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Slaughtering Slaughter-House: An Assessment of 14th Amendment Privileges or Immunities Jurisprudence

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NOTE

SLAUGHTERING *SLAUGHTER-HOUSE*: AN ASSESSMENT OF 14TH AMENDMENT PRIVILEGES OR IMMUNITIES JURISPRUDENCE

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ABSTRACT

In 1872, the Supreme Court decided the Slaughter-House Cases*, which applied a narrow interpretation of the Privileges or Immunities Clause of the 14th Amendment that effectually erased the clause from the Constitution. Following* Slaughter-House*, the Supreme Court compensated by utilizing elastic interpretations of the Due Process Clause in its substantive due process jurisprudence to cover the rights that would have otherwise been protected by the Privileges or Immunities Clause. In more recent years, the Court has heard arguments favoring alternative interpretations of the Privileges or Immunities Clause but has yet to evaluate them thoroughly. By applying the Court's previously articulated stare decisis factors, this Note will evaluate the prudence in overturning the Court's long-standing Privileges or Immunities Clause precedent established in the* Slaughter-House Cases*.*

I. INTRODUCTION

Under the U.S. Constitution, "[a]ll legislative Powers" are vested in Congress, while courts are limited to deciding only "Cases" and

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"Controversies."[1] However, at several junctures in American history, courts have overstepped these delineated bounds, taking on the role of policy-makers instead of judges. One such instance was in 1873, when the Supreme Court's ruling in in the *Slaughter-House Cases* effectually erased the Privileges or Immunities Clause from the 14th Amendment.[2] Although the Clause had been "intended as the centerpiece of the [14th] Amendment," *Slaughter-House* wrongly stripped it of all significant meaning.[3]

In addressing this problem, this Note will first focus on the Privileges or Immunities Clause of the 14th Amendment and the consequences of its historical interpretation. More specifically, it will evaluate the Supreme Court's decision in the *Slaughter-House Cases*, which held that the Privileges or Immunities Clause of the 14th Amendment protects only a small subset of rights, "which own their existence to the federal government, its national character, its Constitution, or its laws."[4] It will then analyze the subsequent effects of the *Slaughter-House* precedent on the interpretation of the Due Process Clause by chronicling the development of substantive due process. Finally, in considering the best response to the problem presented, this Note will evaluate the prudence in overturning the Supreme Court's long-standing Privileges or Immunities precedent established in the *Slaughter-House Cases*. In doing so, it will consider the Supreme Court's previous treatment of this question before conducting a thorough application of the Court's commonly used stare decisis factors to come to a final conclusion.

The *Slaughter-House* issue remains significant because the Supreme Court's interpretation of the now-defunct Privileges or Immunities Clause carries resounding impacts today, especially in regard to its effects on substantive due process. The enigma of substantive due process is one of the most contentious and elusory concepts in American constitutional discourse.[5] Although the Supreme Court initially rejected the argument that the Due Process Clause of the 14th Amendment incorporated the procedural rights in the Bill of Rights against the States,[6] it later came to conclude that

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[1] U.S. CONST. art. I, § 1; *id.* art. III, § 2.

[2] Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 NYU J.L. & LIBERTY 115, 115 (2010).

[3] *Id.*

[4] Slaughter-House Cases, 83 U.S. 36, 79 (1872).

[5] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999).

[6] McDonald v. City of Chicago, Ill., 561 U.S. 742, 809–10 (2010) (Thomas, J., dissenting) (citing Hurtado v. California, 110 U.S. 516 (1884) (grand jury indictment requirement); Maxwell v. Dow, 176 U.S. 581 (1900) (12–person jury requirement); Twining v. New Jersey, 211 U.S. 78 (1908) (privilege against self-incrimination)).

some Bill of Rights guarantees were sufficiently fundamental to fall under the 14th Amendment's guarantee of due process.[7] Such fundamental rights included both substantive rights[8] and procedural rights.[9] Over time, the Court has read this provision of the 14th Amendment with increasing elasticity in its substantive due process jurisprudence.[10] And because substantive rights are no longer covered by the Privileges or Immunities Clause, substantive due process has become "a means to evade *Slaughterhouse* and a flexible, potent protection for corporations, businesses, and property rights."[11]

II. BACKGROUND

To understand how the Privileges or Immunities Clause was read prior to the *Slaughter-House Decision*, a survey of its historical context is necessary. In 1823, Justice Bushrod Washington, a circuit rider from the District of Colombia, penned *Corfield v. Coryell*, a Pennsylvania circuit court case that defined how "privileges and immunities" were understood in the context of the federal government and Article IV, Section 2 of the Constitution.[12] The *Corfield* decision listed several examples of fundamental privileges and immunities, including "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[13] Washington was careful to note that this list is not exhaustive; however, he expressed confidence that the protections under Article IV are confined to those privileges and immunities "which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union."[14]

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[7] *Id.* at 810.

[8] *Id.* (citing Gitlow v. New York, 268 U.S. 652, 666 (1925) (addressing the right to free speech); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707 (same)).

[9] *Id.* (citing Benton v. Maryland, 395 U.S. 784 (1969) (addressing protection against double jeopardy)).

[10] *Id.* at 811.

[11] Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197, 211 (2000).

[12] RANDY E. BARNETT & JOSH BLACKMAN, AN INTRODUCTION TO CONSTITUTIONAL LAW 115 (2020); Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823); U.S. CONST. art. IV, § 2.

[13] *Corfield*, 6 F. Cas. at 551-52.

[14] *Id.* at 551.

The Civil Rights Act of 1866 was another significant precursor to the 14th Amendment. The Act served to protect a number of essential rights of all citizens, regardless of race or servitude, such as the right "to make and enforce contracts" and the right "to inherit, purchase, lease, sell, hold, and convey real and personal property."[15]

Following the Civil War, a series of constitutional amendments known as the Reconstruction Amendments were adopted to protect individual rights against state encroachment.[16] Among these was the 14th Amendment, which was ratified in 1868 to ensure that the "fundamental rights" covered by the Civil Rights Act of 1866 would still be protected even if a later Congress repealed the Act.[17] In addition to the Citizenship Clause, which established that all persons born or naturalized in the United States are citizens of the United States and of their state, the 14th Amendment included a Privileges or Immunities Clause, a Due Process Clause, and an Equal Protection Clause.[18] The Privileges or Immunities Clause prohibited states from making laws that abridge the privileges or immunities of citizens of the United States.[19] The Due Process Clause added that states are now subject to the constitutional proscription against depriving people of life, liberty, or property without due process of law.[20] Finally, the Equal Protection Clause posited that states cannot deny any person within its jurisdiction the equal protection of the laws.[21]

The sponsor of the 14th Amendment, Senator Jacob Howard, indicated in a speech to the Senate that the phrase "privileges or immunities" was understood to include the rights described by Justice Bushrod in *Corfield* regarding the nearly identical language in Article IV, as well as the rights delineated in the first eight amendments, which Howard suggested would now be applied against the states through the 14th Amendment.[22] Together with the Civil Rights Act of 1866, which the 14th Amendment sought to enshrine, the rights listed in *Corfield* and those contained in the first eight

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[15] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[16] Kermit Roosevelt III, *What If Slaughter-House Had Been Decided Differently?*, 45 IND. L. REV. 61, 65–66 (2011).

