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## WHAT IF *SLAUGHTER-HOUSE* HAD BEEN DECIDED DIFFERENTLY?

KERMIT ROOSEVELT III\*

“[W]hy are you asking us to overrule 150, 140 years of prior law . . . when you can reach your result under substantive due [process] . . . unless [you are] bucking for a . . . place on some law school faculty[?]”<sup>1</sup>

### INTRODUCTION

In *District of Columbia v. Heller*,<sup>2</sup> the Supreme Court surprised many veteran Court-watchers by breathing life back into the long-moribund Second Amendment. The federal government’s power to restrict individual gun ownership was meaningfully limited, the Court wrote: the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>3</sup>

But *Heller* dealt only with federal regulation.<sup>4</sup> What about the states? For over a century, the Supreme Court has approached questions about whether a particular Bill of Rights liberty could be asserted against the states by asking whether the right was “incorporated” in the Fourteenth Amendment’s Due Process Clause.<sup>5</sup> Nonetheless, when *McDonald v. City of Chicago*<sup>6</sup> presented the Second Amendment question, Alan Gura, the petitioners’ lawyer, asked the Court to take a different tack.

Rather than deciding whether the Second Amendment met the test for incorporation in the Due Process Clause,<sup>7</sup> Gura suggested the Court should ask whether private possession of firearms was one of the privileges or immunities of U.S. citizenship protected by the Fourteenth Amendment’s Privileges or

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\* Professor of Law, University of Pennsylvania Law School. Thanks to Gerard Magliocca for organizing this Symposium, to my fellow participants for their contributions, and to the editors of the *Indiana Law Review* for their editorial assistance. Rebecca Sivitz provided valuable research assistance.

1. Transcript of Oral Argument at 6-7, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 710088 at \*6-7 (quoting Justice Scalia).

2. 554 U.S. 570 (2008).

3. *Id.* at 592.

4. *See id.*

5. For early cases, see, for example, *Hurtado v. California*, 110 U.S. 516 (1884), and *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

6. 130 S. Ct. 3020 (2010).

7. The most frequently cited formulation of the selective incorporation test is probably that of *Palko v. Connecticut*, 302 U.S. 319 (1937), which asked whether the asserted right was “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964)).

Immunities Clause.<sup>8</sup> In *The Slaughter-House Cases*,<sup>9</sup> the Court had adopted a reading of the Privileges or Immunities Clause that excluded the Bill of Rights liberties from its scope, but, Gura contended, that “narrow [reading] . . . should now be rejected.”<sup>10</sup>

The Justices’ questions at oral argument indicated no enthusiasm for reconsidering *Slaughter-House*. Justice Scalia, in particular, demanded whether it was “easier” to reach Gura’s desired result via Privileges or Immunities than through the Court’s established substantive due process approach (Gura admitted it was not)<sup>11</sup> and whether a Privileges or Immunities jurisprudence might end up using exactly the same test (Gura admitted it might).<sup>12</sup>

In the end, the Court went the Due Process route. Gura got Justice Thomas’s vote for his Privileges or Immunities theory, but even Thomas seemed hard-pressed to explain why it would make a practical difference. His concurrence offered an argument that the Court’s Due Process approach to fundamental rights was problematic (it “strains credulity for even the most casual user of words” and is “particularly dangerous” because it lacks a guiding principle).<sup>13</sup> However, his suggested turn to Privileges or Immunities did not seem to be much of an improvement: the only restriction he was able to place on the rights he would recognize under that clause was that they be “fundamental,”<sup>14</sup> which is the same limit the Court has observed, with more or less rigor, in its substantive due process jurisprudence.<sup>15</sup> Thus, as Scalia implied during oral argument,<sup>16</sup> a revitalized Privileges or Immunities Clause would probably simply take over the function currently performed by the Due Process Clause.

That is more or less the academic consensus. *Slaughter-House* was wrong—blatantly,<sup>17</sup> maliciously,<sup>18</sup> egregiously.<sup>19</sup> (Pick your adverb.) But

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8. See Transcript of Oral Argument, *supra* note 1, at 4.

9. 83 U.S. (16 Wall.) 36 (1872).

10. *McDonald*, 130 S. Ct. at 3028.

11. Transcript of Oral Argument, *supra* note 1, at 6.

12. *Id.* at 11.

13. *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring).

14. *Id.* at 3067 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230)).

15. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (describing methodology). Thomas did advert briefly to the view that the Bill of Rights exhausts the meaning of Privileges or Immunities, see *McDonald*, 130 S. Ct. at 3075-76 (Thomas, J., concurring), but this probably does not help much given that the Bill of Rights, in the Ninth Amendment, proclaims itself to be a nonexhaustive list of rights. For a recent and valuable discussion of the Ninth Amendment, see Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011).

16. Transcript of Oral Argument, *supra* note 1, at 11.

17. Alan Gura et al., *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 183 (2010).

18. *Id.*

19. Brief for Constitutional Law Professors as Amici Curiae Supporting Petitioners at 33,

overruling it would not change much about the current state of constitutional law.<sup>20</sup> The brief for constitutional law professors as amici curiae in *McDonald*, after some forceful language about the error of *Slaughter-House*, concluded that section with the somewhat anticlimactic observation that “[a]s professors of constitutional law, we look forward to the day when we can teach our students how the Supreme Court corrected this grievous error.”<sup>21</sup> It should surprise no one that the Justices were unmoved.

My aim in this Article is not to disturb that consensus. Reviving the Privileges or Immunities Clause would probably not change the results in cases currently decided as part of our equal protection or fundamental rights substantive due process jurisprudence.<sup>22</sup> In particular, it would not make the problems associated with that line of cases go away; judicial identification of unenumerated fundamental rights is going to be problematic no matter what the textual hook.<sup>23</sup>

The interesting question, I will suggest, is not what might happen in the future if the clause returned to life, but what would have happened in the past if it had not been killed in the first place. And the puzzle for such a counterfactual history, I will argue, is not what the Court’s jurisprudence of Privileges or Immunities would look like. There are two possibilities, and we are quite familiar with them. They are what we now call Equal Protection and (substantive) Due Process.

Instead, the real puzzle is what Equal Protection and Due Process would look like if the Privileges or Immunities Clause had fulfilled its mission rather than passing the torch to them. I will suggest that they might look very different, and that our constitutional jurisprudence, as a whole, might look somewhat better. Thus, there would have been a real consequence to reaching the results we now reach through Equal Protection and Due Process through Privileges or Immunities instead: It would have freed up one or both of those clauses to do something else of value. *Slaughter-House* cost us something, I will argue, not because it killed the Privileges or Immunities Clause<sup>24</sup>—the substance of that clause made it into our doctrine anyway. It cost us something because the price of getting Privileges or Immunities through Due Process and Equal Protection was the original and intended substance of those clauses.

The first Part of this Article gives a brief description of the *Slaughter-House* case and the interpretation of Privileges or Immunities which the majority

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McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4099504 at \*33.

20. See, e.g., Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1242 (1998) (suggesting that “*Lochner* will bite us one way or the other”).

21. Brief for Constitutional Law Professors as Amici Curiae, *supra* note 19, at 35.

22. As Justice Thomas put it in *Saenz v. Roe*, 526 U.S. 489 (1999), a revitalized Privileges or Immunities Clause would probably “displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.” *Id.* at 528 (Thomas, J., dissenting).

23. See generally Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983 (2006) (describing substantive due process methodology).

24. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

adopted. Part II goes on to discuss the interpretations proposed by the dissents. And Part III considers what Equal Protection and Due Process might have looked like if the Court had adopted one or both of the dissents.

