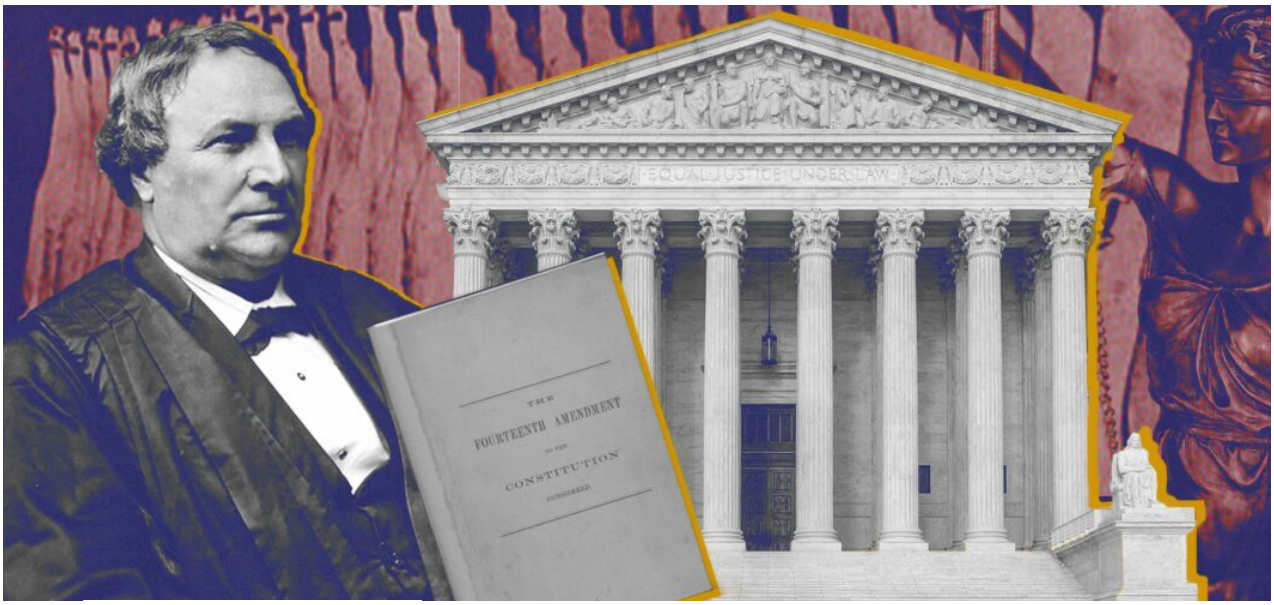

FORUM APRIL 26, 2023

Should We Kick the Sleeping Dog?

ALLEN MENDENHALL

Reversing the *Slaughter-House Cases* may just lead to a reenactment of the problem we're hoping to resolve.

THE FOURTEENTH AMENDMENT HAS LONG GENERATED controversy and continues to spark heated debate. "Our understanding of the Fourteenth Amendment, and especially of its first section," wrote the late conservative literary critic Mel Bradford, "is beclouded by the greatest variety and volume of interpretive distortion attached to any component of the United States Constitution."

That's a strong, colorful claim. Justice Clarence Thomas's concurring opinion in *Dobbs v. Jackson Women's Health Organization*, however, suggests that Bradford was right. There Justice Thomas called for a wholesale reconsideration of "all of this Court's substantive due process precedents," proving how valuable, relevant, and timely any new studies

of the Fourteenth Amendment's origins and interpretations. After all, the Supreme Court's conservative majority could institute sweeping changes in this area.

During the 1970s, Raoul Berger, a constitutional law scholar, popularized research on the Fourteenth Amendment and initiated a veritable cottage industry involving interpretations of that amendment's due process of law, equal protection, and privileges or immunities clauses. Forrest McDonald alleged that Berger, a man of the left, became "a hero to conservatives" because his interpretations of the Fourteenth Amendment contravened the Warren Court's.

More work on the Fourteenth Amendment continues to appear, most notably by Randy Barnett and Evan D. Bernick (*The Original Meaning of the Fourteenth Amendment*) and by Ilan Wurman (*The Second Founding*) who calls, in this debate, for the reversal of the *Slaughter-House Cases* and the resurrection of the Privileges or Immunities Clause.

Wurman analyzes, here, key language from the Privileges or Immunities Clause, as any dutiful originalist would. Yet overturning a 150-year-old precedent could occasion innovations that Wurman does not intend, namely the blanket dismissal of the Fourteenth Amendment as constitutionally valid.

Why Stop with *Slaughter-House*?

In this chaotic age, when previously beyond-the-pale ideas are now mainstream and proliferating widely and quickly via social media, it's not surprising to see people rethinking constitutional questions long settled. But what are the limits of this tendency? For instance, if we should consider, on originalist grounds, overturning a 150-year-old precedent, the *Slaughter-House Cases,* then, one might argue we should also consider, on an originalist reading of Article V and a clear understanding of the political history surrounding the alleged ratification of the Fourteenth Amendment, throwing out the Fourteenth Amendment altogether as illegitimately ratified.

