No. 17-1091

In The

Supreme Court of the United States

Tyson Timbs and a Land Rover LR2,

Petitioners,

V.

State of Indiana,

Respondent.

On Writ of Certiorari to

The Indiana Supreme Court

Brief for Petitioner

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CONSTITUTION

U.S. Const, Amend. VIII, §1, Cl. 2.

U.S. Const. Amend. XIV, §1, Cl. 2.

U.S. Const, Art IV, §2.

U.S. Const. Art. I, §8, cl. 4.

U.S. Const. Art I, § 8, cl. 3.

Question Presented:

Whether the Eighth Amendment's Excessive Fines Clause should be incorporated through the Due Process Clause of the Fourteenth Amendment or the Privileges or Immunities Clause of the 14th Amendment?

Introduction

In 2013, Indiana resident Tyson Timbs purchased a new Land Rover LR2 for 42,000 dollars.[1] He then used the vehicle to transport heroin for several months. Eventually, the police set up a series of "controlled purchases,"[2] in which an undercover agent bought varying amounts of heroin from Timbs. Following the controlled purchases, Timbs was driving his vehicle when the police stopped and subsequently arrested him. He pleaded down to one count of selling illegal substances, and one count of conspiracy to commit theft.[3] These crimes have a maximum fine of 10,000 dollars associated with them. Following the plea deal, Timbs paid 1,200 dollars in various fees associated with the proceedings. On top of these fees, the state wanted to seize the Land Rover, which Timbs contended violated the Excessive Fines Clause of the Eighth Amendment.

The first court ruled for Timbs, holding that the forfeiture of Timbs' vehicle would be an excessive fine. The Supreme Court of Indiana later reversed, holding that although the state's inevitable action indeed violated the Excessive Fines Clause, the clause had not yet been incorporated. Because only the Supreme Court has the authority to incorporate provisions of the Constitution, the court ruled for Indiana.[4] The Supreme Court of the United States granted certiorari to address the

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[1] *Timbs v. Indiana*, Oyez, https://www.oyez.org/cases/2018/17-1091#! (last visited Feb 16, 2019).
[2] *Id.*
[3] *Id.*
[4] *State v. Timbs,* No. 27S04-1702-MI-70, __ N.E.3d __ (Ind., Nov. 2, 2017).

question of whether or not the Excessive Fines Clause is incorporated against the states.

When it was ratified, the 14th amendment effectively delineated federally guaranteed rights of citizens amidst a turbulent reconstruction era. Aimed at protecting the rights of freedmen, the amendment entailed amongst other things a Privileges or Immunities Clause, which states that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States."[5] In 1868, the state of Indiana ordered the closure of all private slaughterhouses and required that citizens use one public slaughterhouse, an action which was challenged by butchers as a violation of the Privileges or Immunities Clause. The resulting legal controversy ended in the *Slaughterhouse Cases*,[6] which effectively nullified the Privileges or Immunities clause in a 5-4 ruling. The destruction of Privileges or Immunities was completed by other cases such as that of *Bradwell v. Illinois*,[7] which ruled that the Constitution did not protect Myra Bradwell when she sought to become a lawyer, and *United States v. Cruikshank*,[8] which ruled that the First and Second amendment were not applicable against the states. These constituted landmark decisions in the effective status of state power. The Second clause of the 14th amendment, the Due Process Clause, became the primary method of incorporation and application against the states to secure rights. Meanwhile, the Privileges or Immunities Clause remained dormant until the 1999

[5] U.S. Const. Amend. XIV, §1, Cl. 2.
[6] 83 U.S. 36 (1872)
[7] 83 U.S. 130 (1872)
[8] 92 U.S. 542 (1876)

case of *Saenz v. Roe*,[9] where the court recognized a right to travel. Justice Thomas dissented, reprimanding the Court for cleaving to the incorrect Slaughterhouse. Eventually, the Privileges or Immunities Clause was revisited during the 2010 case of *McDonald vs City of Chicago*.[10] Justice Thomas concurred, aiming to restore the original meaning and purpose of the Privileges or Immunities by recognizing a right to keep and bear arms for self-defense as a Privilege or Immunity of citizenship.