#### I. *SLAUGHTER-HOUSE* AND THE EVISCERATION OF PRIVILEGES OR IMMUNITIES

In 1869, the Louisiana legislature enacted a statute that created the Crescent City Live-Stock Landing and Slaughter-House Company and gave it the exclusive right to engage in the slaughtering of livestock within New Orleans and its environs.<sup>25</sup> The evident purpose was to protect the public health from the filth of unrestricted butchery, which contributed to regular outbreaks of cholera.<sup>26</sup> Other butchers were permitted to use the Crescent City facilities upon payment of a prescribed fee.<sup>27</sup> Unhappy with this state of affairs, they sued, challenging the statute on every available ground, including the Thirteenth Amendment and every clause of the Fourteenth.<sup>28</sup> “[F]or the first time,” the Court wrote, it was called upon “to give construction to these articles.”<sup>29</sup>

The Court’s analysis of the possible application of the Thirteenth Amendment, Due Process, and Equal Protection was relatively brief, and it has not exerted much influence on subsequent law.<sup>30</sup> *Slaughter-House* is famous, instead, for its evisceration of the Privileges or Immunities Clause.<sup>31</sup>

The Clause, Justice Miller observed, protects the privileges and immunities of federal citizenship from state interference.<sup>32</sup> What are these privileges and immunities? Not those associated with state citizenship.<sup>33</sup> They are, instead, those “which own their existence to the [f]ederal government, its [n]ational [c]haracter, its Constitution, or its laws.”<sup>34</sup> An ordinary reader might think from this description that Bill of Rights provisions would be included, since they

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25. *Id.* at 59.

26. *See id.* (indicating purpose of statute was for public health). For a description of the conditions in New Orleans prior to the enactment of the law at issue in *Slaughter-House*, see, for example, JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865-1900*, at 117-20 (2007).

27. *Slaughter-House*, 83 U.S. (16 Wall.) at 60.

28. *Id.* at 58.

29. *Id.* at 67.

30. *See id.* at 72, 80-81.

31. Just as one may choose from several adverbs to describe the quality of the Court’s error, colorful descriptions of the decision’s impact on the Privileges or Immunities Clause abound. Most use words suggestive of butchery, which is appropriate, if obvious. *See, e.g.*, Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 1 (1996) (“liquidated”); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J. L. & LIBERTY 115, 115 (2010) (“mutilated” and “entombed”).

32. *Slaughter-House*, 83 U.S. (16 Wall.) at 74-76.

33. *Id.* at 74.

34. *Id.* at 79.

“ow[e] their existence to the . . . Constitution.”<sup>35</sup> Indeed, it is possible to read Miller’s opinion as not foreclosing Bill of Rights incorporation through Privileges or Immunities.<sup>36</sup> But later cases have read it to exclude the Bill of Rights,<sup>37</sup> and if Miller thought those provisions included, it is odd that he did not turn to them as examples. Instead, he offered the right “to come to the seat of government . . . to transact any business he may have with it” and “the right of free access to its seaports.”<sup>38</sup> He went on to include the right “to demand the care and protection of the Federal government . . . when on the high seas . . . the privilege of the writ of *habeas corpus* . . . [t]he right to use the navigable waters of the United States.”<sup>39</sup> Last, in an especially odd twist, he added, “the rights secured by the thirteenth and fifteenth articles of amendment.”<sup>40</sup> A broader reading, Miller warned, would “radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”<sup>41</sup>

As many people have pointed out, Miller’s reasoning is somewhat less than satisfactory.<sup>42</sup> Most obviously, changing the relationship between the states, the federal government, and the people was exactly the purpose of the Reconstruction Amendments. The political paradigm of the founding generation took a distant central government as threatening to the liberty of individuals and looked for protection to the states in their sovereign capacity. That was the lesson of the Revolution, when state militiamen faced down Redcoats from overseas. So the founders’ Constitution limited federal power and preserved the military capacity of the states, most notably with the Second Amendment.<sup>43</sup>

But that political theory was proved false, or at least incomplete, by the Civil War and its aftermath. In the minds of the Reconstruction Congress, the national

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35. *Id.* The counterargument is that the Bill of Rights guarantees are actually pre-existing natural rights that exist independent of the Constitution.

36. *See, e.g.,* Jonathan Lurie, *Reflections on Justice Samuel F. Miller and the Slaughter-House Cases: Still a Meaty Subject*, 1 N.Y.U. J. L. & LIBERTY 355 (2005); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L. J. 643, 649 (2000).

37. *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 759 n.6 (1997) (Souter, J., concurring).

38. *Slaughter-House*, 83 U.S. (16 Wall.) at 79 (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867)).

39. *Id.*

40. *Id.* at 80.

41. *Id.* at 78.

42. *See, e.g.,* CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 41-85 (1997).

43. When the original constitution protected individuals against states, it was most concerned to protect them against *other* states. Averting discrimination against out-of-staters is a central concern of Article IV of the Constitution, reflected primarily in the Privileges or Immunities Clause but also the Full Faith and Credit Clause. Protections for individuals against their own states were very narrow, most notably the Ex Post Facto and Bill of Attainder Clauses.

government was not the threat to individual liberty, but rather its protector.<sup>44</sup> And the states were not defending their citizens from a tyrannical national government; they were oppressing them, or at least some of them.<sup>45</sup> The Reconstruction Congress envisioned what the Framers largely did not, that federal laws and federal rights could come between individuals and their states in order to protect liberty.<sup>46</sup> The Reconstruction Amendments could hardly be clearer in terms of enacting this model, superimposing the new vision onto the old constitutional structure.

This fact was not lost on the dissenters. “The first eleven amendments to the Constitution,” wrote Justice Swayne, “were intended to be checks and limitations upon the government which that instrument called into existence.”<sup>47</sup> The Reconstruction Amendments, by contrast, “are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the [s]tates, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven.”<sup>48</sup> “By the Constitution, as it stood before the war,” he continued, “ample protection was given against oppression by the Union, but little was given against wrong and oppression by the [s]tates. That want was intended to be supplied by this amendment.”<sup>49</sup>

From that perspective, Miller’s list of federal privileges and immunities is bizarre. Most of the rights he identifies are certainly not those about which the Reconstruction Congress was concerned. As Alan Gura said in his opening statement in *McDonald*, “The Civil War was not fought because [s]tates were attacking people on the high seas or blocking access to the Bureau of Engraving and Printing.”<sup>50</sup> The rights secured by the Thirteenth and Fifteenth Amendments, by contrast, are rights about which Congress was concerned, but Miller’s inclusion of them in his list actually just makes things worse.

The problem is that those rights run against the states by their own force; they do not need another amendment to gather them up and protect them. States cannot enslave people or deny the right to vote on racial grounds because of the Thirteenth and Fifteenth Amendments by themselves, whether the Privileges or Immunities Clause exists or not. So including these pre-existing federal rights is simply redundant. As Justice Field put it, if that is its effect, then the Fourteenth Amendment “was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its

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44. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 56 (1998).

45. See, e.g., *id.* at 258.

46. See *Slaughter-House*, 83 U.S. (16 Wall.) at 128 (Swayne, J., dissenting) (“The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members.”).

47. *Id.* at 124 (Swayne, J., dissenting).

48. *Id.* at 125.

49. *Id.* at 129.

50. Transcript of Oral Argument, *supra* note 1, at 3-4.

passage.”<sup>51</sup>

More or less everyone agrees that the Miller reading makes little sense, at least if we take the rights he listed as truly exemplary of the privileges and immunities of federal citizenship. But how should the clause have been read? Here interpretations diverge into what we can call the anti-discrimination and the fundamental rights camps. Each makes sense, textually and historically, to a greater extent than Miller’s reading. And each has a representative among the dissenters in *Slaughter-House*. Those dissents are a convenient way to develop the views.

## II. THE ROADS NOT TAKEN

### A. Anti-discrimination

The anti-discrimination reading starts with the observation that the original Constitution also refers to privileges and immunities. Article IV, Section Two, provides that “[t]he [c]itizens of each [s]tate shall be entitled to all [p]rivileges and [i]mmunities of [c]itizens in the several States.”<sup>52</sup> This clause was intended to protect against discrimination citizens of one state who ventured into another. It was designed to knit the several states into a federal union by providing that an individual from Maryland, for instance, who traveled to Virginia, would not be deemed a stranger to its laws but would instead receive all the benefits accorded to Virginians.<sup>53</sup>

This was an example of the Framers’ concern with discrimination against out-of-staters. Discrimination among a state’s citizens was an object of much less concern for the Framers, but of course it rose to prominence after the Civil War. How could an amendment respond?