[17] BARNETT & BLACKMAN, *supra* note 12, at 118.

[18] U.S. CONST. amend. XIV, § 1.

[19] *Id.*

[20] *Id.* Though the 5th Amendment's Due Process Clause contained a similar proscription, *id.* amend. V, the 5th Amendment was not applied against the states, necessitating the Due Process Clause's inclusion in the 14th Amendment.

[21] *Id.* amend. XIV, § 1.

[22] BARNETT & BLACKMAN, *supra* note 12, at 118.

amendments to the Constitution serve as the primary guidelines for understanding how the Privileges or Immunities Clause would have been understood at the time of its ratification.[23]

A. *The Fall of Privileges or Immunities*

In 1873, the Supreme Court was given the opportunity to interpret the Privileges or Immunities Clause in the *Slaughter-House Cases*, which fundamentally shifted the way privileges and immunities would be understood in the United States. The case considered the constitutionality of an order by the Louisiana legislature mandating the closure of all private slaughterhouses in New Orleans.[24] In response, a group of butchers brought suit in the belief that the law violated their constitutional right "to exercise their trade," arguing that the order effectually created a "monopoly" on "the business of butchering" within the city of New Orleans.[25] This belief was rooted in the original public meaning of the 14th Amendment's Privileges or Immunities Clause, which was thought by the Amendment's authors to include protection of "natural and common law rights by virtue of . . . federal citizenship" akin to the federal citizenship rights described in *Corfield*.[26]

However, prior to the 14th Amendment, the relationship between the federal government and the states was such that the Constitution primarily restricted the federal government's powers, leaving states largely sovereign over their own affairs. This was drastically changed by the ratification of the 14th Amendment and its Privileges or Immunities Clause, which expressly limited state governments. The Supreme Court, accustomed to a federal separation of powers, feared altering the Constitution's federal scheme and wanted to avoid "radically chang[ing] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[27] As a result, the majority opinion narrowly interpreted the Privileges or Immunities Clause to protect only that subset of rights "which own their existence to the Federal government, its National character, its Constitution, or its laws."[28] According to the majority, such rights include the right to assert claims against the government, to transact business with it, to

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[23] *Id.*

[24] Slaughter-House Cases, 83 U.S. 36, 36 (1872).

[25] *Id.* at 60.

[26] Sandefur, *supra* note 2, at 144.

[27] *Slaughter-House*, 83 U.S. at 78.

[28] *Id.* at 79.

seek its protection, to share its offices, to administer its functions, and to become a citizen of any state.[29] Not included in these rights, though, was the unenumerated right of the butchers to exercise their trade.

Slaughter-House was quickly followed by *Bradwell v. Illinois* in 1873, which similarly decided that a female attorney lacked a constitutional right under the Privileges or Immunities Clause to exercise her trade.[30] Finally, in *US v. Cruikshank*, the Court ruled that the privileges or immunities of citizens of the United States do not include the rights listed in the first eight Amendments when it held that the 14th Amendment does not bind the states by these Amendments.[31] Together, these three cases eliminated nearly all the power of the Privileges or Immunities Clause, as *Slaughter-House* and *Bradwell* demonstrated that the clause fails to protect both the privileges and immunities described by *Corfield v. Coryell* and the fundamental rights specified in the Civil Rights Act of 1866, while *Cruikshank* showed that the clause fails to incorporate the individual rights enumerated in the Bill of Rights.[32]

B. *Opposition to the* Slaughter-House *Decision*

Since its decision, the *Slaughter-House Cases* ruling has been the subject of much derision by legal scholars.[33] The *Slaughter-House* dissent criticized the majority for reducing the Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[34] Writing for the dissent, Justice Field asserted that the Privileges or Immunities Clause was designed to protect rights that are "in their nature . . . fundamental; which belong, of right, to the citizens of all free governments," including the right of men to pursue their professions without the imposition of unequal or discriminatory restrictions.[35] Instead, in the words of Justice Swayne, the majority ruling turned "what was meant for bread into a stone."[36]

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[29] *Id.* at 79–80.

[30] Bradwell v. People of State of Illinois, 83 U.S. 130 (1872).

[31] United States v. Cruikshank, 92 U.S. 542 (1875).

[32] BARNETT & BLACKMAN, *supra* note 12, at 128.

[33] Roosevelt, *supra* note 16, at 62.

[34] *Slaughter-House Cases*, 83 U.S. at 96 (Field, J., dissenting).

[35] *Id.* at 96–97 (internal quotation marks omitted) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (1823)).

[36] *Id.* at 129 (Swayne, J., dissenting).

Two common alternative approaches to the majority's reading of the Privileges or Immunities Clause in *Slaughter-House* include the "anti-discrimination" and the "fundamental rights views," both of which find their roots in the dissents of *Slaughter-House* but today find expression instead in different clauses of the 14th Amendment.[37] Under the anti-discrimination view attributed to Justice Field, Article IV, Section 2 of the Constitution prevents states from denying rights granted by its own state law to citizens of different states, while the 14th Amendment forbids states from abridging these rights of their own citizens.[38] Following *Slaughter-House*, the principle from this approach has since been enveloped by the Court's Equal Protection jurisprudence.[39]

Conversely, the fundamental rights view sees the 14th Amendment as protecting citizens from potential tyranny by the states in the same way that the Framers sought to protect citizens from potential tyranny by the federal government.[40] Thus, it sees the 14th Amendment as asserting against the states all the rights given to Americans under the Constitution.[41] Today, this conception of privileges or immunities is evidenced in the Court's substantive due process jurisprudence rather than in the Privileges or Immunities Clause.[42]

Today, many legal scholars share the sentiments of the *Slaughter-House* dissenters. Condemnation of the *Slaughter-House* decision spans across political lines, as "[v]irtually no serious modern scholar-left, right, and center-thinks that [the *Slaughter-House* majority's reading] is a plausible reading of the Amendment."[43] Some constitutional law professors have gone so far as to argue that "[t]he reading given to the Privileges or Immunities Clause in *Slaughter-House* and its progeny is contrary to an overwhelming consensus among leading constitutional scholars today, who agree that the opinion is egregiously wrong."[44]

Notably, overturning the precedent of *Slaughter-House* has become something of a personal campaign for Justice Clarence Thomas, who

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[37] Roosevelt, *supra* note 16, at 67.