Summary of Argument

The Supreme Court should not incorporate the Excessive Fines Clause under the Due Process Clause, because Due Process incorporation is inconsistent with the original meaning of the Fourteenth Amendment. The proper avenue for protecting rights against state infringement is instead the Privileges or Immunities Clause, which prevents the states from imposing excessive fines. The securing of fundamental rights can not be achieved merely through Due Process, a clause that is in essence aimed at guaranteeing just and fair laws. Privileges or Immunities, in contrast, expands the range of protected substantive rights. The Supreme Court should overrule the erroneous *Slaughter-House* decision, and restore the Privileges or Immunities Clause to its proper place in our Constitution by implementing the test from *Washington v. Glucksberg*[11] to determine what rights are protected.

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[9] 526 U.S. 489 (1999)
[10] *McDonald v. City of Chicago,* 561 U.S. 742 (2010), (Thomas, J. Concurring).
[11] *Washington v. Glucksberg,* 521 U.S. 702, (1997)

The Framing and Purpose of the Fourteenth Amendment

We begin, as all constitutional scholars should, with the historical context and drafting of the Fourteenth Amendment. Following the Civil War, the Southern States were ignoring and infringing upon the basic liberties of freed slaves. So-called 'Black Codes' imposed nefarious restrictions on the everyday life of freed slaves.[12] They were not allowed to partake in the same civil liberties as the rest of the population, and the federal government could do nothing to stop the Southern states. The expansive reading of the Commerce and Necessary and Proper clauses that we now have did not yet exist, and because of *Barron v. Baltimore*¸ the Bill of Rights did not apply to the states. As part of the solution, the framers of the Fourteenth amendment adopted the Privileges or Immunities Clause.

The term 'Privileges or Immunities,' while today archaic, was used much more readily in the 19th century, as a stand in for the term 'rights.' The 1828 edition of Webster's Dictionary defines 'right' as "Just claim; immunity, privilege."[13] As Justice Thomas notes in his *McDonald v. City of Chicago* concurrence, the 1865 edition adopts an almost identical definition.[14]

The legislative history of the clause is very conclusive. Floor statements from Representative John Bingham of Ohio, among others, tell us exactly what the framers understood the clause to mean. The framers intended and understood the

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[12] Brief for Pet'r at 28, *Timbs v. Indiana,* 586 U.S. __ (2018) (No. 17-1091).
[13] Webster, Noah, *American Dictionary of the English Language,* (1828) Available at http://webstersdictionary1828.com/Dictionary/right
[14] *McDonald v. City of Chicago,* 561 U.S. 742 (2010), (Thomas, J. Concurring).

Fourteenth Amendment to radically alter the relationship between states and the federal government. The Fourteenth Amendment's Clause tracks the language of Article IV Section II of the constitution's "Privileges and Immunities" clause.[15] Ultimately, the Privileges or Immunities clause draws significant elements from the Privileges and Immunities clause. Privileges and Immunities, as defined by Justice Washington during the Corfield v. Coryell case, "are, in their nature, fundamental, which belong, of right, to citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union." [16] These defining characteristics were explicitly referenced and invoked by Senator Jacob Howard in speeches during the passage of the 14th amendment. Eventually, the Joint Committee voted in favor of the second draft proposed by Bingham after he asserted that it secured existing rights. (Presumably, these preexisting rights included a sizeable portion of the Bill of Rights.) Thus, the original framing of the Fourteenth Amendment encompasses protection for, amongst many things, certain historically recognized rights.