One way might be to build on the Article IV Privileges or Immunities Clause. That clause could be paraphrased as saying that states may not abridge the privileges or immunities of citizens of other states, “privileges or immunities” here meaning rights under local state law. What was needed now was saying that states could not do this to their own citizens either—that states could not abridge the privileges or immunities of citizens of other states, or of their own citizens. Put these two categories of citizens together, and you get all state citizens—“citizens of the United States.” Where the Article IV clause aims to make one nation out of the several states, we could say the Fourteenth

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51. *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting). As he went on to explain, “[w]ith privileges and immunities thus designated or implied no [s]tate could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any [s]tate legislation of that character.” *Id.*

52. U.S. CONST. art. IV, § 2, cl. 1.

53. Or at least the important ones. In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), the canonical Article IV Privileges and Immunities case, Justice Washington noted that the clause guaranteed fundamental rights.

Amendment clause aims to make us one people within the several states. Or, as Justice Field put it,

What the [Article IV] clause . . . did for the protection of the citizens of one State against hostile and discriminating legislation of other [s]tates, the [F]ourteenth [A]mendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different [s]tates. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different [s]tates, under the [F]ourteenth [A]mendment the same equality is secured between citizens of the United States.<sup>54</sup>

A textually and historically plausible reading of the Fourteenth Amendment clause, and one endorsed by some scholars,<sup>55</sup> is thus that it announces that discrimination among state citizens is now to be viewed as skeptically as discrimination against citizens of other states was under the Article IV clause. “Privileges or Immunities” denotes rights created by state law, just as in Article IV, and “citizens of the United States” sets out the class of people protected against discriminatory abridgement.

The Supreme Court, of course, has not adopted this reading. And from one perspective, that is a loss. A prohibition on discrimination against a state’s own citizens is certainly something that the Reconstruction Congress wanted, and it is normatively appealing as well. But from another perspective, nothing of significance has been lost. We do, after all, have lots of cases holding that certain kinds of discrimination among state citizens are unconstitutional: that is our Equal Protection jurisprudence.

So Field’s dissent has, in one sense, been vindicated; the Court is now, under the Equal Protection Clause, doing what he urged it to do under the Privileges or Immunities Clause. If Field’s dissent had prevailed in *Slaughter-House*, we would have reached those results under a different clause, but they might be very much the same. The difference would lie elsewhere—it would be in the different tack that Equal Protection jurisprudence might have taken. I discuss that possibility in Part III; first, there is another dissent to consider.

### B. Fundamental Rights

The preceding section suggested that one way of describing the concerns of the Reconstruction Congress was to say that they had realized that there was a danger of states discriminating not just against citizens of other states, but also against some of their own citizens. That description leads naturally to the anti-discrimination understanding of Privileges or Immunities. But there is also another way of describing the concern.

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54. *Slaughter-House*, 83 U.S. (16 Wall.) at 100-01 (Field, J., dissenting).

55. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1451-73 (1992).

The Framers, we could say, were worried about oppression by the national government and, therefore, they gave individuals rights against it.<sup>56</sup> After the Civil War, the Reconstruction Congress realized that oppression by the states was also a danger. How could a constitutional amendment resolve such concerns?

An obvious way would be to take the same rights that protected individuals against the federal government and apply them to the states as well. “No state shall . . . abridge”<sup>57</sup> does a pretty good job of explaining that these rights can be asserted against states. But how to describe the rights? They are the rights that the Constitution gives, that belong to every American<sup>58</sup>—they are “the privileges or immunities of citizens of the United States.”<sup>59</sup>

In his dissent, Justice Bradley suggested this interpretation. “In my judgment,” he wrote, “it was the intention of the people of this country in adopting [the Fourteenth] amendment to provide [n]ational security against violation by the [s]tates of the fundamental rights of the citizen.”<sup>60</sup> Enumerating his conception of Privileges or Immunities, he listed some Bill of Rights provisions and concluded, “[t]hese, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.”<sup>61</sup>

This “fundamental rights”<sup>62</sup> reading of the Privileges or Immunities Clause is the one most commonly held by scholars.<sup>63</sup> Like the anti-discrimination reading, it makes good textual and historical sense.<sup>64</sup> Again, the Supreme Court has not adopted it, and again, that is a loss from one perspective. That states should not be able to violate the fundamental rights of their citizens—both those

56. It is worth noting, however, that grants of individual rights were probably considered the least significant protection against federal tyranny by the Framers, as shown by the initial failure to include a Bill of Rights. The grant of limited powers to the federal government was likely considered a more valuable protection, as was the correlative preservation of state authority. *See, e.g., THE FEDERALIST* No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the Constitution itself is “to every useful purpose, a Bill of Rights”) (emphasis omitted).

57. U.S. CONST. amend. XIV, § 1.

58. Citizenship is not necessary for some rights, of course. For instance, Fifth Amendment Due Process protects “persons.” U.S. CONST. amend. V. But citizenship is sufficient.

59. U.S. CONST. amend. XIV, § 1; *see also supra* note 58 and accompanying text. Rather than setting out the class of protected people, “of citizens of the United States” identifies the rights as based in federal, rather than state, law.

60. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 122 (1872) (Bradley, J., dissenting).

61. *Id.* at 118-19.

62. *See id.* at 111-24.

63. *See generally, e.g., AMAR, supra* note 44 (evaluating the creation and reconstruction of the Bill of Rights and the impact of the Fourteenth Amendment); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071 (2000) (describing the fundamental rights approach).

64. I suggested in *supra* Part II.A that there is a textual basis for the anti-discrimination reading, but the fundamental rights reading may be more straightforward. *See supra* note 63.

enumerated in the Constitution and, perhaps, some others—is a principle that Congress valued during Reconstruction and that we should value now. But again, it is also a principle that is well established in our case law. Protecting fundamental rights from state abridgment is what our substantive due process jurisprudence does.<sup>65</sup>

Just like Justice Field's dissent then, Justice Bradley's dissent has won out under a different name. *Slaughter-House* may have emptied the Privileges or Immunities Clause, but its contents are still with us. The two visions of Privileges or Immunities that the dissenters offered are what we now know as Equal Protection and substantive due process.<sup>66</sup> Overruling *Slaughter-House* in order to shove those doctrines back into the Privileges or Immunities Clause at this point would be a largely pointless exercise.

But that does not mean that Miller's victory did not matter. It did. By forcing Equal Protection and Due Process to shoulder a burden that Privileges or Immunities let slip, *Slaughter-House* prevented them from performing other functions. The question worth asking is not how things might change now if we overruled *Slaughter-House*; it is how things might have been different if the dissents had won in 1872, if Equal Protection and Due Process had not been called on to play roles more properly assigned to Privileges or Immunities. That is the counterfactual that this Article seeks to explore.

### III. COUNTERFACTUALS

#### A. Disclaimer

First, a word about the kind of counterfactual analysis I will employ. We sometimes speak of the development of doctrine as though the law unfolded autonomously, working itself pure, or fully realizing its conceptual commitments. This account of doctrinal change is like the teleological view of biological evolution as a steady progress towards higher or better forms of life. And, like the teleological view of evolution, it is wrong. Evolution is not driven by values exterior to the world. What direction it takes, what forms of life will reproduce and perpetuate themselves, depends not on their intrinsic merits but on how their characteristics fit the circumstances with which they must contend.

Law, likewise, does not grow in a vacuum towards some ideal form; it is responsive to social context. The path of our equal protection jurisprudence, for instance, owes much less to the specific beliefs of the Reconstruction Congress or the true philosophical meaning of equality than to the changing social understanding of equality's demands. For example, *Brown*<sup>67</sup> was not generated

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65. See *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997).

66. See Rosen, *supra* note 20, at 1233 (stating that “both equal protection and substantive due process jurisprudence in the twentieth century seem to have evolved similarly (although not identically) to the way Privileges or Immunities jurisprudence might have developed if the dissenters’ views in *Slaughter-House* had prevailed”).

67. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

by the law alone, but by the Justices of the Warren Court, the lawyers of the NAACP, and the members of the civil rights movement. Vague and value-laden constitutional provisions like equal protection serve most often as a site for ideological antagonists to debate their competing visions,<sup>68</sup> and law goes nowhere without people to take it.