[38] *Id.*

[39] *Id.* at 68.

[40] *Id.* at 69.

[41] *Id.*

[42] *Id.* at 70.

[43] Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 632 (2001).

[44] Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 33, McDonald v. City of Chicago Ill., 561 U.S. 742 (2010) (No. 08-1521).

criticized the Supreme Court's Privileges or Immunities jurisprudence in cases such as *Saenz v. Roe*, *McDonald v. Chicago*, and *Timbs v. Indiana*, though never in the majority.[45] However, Justice Gorsuch indicated some mutual accord with Justice Thomas in his *Timbs* concurrence, where he recognized that "the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."[46]

C. *Substantive Due Process Development*

While the Court in *Slaughter-House* successfully butchered the Privileges or Immunities Clause, the specter of *Slaughter-House* has endured by way of its impact on substantive due process development. Since the Privileges or Immunities Clause no longer serves to protect substantive rights, the Due Process Clause has become the Court's vessel of choice to house such rights and to sidestep *Slaughterhouse*.[47] In doing so, the Court has read the Due Process Clause with increasing elasticity, stretching its applicability far beyond the Clause's original procedure-based understanding.[48] This section will explore the various ways the Court has read the 14th Amendment's Due Process Clause to demonstrate the unexpected negative impact of *Slaughter-House* on the elasticity of due process.

1. Early Origins.

The Fifth Amendment instructs the federal government not to deprive individuals "of life, liberty or property without due process of law."[49] Similarly, the 14th Amendment instructs states not to "deprive any person of life, liberty, or property, without due process of law."[50] While these clauses clearly mandate that certain necessary procedures take place to satisfy due

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[45] Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting); McDonald v. City of Chicago, Ill., 561 U.S. 742, 855 (2010) (Thomas, J., concurring); Timbs v. Indiana, 139 S. Ct. 682, 691–92 (2019) (Thomas, J., concurring).

[46] *Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring).

[47] Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197, 211 (2000).

[48] McDonald v. City of Chicago, Ill., 561 U.S. 742, 811 (2010) (Thomas, J., dissenting).

[49] U.S. CONST. amend. V.

[50] *Id.* amend. XIV, § 1.

process of law, the development of substantive due process from these clauses is less straightforward. Through substantive due process, the Court is able to recognize certain important liberties that are not enumerated in the Constitution and protect them from infringement based on the substance of the asserted rights, regardless of the procedures applied.

Though not expressly stated therein, the principle of substantive due process finds its earliest roots in the *Dred Scott* decision, where the Court held that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law."[51] With these words, the Court for the first time used the Due Process Clause to invalidate a law based on its substance rather than its articulated procedure.

Then, in 1873, the Supreme Court decided the *Slaughter-House Cases*, which held that the 14th Amendment does not protect the unenumerated right to practice one's trade.[52] Ironically, the decision by the *Slaughter-House* Court to eviscerate the Privileges or Immunities Clause eventually led the Court to expand its substantive due process jurisprudence to compensate for this loss, placing increasing weight on the role of the 14th Amendment's Due Process Clause to make up for the fundamental rights no longer protected by Privileges or Immunities. However, doing so required an elastic reading of the Due Process Clause that resulted in a string of atextual constructions, as due process "became a means to evade *Slaughterhouse* and a flexible, potent protection for corporations, businesses, and property rights."[53]

2. Substantive Due Process and Economic Liberty.

In 1897, the Supreme Court decided *Allgeyer v. Louisiana*.[54] This was the first in a series of cases that invalidated economic regulations for violating the unenumerated right to contract under substantive due process. The Court held that the substance of the statute violated due process "because it prohibit[ed] an act which under the federal constitution the defendants had a right to perform."[55] But for *Slaughter-House*, the right to contract could

[51] Dred Scott v. Sandford, 60 U.S. 393, 450 (1857).
[52] Slaughter-House Cases, 83 U.S. 36 (1872).
[53] Tepker, *supra* note 11.
[54] Allgeyer v. State of La., 165 U.S. 578 (1897).
[55] *Id.* at 591.

have been protected under the Privileges or Immunities Clause through an application of federal privileges or immunities like that prescribed in *Corfield*. Instead, *Allgeyer* was led to place the right to contract under the Due Process Clause, even though the text of the Clause would not have naturally covered such a substantive right.

Then, in 1905, the Supreme Court held in *Lochner v. New York* that a law implementing a maximum hours requirement for workers was "an unreasonable, unnecessary, and arbitrary interference" with the liberty of contract and was thus unconstitutional under the Due Process Clause.[56] However, the Court flipped in 1908 when it unanimously upheld a similar maximum-hour law for women in Oregon based on the differences between men and women.[57] Nearly a decade later, *Buchanan v. Warley* held that a Louisville city ordinance that prevented black people from buying homes in white neighborhoods and white people from buying homes in black neighborhoods violated the Due Process Clause, as the 14th Amendment protects all persons against discriminatory state legislation regardless of race.[58] *Buchanan* was then followed by *Adkins v. Children's Hospital*, which held that the federal minimum wage for women was unconstitutional under the Due Process Clause's right to contract.[59] During this era, the Court applied a rebuttable presumption of liberty for economic regulations, presuming such regulations to be unconstitutional unless the government could provide factual evidence to show that the regulation was reasonable.[60]

In 1931, the *Lochner*-era precedent on substantive due process was undone. In *O'Gorman & Young, Inc v. Hartford Fire Insurance Co.*, the Court considered a New Jersey law that required commissions on the sale of fire insurance policies be reasonable.[61] A trial court found that O'Gorman's commission rate of 25% was unreasonable.[62] O'Gorman appealed, arguing that this resulted in a deprivation of property without due process of law.[63] Applying a rebuttable presumption of constitutionality wherein economic regulations are upheld unless evidence is provided that the remedy was not appropriate, the Court held that "[t]he business of insurance is so far affected

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[56] Lochner v. New York, 198 U.S. 45, 56 (1905).