However, the differing context behind its eventual passage inherently changes the dynamic and extent of the fundamental rights it was meant to protect and apply against the states. With the *Barron v. Baltimore*[17] decision, citizens were not protected from state actions that violated the Bill of Rights. If the framers had wished to simply enact an amendment that overruled *Barron v. Baltimore*, they

[15] U.S. Const, Art IV, §2.
[16] 6 Fed. Case 546, 551 (Fed. 1823)
[17] 32 U.S. 243 (1833)

could have done so easily. Instead, they chose the Privileges or Immunities Clause, which cannot be understood as either a restatement of Article IV section II, or as an entirely different clause. However, rather then its scope being more narrow then previous clauses, in the words of professor Akhil Amar, it adds "several improvements to the old."[18] Implying a focus "solely on civil rights,"[19] the clause modifies previous provisions by eliminating confusing references and exceptions, and is tailored to protect the rights of freedmen in a post-civil war era. It is important to understand this context and observe that the clause was framed to protect citizens from abusive state power. The effects of the clause, therefore, must be understood as being responsive to the contemporaneous political climate.

Implementing a Framework to determine what rights are protected

Now that we have determined that the Privileges or Immunities Clause protects certain fundamental rights from state infringement, the next step is to set forth a framework for determining which rights are protected. We propose that the Court utilize the *Glucksberg* test to decide what constitutes a Privilege or Immunity of citizens of the United States.[20] The *Glucksberg* test provides that a right is

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[18] Amar, Akhil Reed, *The Bill of Rights: Creation and Reconstruction*, 178. Yale University Press (2000).
[19] *Id.*
[20] This is not an original argument. For the original exposition of this argument, see Blackman, Josh and Shapiro, Ilya, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States* (November 10, 2009). Georgetown Journal of Law & Public Policy, Vol. 8, 2010. Available at SSRN: https://ssrn.com/abstract=1503583

protected when it is clearly defined, and deeply rooted in history and tradition. This has three distinct benefits: firstly, it is faithful to the text. Secondly, it cabins the recognition of new rights and prevents the judiciary from imposing their personal preferences on a hapless Privileges or Immunities Clause. Thirdly, it is clear and defined. Using *Glucksberg* does not require the Court to devise a new test, and it brings with it a clear and well-established body of law, with plenty of guidance for the Courts.

Glucksberg, unlike many other substantive Due Process tests, looks explicitly toward history. It does not ask whether a right is implied by the general aura of the Constitution,[21] or whether the denial of a right would violate a nebulous concept such as liberty. Instead, it requires a thorough historical analysis to determine whether or not a particular right is protected by the text of the Fourteenth Amendment. This careful historical analysis, reliant on history, is exactly what is required to ascertain the meaning of a Clause such as Privileges or Immunities. This historical approach is in stark contrast with the less defined and less historical tests such as the ones the Court uses to determine a dignity interest. As is evident, those tests are far more subjective than the historically grounded Glucksberg. Perhaps the most compelling argument for adopting *Glucksberg* is that it is the best way we have of determining what rights are constitutionally protected Privileges or Immunities.

[21] *Griswold v. Connecticut,* 381 U.S. 79, (1965)

At the most basic level, this test, if adhered to, prevents the judiciary from inventing new rights that the Constitution does not protect, in stark contrast to some of the more open-ended tests the Court has used. Privacy and Dignity jurisprudence, for example, lack the sort of historical grounding many hope for. Under those tests, a right to free healthcare or affordable housing might be essential to securing human dignity, and thus might be protected by the supposedly intertwined Equal Protection and Due Process Clauses Justice Kennedy invokes in Obergefell.[22] No such rights would be conceivable under *Glucksberg*. This serves as a quite convincing response to those who suggest that resuscitating Privileges or Immunities would lead to a landslide of new rights with no connection to the Constitution at all.

The third major benefit to protecting substantive rights through *Glucksberg* is that it comes with an already established body of law.[23] The Court is not required, nor is it invited, to devise a new test, which might be vulnerable to exploitation.[24] It

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[22] Someone with a less rosy outlook on the state of the modern judiciary might contend that, should Democratic appointees control the Supreme Court, it is likely they would enshrine such rights regardless of whether or not the Privileges or Immunities Clause is brought back to life. After all, such a dour observer might opine, a lack of textual support has not seemed to stop the Court in the past. To reply to that skeptic, however: if the judiciary has been reduced to a partisan institution, there is no point in making legal arguments in the first place.

