dred Scott*, 52 ST. LOUIS U. L.J. 1153, 1156–65 (2008) (explaining that until the *Dred Scott* decision the character of national citizenship and its relationship to state citizenship were debated nationwide).

reside.”¹⁸³ In a sense, this provision reversed one of the prevailing antebellum theories on federal citizenship, that it was derivative of state citizenship, as well as rejected Chief Justice Taney’s notorious theory on race and national citizenship.

Most jurists and practitioners regard the Citizenship Clause as merely definitional—a clarification on a critical previously ambiguous or indeterminate matter, and a reversal of an odious and infamous Supreme Court decision.¹⁸⁴ For this reason, the Citizenship Clause is not a site of interpretative contestation. Yet, there are reasons to believe that this clause is not so inert as is generally regarded.

The case for an expansive and far more substantive rendering of the Citizenship Clause was most powerfully made by the current California State Supreme Court Associate Justice Goodwin Liu in a landmark law review article in 2006 entitled “Education, Equality, and National Citizenship.”¹⁸⁵ The gist of his argument was that the Citizenship Clause is far more than definitional; rather, it is a “font of substantive guarantees that Congress has the power and duty to enforce,”¹⁸⁶ and could be used as a basis for federal efforts to equalize educational opportunity.

This was not as fanciful as it may seem at first blush. Undergirding Liu’s argument was a solid foundation: the interpretive guidance of the first Justice John Harlan. Although his dissent in *Plessy* is probably the most widely known, his most important was his impassioned and elaborate dissent in the 1883 *Civil Rights Cases*.¹⁸⁷ In that dissent, Harlan laid out a comprehensive, alternative understanding of the various Reconstruction Amendments. It was the foundation for his subsequent opinions.

As Justice Harlan explained:

The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section—“All persons born or

¹⁸³ U.S. CONST. amend. XIV.

¹⁸⁴ *Id.* at 1165–71.

¹⁸⁵ See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332–41 (2006) (arguing that the guarantee of citizenship in the Fourteenth Amendment requires the federal government, particularly Congress, to ensure education adequacy as means of securing membership, participation, and dignity for all American citizens).

¹⁸⁶ *Id.* at 330.

¹⁸⁷ 109 U.S. 3, 26–62 (1883) (Harlan, J., dissenting).

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside’—is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided. [. . .]

The citizenship thus acquired, by that race, in virtue of an affirmative grant from the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce ‘the *provisions* of this *article*’ of amendment; not simply those of a prohibitive character, but the provisions—all of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action.¹⁸⁸

In brief, Harlan’s view is that the enforcement power granted by Section 5 extends to the grant of citizenship in Section 1, and not simply to the prohibitory clauses in the remainder of that section. This suggests, as Liu asserts, that it is a “font” of affirmative power that can be leveraged by Congress to promote social equality. Additionally, this means that anything that is requisite or required for national citizenship, including, as the Court declared in *Brown* – a good public education, could be considered a requisite to national citizenship.¹⁸⁹

The Citizenship Clause is not dormant or neglected in the same sense as the Exceptions or the Guarantee Clauses, because it is and has been legally operative, but only in a definitional sense. It has been drained of its full potential as a basis for congressional power. It has been radically shrunk down to size. If applied in the manner or mode suggested by Justice’s Liu and Harlan, it could be a vital source of power and constitutional authority to address longstanding social inequities as well as a source of individual rights and protections.

5. *Privileges or Immunities*

Perhaps the most voluminous scholarship on the intersection of constitutional errors, or taking ‘wrong turns,’ and the separate but related body of scholarship regarding ‘lost,’ ‘forgotten’ or neglected provisions,

¹⁸⁸ *Id.* at 46 (Harlan, J., dissenting).

¹⁸⁹ See *Brown v. Bd. of Educ.*, 347 U.S. 686, 691 (1954) (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

relates to the Privileges *or* Immunities Clause of Section 1 of the 14th Amendment (not to be confused with the Privileges *and* Immunities Clause of Article IV).¹⁹⁰ Justice Antonin Scalia dubbed it the “darling of the professoriate,” reflecting the enormity of the scholarly attention while simultaneously highlighting the lack of judicial attention to the same provision.¹⁹¹

The Privileges or Immunities Clause states that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”¹⁹² To date, the Supreme Court has only applied this provision a single time to invalidate a state law, in 1999, when it struck down residency requirements to access public welfare benefits imposed by California (and Congress) in *Saenz v. Roe*.¹⁹³

This provision was first tackled by the Supreme Court as an interpretive matter in the now infamous *Slaughterhouse Cases* in 1873.¹⁹⁴ In that case, a group of disgruntled butchers argued that the city of New Orleans’ municipal regulations created an effective monopoly from which they were excluded, and argued that the municipal ordinance violated, among other provisions, this new section of the 14th Amendment.¹⁹⁵

The Supreme Court ruled against the plaintiffs, but not before landing a devastating blow which permanently impugned the meaning and integrity of that provision. The Court rejected the broad contention that the purpose of this provision was “to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?”¹⁹⁶ In rejecting this possibility, the Court responded with one of the great bromides of states’ rights:

[S]uch a construction [. . .] would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights,

¹⁹⁰ BARNETT & BERNICK, *supra* note 8, at 41 n.2 (citing many but not all of the “countless articles and books spanning thousands of pages” of scholarship relating to the Privileges or Immunities Clause).

¹⁹¹ Tr. of Oral Arg. 7:8-10, *McDonald v. Chicago*, 561 U.S. 742 (2010) [hereinafter Scalia].

¹⁹² U.S. CONST. amend. XIV, § 1, cl. 2.