[57] Muller v. State of Oregon, 208 U.S. 412 (1908).

[58] Buchanan v. Warley, 245 U.S. 60 (1917).

[59] Adkins v. Children's Hosp. of the D.C., 261 U.S. 525 (1923).

[60] BARNETT & BLACKMAN, *supra* note 12, at 171.

[61] O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251 (1931).

[62] *Id.* at 256.

[63] *Id.* at 257.

with a public interest that the State may regulate the rates."[64] *O'Gorman* was followed up by *Nebbia v. New York*, which affirmed *O'Gorman* and employed a means-end analysis for due process.[65] *Nebbia* required that "the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[66] Significantly, the holding of *Nebbia* found that even a small corner-store business affects the public interest, clarifying the breadth of the *O'Gorman* requirement.[67] Finally, *West Coast Hotel v. Parrish* overturned *Adkins* when it held that minimum-wage laws for women were constitutional and recognized that *Adkins* could not be reconciled with *O'Gorman*'s presumption of constitutionality.[68]

In 1938, the Supreme Court decided *United States v. Carolene Products*, which introduced the third test for economic liberty cases under substantive due process: a qualified presumption of constitutionality.[69] The iconic fourth footnote of *Carolene Products* clarified that the presumption of constitutionality should not occur when the legislation violates a specific provision of the Constitution, asserting that a presumption of liberty applies here.[70] Additionally, *Carolene Products* held the presumption of constitutionality does not apply when legislation restricts the political processes; when a statute is directed at particular religious, national, or racial minorities; or when legislation is directed at discrete and insular minorities.[71]

However, a fourth approach created by *Williamson v. Lee Optical* made the presumption of constitutionality nearly impossible to rebut.[72] In *Williamson*, the Court reasoned that it is not the job of courts to "balance the advantages and disadvantages" of economic regulations.[73] As a result, it adopted a conceivable basis review.[74] Under this regime, a legislative action did not have to be logically consistent with its purported aims to be upheld; rather, *Williamson* said that "[i]t is enough that there is an evil at hand for

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[64] *Id.* at 257–258.
[65] Nebbia v. People of New York, 291 U.S. 502, 525 (1934).
[66] *Id.*
[67] *Id.*
[68] W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[69] BARNETT & BLACKMAN, *supra* note 12, at 172.
[70] United States v. Carolene Prod. Co., 304 U.S. 144, 153 (1938).
[71] *Id.*
[72] BARNETT & BLACKMAN, *supra* note 12, at 172.
[73] Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 487 (1955).
[74] *Id.*

correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[75]

The Court's repeated invention of new tests concerning economic liberty and substantive due process demonstrates the disruptive effect of the *Slaughter-House* decision on other areas of law. This is evidenced by the Court's apparent struggle to define the unenumerated substantive rights placed in the Due Process Clause "in the absence of textual or historical guideposts."[76] While the Privileges or Immunities Clause would likewise have enforced unenumerated rights against the states apart from *Slaughter-House*, a proper application of the Privileges or Immunities Clause would have benefited from the guidance of an "inquiry focuse[d] on what the ratifying era understood the Privileges or Immunities Clause to mean."[77] In this way, the Court would have been better equipped to more objectively determine the correct application of the right to contract and other rights tangential to economic liberty.

3. Substantive Due Process and Personal Liberty.

The Supreme Court has also interpreted substantive due process in cases regarding personal liberty. Going back to 1923, the Supreme Court decided *Meyer v. Nebraska*, which was significant in substantive due process jurisprudence because it broadened the definition of liberty for purposes of the 14th Amendment's Due Process Clause.[78] According to *Meyer,* liberty "denotes not merely freedom from bodily restraint" but also the right to contract, to engage common occupations, to acquire education, to marry, to raise children, to worship God according to one's conscience, and "to enjoy those *privileges* long recognized at common law as essential to the orderly pursuit of happiness by free men."[79] In *Meyer*, a Nebraska statute criminalizing teaching alien speech to young students was invalidated as an arbitrary and unreasonable means to the state's appropriate end.[80] Evidently, the Court still found it necessary to protect the privileges of citizens of the United States, albeit under the Due Process Clause rather than the Privileges or Immunities Clause.

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[75] *Id.* at 488.

[76] McDonald v. City of Chicago, Ill., 561 U.S. 742, 854 (2010) (Thomas, J., dissenting).

[77] *Id.* at 855.

[78] Meyer v. Nebraska, 262 U.S. 390 (1923).

[79] *Id.* at 399 (emphasis added).

[80] *Id.* at 402.

Two years later, the Supreme Court decided *Pierce v. Society of Sisters*, where the Court considered the Oregon Compulsory Education Act, a law requiring children to attend public schools.[81] The Court held the Oregon statute unconstitutional, reasoning that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state" and that that the statute unreasonably interfered with parents' liberty to direct their children's upbringing and education, as described by *Meyer*.[82]

In 1927, the Court decided *Buck v. Bell*, an infamous personal liberty case that denied substantive due process protections to citizens labeled "imbeciles" from forced sterilization.[83] Under Virginia's Sterilization Act, the government could recommend mental institutions sterilize patients to prevent the disfavored hereditary genes from being passed on.[84] The Court compared this forced sterilization to mandated vaccination, which was upheld in *Jacobson v. Massachusetts*, reasoning that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[85]

Though *Buck v. Bell* remains good law, it has long been lamented as "part of the Supreme Court's *anti-canon*."[86] However, an application of federal privileges or immunities informed by *Corfield* may have successfully prevented Buck's forced sterilization as a violation of her "enjoyment of life and liberty" and her right "to pursue and obtain happiness and safety."[87] In this way, the unfortunate holding of *Buck v. Bell* may have been avoided under a revitalized Privileges or Immunities Clause.

4. Modern Substantive Due Process.

Substantive due process jurisprudence shifted again when the Court decided *Griswold v. Connecticut* in 1965, holding that Connecticut's contraceptive ban for married couples was unconstitutional as a violation of the right to privacy.[88] In keeping with the Court's decision in *West Coast*

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[81] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).
[82] *Id.* at 535.
[83] Buck v. Bell, 274 U.S. 200, 207 (1927).
[84] *Id.*
[85] *Id.* at 207.
[86] BARNETT & BLACKMAN, *supra* note 12, at 162.
[87] *Corfield*, 6 F. Cas. at 551-52.
[88] Griswold v. Connecticut, 381 U.S. 479 (1965).