[23] Implement one textually accurate test, receive one already established precedent free!

[24] Even the best tests and principles can be hijacked. Take, for example, Footnote 4. As originally construed, the footnote granted significant power to the legislature when it infringed on unenumerated rights. However, the Court soon altered the test, with principles such as 'fundamental rights,' and more recently the concept of equal dignity. (See *Obergefell v. Hodges*, 576 US __ 2015). Another example of a test gone awry is rational basis review, which was originally much closer to the 'rational basis plus' test the Court used in *Cleburne v. Cleburne Living Center*. (473 U.S. 432, (1985). However, once *Williamson v. Lee Optical* (348 U.S. 483, 1955) was decided, rational basis became something else entirely, allowing the legislature to restrict liberty so long as it had *any* reason that *any* 'reasonable' person could conceivably believe. Even if the government's rationale was no more than a cover for some illegitimate interest, the Court would accept it. This adoption of Justice Holmes' dissenting opinion in *Lochner v. New York* (198 U.S. 45, 1905) left the test mangled beyond recognition.

can instead draw on an already existing line of jurisprudence. Not only is this jurisprudence well established, it points to the original meaning of the Fourteenth Amendment.

Application of this framework to the Excessive Fines Clause

Using the Glucksberg framework in which clearly defined constitutional protections that are deeply rooted in history are encompassed by Privileges or Immunities, the Excessive Fines Clause becomes inherently applicable. Stated originally in the 8th amendment as "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[25] the language itself had been traced by William Blackstone to various historical traditions, including the Virginia Declaration of Rights, which borrowed from the 1689 English Bill of Rights. Additionally, throughout the establishment of various colonies including Pennsylvania, provisions that sought to eliminate Excessive Fines have been included in various governing documents. One example of this enumeration is the Northwest Ordinances, which specifically prohibits excessive fines.[26] When it was ratified, this doctrine that was so ever present in our nation's history became widely considered to be fundamental by even those who opposed the bill of rights, such as Edmund Randolph, who thought of the right as so

[25] U.S. Const, Amend. VIII, §1, Cl. 2.
[26] David Lieber, Eighth Amendment--The Excessive Fines Clause, 84 J. Crim. L. & Criminology 805, 31 (Winter 1994)

fundamental that it was "foolish to enumerate it." The extent to which the concept of protection against excessive fines can be traced in our nation's history shows that it is deeply rooted in our traditions and must therefore qualify as a Privilege or Immunity.[27]

Why Privileges or Immunities? The practical case for rejecting modern Due Process incorporation

But what reasons, beyond the purely theoretical, counsel a shift to Privileges or Immunities? There are several serious issues with the Due Process Clause model, and several distinct benefits to Privileges or Immunities Clause model of protecting rights against the states. The primary pitfall of the Due Process model is that it, Laurence Tribe argues, forces the court into expanding the Due Process Clause beyond its original meaning,[28] and creates a public image problem for the Court. This is not an issue that would remain if the Court were to use the proper method of protecting rights, the Privileges or Immunities Clause.

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[27] Brief for Pet'r, *supra* note 7, at 24-32

[28] Tribe (quite charitably) describes the current application of the Due Process Clause as being afflicted with "semantic difficulties." Tribe, Laurence: *American Constitutional Law*, 1316. 3 Ed. Vol. I, Foundation Press, 2000.