That said, Supreme Court decisions do have an obvious effect on the development of doctrine, even if they cannot be explained entirely in terms of prior doctrine. They make certain arguments and outcomes more or less plausible. They may foreclose certain theories that once looked persuasive, and they may open the door to claims that previously seemed outrageous. A theory that was “off-the-wall” yesterday may be on the table tomorrow.<sup>69</sup> What I seek to identify in the following sections, then, are some arguments that ended up “off-the-wall,” as things worked out in the real world, but might have been on the table if *Slaughter-House* had come out differently.

### B. What Equal Protection Could Have Been

If we start with the text of the Equal Protection Clause, which guarantees “the equal protection of the laws,”<sup>70</sup> there is something a little surprising about our current jurisprudence. Equal protection doctrine, in the main, is about government classifications; it is about the content of state laws, and in particular whether they have drawn lines based on impermissible characteristics.<sup>71</sup> This is surprising because the most natural reading of “equal protection of the laws” probably takes it to be about application or enforcement, rather than content.<sup>72</sup> On this reading, the paradigm violation of equal protection—the sort of thing the Reconstruction Congress believed was at the heart of what the Equal Protection Clause prohibited—would not be race-segregated schools or railroad cars. It would be the failure to enforce state tort or criminal law to protect freed slaves from night-riders and the Klan, or the failure to enforce common carrier laws against racial discrimination by innkeepers and restaurateurs. One could think of the three different clauses of the Fourteenth Amendment as addressing three different problems. First, the content of state laws is unjust and discriminatory. The Privileges or Immunities Clause responds to that problem by forbidding

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68. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 554-66 (2009).

69. Balkin talks about this as arguments going from “off-the-wall” to “on-the-wall.” See *id.* at 577. I think that “on the table” improves the image, but I can’t take credit for it; the change was suggested by Richard Primus in conversation.

70. U.S. CONST. amend. XIV, § 1.

71. See, e.g., Kermit Roosevelt, *Justice Scalia’s Constitution—and Ours*, 8 J.L. & SOC. CHANGE 27, 32 (2005).

72. Another criticism of current law is that the jurisprudence should be concerned with oppression rather than classification, i.e., that it should follow an anti-subordination rather than an anti-classification tack. I will discuss below how anti-subordination might acquire greater prominence in my counterfactual history. See *infra* Part III.C.

discrimination and/or protecting fundamental rights. Second, state officials act outside the law, violating the rights of minorities without legal warrant. The Due Process Clause responds to that problem by requiring them to observe it. Third, state officials fail to enforce their facially neutral laws in favor of freed slaves. The Equal Protection Clause responds to that problem by requiring them to do so.

The idea that states may not selectively withhold the benefits of their laws is, of course, not foreign to our Equal Protection cases. In *DeShaney v. Winnebago County Department of Social Services*,<sup>73</sup> the Court stated just that principle, though in a footnote and with the qualification that protection could not be denied “to certain disfavored minorities.”<sup>74</sup> But the cases that form the core of our understanding of Equal Protection are about laws that grant rights to one group and deny them to another—cases like *Brown*<sup>75</sup> and *Loving*,<sup>76</sup> or more recently *Gratz*,<sup>77</sup> *Grutter*,<sup>78</sup> and *Parents Involved*.<sup>79</sup>

What would have happened to Equal Protection if Justice Field’s dissent had prevailed and discrimination cases like *Brown* and *Loving* were decided instead under the Privileges or Immunities Clause? Of course we can only speculate. But here are some thoughts.<sup>80</sup>

Equal Protection would be understood to be focused on the failure of state officials to enforce state law to the benefit of certain individuals or groups. Such selective enforcement would be the core Equal Protection violation, rather than the somewhat marginal one it is today. We would understand Equal Protection as a positive right, as guaranteeing some affirmative assistance and protection from the state. With this positive right well established, we would have a lesser overall commitment to the idea that the Constitution is generally “a charter of negative liberties.”<sup>81</sup> And we would have a greater receptivity to the idea that

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73. 489 U.S. 189 (1989).

74. *Id.* at 197 n.3.

75. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

76. *Loving v. Virginia*, 388 U.S. 1 (1967).

77. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

78. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

79. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

80. In two recent articles, Christopher Green has argued for the failure to protect understanding of equal protection and developed many of the same points addressed here. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1 (2008) [hereinafter Green, *Pre-Enactment History*]; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 224-55, 293-309 (2009) [hereinafter Green, *Subsequent Interpretation and Application*]. He also considers some points I do not, such as the argument that a failure to protect understanding would support constitutional challenges to the death penalty. *Id.* at 223, 307.

81. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). No judge in my counterfactual world would say what Posner went on to say: that the Constitution “tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary

failure to protect is constitutionally problematic.

How would these general trends be reflected in specific doctrine? For clarity, I will now use “failure to protect” to mean the counterfactual Equal Protection and “anti-classification” to mean the actual one. My main suggestion is that separating cases involving failure to protect from cases involving classifications generally might allow for more robust judicial supervision of failure to protect. In the anti-classification context, a strong textualist enforcement of the Equal Protection Clause is neither possible nor desirable. As Justice Kennedy observed in *Romer v. Evans*,<sup>82</sup>

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. . . . We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.<sup>83</sup>

Which is to say, exceptions must be made to the anti-classificationist command. Sometimes discrimination (by which I mean merely differential treatment) is morally required: We should treat people who have committed crimes differently from those who have not. Sometimes it is obviously justified: We should deny driver's licenses to the blind. And sometimes it is in keeping with our idea of merit and desert: There is no problem with giving admissions preferences to applicants with higher grades or test scores. Rational basis review in the absence of a suspect classification, and the related rule that disparate impact by itself merits only rational basis review,<sup>84</sup> limit judicial interference.

But these concerns have much less purchase in the failure to protect context. I have a hard time thinking of circumstances in which morality demands that some people be denied the benefit of law enforcement.<sup>85</sup> And while the idea of

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a service as maintaining law and order.” *Id.* For an early argument that the negative rights conception of the Constitution can be linked to *Slaughter-House*, see Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).

82. 517 U.S. 620 (1996).

83. *Id.* at 631 (internal citations omitted).

84. There are different explanations for the Court's use of rational basis review in disparate impact cases. The main one, discussed later in this Article, is that the touchstone for an anti-classification claim is intentional discrimination, which is lacking in disparate impact cases. Another is that groups differ in various physical or socioeconomic characteristics, so that neutral and sensible laws will inevitably affect the sexes (or, less commonly, the races) differently. Again, this is not an argument that can be made as easily with respect to failures to protect: it is not the case that groups inherently differ with respect to their entitlement to protection.

85. Stripping people of legal protection used to be a form of punishment and was a relatively common feature of bills of attainder. See Akhil Reed Amar, *Attainder and Amendment 2: Romer's*

merit and desert pervasively supports and legitimizes discrimination in the allocation of scarce resources, it operates more weakly with regard to failure to protect. Law enforcement resources are scarce, of course, and we could create an analog to merit by saying that they should be allocated to the most serious offenses. But a deliberate refusal or grossly negligent failure to enforce the law to protect or compensate an injured individual probably strikes most people as worse than the creation of a merit-based admission system for a public university.

What that means is that we could have a more aggressive judicial stance with respect to failure to protect cases than anti-classification ones.<sup>86</sup> That would make some cases easier. When classification according to a certain characteristic receives only rational basis review, it is hard to argue that failure to protect based on that characteristic is unconstitutional, since we think of classification and not failure to protect as the core Equal Protection concern. In *Romer v. Evans*, for instance, the Court considered a Colorado state constitutional amendment that withdrew from gays, lesbians, and bisexuals the protection of local anti-discrimination laws.<sup>87</sup> This was, wrote Justice Kennedy, “denial of equal protection of the laws in the most literal sense.”<sup>88</sup> But under settled law at the time, discrimination on the basis of sexual orientation received only rational basis review.<sup>89</sup> And given the purported validity of *Bowers v. Hardwick*, which upheld a criminal ban on same-sex sexual activity,<sup>90</sup> striking down the Colorado law required some fancy footwork. As Justice Scalia argued, if the conduct that defines a class can be criminalized, can we really say it is not rational to permit private discrimination against that class?<sup>91</sup> Probably not, which is why sexual orientation discrimination is now widely understood to be governed by something higher than rational basis review, even though the Court has not explicitly said so.<sup>92</sup>

But if we separate anti-classification from failure to protect, rational basis review for classifications need not imply equally deferential review for failure to protect. A classification may be explained by many things; failure to protect is more likely, as Kennedy wrote in *Romer*, “inexplicable by anything but

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*Rightness*, 95 MICH. L. REV. 203, 212 (1996) (describing bills of “outlawry”). But, of course, attainders were one of the few things the original Constitution intervened between states and their own citizens to bar.