Hotel, the Court did not use *Lochner* as a guide. Although *Griswold* recognized a new, unenumerated right to privacy, it claimed not to act "as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[89] Rather, the majority argued that various guarantees in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance" and that one of those penumbras is the creation of zones of privacy.[90] This ambiguous origin of the right to privacy helped open the floodgates to the untethered modern substantive due process jurisprudence to follow.

In 1967, the Supreme Court decided *Loving v. Virginia*, which considered Virginia's Racial Integrity Act.[91] In its decision, the Supreme Court found the act unconstitutional under both the Equal Protection Clause and the Due Process Clause of the 14th Amendment.[92] The Court reasoned that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men," so such restrictions on it would be in violation of due process, as "subversive of the principle of equality at the heart of the Fourteenth Amendment."[93] While this decision was also firmly rooted in Equal Protection principles, its Due Process Clause rationale foreshadowed the Court's increasing substantive due process considerations to come.

In 1973, one of the most notable missteps in modern substantive due process jurisprudence was made in the seminal case of *Roe v. Wade*, which defined a constitutional right to abortion.[94] The Court in *Roe* held that a Texas law prohibiting abortions except when necessary for the life of the mother was unconstitutional under the unenumerated right to privacy.[95] As in *Loving*, the Court based its conception of this substantive right under the Due Process Clause rather than using *Griswold*'s penumbras formed by emanations theory.[96] As such, the Court clarified that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered

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[89] *Id.* at 482.
[90] *Id.* at 484.
[91] Loving v. Virginia, 388 U.S. 1 (1967).
[92] *Id.*
[93] *Id.* at 12.
[94] Roe v. Wade, 410 U.S. 113 (1973).
[95] *Id.*
[96] *Id.*

liberty' . . . are included in this guarantee of personal privacy."[97] The majority also considered the state's interest in protecting the woman's health and safety and the eventual interest in the potential of human life.[98] The result of *Roe* was a Court-created trimester framework based on viability.[99] This spurred criticism from the dissent, who condemned *Roe* as a form of judicial legislating much akin to *Lochner*.[100] Rehnquist lamented that *Roe*'s compelling state interest standard would inevitably require the Court "to examine the legislative policies and pass on the wisdom of these policies" when deciding whether a state interest is compelling.[101] In effect, this blurred the lines between the legislative branch, whose responsibility it is to make policy, and the judicial branch, which is tasked exclusively with interpreting the law as written.

In 1997, the Supreme Court adjusted course with its decision in *Washington v. Glucksberg*, where the Court held that the asserted right to assistance in committing suicide was not a fundamental liberty interest protected by Due Process Clause and that the state's ban on assisted suicide was rationally related to legitimate government interests.[102] From this decision came the *Glucksberg* test, which outlined the analysis to be applied when determining what is a fundamental liberty under the Due Process Clause. The test requires the Court to consider whether the asserted liberty is objectively deeply rooted in this Nation's history and tradition and whether there is a "careful description" of the asserted fundamental liberty interest.[103] In *Glucksberg*, the Court held that the right to assisted suicide was not deeply rooted in history and tradition and was thus not recognized as a fundamental liberty interest.[104]

However, in 2003, *Lawrence v. Texas* held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause.[105] Although *Lawrence* did not overturn *Glucksberg*, it did not faithfully follow the *Glucksberg* test in determining what constitutes a fundamental liberty. The

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[97] *Id.* at 152.
[98] *Id.* at 114.
[99] *Id.* at 164.
[100] *Id.* at 174 (Rehnquist, C.J., dissenting).
[101] *Id.*
[102] Washington v. Glucksberg, 521 U.S. 702 (1997).
[103] *Id.* at 703.
[104] *Id.*
[105] Lawrence v. Texas, 539 U.S. 558 (2003).

majority did not define a careful or narrow description of the right at issue—homosexual sodomy—but described the right as "intimate conduct with another person."[106] Additionally, the Court did not inquire whether such a right was deeply rooted in the Nation's history and tradition but instead recognized the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[107]

In 2013, the Court in *United States v. Windsor* held that the Defense of Marriage Act (DOMA)—which defined marriage as between one man and one woman—violated both Due Process and Equal Protection principles applicable to the federal government.[108] The Court reasoned that DOMA's purpose was to impose a stigma on same-sex marriages and that, as a result, any state-recognized same-sex marriages would be treated as second-class marriages for purposes of federal law.[109]

From this decision came *Obergefell v. Hodges*, which was decided in 2015 and held that the 14th Amendment requires states to license marriages between people of the same sex.[110] *Obergefell* reasoned that the fundamental liberties protected by substantive due process "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[111] As with the Court in *Lawrence*, the *Obergefell* Court failed to faithfully adhere to the *Glucksberg* test but did not go so far as to overturn it. The majority argued that, although history and tradition guide the Court's inquiry, they do not set its outer boundaries.[112]

Finally, in 2022, the Supreme Court took a major shift in substantive due process jurisprudence yet again in *Dobbs v. Jackson* by reasserting the *Glucksberg* test and overturning both *Roe* and *Casey*.[113] In *Dobbs*, the Court considered "whether the Constitution, properly understood, confers a right to obtain an abortion."[114] The majority held that the Due Process Clause protects only the substantive rights guaranteed by the first eight

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[106] *Id.* at 567.
[107] *Id.* at 572.
[108] United States v. Windsor, 570 U.S. 744 (2013).
[109] *Id.* at 746.
[110] Obergefell v. Hodges, 576 U.S. 644 (2015).
[111] *Id.* at 663.
[112] *Id.* at 664.
[113] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
[114] *Id.* at 234.