In fact, respectable scholars, who are not extremists or activists, hold the view that fidelity to originalism and the conditions of Article V require invalidating the Fourteenth Amendment *in toto*. Thomas Colby, for instance, contends that "the traditional normative case for originalism does not hold water when applied to the Fourteenth Amendment—the constitutional provision that underlies most controversial cases." And Bruce Ackerman declares that "the process by which Congress procured ratification of the Fourteenth Amendment simply cannot be squared with the text [of Article V]," which describes the procedures for amending the Constitution. These men are critics of originalism, a hermeneutic they seek to undermine, but their complaint is well taken. McDonald himself, a conservative, asserted, "the constitutionality of the adoption of the Fourteenth Amendment remains open to question." Article V presents the only mechanism for amending the Constitution, and if ratification of the Fourteenth Amendment was inconsistent with the mandates of Article V, as consensus holds, then how can originalists maintain the validity of the Fourteenth Amendment?

In short, one danger in Wurman's approach, from an originalist perspective, is that it could, inadvertently, render the Privileges or Immunities Clause—and the full Fourteenth Amendment—a nullity under Article V, thereby undoing his commendable efforts to celebrate and study that amendment. If we're willing to take a big leap to overturn the *Slaughter-House Cases*, it's only a small hop from there to throw out the Fourteenth Amendment altogether under an originalist reading of Article V. There's an originalist case, as I say, that the procedural mandates of Article V were not met during the ratification process for the Fourteenth Amendment. I express no judgment on the merits of this position, which has, in fact, attracted scholarly support, but here's how Colby abridges the substantiating facts on which it is predicated:

> The Fourteenth Amendment was a purely partisan measure, drafted and enacted entirely by Republicans in a rump Reconstruction Congress in which the Southern states were denied representation; it would never have made it through Congress had all of the elected Senators and Representatives been permitted to vote. And it was ratified not by the collective assent of the American people, but rather at gunpoint. The Southern states had been placed under military rule, and were forced to ratify the Amendment—which they despised with an (un)holy hatred—as

> a condition of ending military occupation and rejoining the Union. The Amendment may have enjoyed military legitimacy—might makes right, and the factor on the battlefield can dictate the terms of the peace. And it surely enjoyed moral legitimacy—right is right, and the evil of racism flies in the face of freedom and justice. But it can claim no warrant to democratic legitimacy through original popular sovereignty. It was added to the Constitution despite its open failure to obtain the support of the necessary supermajority of the American people.

Accordingly, the originalist case for reviving the Privileges or Immunities Clause might be as plausible as the originalist case for nullifying the entire Fourteenth Amendment as having failed the procedural directives of Article V. In either case, the conservative, vigilant, and prudent, contemplating difficult options with a measured temperament, chooses order and stability over the large-scale disruption that could follow a sudden breach of continuity. If the meaning of the Privileges or Immunities Clause were clearer, its implications generally agreed upon, and if ordinary citizens (not just scholars or a few bookish jurists) had contemplated empowering that provision for decades, then I might come down differently. When we deal with abstractions like "fundamental rights," however, we're better off circumscribing judicial discretion.

Substituting One Problem for Another

It is not clear, at least to me, that the scope of the Privileges or Immunities Clause in the Fourteenth Amendment is purely coextensive with that of the privileges or immunities language that appears in Article IV and which Bushrod Washington explicated in 1825. Barnett and Bernick stress that the "original meaning of the Privileges and Immunities Clause of Article IV most likely required only that citizens of any given state be treated the same as local citizens when they traveled." And that is also how most antebellum courts interpreted that clause: as an intrastate comity provision, not as a guarantee of abstract fundamental rights.

Even if Wurman's interpretation is correct, though, one can still imagine future justices disagreeing, and feeling completely at liberty, or at sea, developing a list of "privileges or immunities of citizens" for Fourteenth Amendment purposes on an ad hoc basis, as cases arise one by

one. Wurman may not allow for the creation of a new list of privileges or immunities, but what guarantees that jurists will follow his lead in that interpretation? Judges created such lists out of substantive due process—and developed an entire canon of interpretation from a mere footnote in *US v. Carolene Products Co.* (1938)—so what's to stop them from doing so out of privileges or immunities, especially when not all judges are originalists?

> Like Wurman, I find the modern doctrine of incorporation highly suspect, but I'm not persuaded that reviving the Privileges or Immunities Clause is, under present circumstances and in light of the available information, a viable or sage course when there are other options available to achieve the desired end.

Justice Thomas apparently believes that the judiciary should rein in substantive due process at least in part because it affords unelected judges too much latitude to enact their policy preferences into constitutional law. But neither Wurman's nor Thomas's solution solves this problem. In fact, their solution could empower judges with a clean slate to engage in almost the same exercise, only with a new clause. Judges might discover unwritten "privileges or immunities of citizenship" just as they discover "fundamental rights," in other words. Wurman's piece itself illustrates that conservatives are unlikely to agree among themselves about what privileges and immunities rights are or how to determine what they are. How many conservatives will agree, for instance, that the Privileges or Immunities Clause was originally understood to be only a non-discrimination right or that it should be understood as such today?