¹⁹³ 526 U.S. 489, 492-94, 498-505 (1999) (holding that California’s welfare program, which limited benefits new residents could receive to the benefits they would have received in their prior state of residence, violates § 1 of the Fourteenth Amendment).

¹⁹⁴ 83 U.S. 36, 74-80 (1872).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 77-78.

as they existed at the time of the adoption of this amendment. . . . [W]hen, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.¹⁹⁷

Yet, as a continuous line of jurists, historians and legal scholars have subsequently argued, that is precisely what was intended. Justice Field's dissenting opinion in the same case is probably still the most persuasive word on this matter:

If this [provision] only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a *vain and idle enactment*, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference.¹⁹⁸

Justice Field has the more persuasive argument. The Fourteenth Amendment was more than a patch to a worn-out and frayed Constitution: it was a dramatic reworking and re-writing of the Constitution. It re-ordered the relationship between the states and the federal government in a fundamental way (as demonstrated by the Citizenship Clause), and permanently put state legislation under the watchful supervision of federal courts in a way that was hardly contemplated by the original Constitution of 1789 (despite the provisions of Article I, Section 10).¹⁹⁹

¹⁹⁷ *Id.* at 78.

¹⁹⁸ *See id.* at 96 (Field, J., dissenting) (emphasis added) (rejecting the court's interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment).

¹⁹⁹ *See* U.S. CONST. art. I, § 10 (setting out prohibitions on state power and authority, such as entering into treaties or adopting ex post facto laws).

The abuse of Black Americans by states necessitated a dramatic remedy, and the Fourteenth Amendment was tough medicine. The majority in *Slaughterhouse*, under the baleful leadership of Chief Justice Miller, could not swallow the pill, and thus eviscerated the Privileges or Immunities Clause instead.

What, then, did the *Slaughterhouse* majority leave as the Privileges or Immunities of national citizenship? As Justice Field noted, a pittance:

- “[T]he right of the citizen of this great country, protected by implied guarantees of its Constitution, ‘to come to the seat of government to assert any claim he may have upon that government,
- to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions.
- He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.’
- Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government.
- The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution.
- The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.
- One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.^{79,200}

To the point already made by Justice Field, that each of these are already rights guaranteed by the Constitution prior to the 14th Amendment, the legal scholar Charles L. Black Jr. more derisively observed that “the Court would have done well to omit the final taunt of this ‘list.’ What the list painstakingly shows is that, in the Court’s view,

²⁰⁰ *Id.* at 79–80.

nothing was set up, or added, or created, or even newly recognized by the Fourteenth Amendment’s ‘privileges and immunities clause.’”²⁰¹

This is why Professor Black asserted not that the Privileges or Immunities Clause was neglected by the Court, but rather that they “annihilated” it.²⁰² He therefore deemed the *Slaughterhouse Cases* “probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court.”²⁰³ He added that the opinion “blows a kiss at the recently freed slaves. That kiss was the kiss of the death . . . but it was blown from a long distance,” as the cases subsequent to it—culminating in *Plessy*—illustrated.²⁰⁴

The recognition that the Court made a terrible error in *Slaughterhouse* is now increasingly appreciated within the legal academy, and not just by progressive advocates or civil rights scholars. Conservative and libertarian originalists, textualists, and others are persuaded by the available historical evidence. New scholarship is emerging with increasing frequency advancing this argument, such as *The Original Meaning of the 14th Amendment* by the originalist scholar Randy Barnett, with a discussion of this Clause at its center.²⁰⁵ He and his co-author variously described the clause as having been “effectively nullified” and “effectively redacted” among other characterizations.²⁰⁶ Other scholars have simply regarded it as “moribund.”²⁰⁷

If these characterizations even remotely approach the truth, then why have the courts failed to follow the scholarly consensus? Barnett and Bernick argue, persuasively, that the sticking point is the lack of consensus on *how* it should be interpreted, not that it has been erroneously misinterpreted.²⁰⁸ It is not sufficient to admit that an error has been made; once that step has been taken, then it is incumbent on the Court to further correct that error. Doing so would require quite a bit of re-writing of Supreme Court jurisprudence, with risks that both conservatives and

²⁰¹ Charles L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* (1999).

²⁰² *Id.* at 55.

²⁰³ *Id.*

²⁰⁴ *Id.* at 76.

²⁰⁵ BARNETT & BERNICK, *supra* note 8, at 240–58.

²⁰⁶ *Id.* at 19, 22.

²⁰⁷ Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1518 (1990).

²⁰⁸ BARNETT & BERNICK, *supra* note 8, at 22.

liberals on the Court seem apprehensive about incurring by taking that step.

Justice Samuel Alito, for example, noted that there is a lack of consensus among scholars about how the provisions should be interpreted,²⁰⁹ a concern shared by other Justices. The only currently sitting Justice that has repeatedly expressed an appetite in written opinions for reinterpreting this clause is Justice Clarence Thomas.²¹⁰ His willingness—if not apparent eagerness—to do so may give many liberal jurists pause.

If the Court in *Slaughterhouse* was wrong, and there is growing academic consensus on that point, then how should it have been interpreted? What should it have said? Although it is true that there is a lack of complete consensus on how this clause should be interpreted, there is at least a partial consensus on a few key points. But the legal backdrop to that question is somewhat complicated, with the discussion often centering on the antebellum case of *Corfield v. Coryell*,²¹¹ which was the first and leading case on Article IV's Privileges and Immunities Clause. Drawing on the opinion of Justice Washington in that case, Field would hold the clause to encompass fundamental rights which "belong to the citizens of all free governments."²¹²

Quoting Justice Washington, Field maintained that these rights may "be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness

²⁰⁹ *McDonald v. Chicago*, 561 U.S. 742, 931 (2010) (Breyer, J., dissenting).