Amendments to the Constitution, as well as the rights not mentioned in the Constitution that are nevertheless deemed fundamental.[115] The Court reasoned that the asserted right to abortion is neither deeply rooted in the nation's history and traditions, nor is it mentioned in the first eight Amendments to the Constitution.[116] Further, the majority rejected any "appeals to a broader right to autonomy and to define one's 'concept of existence.'"[117] As such, they held that abortion should not be awarded the status of a fundamental right and instead that rational-basis review with "a strong presumption of validity" should be used when looking at state abortion regulations.[118]

While *Dobbs* indicated the current Court's favorability toward the *Glucksberg* test for substantive due process, the future of due process jurisprudence is far from settled. Given that substantive due process stems from an atextual reading of the Due Process Clause, it would be difficult to expect judges to rely on "textual or historical guideposts" to guide the boundaries of their inquiries when the doctrine itself ignores such guides.[119] However, if the 14th Amendment's substantive rights were to be placed in the Privileges or Immunities Clause rather than the Due Process Clause, the Court would benefit from having made the right inquiries—inquiries that "are more worthy of [the] Court's attention" and are "far more likely to yield discernible answers."[120]

III. RESPONDING TO *SLAUGHTER-HOUSE*

As has been demonstrated, the Court's decision in the *Slaughter-House Cases* rests on tenuous footing and has inadvertently led to a torrent of untethered decisions in the form of substantive due process. As a result, some, like Justice Thomas, have questioned whether a solution can be found in overturning *Slaughter-House* and its progeny. In *Saenz v. Roe*, Justice Thomas questioned whether the Privileges or Immunities Clause "should displace, rather than augment, portions of our equal protection and

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[115] *Id.* at 216.

[116] *Id.* at 250; *Id.* at 237.

[117] *Id.* at 257 (quoting Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

[118] *Id.* at 301 (quoting Heller v. Doe, 509 U.S. 312, 319 (1993) (establishing that health and welfare laws generally receive a strong presumption of validity)).

[119] McDonald v. City of Chicago, Ill., 561 U.S. 742, 854 (2010) (Thomas, J., concurring).

[120] *Id.* at 855.

substantive due process jurisprudence."[121] Again, in *McDonald v. Chicago*, Justice Thomas called for the overturn of *Cruikshank*, a progeny of *Slaughter-House*, arguing that *Cruikshank* "is not a precedent entitled to any respect."[122] This section will consider arguments for overturning the *Slaughter-House* line of precedents, weighing such arguments against stare decisis considerations.

In the American court system, faulty reasoning alone is often insufficient to merit a departure from precedent. As the Court recognized in *Dobbs v. Jackson*, "Stare decisis plays an important role and protects the interests of those who have taken action in reliance on a past decision."[123] Following precedent deters repeated challenging of settled precedents, which prevents the unnecessary expense of endless relitigation.[124] Stare decisis further contributes to the integrity of the judicial process, in part by "restrain[ing] judicial hubris by respecting the judgment of those who grappled with important questions in the past."[125] This history of past judgment often serves as "a font of established wisdom richer than what can be found in any single judge or panel of judges."[126]

However, even long-established decisions can be faulty, and the Supreme Court has sometimes departed from precedent when certain factors have been met. The Court has historically shown greater willingness to depart from precedent when dealing with constitutional interpretation, as the Constitution is not as easily amended as statutes.[127] Such was the case in the Court's most recent articulation of its stare decisis factors, *Dobbs v. Jackson*, where the Court cited previous compilations of factors from *Janus v. American Federation of State* and *Ramos v. Louisiana* when deciding to overturn the decades-old precedent of *Roe v. Wade*.[128]

In 2018, the Supreme Court decided *Janus v. American Federation of State*, which recognized "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance

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[121] Saenz v. Roe, 526 U.S. 489, 528 (1999).

[122] *McDonald*, 561 U.S. at 855 (Thomas, J., concurring).

[123] *Dobbs*, 597 U.S. at 218.

[124] Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 455 (2015).

[125] *Dobbs*, 597 U.S. at 218.

[126] NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 217 (2019).

[127] Agostini v. Felton, 521 U.S. 203, 235 (1997).

[128] *Dobbs*, 597 U.S. at 268.

on the decision" as factors to be considered when evaluating whether to overturn established precedent.[129]

In his 2020 concurrence in *Ramos v. Louisiana*, Justice Kavanaugh compiled another list of previously considered factors to be reviewed when determining whether to overturn precedent, including "the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent."[130]

However, Justice Kavanaugh lamented that the Court "has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together."[131] He thus proposed to instead apply a three-factor test, asking whether the prior decision was "grievously or egregiously wrong," whether the prior decision caused "significant negative jurisprudential or real-world consequences," and whether "overruling the prior decision [would] unduly upset reliance interests."[132]

Finally, in 2022, the Supreme Court ruled on *Dobbs v. Jackson*, which articulated its most recent list of factors to be considered when determining whether to overturn precedent by combining and separating some of the factors posited in both the *Janus* and *Ramos* decisions.[133] These factors included "the nature of [the precedents'] error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[134]

The precedential value of the *Slaughter-House Cases* was reconsidered by the Court in 2010 with *McDonald v. Chicago*, where the petitioners argued that "the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter–House Cases* . . . should now be rejected."[135] Justice Alito, writing for the plurality, rejected arguments

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[129] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018).

[130] Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring).

[131] *Id.*

[132] *Id.* at 1414–15.

[133] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 261 (2022).

[134] *Id.*

[135] McDonald v. City of Chicago, Ill., 561 U.S. 742, 753 (2010).

regarding the proposed Privileges or Immunities interpretation put forth by the petitioner, citing a lack of consensus among scholars who agree that the *Slaughter-House Cases*' interpretation is flawed as to what rights ought to be covered.[136] Though he did not consider the workability of the *Slaughter-House* interpretation directly, his comment impliedly criticized the proposed workability of the alternative. Justice Alito then appealed to the age of the precedent, stating that, "for many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause."[137] Without considering any factors further, the plurality declined to consider the petitioner's argument on the Privileges or Immunities Clause.[138]

In Justice Thomas's concurrence, he distinguished himself from the plurality by placing the petitioner's asserted right in the Privileges or Immunities Clause rather than the Due Process Clause.[139] Justice Thomas criticized the reasoning of *Slaughter-House* and its successors, such as *United States v. Cruikshank*, which denied that the right to keep and bear arms was "a privilege of United States citizenship because it was not in any manner dependent upon that instrument for its existence."[140] Justice Thomas further argued that *Cruikshank*'s reasoning was circular because it made a right's "nature as an inalienable right that pre-existed the Constitution's adoption . . . the very reason citizens could not enforce it against States through the Fourteenth [Amendment]."[141]

Justice Thomas's concurrence also appealed to the *Slaughter-House* precedent's disruptive effect on other areas of law, namely the rest of 14th Amendment jurisprudence. He asserted that, "[a]s a consequence of this Court's marginalization of the [Privileges or Immunities] Clause, litigants seeking federal protection of fundamental rights turned to the remainder of § 1 in search of an alternative fount of such rights."[142] They were eventually able to place those rights in the Due Process Clause, which has been read with increasing elasticity ever since the Court "determined that the Due Process Clause applies rights against the States that are not mentioned in the

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[136] *Id.* at 758.