The great practical issue with Due Process clause incorporation is that it stretches the Clause too far, leading to negative consequences beyond the obvious. Judges, Tribe says, are naturally suspect of any interpretive theory that places immense power in their hands, is subject to few limiting principles, and is historically and textually indefensible to boot. This wariness, Tribe warns, presents "the danger that the potential disillusionment . . . will lead judges to abdicate their role as guarantors of individual rights."[29] The concern is that an ambiguous and unrestrained vision of the Due Process Clause will lead judges to overcorrect and stop protecting rights altogether. A prime example of this danger would be Justice Thomas' dissenting opinion in *Sessions v. Dimaya.*[30] Justice Thomas is rightly skeptical of much of modern substantive Due Process doctrine. However, this skepticism leads him to question Justice Gorsuch's exposition of Fair Notice as a fundamental guarantee of the Fifth Amendment's Due Process Clause.[31] The end

[29] Tribe, *Supra* note 28, at 1318
[30] 584 U.S. __ (2018) (Thomas, J. dissenting).
[31] *Id.* Justice Thomas remarks that

> "Tellingly, the modern vagueness doctrine emerged at a time when this Court was actively interpreting the Due Process Clause to strike down democratically enacted laws . . . [which] does not seem like a coincidence. Like substantive due process, the vagueness doctrine provides courts with open-ended authority to oversee legislative choice . . . This Court also has a bad habit of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process. *If vagueness is another example of this practice, then that is all the more reason to doubt its legitimacy.*" (Internal quotation marks and citations omitted, and emphasis added.)

Thomas connects what he sees as judicial overreach in the area of Fourteenth Amendment Due Process to the Fifth Amendment's Due Process Clause. His belief that the prior clause does not protect the substantive rights the Court has purported it to cover leads him to oppose the application of a much more historically grounded doctrine, namely fair notice. His actions are presumably what Tribe was concerned about.

result, should Justice Thomas' position have prevailed, would have been a reduction in protected personal liberty, which is surely undesirable.

Unlike the superfluity in incorporating the Due Process Clause, Privileges or Immunities outlines the set of unenumerated rights that would otherwise be implicitly brought forth under Due Process incorporation. Under substantive Due Process incorporation, courts would inevitably come to question the standards that guide their analysis, whereas Privileges or Immunities becomes a more effective basis of analysis and enforcement of protections. It acts as an affirmation of the rights of citizens against action of the state itself, and while not without its intricacies and difficulties of implementation, it is an easier method of incorporation than the "linguistic incoherence and clearly inauspicious pedigree"[32] of Due Process.

Rebuttal of Objections

Privileges or Immunities and non-citizens

The last time Privileges or Immunities was mentioned at the Supreme Court, it elicited a somewhat unusual reaction. Immediately, Justice Ginsburg asked the oral advocate "That would leave out non-citizens?"[33] This question is not new.[34] The response that Wesley Hottot, Laurence Tribe, and we give is the same: a frank

[32] Tribe, *supra* note 28, at 1331
[33] Transcript of Oral Argument at 6, Timbs v. Indiana, 528
[34] *See* Tribe, *supra* note 28, at 1324.

reading of the Clause does not yield any other result. However, concern for non-citizens is not a good reason to continue Due Process incorporation. This is because, as Laurence Tribe notes, the Court can still protect the rights of non-citizens through the Equal Protection Clause, which assuredly prohibits adverse government action on account of citizenship. If the Court is still unconvinced, it can opt to use the Due Process Clause, which protects *persons,* not *citizens*. Not only is dissatisfaction and concern over the results not a legal argument, it is entirely unwarranted.

Not only are there other avenues for the Court to protect non-citizens, but there is almost certainly congressional power available to protect non-citizens. After a broad construction of the Necessary and Proper Clause in cases such as *Jones-Laughlin Steel*[35] and *Wickard v. Filburn*,[36] congressional power to protect non-citizens under the Necessary and Proper Clause (attaching to the Commerce Clause) certainly seems plausible. Congress's enumerated power to "establish a uniform rule of naturalization"[37] would also seem to be a likely source of power to protect non-citizens. Another likely culprit would be the enumerated power to regulate commerce "with foreign nations."[38] Ensuring that immigrants from other countries are treated fairly could feasibly have a substantial impact on trade with foreign nations, at least in aggregate.

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[35] 301 U.S. 1 (1937)
[36] 317 U.S. 111, (1942)
[37] U.S. Const. Art. I, §8, cl. 4.
[38] U.S. Const. Art I, § 8, cl. 3.