²¹⁰ *See id.* at 806 (Thomas, J., concurring in part and concurring in judgment) ("[T]he Court concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause I cannot agree that [the right] is enforceable against the States through a Clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."); *see also* *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Thomas, J., concurring) ("Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with 'process,' I would hold that the right to be free from excessive fines is one of the 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.")

²¹¹ *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230).

²¹² *Id.* at 551.

and safety, subject; nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.”²¹³

Helpfully, legal scholars have suggested a more practical reading that is immediately applicable to a set of contemporary problems.²¹⁴ Starting with Professor Black Jr., but extending forward to more contemporary advocacy and scholarship, many have argued that the principal meaning of the Privileges and Immunities Clause should, at a minimum, be to incorporate the rights and protections in the Bill of Rights against the states.²¹⁵

Since the Supreme Court held in 1833 in *Barron v. Baltimore* that the Bill of Rights is not operative against the states,²¹⁶ the adoption of the 14th Amendment in 1868, through the Privileges or Immunities Clause, could be very plausibly seen as overturning that decision. This is exactly what Professor Black Jr. argued, and as a far superior vehicle for what is now known as “incorporation” (meaning the incorporation of the Bill of Rights against the states) through the Due Process Clause (which has given rise to yet another term of art, the “substantive due process” jurisprudence, a term which Professor Black Jr. called a “contradiction” in terms).²¹⁷ This argument has now been developed elsewhere, including in a remarkable paper by the Constitutional Accountability Center, whose title described the Privileges or Immunities Clause as the “Gem of the Constitution,” based upon a famous description by the Speaker of the House in 1866.²¹⁸

Although the most widely agreed upon point is that the Privileges or Immunities Clause was meant to incorporate and extend the protections of the Bill of Rights (specifically the first eight amendments) against the states,²¹⁹ various scholars have advanced different arguments beyond that

²¹³ *Id.* at 551–52; see *Slaughterhouse Cases*, 83 U.S. 36, 117 (1872) (Field, J., dissenting) (quoting *Corfield*, 6 F. Cas. at 551–52).

²¹⁴ See Philip A. Hamburger, *Privileges or Immunities*, 05 Nw. L. Rev. 1, 64 n. 8 (2011).

²¹⁵ See CHARLES LUND BLACK JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 54–66 (1997).

²¹⁶ 32 U.S. 243, 250 (1833).

²¹⁷ BLACK, *supra* note 201, at 92.

²¹⁸ *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause of the Fourteenth Amendment*, CONST. ACCOUNTABILITY CTR., at 1 (2008), https://www.theconstitution.org/wpcontent/uploads/2017/12/Gem_of_the_Constitution.pdf [<https://perma.cc/7JZT-7QRV>].

²¹⁹ *Id.* at vii.

baseline viewpoint, with arguments that are too intricate or complex to fully canvass here.²²⁰

Beyond the bare consensus, the most important point is that the timing to reconsider this provision is now ripe. In the wake of the *Dobbs* decision, Justice Thomas has made known his desire to reconsider so-called “substantive due process” decisions.²²¹ That reconsideration does not necessarily mean throwing out those decisions, but could mean regrounding them under the Privileges or Immunities Clause.

In 1972, a legal scholar wondered whether the Privileges or Immunities Clause’s “Hour [Had] Come Round At Last”?²²² Sadly, the answer, more than 50 years later, is not yet. Yet the scholarly consensus that *Slaughterhouse* was wrongly decided is growing stronger and louder. Some scholars, however, fear that overturning *Slaughterhouse* could lead to a new *Lochner* era, where a highly conservative and reactionary Court uses the clause to strike down progressive economic legislation and market regulations in the name of constitutional liberty interests.²²³ While this is a possibility, fears of what may happen inhibit the debate on how the clause should be interpreted. That debate cannot occur until the error is corrected.

6. Unenumerated Rights Retained

If the Privileges or Immunities Clause is the “darling of the professoriate,”²²⁴ the Ninth Amendment has been called “the stepchild of the Constitution[.]”²²⁵ It states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²²⁶ This simple provision has proven to be an enigma and a cipher, especially to jurists.

²²⁰ For a summary, see BARNETT & BERNICK, *supra* note 8, at 42.

²²¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”)

²²² Philip B. Kurland, *The Privileges or Immunities Clause: Its Hour Come Round at Last?*, 1972 WASH. U. L.Q. 405 (1972).

²²³ See, e.g., Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1242 (1998).

²²⁴ Scalia, *supra* note 191.

²²⁵ Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 134 (1988).

²²⁶ U.S. CONST. amend. IX.

Although this Amendment has been mentioned by many lower federal and state courts, and has a few high-profile mentions in the Supreme Court, this Amendment has never been invoked or applied by a majority or plurality of the Court to decide a case. The Supreme Court finally heard a Ninth Amendment claim in 1947 but declined to apply it.²²⁷ Up until that point, plaintiffs would occasionally plead a Ninth Amendment violation in their complaints. This opinion signaled to the public a lack of solicitude to such arguments.