86. As the Court noted in *Washington v. Davis*, 426 U.S. 229 (1976), rejecting the invitation to apply Title VII standards to equal protection disparate impact claims more generally, aggressive judicial review is more tolerable when its scope is narrower. *See id.* at 247-48.

87. *Romer*, 517 U.S. at 623-24.

88. *Id.* at 633.

89. *See id.* at 636 (Scalia, J., dissenting) (acknowledging *Bowers v. Hardwick*).

90. 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

91. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

92. Based on the criteria the Court has set out in cases such as *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), the argument for heightened scrutiny seems fairly strong, but that is another issue.

animus.”<sup>93</sup> If failure to protect and anti-classification were separated, we could have more demanding scrutiny in failure to protect cases without risking excessive judicial intervention in classification cases.

Under a slightly more demanding review, some cases might also come out differently. It is hard to see, for instance, what justification the state could give for its failure to protect Joshua DeShaney that would stand up to more than rational basis scrutiny.<sup>94</sup> At least, that is so if differential failure to protect is what is needed to make out a claim.<sup>95</sup> Under our current anti-classificationist approach, something more is needed—discriminatory intent. Without intentional discrimination, there can be no anti-classification claim.

That makes some sense as far as anti-classification is concerned. Under current law, and as seen most clearly in some of Justice Kennedy’s opinions, classification by itself violates the Equal Protection Clause.<sup>96</sup> Governmental sorting of individuals into racial categories—regardless of whether this sorting is the basis for oppression, or even for differential treatment of the categories—is itself the harm the clause seeks to avert.<sup>97</sup> Unintentional discrimination does not

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93. *Romer*, 517 U.S. at 632.

94. *See* *Deshaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (involving case where child’s mother brought claim against social workers for failure to remove child from abusive father’s custody). In fact, the Court did not use rational basis scrutiny. It simply decided that the conduct alleged fell outside the scope of the right asserted. “[N]othing in the language of the Due Process Clause itself,” the Court wrote, “requires the [s]tate to protect the life, liberty, and property of its citizens against invasion by private actors.” *Id.* at 195. It is not entirely clear why Joshua DeShaney’s lawyers did not pursue a rational basis equal protection claim, though perhaps the answer is that they could not allege intentional discrimination.

95. One might also argue, as Christopher Green does, that just as the Privileges or Immunities Clause might have both anti-discrimination and fundamental rights elements, Equal Protection should be understood both to prohibit differential failure to protect and to require some minimal baseline of protection. *See* Green, *Pre-Enactment History*, *supra* note 80, at 3 (stating that “the requirement of equal protection is a requirement that the government supply ‘protection of the laws,’ and do so equally”).

96. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring) (suggesting that what was offensive about the school assignments was that they used “official labels proclaiming the race of all persons”). The harm here appears to be to an individual’s self-definition, which interestingly aligns Kennedy’s equal protection jurisprudence with his substantive due process opinions. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the [s]tate.”).

97. This is why, for instance, the majority could find an Equal Protection violation in *Parents Involved*, where individual students were sometimes assigned to schools based on race but no racial group was treated differently in aggregate. *See Parents Involved*, 551 U.S. at 711-12 (describing racial tiebreaker). It is also, presumably, why Justice Kennedy suggested in that case that race-conscious action that did not use explicit classifications, such as “drawing attendance zones with

involve any such classification and, therefore, it is reasonable that unintentional discrimination cannot create a claim under anti-classificationist equal protection.<sup>98</sup>

But from the failure to protect perspective, the harm more likely lies in the actual injury suffered, which the state has failed to avert or remedy. Intent is far less relevant. Put another way, failure to protect seems to demand equality of outcome in a way that anti-classification does not. Perhaps, one might say, *ex ante* equality is sufficient, so that inevitable failures to protect particular individuals due to bad luck or unforeseeable circumstances, which produce *ex post* inequality, do not create a claim. But gross negligence seems morally culpable enough to be actionable, and policies with disparate impact might be subjected to heightened scrutiny (if tiers of scrutiny existed in failure to protect jurisprudence<sup>99</sup>) if knowledge, rather than intent, could be shown. (A state that *knows* it is failing to protect a group plausibly violates its equal protection obligations regardless of whether it intends that consequence.)

That could produce a different result in, for instance, cases challenging the failure of police forces to treat domestic violence as seriously as stranger violence.<sup>100</sup> These policies disproportionately impact women, but since the government classification is sex-neutral on its face (it relies not on the sex of the victim but whether the victim knew the assailant), it receives rational basis review under the anti-classification approach.<sup>101</sup> Given that the outcome of the policies is overwhelmingly a failure to protect women, however, the argument for heightened scrutiny would be strong once the intent requirement is abandoned or reduced to knowledge.

Last, a failure to protect perspective might give a different look to some of the questions about Congress's power to enforce the Equal Protection Clause under Section Five of the Fourteenth Amendment. In *United States v. Morrison*, for instance, the Court held that the creation of the Violence Against Women

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general recognition of the demographics of neighborhoods" would not face strict scrutiny. *Id.* at 789 (Kennedy, J., concurring).

98. One might, of course, quibble with this doctrine, perhaps on the ground that the analysis should focus on oppression and subordination rather than classification, but that is not my current concern.

99. I suggested above that the baseline level of scrutiny might be something more than rational basis review. It might still make sense to have even higher levels of scrutiny for failure to protect certain groups, for essentially the reasons the Court has adopted in the anti-classification context.

100. *See, e.g., Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026 (3d Cir. 1988) (finding no equal protection violation where plaintiffs alleged that police officers treated "domestic abuse cases differently than non-domestic abuse cases"). Much the same argument could be made against marital rape exemptions. *See generally* Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 45 (1990) (stating that "a more obvious denial of equal protection is difficult to imagine").

101. *See Ricketts v. City of Columbia, Mo.*, 36 F.3d 775, 781 (8th Cir. 1994) (noting that over ninety percent of victims of domestic violence are female).

Act's Civil Rights Remedy exceeded Congress's power under Section Five.<sup>102</sup> The Civil Rights Remedy gave victims of gender-motivated violence a cause of action in federal court as a substitute for the state-law claims that state and federal task forces had found inadequate because of pervasive sex-based discrimination in state judicial systems.<sup>103</sup>

To reach that result, the *Morrison* majority relied on the Reconstruction-era civil rights cases, divining the rule that Section Five legislation could not regulate private parties.<sup>104</sup> That rule left Congress with no practical means to address the problem it had identified. A civil remedy against state officials was essentially inconceivable: Bias by state judges or other officials would be difficult to prove in individual cases. A federal remedy that ran against them for their official conduct would be absurdly intrusive, in addition to overturning longstanding traditions of judicial and prosecutorial immunity.

Leaving Congress without a means to remedy the problem might seem acceptable if the kind of violation Congress identified is at the periphery of equal protection, as it is from the anti-classificationist perspective. After all, substantial power to remedy state classifications persists. But from the failure to protect perspective, *Morrison* renders Section Five almost a nullity with respect to the Equal Protection Clause; it strikes down federal legislation in the paradigm case, not a marginal one. Thus, if equal protection had gone the failure to protect route, the Court might have been less willing to forbid a Section Five remedy against private actors.

In sum, focusing equal protection on failure to protect and leaving anti-discrimination for privileges or immunities might have had very significant effects. It could, as a general matter, have produced a greater receptivity to arguments for positive rights.<sup>105</sup> More specifically, it might have allowed the Court to engage in more aggressive review of failure to protect claims than it currently does under the Equal Protection Clause. Such claims would be seen as the core, and not a peripheral, concern of the Clause, and aggressive review—abandoning the rule that disparate impact merits only rational basis review, for instance, or adopting a slightly more demanding baseline than rational basis—would not necessarily operate in the anticlassification context. Last, seeing failure to protect as the paradigm case might have made it harder for the Court to rule that Section Five remedies in such cases cannot run against private actors, since that ruling leaves the violations all but irremediable.