[137] *Id.*

[138] *Id.*

[139] *McDonald*, 561 U.S. at 806 (Thomas, J., concurring).

[140] *Id.*, at 809 (internal quotation marks omitted).

[141] *Id.*

[142] *Id.*

Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights."[143] Justice Thomas reasoned that this effect is dangerous due to the "lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."[144]

Justice Thomas's reasoning also spoke to the workability of *Slaughter-House*'s interpretation when he argued that a return to a pre-*Slaughter-House* understanding of Privileges or Immunities "would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed."[145] He expressed confidence that the Court would be able to apply principled interpretations of the Privileges or Immunities Clause despite the fact that the fundamental rights contained would be unenumerated, asserting that the clause could still be interpreted based on "what the ratifying era understood the Privileges or Immunities Clause to mean."[146]

Though the Court here failed to apply any kind of a comprehensive stare decisis test, it did speak to some of the elements, even if inadvertently. In evaluating the petitioner's arguments, the plurality in *McDonald* seems to have considered the workability of the *Slaughter-House* line's rule and the age of the precedent, while Justice Thomas's concurrence considered the quality of the *Slaughter-House* line's reasoning, the disruptive effects on other areas of law, and the workability of the *Slaughter-House* line's rules. However, neither side addressed the nature of the precedent's error, the reliance interests involved, the precedent's consistency with other related decisions, or subsequent legal or factual developments. As such, a complete application of the Court's expressed stare decisis factors is still necessary to properly evaluate the merits of arguments to overturn the *Slaughter-House Cases*.

IV. OVERTURNING *SLAUGHTER-HOUSE*

Finally, this section will aim to comprehensively evaluate the merits of arguments to overturn *Slaughter-House* by applying the factors previously considered by the Court when determining whether to overturn precedent.

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[143] *Id.* at 811.
[144] *Id.*
[145] *Id.* at 812.
[146] *Id.* at 854.

It will consider the list of factors first delineated in *Janus v. American Federation of State*, the factors compiled by Justice Kavanaugh in *Ramos v. Louisiana*, those subsequently proposed by Justice Kavanaugh in *Ramos*, and the factors most recently applied by the Court in *Dobbs v. Jackson Women's Health Org.*[147]

A. *Nature of Error.*

The first factor to be considered in applying the Court's stare decisis tests is the nature of the precedent's error. In *Dobbs v. Jackson*, consideration of this factor entailed looking at the "egregiously wrong and deeply damaging" nature of the Court's prior precedent and the fact that it "short-circuited the democratic process."[148] This accords with Justice Kavanaugh's proposed consideration in *Ramos v. Louisiana*, which asks whether the prior decision was "grievously or egregiously wrong."[149]

Regarding *Slaughter-House*, the Court's error was grievously wrong because it took almost all meaning out of a clause of the Constitution, making it so that the clause bears no effect on the modern understanding of constitutional rights. In effect, *Slaughter-House* wrote out a clause of the Constitution, avoiding the democratic process much in the same way that *Roe* avoided it by adding rights to the Constitution. Thus, the nature of the error factor supports overturning *Slaughter-House*.

B. *Quality of Reasoning*.

The second factor considered by the Supreme Court is the quality of the precedent's reasoning, as posited by *Dobbs*, *Janus*, and Kavanaugh's *Ramos* compilation.[150] In *Dobbs*, the Court found this factor was met when the precedent's rationale "failed to ground its decision in text, history, or precedent."[151]

Regarding *Slaughter-House*, the Court's reasoning is of similarly poor quality. The *Slaughter-House* majority failed to consider the original

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[147] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018); Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022).

[148] *Dobbs*, 597 U.S. at 268–69.

[149] *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring).

[150] *Dobbs*, 597 U.S. at 268; *Ramos*, 140 S. Ct. at 1414; *Janus*, 138 S. Ct. at 2478–79.

[151] *Dobbs*, 597 U.S. at 270.

public meaning of the text: the understanding "that 'privileges or immunities of citizens' were fundamental rights, rather than every public benefit established by positive law," despite the ample evidence to the contrary from the time of the 14th Amendment's ratification.[152] As time has progressed, the inferior quality of *Slaughter-House*'s reasoning has subsisted, and the opinion remains "contrary to an overwhelming consensus among leading constitutional scholars."[153] In this way, the quality of reasoning factor supports overturning the *Slaughter-House* precedent.

C. *Workability*.

The workability of the rules imposed by an established precedent is a third factor considered by the Supreme Court when applying stare decisis considerations.[154] In *Dobbs*, this meant asking "whether [the precedent] can be understood and applied in a consistent and predictable manner."[155] Similarly, *Janus* found precedent to be unworkable when its standard would "invite 'perpetua[l] give-it-a-try litigation.'"[156]

In the present matter, the Supreme Court's ruling was—at least in some respects —a workable standard. By limiting the rights flowing from the Privileges or Immunities Clause to those "which own their existence to the Federal government, its National character, its Constitution, or its laws," the Court created a clearly delineated body of rights that future courts would be able to readily identify.[157]

Some may argue that history demonstrates the unworkability of the *Slaughter-House* precedent because a corollary of the Privileges or Immunities precedent was that "litigants seeking federal protection of fundamental rights turned to the remainder of § 1 in search of an alternative fount of such rights."[158] However, this development speaks more to the secondary disruptive effects caused by *Slaughter-House* than it does to the

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[152] Saenz v. Roe, 526 U.S. 489, 527 (1999) (Thomas, J., concurring).

[153] Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 33, McDonald v. City of Chicago Ill., 561 U.S. 742 (2010) (No. 08-1521).

[154] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018); Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022).

[155] *Dobbs*, 597 U.S. at 281.

[156] *Janus*, 138 S. Ct. at 2481 (quoting Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 551 (1991)).

[157] *Id.* at 79.