The first serious analysis of the Ninth Amendment by any member of the Supreme Court is that of Justice Goldberg in a concurring opinion in the controversial but landmark case of *Griswold v. Connecticut* decided in the 1965 term, which established the right to privacy and overturned a law that criminalized contraception.²²⁸ The majority opinion based its inference of a right to privacy on the infamous “penumbra” that emanated from the Bill of Rights.²²⁹ Justice Goldberg, in a concurrence, preferred to ground this right in the Ninth Amendment instead. He concluded that “the right of privacy in the marital relation is fundamental and basic – a personal right ‘retained by the people’ within the meaning of the Ninth Amendment”²³⁰

Aside from this brief mention, it would be several decades before members of the Court invoked the Amendment again. This explains why in 1955, Bennett Patterson authored a book entitled “The Forgotten Ninth Amendment,” a title that was quite appropriate given the scant judicial attention it had received.²³¹ One student note wondered if the *Griswold* decision might herald a “renaissance” for the Ninth Amendment, but this proved not to be.²³²

The Ninth Amendment was ultimately invoked and applied to decide a case by the plurality of the Supreme Court in 1980 for the first time in *Richmond Newspapers, Inc. v. Virginia*, where the Court reviewed a challenge to a trial court’s attempt to close a trial to the public and the

²²⁷ *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94–98 (1947).

²²⁸ *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

²²⁹ *Id.* at 484.

²³⁰ *Id.* at 499 (Goldberg, J., concurring).

²³¹ See generally Bennett B. Patterson, *The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights Under Social Conditions of Today* (1955).

²³² James F. Kelley, Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 81414-15 (1966).

media.²³³ The plurality based its decision, at least in part, on the Ninth Amendment, a choice that was strongly criticized by other members of the court.²³⁴ Once again, this proved not to be a portent for the future, as the Court has only invoked this Amendment in passing one further time.

In their plurality opinions in *Planned Parenthood v. Casey*, a landmark case that affirmed the essence of *Roe v. Wade*, Justices O'Connor, Kennedy and Souter explicitly cited the Ninth Amendment.²³⁵ They wrote: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U. S. Const., Amend. 9."²³⁶ The invocation of the Amendment, however, did not signal a new wave of application or suggest how it should be interpreted or applied, but it is notable as a high-profile mention among the nation's leading jurists. That pretty much exhausts its mentions.

Until the 1980s, there was very little scholarship purporting to interpret or make sense of the Ninth Amendment, followed by a mini-boomlet and then a more serious flowering of historical and legal commentary that has continued unabated to this day. In 1981, Charles Black Jr. published a book entitled "Decision According to Law" based upon a lecture he gave at Harvard Law School in 1979, in which he argued that the Ninth Amendment was a reservoir of individual freedoms.²³⁷ His argument was not well received, and faced a barrage of criticism.²³⁸ It did, however, open the door to serious scholarly debates regarding it.

One of the leading scholars on the Ninth Amendment, Randy Barnett, published an article entitled "Reconceiving the Ninth Amendment" in 1988,²³⁹ followed by a symposium which he organized

²³³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558-63 (1980).

²³⁴ *Id.* at 605-606 (Rehnquist, J., dissenting).

²³⁵ 505 U.S. 833, 848 (1992).

²³⁶ *Id.*

²³⁷ Charles L. Black, Jr., *Decision According to Law: The 1979 Holmes Lectures* (1981).

²³⁸ See generally Russell L. Caplan, *Charles Black's Rediscovery of the Ninth Amendment, and What He Found There*, 80 MICH. L. REV. 656 (1982) (arguing that the author of the Ninth Amendment intended it to be a rule of construction rather than a source of substantive rights); see also William Van Alstyne, *Slouching Towards Bethlehem with the Ninth Amendment*, 91 YALE L.J. 207, 209-14 (1981).

²³⁹ Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988).

around the Amendment,²⁴⁰ and then a volume that reprinted a large index of prior notable scholarship in an edited anthology volume.²⁴¹

This work received wider attention, in part, because a United States Senator quizzed controversial Supreme Court nominee Robert Bork about the Ninth Amendment in one of his confirmation hearing sessions.²⁴² The deeply conservative and strict constructionist judge responded that he regarded the Amendment as akin to an “ink blot” which he was unable to read, and therefore unable to apply.²⁴³ This caused some constitutional scholars to fear that the Amendment was being “redacted from the text” of the Constitution by the Supreme Court.²⁴⁴ In a 2013 interview, Justice Antonin Scalia dismissed such concerns, even denigrating the stature and status of the Amendment, admitting that the high court had ignored it for 200 years.²⁴⁵

Interest in the Amendment intensified following the *Casey* decision. Additional scholars and historians began to weigh in, not only arguing that the Ninth Amendment was more than “simply a rule about how to read the Constitution,” as constitutional law scholar Laurence Tribe contends,²⁴⁶ but was actually a source of rights and constitutional substance.²⁴⁷

Although the text of the Ninth Amendment does not expressly assert that there are other unenumerated rights, it implies so. Otherwise, it is entirely superfluous and adds nothing to the Constitution. As Professor Black Jr. wryly observed: “The Ninth Amendment seems to be guarding something; such [a] bother is not likely to be taken if the question is

²⁴⁰ Randy E. Barnett, Foreword: The Ninth Amendment and Constitutional Legitimacy, 64 *CHI.-KENT. L. REV.* 37 (1988).

²⁴¹ Randy E. Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989).

²⁴² Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearing Before the Subcomm. on the Judiciary, 100th Cong. 1 (1987).

²⁴³ *Id.* at 1278 (providing testimony of Laurence H. Tribe).

²⁴⁴ BARNETT, *supra* note 16, at xii.

²⁴⁵ Jennifer Senior, *In Conversation: Antonin Scalia*, *N.Y. MAG.* (Oct. 4, 2013), <https://nymag.com/news/features/antonin-scalia-2013-10/> [<https://perma.cc/8E56-QNGR>].

²⁴⁶ Laurence H. Tribe, *American Constitutional Law* 776 n.14 (2d ed. 1998).