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102. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

103. See Joseph R. Biden, *Domestic Violence: A Crime, Not a Quarrel*, TRIAL 56, 59 (June 1993).

104. *Morrison*, 529 U.S. at 620.

105. I do not discount the formidable practical problems associated with a jurisprudence of positive rights. Most notably, aggressive judicial enforcement of positive rights risks complete judicial takeover of government: one might see judges running police departments by injunction. But some of these problems could be dealt with by limiting remedies to damages, rather than injunctions, and in any event my claim is only that judges in the counterfactual world would be relatively more receptive to positive rights arguments than they are in the real world.

C. *What Due Process Could Have Been*

Alternatively, what if the Bradley dissent in *Slaughter-House*<sup>106</sup> had prevailed? The Privileges or Immunities Clause, rather than the Due Process Clause, would be the one that protects fundamental rights, including most Bill of Rights liberties, from state interference. What would due process do in this world?

It is relatively common to assert that substantive due process arose as a replacement for the privileges or immunities jurisprudence that should have been.<sup>107</sup> If we believe that, then the most likely counterfactual history for the Due Process Clause, assuming that privileges or immunities took the fundamental rights tack, is one in which substantive due process never existed. But the assertion is partially accurate at best. Substantive due process existed before *Slaughter-House*; it existed before the Fourteenth Amendment or the Civil War, most famously in *Dred Scott*.<sup>108</sup> (Existed as a concept, that is, not a name; the phrase would not be coined until considerably later and would not appear in a Supreme Court opinion until 1948.)<sup>109</sup> So while it is probably fair to say that the incorporation of the Bill of Rights through the Due Process Clause, and the associated “fundamental rights” version of substantive due process, is a replacement for privileges or immunities jurisprudence, this does not exhaust the concept. Indeed, the early version of substantive due process was something quite different.<sup>110</sup>

Substantive due process now is a matter of finding in the Due Process Clause, by whatever test, fundamental rights that can trump state laws. In this guise it has been criticized as hard to derive from the text of the clause, and even, famously, oxymoronic.<sup>111</sup> The merits of those criticisms aside, they cannot be levied at the early version, for that kind of due process follows easily from the text. It is a requirement that if the government proposes to deprive individuals of life, liberty, or property, it do so by means of a valid law. It gives individuals a federal constitutional right—against the federal government through the Fifth Amendment and the states through the Fourteenth—against lawless government action.

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106. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 111-24 (1872) (Bradley, J., dissenting).

107. See Sandefur, *supra* note 31, at 147-48 (noting and criticizing this trend).

108. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), *superseded by* U.S. CONST. amend. XIV; see also Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 467 (2010).

109. See Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 406 & n.55 (1993) (citing *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting)).

110. For a more extensive development of some of the following points, see Roosevelt, *supra* note 23.

111. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18-20 (1980).

Since the Due Process Clause does not, on this reading, create any additional grounds of invalidity, it protects individuals only from the enforcement of laws that are invalid for some independent reason. It does not, that is, create rights that can serve as trumps against otherwise-valid laws. Rather, it provides a means of resisting laws that exceed the sovereign's legislative power. But the failure to create rights does not make it redundant, or even unimportant.

Without the Due Process Clause, an individual could perhaps resist unauthorized government action on state law grounds. He could, for instance, characterize the government officials trying to enforce a law as trespassers and sue them in tort.<sup>112</sup> But a state tort claim and a federal constitutional claim are very different, notably in terms of an individual's ability to invoke federal jurisdiction. Prior to the ratification of the Due Process Clause, individuals frequently challenged state action on the basis of the argument that it exceeded the bounds of state police power.<sup>113</sup> This was typically understood as an appeal to general constitutional law—principles common to all free states—and hence not a claim based on federal law.<sup>114</sup> Federal courts could, and did, hear these suits when some other basis for jurisdiction, such as diversity, existed, but most individuals with such claims could not get into federal court.<sup>115</sup>

The ratification of the Due Process Clause changed things; by giving individuals a federal right against lawless state action, it effectively federalized the general constitutional limits on state police power.<sup>116</sup> Armed with both Fifth and Fourteenth Amendment Due Process rights, individuals could now assert in federal court, as federal constitutional claims, arguments that state or federal governments had overstepped the limits on their powers.<sup>117</sup>

What are these limits? With respect to the federal government, the most obvious limit is the fact that federal powers are specific and enumerated; there is no general federal police power. When Congress regulates intrastate noncommercial activity, it goes beyond its enumerated powers, according to *Morrison*<sup>118</sup> and *Lopez*.<sup>119</sup> But what constitutional provision shields an individual against such *ultra vires* lawmaking? The Supreme Court has not given this question much apparent thought, but on the account developed above, it is the Due Process Clause that should be invoked.

Another limit, which applies to state legislative jurisdiction (or used to), is

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112. See Akhil Amar's suggestion of state tort law as a remedy for Fourth Amendment violations, in, for example, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

113. See Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1304-15 (2000).

114. *Id.*

115. *Id.*

116. See Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 72-74 (2001).

117. See *id.* at 92-95.

118. *United States v. Morrison*, 529 U.S. 598 (2000).

119. *United States v. Lopez*, 514 U.S. 549 (1995).

geography. One of the seminal *Lochner*-era cases—indeed, one frequently cited for its alleged recognition of a fundamental right—is *Allgeyer v. Louisiana*.<sup>120</sup> In that case, Louisiana sought to apply its marine insurance regulations to a local company that had entered into a contract in New York and subsequently mailed a notification letter from New Orleans.<sup>121</sup> Impermissible, the Court said: A contract that “was valid in the place where made and where it was to be performed,” was one that Louisiana had “no right or jurisdiction to prevent its citizen from making outside the limits of the state.”<sup>122</sup> This is not, of course, saying that a fundamental right to contract trumps a state’s police power—New York surely could have sanctioned the parties for not complying with its marine insurance laws, which is what Louisiana was trying to do. It is rather the recognition that an attempt to impose liability based on conduct outside a state’s legislative jurisdiction is not due process of law because the law by which the state attempts to act is invalid.<sup>123</sup> The law literally cannot reach the parties to impose its sanctions, and any attempt to confiscate their money (Louisiana wanted to fine Allgeyer) is a deprivation of property without legal warrant.<sup>124</sup>

Last, and most notoriously, the Supreme Court used to use more or less abstract political theory—the general constitutional law mentioned earlier—to derive limits on the police power of the states.<sup>125</sup> This is *Lochner*-era substantive due process, and if we want to know what due process might have done had it not been drafted into the fundamental rights business, that is what we need to look at.

According to the view that I find persuasive,<sup>126</sup> courts applying *Lochner*-era

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120. 165 U.S. 578 (1897). For the characterization of *Allgeyer* as recognizing a fundamental right, see, for example, David N. Mayer, *Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 368 n.95 (1996).

121. *Allgeyer*, 165 U.S. at 579-80.

122. *Id.* at 592.

123. This is no longer the case. In a series of cases culminating in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), the Supreme Court relaxed the geographical limits on state legislative jurisdiction.

124. See *Allgeyer*, 165 U.S. at 588-89.

125. See Collins, *supra* note 113, at 1304-11.

126. There has been much debate about the proper characterization of the *Lochner* era. Contemporary critics charged that the Court was simply substituting its views of wise policy for those of the legislature. See, e.g., EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* (1950) (discussing judicial review as a mechanism for substituting legislative policy). This was a rhetorically powerful move, given the American public’s persistent concern with the specter of judicial activism, and it established a conventional wisdom about *Lochner* that persisted into the 1990s. Then, beginning with work by Howard Gillman, Barry Cushman, and others, a revisionist view of *Lochner*, which took it to be animated in large part by equality concerns, developed. Most recently, David Bernstein has attempted to argue, contrary to the revisionists, that *Lochner*-ian jurisprudence was more concerned with fundamental rights than with partial legislation. David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003).

due process were not attempting to identify unenumerated fundamental rights that trumped otherwise valid exercises of state power. Instead, starting with the principle that people did not delegate unlimited power to the government, but rather created it for certain limited purposes, they were preventing the government from doing things that people could never have intended it to do.<sup>127</sup> The people would never, courts reasoned, have given the power to do such things, and therefore no attempt to achieve them could be dignified with the name due process of law.

