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A Distinction with a Difference: Rights, Privileges, and the Fourteenth Amendment

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Abstract

In Timbs v. Indiana*, the Supreme Court held the Eighth Amendment's prohibition on excessive fines was incorporated and applied to states through the Due Process Clause of the Fourteenth Amendment. While the decision was unanimous, the concurring opinions offered a revealing reflection of past constitutional battles and an intriguing vision of future conflicts. Both Justices Gorsuch and Thomas suggested resurrecting the Privileges or Immunities Clause as a more appropriate vehicle than the Due Process Clause for applying the prohibition on excessive fines to states.*

Justice Thomas took this proposal one step further. He suggested the Privileges or Immunities Clause should be used instead of the Due Process Clause to address all fundamental rights. This would not be a simple exchange of constitutional sources to guide incorporation; the actual scope of fundamental rights would also be affected. Unlike the Due Process Clause, Justice Thomas found the Privileges or Immunities Clause to be more grounded in history and tradition, thereby offering the Court a guiding principle for distinguishing "fundamental rights that warrant protection from nonfundamental rights that do not." The Privileges or Immunities Clause would allow for the application of the Eighth Amendment's prohibition on excessive fines to states. But under this

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approach, other rights, such as abortion or same-sex marriage, would not be considered privileges of "American citizenship" entitled to constitutional protection.

The consequences of resurrecting the Privileges or Immunities Clause at the expense of the Due Process Clause are troubling and far-reaching. Renouncing over a century of precedent would result in the radical transformation of constitutional law and the weakening of fundamental rights. In the realm of the Fourteenth Amendment, rights and privileges are a distinction with a difference.

I. Introduction

In *Timbs v. Indiana*,[1] the U.S. Supreme Court held the Eighth Amendment's prohibition on excessive fines was incorporated and applied to states through the Due Process Clause of the Fourteenth Amendment.[2] According to a unanimous Court, this safeguard is "'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.'"[3] *Timbs* is historically significant because the Court addressed one of the last remaining provisions of the Bill of Rights to be incorporated and applied to state and local governments. Until this decision, four provisions in the Bill of Rights had not yet been incorporated through the Due Process Clause and, therefore, were not conclusively applicable to states: (1) the Third Amendment's prohibition on quartering of troops in homes; (2) the Fifth Amendment's right to a grand jury indictment in criminal cases; (3) the Seventh Amendment's right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines.[4] To most scholars and jurists, this represented a constitutional anomaly. As Justice Gorsuch wryly noted during oral argument in *Timbs*, "And here we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really?"[5]

While the Court's decision was unanimous, the concurring opinions offered a revealing reflection of past constitutional battles and an intriguing vision of future conflicts. Both Justices Gorsuch and Thomas suggested resurrecting the Privileges or Immunities Clause of the Fourteenth Amendment as a more appropriate vehicle than the Due Process Clause for applying the prohibition on excessive fines to states.[6]

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1. 139 S. Ct. 682 (2019).

2. *Id.* at 687.

3. *Id.* at 686–87 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

4. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 565 (5th ed. 2017).

5. Transcript of Oral Argument at 32, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) [hereinafter *Timbs* Transcript]. Justice Kavanaugh offered a similar perspective during oral argument, asking whether it is "just too late in the day to argue that any of the Bill of Rights is not incorporated?" *Id.* at 33.

6. *Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring); *id.* (Thomas, J., concurring in judgment). While the Privileges or Immunities Clause is rarely considered by the Supreme Court, it has still received significant scholarly attention. *See, e.g.*, KURT T. LASH, THE FOURTEENTH AMENDMENT

Justice Thomas took this proposal one step further.[7] He suggested the Privileges or Immunities Clause should be used instead of the Due Process Clause to address the existence of fundamental rights.[8] This would not be a simple exchange of constitutional sources to guide incorporation; the actual scope of fundamental rights would also be affected. Unlike the Due Process Clause, Justice Thomas found the Privileges or Immunities Clause to be more grounded in history and tradition, thereby offering the Court a guiding principle for distinguishing "'fundamental' rights that warrant protection from nonfundamental rights that do not."[9] The Privileges or Immunities Clause would, therefore, allow for the application of the Eighth Amendment's prohibition on excessive fines to states. But under this approach, other rights, such as abortion or same-sex marriage, would not be considered privileges of "American citizenship" entitled to constitutional protection.

This Article examines the Court's decision in *Timbs* and its broader implications for the protection of fundamental rights. While *Timbs* involves incorporation of the Bill of Rights and the prohibition on excessive fines, the case also highlights the ongoing debate regarding substantive due process, fundamental rights, and even reproductive autonomy. Part II of this Article reviews the Court's unanimous opinion in *Timbs*, and Part III examines the concurring opinions and their call for resurrecting the Privileges or Immunities Clause. Part IV then assesses the implications of this call and the shortcomings of this approach. The consequences of resurrecting the Privileges or Immunities Clause at the expense of the Due Process Clause are both troubling and far-reaching. Renouncing over a century of precedent would result in the radical transformation of constitutional law and the weakening of fundamental rights. And, it would represent the effective death of *stare decisis* as a guiding principle for the Court.

AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295 (2009); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334 (2005); J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 43 (1989). To be clear, the Privileges or Immunities Clause is distinct from the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution, which prohibits states from discriminating against non-state citizens. *Compare* U.S. CONST. amend. XIV, § 1, *with* U.S. CONST. art. IV, § 2.