²⁴⁷ *See, e.g.*, Mark Niles, *Ninth Amendment Adjudication: An Alternative To Substantive Due Process Analysis of Personal Autonomy Rights*, 48 *UCLA L. REV.* 85, 141–43 (2000).

thought to be quite at large whether there is anything out there to be guarded.²⁴⁸

Assuming it is not superfluous, then the question becomes trying to isolate what it may be hinting at or how such rights might be identified or derived. There are varying approaches to this question. Thomas McAfee argued that the Ninth Amendment was a source of residual rights.²⁴⁹ More recently, Randy Barnett has expanded upon his views that the Ninth Amendment was a repository for “natural liberty rights” and a presumption against the interference with those rights.²⁵⁰ Charles Black Jr. emphasizes the word “retained” as part of the interpretive puzzle, noting that it suggests the existence of rights prior to the framing of the Constitution, but which may have been abrogated or at risk of incursion subsequently.

But rather than trying to figure out exactly what rights it may be referring to, Charles Black Jr. ultimately argued that the provision should be used to undergird a general set of commitments and mode of reasoning from those commitments rather than used to derive specific protected rights. In this way, he ties the Ninth Amendment to the Privileges or Immunities Clause in a deeper way than the resemblant ambiguity of what they might mean. He argues that they undergird any meaningful framework for basing human rights within the Constitution.²⁵¹ In particular, he presses the argument that these provisions should be a source or grounding for “open-ended, open textured” commitments to human rights,²⁵² perhaps along similar lines to—but with at least a somewhat clearer textual hook—the infamous ‘penumbra’ emanating a right to privacy found in *Griswold*, among other cases or holdings. Along similar lines, Elie Mystal observes that the Ninth Amendment requires a more

²⁴⁸ BLACK, *supra* note 201, at 12.

²⁴⁹ Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1220–23 (1990).

²⁵⁰ Randy E. Barnett & Louis Michael Seidman, *Common Interpretation: The Ninth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-ix/interpretations/131> [<https://perma.cc/D6QQ-XEZB>] (last visited Sept. 27, 2023).

²⁵¹ See BLACK, *supra* note 201, at ix–x (“[A] sound and satisfying foundation for a general and fully national American law of human rights exists in three imperishable commitments—the Declaration of Independence, the Ninth Amendment, and the ‘citizenship’ and ‘privileges and immunities’ clauses of Section 1 of the Fourteenth Amendment (as those clauses ought to have been and still ought to be interpreted).”).

²⁵² *Id.* at 159.

expansive mindset and mode of reasoning, suggesting that “Madison put the Ninth Amendment in to counteract what he knew small-minded people would do to the rest of the document. . . .”²⁵³

This scholarship, however, has not translated into judicial application. Just as the inhibiting factor in the restoration of the Privileges or Immunities Clause is fear or uncertainty about what it would mean, the Ninth Amendment presents a similar set of problems. Many conservative jurists fear that it could provide a basis for judicial activism untethered from either text or the original public meaning or intent of the Amendment. Mystal provokingly claims that the “reason[] Scalia, Bork, and other conservatives deny the existence of the Ninth Amendment[] [is] because the Ninth Amendment blows their whole little project apart.”²⁵⁴ The invocation of the Amendment in cases like *Griswold* and *Casey* has done little to mollify these concerns.

Conversely, liberals and progressives may fear that the Ninth Amendment may be invoked as a vehicle for reviving *Lochner*, an era of greater judicial scrutiny to economic regulation and legislation, much as Justice Thomas and other conservative jurists and scholars have hinted how the Privileges or Immunities Clause might be deployed. But once again, fear over possible interpretations should not dictate the outcome or stifle the interpretive debate. Not if fidelity to the Constitutional text or our constitutional inheritance is to prevail. It surely means something, yet there is—as of yet—no judicial construction or method supplied on how to generate that meaning. It may be a “pack of troubles” to try to work it out, but the alternative is to allow the “priceless rights it refers to - [to] keep gathering dust for a third century.”²⁵⁵

III. FORGOTTEN BUT NOT LOST: THE SHADOW CONSTITUTION

In Part II, this Article delineated the key components of any fully operational written constitution, including, but not limited to, the rights of the people (both affirmatively and by constraining government), the

²⁵³ Elie Mystal, *Allow Me to Retort: A Black Guy’s Guide to the Constitution* 239 (2022).

²⁵⁴ *Id.*

²⁵⁵ BLACK, *supra* note 201, at 15.

affirmative authority and powers of government, and various procedures and processes that operationalize government or invest people with governmental authority. The provisions covered in Part III fit or conform to each of these descriptions.

Although not enumerating and discussing every single constitutional provision plausibly characterized as ‘lost’ or ‘forgotten,’ Part III analyzed provisions corresponding to each of these core functions. It covered provisions relating to the powers and authority of different branches of government, the relationships between those branches (and preventing encroachments), limitations and constraints on the power and authority of each of those branches (and abuses by those filling those offices), and the fundamental rights and protections of individuals in society that cannot be amended by ordinary legislation. They relate to the qualifications for office, the distribution of representation, the regulation of elections, the constraints on states and the federal judiciary, and the rights and privileges of citizens from government abuse and private discrimination. In short, they relate to every aspect that is fundamental to a constitutional order.

This Article and the scholarship it cites has most frequently characterized these neglected and disused provisions as “lost,” “forgotten,” or “neglected,” which makes a good deal of intuitive sense when describing individual provisions. But a more accurate frame would be to characterize these provisions, in their totality, as a ‘shadow’ constitution rather than a lost or forgotten constitution or set of such provisions.

A shadow is a visual impression without substance. It is real but phantasmal, lacking mass or weight. The twelve provisions discussed in Part III have the same quality: they are visible but lacking in substance or weight. The overwhelming attention given to the other, more heavily contested provisions, has simply drawn focus away from these provisions. The lamp of attention casts a shadow which obscures these neglected provisions.