[158] McDonald v. City of Chicago, Ill., 561 U.S. 742, 809 (2010) (Thomas, J., concurring).

immediate workability of the rule established. Thus, the workability factor does not support overturning *Slaughter-House.*

D. *Disruptive Effect.*

The fourth factor considered by the Court is the disruptive effect caused by the precedent in question. *Dobbs*, for example, considered the ways "*Roe* and *Casey* . . . led to the distortion of many important but unrelated legal doctrines."[159] Justice Kavanaugh in *Ramos* likewise thought it necessary to consider whether "the prior decision caused significant negative jurisprudential or real-world consequences."[160]

Regarding *Slaughter-House*, the disruptive effect is evidenced most obviously in the aforementioned substantive due process jurisprudence that grew out of the need for a source for such rights. The Due Process Clause was never intended to house such substantive rights, and the history of substantive due process demonstrates this by its ever-evolving nature due to the lack of guiding principle in the text.

However, some may argue that "judicial identification of unenumerated fundamental rights is going to be problematic no matter what the textual hook," so placing the 14th Amendment's substantive rights under the Privileges or Immunities Clause would not lead to more principled decision-making. However, the Court has undertaken similar efforts of inquiring what the ratifying era understood a text to mean in interpreting clauses such as the Necessary and Proper Clause and the Cruel and Unusual Punishments Clause; to do the same for Privileges or Immunities "should be no more 'hazardous' than interpreting these other constitutional provisions . . . using the same approach."[161]

The *Slaughter-House* decision was also disruptive to the way the Equal Protection Clause has been read. If *Slaughter-House* had not rejected the "anti-discrimination" understanding of the Privileges or Immunities Clause, it would not have been picked up by the Equal Protection Clause.[162] Instead, the focus of the Equal Protection Clause would likely be "on the failure of state officials to enforce state law to the benefit of certain individuals or groups."[163] Rather than being viewed primarily as a negative right with a

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[159] *Dobbs*, 597 U.S. at 286.

[160] Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring).

[161] *McDonald*, 561 U.S. at 855 (Thomas, J., concurring).

[162] Roosevelt, *supra* note 16, at 72–73.

[163] *Id.* at 72.

marginalized understanding of failure to protect, equal protection would be considered a positive right "guaranteeing some affirmative assistance and protection from the state."[164] Given these considerations, the disruptive effect factor in the Court's stare decisis review supports overturning *Slaughter-House.*

E. *Reliance Interests.*

The fifth factor to be considered in applying the Court's stare decisis evaluation is whether there is a concrete reliance interest in the established precedent.[165] In the *Dobbs* decision, the Court asserted that its history of recognized interests "emphasize very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"[166] The question of whether overturning *Slaughter-House* would upset such reliance interests depends largely on whether doing so would necessarily have the effect of also undoing the Court's substantive due process jurisprudence.

The history of substantive due process development is made up of many decisions concerning economic liberties, as the Court has analyzed 14th Amendment substantive rights under the Due Process Clause "for many decades," so concrete interests like property and contract rights would be upset if substantive due process were disturbed.[167] Further, proponents of overturning *Slaughter-House* often argue to do as much with that express purpose. For example, in *Saenz v. Roe*, Justice Thomas suggests that the Court "should . . . consider whether the [Privileges or Immunities] Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence."[168] To overturn *Slaughter-House* without disturbing substantive due process would thwart its desired effect of remedying the grievous damage done to the rest of 14th Amendment jurisprudence. Thus, the reliance interest factor is unlikely to support overturning *Slaughter-House*.

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[164] *Id.*

[165] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018); *Ramos*, 140 S. Ct. at 1414–15 (Kavanaugh, J., concurring); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022).

[166] *Dobbs*, 597 U.S. at 288 (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

[167] *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 758 (2010).

[168] Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., concurring).

F. *Consistency and Age.*

Though the aforementioned factors capture those most recently applied by the Supreme Court in *Dobbs v. Jackson Women's Health Org.*, the Court has at times reviewed other factors when assessing stare decisis, such as consistency with other related decisions and the age of the precedent.[169]

Here, the Court's decision in the *Slaughter-House Cases* took place only a few years after the ratification of the 14th Amendment and has remained the Court's undisturbed interpretation of the Privileges or Immunities Clause for over 150 years. As such, these factors counsel against overturning *Slaughter-House*.

G. *Subsequent Developments*.

A final factor reviewed by the Supreme Court in assessing stare decisis considers subsequent factual and legal developments.[170] One such development that would support overturning *Slaughter-House* is the change in relationship between the federal government and the states following the Court's 1873 decision. The *Slaughter-House* majority feared "radically chang[ing] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," which influenced its decision to narrowly read the Privileges or Immunities Clause.[171] However, unbeknownst to the *Slaughter-House* majority, the states would soon be restricted by federally prescribed substantive rights through the Reconstruction Amendments and the selective incorporation to follow. As a result, the concerns that gripped the *Slaughter-House* majority would likely fail to bear the same weight on the Court's decision if the Privileges or Immunities Clause were reinterpreted today.

V. CONCLUSION

The Supreme Court's holding in the *Slaughter-House Cases* has been the Pandora's box for 14th Amendment jurisprudence since its decision in 1873. By holding that the Privileges or Immunities Clause protects only a small subset of rights "which own their existence to the federal government,

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[169] *Janus*, 138 S. Ct. at 2478–79; *Ramos*, 140 S. Ct. at 1414–15 (Kavanaugh, J., concurring).
[170] *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring).
[171] Slaughter-House Cases, 83 U.S. 36, 78 (1872).

its national character, its Constitution, or its laws," the Court emptied the clause of its substantive power.[172] In an effort to compensate for this loss, the Supreme Court then turned to the Due Process Clause as the source of foundational rights in its substantive due process jurisprudence. However, this atextual alternative has only produced a system of untethered decision-making.

To undo the damage caused by *Slaughter-House*, the Court must consider whether its long-established precedent should now be overturned through an application of its expressed stare decisis factors. In the past, the Court has declined to do so, often dismissing the argument to overturn *Slaughter-House* without serious consideration.[173] However, when applying the Supreme Court's expressed stare decisis factors, a number of these can be read as supporting the overhaul of *Slaughter-House*. While the workability, reliance interests, consistency with related decisions, and age of the precedent undergird the status quo, the nature of the error, quality of reasoning, disruptive effect, and subsequent developments all favor overturning the precedent. Thus, if the Supreme Court is to have any hope of solving the problem of substantive due process, it must start by taking the critical first step of slaughtering *Slaughter-House*.

[172] *Id.* at 79.

[173] *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 758 (2010).