We Still Need *Stare Decisis*

Although I believe the Constitution is the supreme law of the land and that any precedent clearly contrary to it should be overturned—*Roe v. Wade* is a notable example—research regarding the Privileges or Immunities Clause does not, in my view, definitively establish that the reanimation of that provision is obviously necessary. *Roe v. Wade* was highly contested from the moment it was published, not just by scholars but by much of the American public. By contrast, curious academics writing for themselves have undertaken the obscure exercise of criticizing the *Slaughter-House Cases*; few judges paid them any attention. People across the political spectrum, with diverse careers and social statuses, and ethnic backgrounds, challenged the soundness of *Roe*'s logic and rationale. Overturning that precedent was justified; overturning the

Slaughter-House Cases isn't. There's not enough evidence to warrant such an alteration to our constitutional system.

Deprioritizing the doctrine of *stare decisis* and overturning dozens of eminent precedents all at once, as Wurman's approach would require, comes with significant costs even if an opinion doing just that is far superior in its fidelity to the constitutional text. Courts have uniformly followed the *Slaughter-House Cases* for a century and a half, and we cannot foresee whether abandoning its holdings will have deleterious consequences for society writ large, let alone for the judiciary. If originalism would have us overturn the *Slaughter-House Cases*, as inquisitive scholars more so than practitioners have suggested, it might also have us "overturn" the Fourteenth Amendment as unconstitutionally ratified according to the text of Article V, as inquisitive scholars more so than practitioners have suggested. These debatable matters of interpretation do not definitively demand courts' attention when judges can achieve the same outcomes through currently operative and available means, and when the unforeseeable consequences are foreseeably momentous.

Conservative Reservations

Unlike judges, who should be constrained by originalism and textualism, academics enjoy the liberty to pursue idiosyncrasies that do not bind anyone by force of law. Let's step away, then, from the semantic particulars of the Privileges or Immunities Clause (about which there is little consensus) to question whether reviving that clause is wise from the wider vantage of conservatism, which, of course, takes the long view. Originalism, after all, is merely one species of conservatism understood as a broader philosophy or disposition. Setting aside originalism, *arguendo*, here are some "big picture" conservative objections to resurrecting the Privileges or Immunities Clause. They're neither consistent nor mutually reinforcing because some subvert others; the point is simply to register disparate concerns.

1. We might open the door to unpredictable novelties. Wurman references "same-sex marriage." What was the original public meaning

of that term when the Fourteenth Amendment was ratified? The answer is that there was no such notion. Are there other notions of fundamental rights of which we're not yet aware? How many of them could weaken the economic liberties that Wurman hopes to safeguard? For decades, progressives have argued for a right to subsistence (that is, to a minimum standard of living) involving government entitlements. How much longer until these arguments become part of our nation's history and traditions?

2. We need decentralization, not centralization, in our fractured society. In his *Concise Guide to Conservatism*, Russell Kirk submitted that conservatives favor "variety and diversity" over "[u]niformity and absolute equality," a preference that seems conducive to federalism and variability between state laws. Kirk also cautions that "[c]entralization is ordinarily a sign of social decadence." Although the Fourteenth Amendment *already* concentrates power in the federal judiciary through the vehicle of its due process and equal protection clauses, the Privileges or Immunities Clause adds yet another mechanism for centralization.
3. Even if the *Slaughter-House Cases* were wrongly decided on originalist grounds, the work that the Privileges or Immunities Clause might have done is accomplished by other means—chiefly, the due process clause of the Fourteenth Amendment. Why complicate matters by duplication?
4. We shouldn't do at the federal level what states could do themselves. The liberties enshrined in the US Constitution drew from state constitutions, which in many instances contain more expansive guarantees of individual rights than the federal Constitution. Judge Jeffrey Sutton avers, "[V]irtually all of the foundational liberties that protect Americans originated in the state constitutions and to this day remain independently protected by them." Because of the principle of subsidiarity, conservatives should resolve disputes about individual rights on the local level whenever possible.
5. The prevailing ideas in society shape rules and institutions regardless of whether the judiciary intervenes to formalize them in law. Even if the Fourteenth Amendment had never materialized, we would no longer have state laws prohibiting interracial marriage or the use of contraception. People would discover other ways to conform law to evolving social norms. It's better for change to occur incrementally and

legislatively (with the electoral accountability that entails) to ensure social harmony and minimize conflict.

Like Wurman, I find the modern doctrine of incorporation highly suspect, and I've made a career of defending economic liberties, but I'm not persuaded that reviving the Privileges or Immunities Clause is, under present circumstances and in light of the available information, a viable or sage course when there are other options available to achieve the desired ends—options that don't depend for their realization on unelected federal judges or US Supreme Court justices.

I'm not saying, "Let sleeping dogs lie." I'm saying, "Don't go out of your way to kick the sleeping dog." The distinction is important.

A RESPONSE TO

APR 3, 2023

Reversing the Legacy of *Slaughter-House*

ILAN WURMAN

VIEW FULL FORUM

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