Moreover, as the foregoing discussion illustrates, the provisions themselves may seem like errors or anomalies in isolation, but from a broader lens, they appear to be something else altogether. The shadow metaphor connotes a totality or coherency to these darkened or hidden

lines of constitutional text and meaning. From that vantage point, they appear to be something more than the sum of their individual parts.

A long line of legal scholars have likened the Constitution to an intricate machine or mechanical device, such as a watch.²⁵⁶ As this metaphor suggests, the Constitution has both an overarching set of purposes, within which, each component part has its own individual—and distinct and subsidiary—function: “Like the flywheel, gears, and springs of watch, each of its clauses was designed to work harmoniously with the others to fulfill those functions. Like a watch, each of its constituent parts has its own secondary function as a means to the more general ends.”²⁵⁷ The degradation of some of those internal components has serious consequences for other components, even those that may appear well-functioning. The result has been a vitiation of the constitutional order and malfunctions in its machinery.

Hidden beneath the mighty oaks and towering pines of the Due Process Clause, Equal Protection Clause, Freedom of Speech and Free Exercise Clauses are neglected but no less potent clauses such as the Guarantee Clause, Privileges and Immunities, and the Excessive Fines Clause. These clauses have been neglected or obscured, but they are not forgotten. They have fallen into disuse, largely due to political timidity and neglect on the one hand, and judicial error and acquiescence on the other. Regardless of the cause, they have lost their power and been drained of their full meaning.

What might be the “causes of quiescence” in relation to these various provisions?²⁵⁸ The most obvious through-line connecting most of these provisions is that they are primarily designed for and on behalf of more marginalized members of society rather than the wealthy and powerful. In fact, many of these provisions were designed to hold power—and its abuse—to account.

In his classic analysis on “The Behavior of Law,” the sociologist Donald Black presented a series of propositions purporting to help explain the subject of his book.²⁵⁹ Among them were the claims that “law varies directly with rank,” meaning that the law takes crimes or offenses

²⁵⁶ BARNETT & BERNICK, *supra* note 8, at 13–14.

²⁵⁷ *Id.* at 14.

²⁵⁸ Kurland, *supra* note 222, at 414.

²⁵⁹ Donald Black, *The Behavior of Law* (1976).

more seriously when the victim is wealthy or well-connected.²⁶⁰ Another proposition was that “Downward law is greater than upward law,” meaning that all applications of law, from civil suits to criminal prosecutions and punishments, are likely to be stronger and more punitive when the defendant has a lower social rank than when they have a higher rank. Professor Black supported these, and more than a dozen additional propositions, with ample examples drawn from the historical record and contemporary societies across the globe.²⁶¹ The behavior, direction, and morphology of law was consistently related to social position, power and privilege.

From this sociological perspective, it is easier to understand how the Reconstruction Amendments quickly fell into a trajectory of narrowed ambitions following the collapse of Reconstruction and a judiciary and a broader public that was, over time, less firmly committed to the project of racial justice and healing, overcoming and fully remedying the ‘original sin’ of racial slavery.²⁶²

This is obvious in the case of the Reconstruction Amendments and the provisions contained therein, but it is also true of other provisions related to them, from the Ninth Amendment to the original Privileges *and* Immunities Clause, which guaranteed the rights of citizens in some states the same as those in others. Elie Mystal asserts that the “Ninth contemplates robust protection of individual rights that defends minority interests against the excesses of the majority.”²⁶³ More pointedly, Charles Black Jr. felt “strongly” that the reason the “Ninth Amendment lay sleeping [is because] it might open up a path for additional rights antagonistic to slavery.”²⁶⁴ It is not hard to imagine that slaveholders would blanche at the thought that the Ninth Amendment might be applied to create protections or rights adverse to their interests. He also believed that this concern played in a role in the *Slaughterhouse* decision:

²⁶⁰ *Id.* at 17.

²⁶¹ ANGELA M. BARLOW, *SEXUALITIES AND CONFLICTING MORALITIES AT WORK: AN EMPIRICAL TEST OF BLACK’S THEORY OF MORAL TIME* 23-24 (2012) (describing empirical support for Black’s theory).

²⁶² *See generally* Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019); Eric Foner, *A Short History of Reconstruction* (2nd ed. 2015).

²⁶³ MYSTAL, *supra* note 253, at 242.

²⁶⁴ BLACK, *supra* note 201, at 151.

I even think it probable that the *Slaughterhouse* Court, realizing that giving full scope to a set of “privileges and immunities of citizens of the United States,” which now definitely included blacks, would open a wide door for claims of right by freedmen, paled at what it saw as the unmanageableness of this.²⁶⁵

After all, it has long been observed that the “different opinions and interests ‘incline men to take different views of the instruments which affect their interests.’”²⁶⁶ In other words, people’s ideological perspectives and material interests will tend to affect or shape their preferred interpretation or construction of a particular provision or law, and specifically whether it should be read more broadly or narrowly. Proponents of gun control will be more likely, for example, to emphasize the clauses of the Second Amendment which seem to situate the right to bear arms in the context of a “well regulated Militia.”²⁶⁷ In contrast, proponents of gun rights will be more likely to interpret that provision broadly, and perceive those clauses as not constraining or delimiting the embedded clause denoting a right to bear arms.