What sort of things might be categorically beyond the limits of government power? In *Calder v. Bull*, Justice Chase gave examples: People would not give the government power to punish innocent actions, or to make people judges in their own cases, or to take property from one person and give it to another.<sup>128</sup> To put the point generally, we could say that people would not give the government power to act contrary to the public interest.<sup>129</sup> This distinction—between laws that were good faith attempts to promote the public interest and those that were arbitrary, oppressive, or partial legislation—was the one that *Lochner*-era courts sought to enforce.

If the issue is just whether a law is in the public interest, it might seem that a judge can strike it down based simply on a policy disagreement—in which case, *Lochner*'s contemporary critics would be right after all. But *Lochner*-era courts steadfastly denied that they had this power.<sup>130</sup> And they were right, in the sense that they relied on some principles that limited judicial discretion. Notably, they tended to take the common law as a neutral baseline and to view skeptically laws that departed from the common law to favor one group or another. Such laws could be upheld if they were intended to promote some traditional object of the

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I find Barry Cushman's rebuttal of Bernstein persuasive. See Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 883-944 (2005). For an analysis of the development of the concept of rights as trumps, see Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994).

127. Probably the canonical cite for this principle is Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), which sought to identify inherent limits on the police power via a species of social contract reasoning. Justice Chase noted, "The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it." *Id.* "An act of the legislature," Chase continued, "(for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* (emphasis omitted).

128. *Calder*, 3 U.S. (3 Dall.) at 388.

129. See JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 51-73 (2003) (exploring evolution of the public interest requirement).

130. See *Lochner v. New York*, 198 U.S. 45, 56-57 (1905) ("This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law.").

police power, such as health—this is why the Court upheld a maximum hour law for miners in *Holden v. Hardy*.<sup>131</sup> But if they looked like attempts to redistribute bargaining power, such as a minimum wage or maximum hour law without a health justification, the Court was liable to strike them down, as it did in *Adkins v. Children's Hospital*<sup>132</sup> and *Lochner* itself.

But these tools—the idea of the common law as a pre-legal given and of redistribution as an impermissible state purpose—melted in the cauldron of Legal Realism<sup>133</sup> and the Great Depression. Once the Court recognized that common law was, in fact, state law—an insight usually associated with *Erie v. Tompkins*<sup>134</sup>—its use as a baseline from which to measure redistributive departures became incoherent. Equally serious, the idea that people would never have authorized the government to engage in redistribution came to seem simply implausible. It might be, for instance, that some kind of redistribution is the only alternative to widespread economic collapse.<sup>135</sup> In such cases, people would presumably want the government to have the power to do it.

Without such principles to guide its discretion, the Court had only two choices: It could engage in a relatively unguided supervision of legislative policy decisions, or it could defer. The American commitment to self-governance by the people and their elected representatives makes the former choice hard to sustain, and eventually the Court embraced deference. “[W]hen the legislature has spoken,” it pronounced in *Berman v. Parker*, “the public interest has been declared in terms well-nigh conclusive.”<sup>136</sup>

What does this mean? If the early version of substantive due process died for reasons unrelated to *Slaughter-House*, one might think, then a counterfactual history in which the Privileges or Immunities Clause bore the burden of protecting fundamental rights still would not be meaningfully different as far as substantive due process goes. It would just be the Due Process Clause that was moribund, rather than Privileges or Immunities.

But, in fact, *Lochner*-era substantive due process did not die—or at least, it did not in the 1930s. The canonical repudiation of aggressive substantive due process review is *United States v. Carolene Products Co.*,<sup>137</sup> where the Court pronounced:

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131. 169 U.S. 366, 398 (1898).

132. 261 U.S. 525 (1923), *overruled in part* by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

133. For a description of this movement, see, for example, Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009).

134. 304 U.S. 64, 79 (1938).

135. Historically, this was the justification used in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). More recently, the federal government used it to justify the Troubled Asset Relief Program (TARP) bank bailout. See *generally* ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009) (providing background information on the bank bailout).

136. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

137. 304 U.S. 144 (1938).

[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>138</sup>

But, like Galileo muttering beneath his breath “[a]nd yet it moves,”<sup>139</sup> the Court appended to that sentence its most famous footnote, footnote four.<sup>140</sup>

What is footnote four about? It is about when judicial review may legitimately be more aggressive than the deferential rational basis standard. Some of the occasions the Court offers are obvious: When a law is “on its face . . . within a specific prohibition of the Constitution”<sup>141</sup> no one would say that the Court is acting illegitimately in striking it down. Some are perhaps more controversial: Laws that restrict the political process, the Court says, may be more closely scrutinized even, apparently, if they do not fall afoul of a particular constitutional provision.<sup>142</sup> Again, however, the reasoning is relatively easy to make out: If courts are supposed to defer to legislatures for reasons of democratic legitimacy, they must be confident that the legislature is not undermining the democratic process to insulate itself from popular review.<sup>143</sup>

Last, footnote four suggests that prejudice against certain “discrete and insular minorities” may be a special factor militating in favor of more aggressive judicial review.<sup>144</sup> It is now commonplace to cite this part of the footnote as the birthplace of the “suspect class” equal protection doctrine, which is fair given

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138. *Id.* at 152 (citations omitted).

139. *See, e.g.*, James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 33, 45 (2003) (recounting story).

140. *Carolene Prods.*, 304 U.S. at 152 n.4 (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .”) (citations omitted).

141. *Id.*

142. *Id.*

143. The problem is that sometimes the legislature may be attempting to improve the political process, and it may have a better sense than the Court of what will do so. The Court’s apparent view that more speech is always better is crude and almost certainly wrong. *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

144. *Carolene Prods.*, 304 U.S. at 152 n.4.

that this is how the Court now seems to conceive of it.<sup>145</sup> But if we think about *Carolene Products* in context, the idea that the Court had decided to use footnote four to chart a new course for equal protection seems a bit odd.<sup>146</sup> The more natural understanding is that the end of the footnote is explaining when courts can strike down laws on due process grounds without repeating the sin of *Lochner*, that of substituting judicial for legislative policymaking. It tells us, that is, when a legislature's assessment of the public interest cannot be trusted.

The core idea is that legislatures are responsive to the politically powerful and not the powerless, and that they may therefore not give appropriate weight to the interests of the politically weak. Footnote four illustrates this point by citing *McCulloch v. Maryland*<sup>147</sup> and *South Carolina State Highway Department v. Barnwell Bros.*,<sup>148</sup> each of which involve state laws benefiting locals at the expense of out-of-staters. As *Barnwell Brothers* puts it "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."<sup>149</sup>

When burdens fall on those who have no voice in state politics, that is, legislators will tend to discount those burdens. They will enact laws that make their constituents better off, even if those laws do not increase public welfare when their burdens are taken into account. They will enact laws, in short, that

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145. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (describing *Carolene Products* as "the moment the Court began constructing modern equal protection doctrine"); Robert J. Cynkar, *Dumping on Federalism*, 75 U. COLO. L. REV. 1261, 1297 (2004) (describing *Carolene Products* footnote four as "a statement from the Court of perhaps the single most important element of equal protection doctrine"); Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 440-41 (2004) (describing *Carolene Products* as "a seemingly innocuous 'economic due process' opinion, [that] would ultimately (and radically) re-structure equal protection doctrine"); see generally Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163 (2004) (discussing the historical context of footnote four and its impact on courts and academics).

146. Justice Stone, the author of the footnote, did not seem to think it set out a roadmap for equal protection. In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring), Stone cited his footnote while asserting that the case should be decided on due process, and not equal protection grounds. *Id.* Stone did not seem to be asserting a law-trumping fundamental right not to be sterilized; he endorsed the proposition that states may interfere with an individual's liberty to prevent the "transmission . . . of his socially injurious tendencies." *Id.* (citing *Buck v. Bell*, 274 U.S. 200 (1927)). Rather, he argued that when important interests are at stake, narrow tailoring, possibly by individualized hearings, is required. *Id.* A law does not constitute due process, that is, if the scope of its coverage fits too poorly with its underlying justifications. See *id.*

147. 17 U.S. (4 Wheat.) 316 (1819).