Existing Due Process jurisprudence, when coupled with the Equal Protection Clause, makes it overwhelmingly likely that the rights of non-citizens are protected in some way. Even if they are not, they could be protected on a national level by Congress. Completely aside from the fact that concern for the rights of non-citizens represents a form of results-oriented thinking, there are other avenues for protecting the rights of non-citizens. These avenues ultimately make the arguments against Privileges or Immunities we have discussed infeasible.

Stare Decisis

While the legal merits of *stare decisis* are many and varied,[39] they are not, as the Supreme Court has itself noted, "an inexorable command."[40] And although the rule of law and consistency are values that are central to our judiciary, blind fealty to precedent is surely incorrect. Lady Justice may indeed be blind, but the judiciary cannot afford to be. The Court has many times reexamined prior decisions, most notably in cases such as *Lawrence v. Texas,*[41] *Brown v. Board of Education,*[42] *West*

[39] The benefits of *proper stare decisis* analysis are too long to be listed here. However, for a more complete discussion of the merits and downfalls of *stare decisis*, see Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 Chi.-Kent L. Rev. 93 (1989).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol65/iss1/6
[40] *Lawrence v. Texas,* 539 U.S. 558, 560 (2003).
[41] *Id.*
[42] *Brown v. Board of Education of Topeka, Kansas,* 347 U.S. 483 (1954).

Coast Hotel v. Parrish,[43] and most recently *Janus v. AFSCME.*[44] It is set to review the decisions of *Auer*[45] and *Seminole Rock.*[46]

Stare decisis is simply unable to sustain *Slaughter-House.* Even the most exhaustive *stare decisis* test to date, the test used in *Planned Parenthood v. Casey,*[47] does not come close to vindicating *Slaughter-House*. In *Casey,* the Court used a complex test. This test asks whether (1) the case law has become unworkable, (2) if there are significant reliance interests at play, (3) whether the progression of legal theory and Supreme Court case law have undermined the case, and (4) if the understanding of facts has changed, or new facts have been uncovered that cast doubt on the decision.[48] While admittedly not all of the factors point decisively to an overruling, the test, when applied in full, leads to a clear conclusion: *stare decisis* concerns cannot save *Slaughter-House.*

Admittedly, the Due Process incorporation line of cases may not be "unworkable." However, it is certainly not without its flaws. As Randy Barnett noted, because the Privileges or Immunities Clause has been excised from the Constitution, the Court has expanded the Equal Protection and Due Process Clauses to fill the void. To Tribe, this is not an adequate solution because it places the Court in the unenviable position of incorporating based on a misreading of the Constitution. Due Process, whether or not it has substantive aspects, has nothing to

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[43] *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937).
[44] *Janus v. AFSCME,* 585 U.S. __ (2018)
[45] *Auer v. Robbins,* 519 U.S. 452 (1997).
[46] *Bowles v. Seminole Rock and Sand Co.,* 325 U.S. 410 (1945).
[47] 505 U.S. 833 (1992)
[48] *Id.* at 844-855

do with incorporation. Furthermore, as we discuss in Part III, misreading the Due Process Clause causes some members of the Court to adjust too far in the other direction. But while the issues with Due Process Clause incorporation are important, they should not distract from the most important *stare decisis* factor: reliance interests.

The most salient features of any potent *stare decisis* argument are the reliance interests. In this case, however, they are conspicuously absent. Tribe remarks that "It cannot be said that the Slaughter-House cases have resulted in any reliance interests such that overturning it would result in hardship or inequity."[49] This becomes blatantly obvious when the case is compared with similar cases or legal questions which also involve *stare decisis* analysis. Unlike *Planned Parenthood v. Casey, Slaughter-House* is not deeply ingrained in our culture; serious uproar would not be caused if it were overturned. Unlike *Wickard v. Filburn*[50] or *Humphrey's Executor,*[51] it does not act as the basis for congressional action or government policy-making. Those are the sorts of reliance interests that the Court accepts. *Slaughter-House* simply cannot compare to them. To put Slaughter-House in the same category as abortion cases, civil rights cases, and landmark cases concerning the most fundamental structural provisions of the constitution is not only incorrect, but devalues the important legal principle of *stare decisis*.