If the operative meaning of our Constitution has been sculpted by men, politicians and jurists hostile—or at least wary or skeptical—of the purposes and functions of certain provisions, then it is readily understandable why these provisions may have been more narrowly construed or perhaps utterly misconstrued. This is most obvious in the case of the post-Reconstruction era, when backlash to civil rights gave way to Jim Crow. But the same dynamic observed in the dilution of the Reconstruction Amendments also helps explain cases like the Guarantee Clause and the Fees and Fines Clause, whose most natural application would be to protect minorities, the poor, and the marginalized. Or the Petition and Assembly Clauses, which create channels for the airing and redress of grievances. These provisions serve similar ends. But it is even true in cases like the Public Debt Clause, which, as a matter of practical application, is an argument about the degree to which the federal government budget should include social safety net programs that prevent people from going hungry, enjoying access to health care, falling into

²⁶⁵ Id.

²⁶⁶ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Bos., Little et al. 1868).

²⁶⁷ U.S. CONST. amend. II.

poverty, or losing shelter, even though it was originally about the Civil War debt.

Collectively, in terms of their sweep, scope, functions, and complementarity, they constitute a shadow constitution, a set of interlocking or reinforcing provisions hidden or obscured within the one that prevails, although the text is there. It is a constitutional order that is far more solicitous and protective of the less powerful and more marginalized peoples and groups in society. More than that, these provisions seek to hold the powerful to account by disqualifying from office those who abuse their power and privilege.

This is why I regard these provisions as more than a disparate collection of errors or mistaken turns. When viewed together, they form a vestment protective of equality and democracy that has been shredded by jurists like Justice Miller and his henchmen, and their contemporary analogs who would think nothing of rendering such provisions a nullity by the most parsimonious and curdled readings.

Although not the focus or subject of this Article, the errors that led to the neglect or misinterpretation of the provisions canvassed here extend to errors made in provisions that are more deeply and frequently contested, like the Equal Protection Clause or the Due Process Clause, and embodied in cases like *Plessy*. The analysis (although not the focus), in that sense, extends beyond the 'lost' and 'forgotten' provisions to those that are hotly and regularly contested. The errors in one case compound and affect the errors in other cases.

This Article argued that there exists within the Constitution, as it has been formally interpreted and adjudicated by the Supreme Court, another, hidden constitutional layer, a set of neglected and dormant provisions. Forgotten but not lost, I hope. They are there both in the text and in history, ready for reclamation and resurrection. It is our heritage. Like a bauble buried deep in a hidden vault; it lies there, quiet and still but ready for possible use, public display and vigorous application.

Some scholars claim that aggressive disuse or public repudiation by political actors of constitutional provisions forms an 'informal

amendment” process.²⁶⁸ That seems like an apt description of what has happened with these provisions: disuse and neglect have functionally written these provisions out of the Constitution, or nearly so. This argument parallels, in a nearly reciprocal manner, the argument developed in this Article, about how political timidity and judicial error have betrayed our constitutional inheritance. It is the duty and responsibility of citizens, jurists and political leaders to ensure that such invisible amendments do not occur, or at least cannot be sustained, and are eventually corrected.

CONCLUSION

Despite its venerable status, the United States Constitution was never a perfect document. Structural flaws emerged almost immediately, requiring revisions to the procedure for electing the President, for example.²⁶⁹ Even worse, the Constitution institutionalized racial inequality in ways that necessitated multiple amendments (and counting) to try to reverse. And there are almost certainly absent provisions and protections that would be a part of any modern constitution, as evidenced from the fact that most state constitutions, for example, provide an explicit right to education and a right to privacy.²⁷⁰ There are compelling reasons to

²⁶⁸ Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMPAR. L. 641, 680–86 (2014).

²⁶⁹ U.S. CONST. amend. XII.

²⁷⁰ IND. CONST. art. VIII (“Education”); N.C. CONST. art. IX (“Education”); FLA. CONST. art. IX (“Education”); *Id.* art. I, § 23. (“Right of privacy”); MINN. CONST. art. XIII, § 1 (establishing a system of public schools and university education); NEV. CONST. art. XI (“Education”); OR. CONST. art. VIII, §§ 3–4 (“Education and School Lands”); ALA. CONST. art. XIV, §§ 256, 263 (describing the education policy of the state ALASKA CONST. art. VII, § 1 (“Public Education”); WIS. CONST. art. X (“Education”); ARIZ. CONST. art. XI (“Education”); COLO. CONST. art. IX (“Education”); IDAHO CONST. art. IX (“Education and School Lands”); N.M. CONST. art. XII, §§ 1, 8, 10 (establishing free public schools, educational policy, and rights); N.D. CONST. art. VIII (“Education”); S.D. CONST. art. VIII (“Education and School Lands”); WASH. CONST. art. IX §§ 1–4 (“Education”); WYO. CONST. art. I, § 23 & art. VII, § 1 (“Education; State Institutions; Promotion of Health And”); DEL. CONST. art. X, § 1 (establishing a system of free public schools); OHIO CONST. art. VI, § 2 (establishing provisions for school funds; ARK. CONST. art. XIV, §§ 1–3 (establishing state education policy); CAL. CONST. art. IX, §§ 1, 5–6 (establishing state education policy); CONN. CONST. art. VIII, § 1 (providing for free public schools); GA. CONST. art. VIII, §§ 1, 7 (providing for free public education and authorizing educational assistance programs); HAW. CONST. art. X, § 1 (providing for

support additional amendments and improve the constitutional machinery.

Many of the problems that are currently traced to the Constitution, however, are not fundamental to the text, the legal principles embodied in that text, or blindspots and omissions from the text, but rather a byproduct of flawed but prevailing interpretations of that text, extra-constitutional political incapacities (such as the Senate filibuster), or simple political timidity. There remains, in the text, more existing tools and potential mechanisms for addressing extant societal problems than is generally acknowledged.