148. 303 U.S. 177 (1938).

149. *Id.* at 184 n.2.

are not in the public interest.

Using the public interest phrasing shows us the connection between footnote four and *Lochner*.<sup>150</sup> Footnote four is telling us that *Lochner*-style due process may still legitimately be employed—that legislative assessments of the public interest may legitimately be second-guessed by judges—when legislatures are predictably bad at making the assessment because they care more about the people who are benefited than the people who are burdened.

This general idea is surely sound. It is for that reason that state laws discriminating against out-of-staters were an object of special concern to the Founders. What *Carolene Products* proposed to do was to extend that solicitude to certain in-state groups. How exactly to define those groups is a difficult question; over twenty years ago Bruce Ackerman argued powerfully that *Carolene Products*' focus on “discrete and insular minorities” subject to prejudice was inadequate.<sup>151</sup> But if we want to speculate about where due process might have gone had it not been needed to protect fundamental rights, footnote four points the way.

One might reasonably wonder whether this speculation can lead anywhere. Why should it matter if courts do this analysis under the Due Process Clause rather than the Equal Protection Clause—we have footnote four analysis in either case, don't we?

Actually, no. Footnote four was at one point significant in equal protection, but it is no longer. Footnote four gives an anti-subordination theory—it calls for judicial supervision of circumstances in which legislatures may fail to consider the interests of the politically weak. It does not contain an anti-classification theory—the idea that certain kinds of government line-drawing are impermissible regardless of their purpose or consequence. But modern equal protection doctrine is very much anti-classificationist.<sup>152</sup> *Lochner*-style substantive due process actually died when equal protection shifted from anti-subordination to anti-classification, something that happened in the last decades of the twentieth century.<sup>153</sup> Anti-subordination, and with it the footnote four methodology, is now almost entirely absent from the Court's jurisprudence.

So one thing that would change in this counterfactual world is that an anti-

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150. Another way of looking at this development is through the lens of redistribution. *Lochner* operates under the premise that redistribution is never in the public interest. See, e.g., Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 634-35 (1998). Cases like *Nebbia v. New York*, 291 U.S. 502 (1934), and *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), recognize that this is not so, that wholesale judicial suspicion of redistribution is mistaken. And footnote four identifies a limited set of redistributions that will remain suspect: Those that work to the detriment of discrete and insular minorities subject to prejudice.

151. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

152. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

153. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995) (discussing federal programs); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (addressing strict scrutiny for state race-based affirmative action).

subordination vision of equality would live on in the Due Process Clause. Several further consequences follow. First, anti-classification would be limited to the states. *Bolling v. Sharpe* is a straightforward Due Process case on this account, easily resolved by footnote four-style thinking.<sup>154</sup> There is no need to suppose that Fifth Amendment due process reverse-incorporates equal protection. In consequence, federal affirmative action programs would not be subject to heightened scrutiny as they are now.<sup>155</sup>

Second, footnote four due process analysis does not require formal classifications to trigger judicial suspicion. The dispositive issue is not whether the legislature has drawn a certain kind of line; it is whether the allocation of burdens and benefits gives cause to doubt the legislature's ability to weigh them accurately. Disparate impact cases might well get heightened scrutiny—at least those where the disparate impact consists of burdening a subset of a vulnerable group. In terms of trusting a legislature's assessment of costs and benefits, such laws should actually be more suspect: If a law burdens none of the powerful and some, but not all, of the powerless, the political counterweight will surely be less than if it burdened all of the powerless. The other kind of disparate impact would probably not get heightened scrutiny: If a law burdens all of the powerless but also many of the powerful, the legislature can probably be trusted since the burdens fall on a significant number of people to whom the legislature is responsive. Thus, if women were considered a group in need of footnote four due process protection, an abortion restriction (which burdens only women, but only some of them) would get heightened scrutiny,<sup>156</sup> while a 1980s preference for veterans (which burdened almost all women but also many men) would not.<sup>157</sup>

Had due process not been required to take up the load of protecting fundamental rights, then it could have continued to serve an anti-subordination function that is now absent from our equal protection jurisprudence. This could produce more searching judicial review in some cases, particularly those where government action burdens a subset of a vulnerable group. Conversely, using a Due Process Clause focused on anti-subordination would produce more lenient judicial review in some cases—the federal government would likely not be subject to anti-classification requirements.

#### CONCLUSION

What does the counterfactual world look like in general? Let us assume, to

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154. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

155. For a discussion of the consequences of heightened scrutiny of federal racial classifications, see Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975 (2004).

156. In trying to determine whether the legislature had inappropriately discounted the interests of women in enacting an abortion restriction, a court might also ask how the tradeoff between life and liberty comes out in cases where the liberty at stake is not that of women alone. See Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 91 (1991).

157. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

make things interesting, that the ideas of both *Slaughter-House* dissents prevailed. Assume, that is, that rather than reading the Privileges or Immunities Clause to mean nothing, the Court read it to contain both fundamental rights and anti-classification. What might have happened?

Again, I admit that a truly historical counterfactual analysis would have to start with a different *Slaughter-House* decision and then ask not simply what doctrinal developments it made more or less likely, but also how the political landscape would change, including differences in presidential elections and Supreme Court appointments, and how all of those changes would affect the law. I cannot do that analysis—I am not sure that anyone could—and so I am focusing on doctrine alone. And by doing so, I may be implicitly assuming that social movements with views and values close to mine prevailed—that is, I may be describing doctrine more as I would like it to be than as it would in fact have developed. (A Court determined to kill off anti-subordination analysis, for instance, might have done so even if it were housed in the Due Process Clause.)

In terms of possibilities made more or less likely, however, we can say a few things. Had *Slaughter-House* been decided differently, equal protection and due process could have gone in very different directions than the ones they took after the actual decision. Equal protection cases could be about state failure to protect, and due process analysis could be about finding that limited set of cases in which legislative assessment of the public interest was unreliable.

Some of our canonical cases would come out the same way, but under different clauses. *Brown*<sup>158</sup> and *Loving*<sup>159</sup> would not be equal protection decisions. They might be decided under the Due Process Clause, but more likely they would be the anti-discrimination strain of the Privileges or Immunities Clause. The incorporation decisions, which would probably be mostly the same, would be the fundamental rights strain. *Bolling*<sup>160</sup> and *Roe*<sup>161</sup> would have the same outcomes, but they would be decided on a due process theory that was about footnote four considerations, rather than fundamental rights or reverse-incorporation.

And some cases would come out differently. Anti-classification obligations would not be extended to the federal government, as the Court did in *Adarand*,<sup>162</sup> with *Bolling* an easy Due Process case, there would be no impulse to say that the federal government must face the same anti-classification scrutiny as the states. Disparate impact cases where burdens fell on a subset of a vulnerable group—pregnancy discrimination being perhaps the most notable example—would be suspect from a due process perspective and would probably come out the other way. And we would take failure to protect much more seriously. Marital rape exemptions would be pretty clearly unconstitutional; *Deshaney*<sup>163</sup>

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158. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

159. *Loving v. Virginia*, 388 U.S. 1 (1967).

160. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

161. *Roe v. Wade*, 410 U.S. 113 (1973).

162. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

163. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

might go the other way; the Violence Against Women Act's Civil Rights Remedy might still be good law.<sup>164</sup>

What all of this means—the payoff from the counterfactual exercise—is that the conventional wisdom about *Slaughter-House* is wrong in an interesting way. Overruling *Slaughter-House* would probably not make a difference now, but that does not mean that *Slaughter-House* cost us nothing. It did not deprive us of the intended benefits of the Privileges or Immunities Clause; those were essential and obvious enough to force their way into our doctrine through other pieces of text. But, in so doing, they displaced the original understandings of those texts, which could have been quite significant had they been given room to grow. Work-arounds, like the substitution of due process and equal protection for privileges or immunities, do not bring us back to the starting point, and overruling a mistaken decision will not necessarily undo its consequences.

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164. See *United States v. Morrison*, 529 U.S. 598 (2000).