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[49] Tribe, *supra* note 28, at 1323

[50] 317 U.S. 111, (1942). (Holding that congressional regulation of wholly intrastate non-commercial activity was authorized under the Necessary and Proper Clause.)

[51] 295 U.S. 602 (1935). (Holding that for-cause removal restrictions on officials who exercise quasi-legislative authority do not impinge on the President's obligation to take care that laws be faithfully executed.)

Although recent Supreme Court case law has been somewhat ambivalent regarding the Slaughter House cases, the progression of legal theory has provided a mountain of bipartisan scholarly evidence that reveals the errant nature of the decision. Scholars from the left, right, and center have universally renounced the decision as disastrous and poorly reasoned. Laurence Tribe is adamantly opposed to *Slaughter-House*. Akhil Amar has opined that "Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the Amendment"[52] Randy Barnett is also in favor of overruling *Slaughter-House*. The case against *Slaughter-House* and Due Process and for Privileges or Immunities has made great strides and garnered support from every side of the legal spectrum. It is, in fact, a mainstream legal opinion that the Court has completely ignored. Simply because the Court has ignored it does not mean that the progression of legal theory has not cast serious doubt on the decision, doubt that warrants the case's reconsideration.

The final factor, which asks whether or not new facts have been uncovered, is admittedly unfriendly to our challenge. This is not to say, however, that the reading of Privileges or Immunities Justice Miller adopts is remotely correct.[53] His reading of the facts at hand is simply inconsistent with the vast majority of the evidence. If

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[52] Amar, Akhil Reed, *The Supreme Court, 1999 Term–Foreword: The Document and the Doctrine* Faculty Scholarship Series, paper 851, at 106. (2000) http://digitalcommons.law.yale.edu/fss_papers/851

[53] Justice Miller even misquotes the Constitution, in a way that is disturbingly helpful to his assertion that the 14th Amendment protects only a narrow set of 'national' rights. (Tribe, *supra* note 28, at 1324.)

new facts have not been uncovered, than at the very least the *understanding* of those facts has changed dramatically since a narrow 5-4 decision 150 years ago.

While we admit that the entirety of the test does not point conclusively towards our position, the test is clear when it is looked at in its entirety. The part of the test that is most heavily weighted, the section which examines reliance interests, unambiguously supports our position. Legal scholarship regarding Privileges or Immunities has marched unstoppably towards the conclusion that *Slaughter-House* should be overturned. *Slaughter-House* was wrong the day it was decided, and is just as wrong today. The fact that it is longstanding does not magically imbue it with reliance interests, or somehow enable it to be upheld on *stare decisis* grounds. You need not rely on our word alone. Instead, look to the deluge of bipartisan scholarly reports, symposiums, papers, and law review articles supporting our position.[54] They demonstrate in far more detail the positions we have discussed here. Fidelity to principles of *stare decisis* and the plain text of the Fourteenth Amendment demand that *Slaughter-House* be cast aside. The Court should not delay.

Conclusion:

Because of the extremely errant nature of the decision, and lack of *stare decisis* concerns, the Court should overrule *Slaughter-House*. It should shun the

[54] *See generally*: Tribe, *supra* note 28, Blackman and Shapiro, *supra* note 20, Amar, *supra* note 52, Willet*, et. al., Institute for Justice, Perspectives on "Privileges or Immunities,"* Accessible at https://www.youtube.com/watch?v=bQuc2H9Sfo0

incorrect and historically deficient Due Process incorporation model, and restore the Privileges or Immunities Clause to its proper place by using the *Glucksberg* test to determine what constitutes a Privilege or Immunity of citizens of the United States. Under this test, the Court should hold that because the right against excessive fines is deeply rooted in history, it is a constitutionally protected Privilege or Immunity. Pursuant to that holding, it should reverse and remand for further proceedings.

Respectfully Submitted,

Curtis Herbert, Sana Wazwaz