Instead of far reaching and risky political reforms or constitutional amendments, many of these problems can be addressed by correct or novel application of the constitutional mechanism. Congress, for example, can ‘make or alter’ any electoral scheme it dislikes.²⁷¹ This

a public education system); ILL. CONST. art. X, § 1 (providing for a free public education system); IOWA CONST. art. IX, §§ 1, 3 (establishing education policy); KAN. CONST. art. VI, §§ 1, 6 (providing for and establishing financing system for public education); KY. CONST. § 183 (providing for a school system); LA. CONST. art. VIII, §§ 1, 13 (establishing and providing for a public education system); ME. CONST. art. VIII, § 1 (requiring support for public schools); MD. CONST. art. VIII, §§ 1, 3 (establishing free public schools and a state school fund); MASS. CONST. art. I, § 8, cl. 8 (education); MICH. CONST. art. VIII §§ 1-2 (encouraging education and providing free public elementary and secondary schools); MISS. CONST. art. VIII, §§ 201, 206, 208 (establishing free public schools and education policy); MO. CONST. art. IX, §§ 1, 3 (establishing free public schools and state school fund); MONT. CONST. art. X, § 1 (“Educational Goals and Duties”); NEB. CONST. art. VII, §§ 1, 8, 9 (establishing public education system and funding thereof); N.H. CONST. Part 2, art. LXXXIII (establishing the duty of legislators to promote education); N.J. CONST. art. XIII, § 4 (education); N.Y. CONST. art. XI, § 1 (providing for maintenance and support of free public education); OKLA. CONST. art. I, § 5 & art. XIII, § 1 (establishing and maintaining system of public education); PA. CONST. art. III, §§ 14-15 (providing for a public education system); R.I. CONST. art. XII, § 1 (promoting public education); S.C. CONST. art. XI, § 3 (providing for a system of free public education); TENN. CONST. art. XI, § 12 (encouraging Support for education); TEX. CONST. art. VII, §§ 1, 3 (establishing system of education and funding thereof); UTAH CONST. art. X, §§ 1-2 (establishing system of free public education); VT. CONST. Ch. II, § 68 (providing laws encouraging maintenance of schools and encouraging public education); VA. CONST. art. I, § 15 & art. VIII, §§ 1-2 (providing for compulsory education and free textbooks); W. VA. CONST. art. XII, § 1 (providing for a system of free public education); ALASKA Const. art. I, § 22 (“Right of Privacy”); ARIZ. CONST. art. II, § 8 (“Right to Privacy”); CAL. CONST. art. I, § 1 (guaranteeing right of privacy); FLA. CONST. art. I, § 23 (“Right of Privacy”); MONT. CONST. art. II, § 10 (“Right of Privacy”); WASH. CONST. art. I, § 7 (“Invasion of Private Affairs or Home Prohibited”); LA. CONST. art. I, § 5 (“Right to Privacy”); HAW. CONST. art. I, § 6 (“Right to Privacy”); ILL. CONST. art. I, § 6 (“Guaranteeing right to privacy”); N.H. CONST. Part I, art. II(b) (“Right of privacy”); S.C. CONST. art. I, § 10 (“Guaranteeing right to privacy”).

²⁷¹ U.S. CONST. art. I, § 4.

Article has surveyed a specific subset of these tools and problems, specifically focused on those provisions or mechanisms that have never or only rarely been invoked or applied, or have otherwise been neglected or ignored by courts or Congress.

As with any object of neglect, there is a natural apprehensiveness about utilization. Like a relationship that has faded due to failure to stay in touch, the hardest and first step is simply reaching back out. Or like a mechanical device that has been allowed to rust and decay, there may be concerns that ‘turning it on’ could do more damage than whatever benefit its application as a tool would serve. Moreover, restoring or fixing the machine may require more work and effort than it may ultimately be worth. But we cannot know until we try.

Much of the concerns and fears that have been expressed about these provisions relate to the uncertainty that arises in making the necessary correction or novel application. Jurists and politicians of all ideological and philosophical stripes have reservations about the potential unknown and unknowable consequences of rescuing or reviving these provisions from error or neglect. There is a degree of risk involved in reviving anything that has fallen into disuse or disrepair, but if we wish to remain faithful to our constitutional heritage, those are debates we must embrace rather than avoid.

Amidst the debate over possible amendments versus pressing for reinterpretation and revival, there is at least one point upon which the advocates for both sides may converge. There is another provision which this Article did not focus on in its presentation, but which has unquestionably fallen into disuse, the neglect of which would have surprised the framers of the Constitution. That provision is Article V’s procedure for calling a constitutional convention to introduce constitutional amendments. Although the first procedure for Amendment has been successfully utilized twenty-seven times, the second has never been used. Not since the convention of 1787 has the United States had a national constitutional convention. To initiate such a convention, Article V only requires two-thirds of the state legislatures to call for one. As in other cases of disuse and neglect, there are deep

reservations based upon political ideology and uncertainties over possible outcomes.²⁷²

Ultimately, the Constitution remains supple enough to reach many desired ends through different routes. This Article has hopefully illustrated just how supple those pathways may be, even as the brush and overgrowth has made them harder to see.

²⁷²

In this case, it is clear that conservative groups have organized and studied this possibility with greater interest and enthusiasm, resulting in greater fear and concern among progressive interest groups. *See, e.g.*, <https://www.commoncause.org/our-work/constitution-courts-and-democracy-issues/article-v-convention/> [<https://perma.cc/6GE2-RW5B>]; <https://nyujlpp.org/quorum/kowal-stop-worrying-love-article-v-convention/> [<https://perma.cc/B7MR-AE8J>]; <https://www.heritage.org/the-constitution/report/reconsidering-the-wisdom-article-v-convention-the-states> [<https://perma.cc/6GE2-RW5B>].