7. During the 2018–2019 term, Justice Thomas increased his criticism of well-established precedent. *See, e.g.*, Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along.*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/04/us/politics/clarence-thomas-supreme-court-precedent.html [https://perma.cc/X2RA-7W5Q].

8. *Timbs*, 139 S. Ct. at 691 (Thomas, J., concurring in judgment). Throughout his tenure on the Court, Justice Thomas has expressed growing interest in the Privileges or Immunities Clause. *See* McDonald v. City of Chicago, 561 U.S. 742, 805 (2010) (Thomas, J., concurring in part and concurring in judgment); Saenz v. Roe, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting).

9. *Timbs*, 139 S. Ct. at 692 (quoting *McDonald*, 561 U.S. at 811 (Thomas, J., concurring in part and concurring in judgment)).

II. *Timbs v. Indiana* and the Due Process Clause

Civil forfeiture has long been a controversial issue in the United States.[10] Under civil forfeiture laws, government actors can seize a person's property that has allegedly been used in the commission of a crime. Such seizure can occur without even proving the person was guilty of the underlying crime. While civil forfeiture laws vary by state, many jurisdictions only require probable cause to seize assets they believe were used as part of criminal activity.[11] If successful, government actors can then keep the property, whether it is real estate, cash, guns, or cars. Because of its financial benefits, state and local governments have been aggressive in their civil forfeiture practices. It has become a multimillion-dollar industry.[12]

In May 2013, Tyson Timbs was arrested by Indiana state police and charged with dealing in a controlled substance and conspiracy to commit theft.[13] He subsequently pled guilty and was sentenced to one year of home detention and five years of probation.[14] As part of his sentence, he was assessed $1,203 in court-related fees and costs.[15] While his criminal case was pending, state officials instituted civil forfeiture proceedings seeking title to Timbs's 2009 Land Rover SUV, which he had been driving when he was arrested.[16] According to the civil complaint, the vehicle had been used to facilitate the violation of a criminal statute and was subject to seizure under Indiana law.[17]

After conducting an evidentiary hearing, the trial court denied the state's request.[18] It noted the Land Rover was worth more than four times the maximum $10,000 monetary fine that could be assessed against Timbs for his drug conviction.[19] Accordingly, the vehicle's forfeiture would have been grossly disproportionate to the gravity of Timbs's offense and, therefore, unconstitutional under the Eighth Amendment's Excessive Fines Clause.[20] The Indiana Court of Appeals affirmed the trial court's decision.[21] While it acknowledged the U.S. Supreme Court had yet to apply the Excessive Fines

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10. *See generally* STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES (2d ed. 2013).

11. *Id.* § 3-3, at 104–05.

12. *See generally* DICK M. CARPENTER II, ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (2d ed. 2015); Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387 (2018).

13. State v. Timbs, 62 N.E.3d 472, 474 (Ind. Ct. App. 2016).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* Indiana law sets the maximum possible fine for felony violations at $10,000. IND. CODE § 35-50-2-4 to -7 (2019).

20. *Timbs*, 62 N.E.3d at 477.

21. *Id.*

Clause to states, it concluded that the Clause did, in fact, apply.[22] The Indiana Supreme Court granted review and reversed.[23] Citing principles of federalism and the lack of controlling U.S. Supreme Court guidance, it held the Excessive Fines Clause constrains only federal action and is inapplicable to state action.[24]

Arguing that the Eighth Amendment's prohibition on excessive fines applied to states, Timbs petitioned the U.S. Supreme Court for review.[25] Timbs focused his argument on the applicability of the Due Process Clause as the proper mechanism for incorporating the Eighth Amendment. Timbs added a second argument—that the Excessive Fines Clause also applied to states through the Privileges or Immunities Clause of the Fourteenth Amendment.[26] The State of Indiana rejected both arguments and urged the Court to not consider whether incorporation should occur through the Privileges or Immunities Clause.[27] Significantly, the Privileges or Immunities Clause was not even at issue in the Indiana Supreme Court's earlier decision.[28]

A diverse coalition of conservative and liberal groups filed amicus briefs with the Supreme Court supporting Timbs. Their common interest stemmed from concerns with government overreach, including the seizure of private property through civil forfeiture programs. The ACLU, NAACP, and ABA as well as the Pacific Legal Foundation and the U.S. Chamber of Commerce all filed amicus briefs in support of the proposition that the Excessive Fines Clause applied to state and local governments.[29] Of the seventeen amicus briefs filed on Timbs's behalf, most argued that the Due Process Clause of the Fourteenth Amendment incorporated the Excessive Fines Clause. However, three amicus briefs argued in support of using the Privileges or Immunities Clause as the more appropriate mechanism for incorporation.[30]

In *Timbs v. Indiana*,[31] the U.S. Supreme Court granted certiorari and

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22. *Id.* at 475 n.4.

23. State v. Timbs, 84 N.E.3d 1179, 1185 (Ind. 2017).

24. *Id.* at 1181, 1184.

25. Brief for Petitioners at 37, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

26. *Id.*

27. Brief for Respondent at 13, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

28. The Indiana Supreme Court briefly referenced the Privileges or Immunities Clause in its review of the U.S. Supreme Court's jurisprudence on incorporation. *Timbs*, 84 N.E.3d at 1183.

29. *See, e.g.*, Brief of the American Civil Liberties Union, the R Street Institute, the Fines and Fees Justice Center, and the Southern Poverty Law Center as Amici Curiae in Support of Petitioners, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

30. Brief for the American Civil Rights Union as Amicus Curiae in Support of Petitioner at 2, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief of Amicus Curiae Cause of Action Institute in Support of Petitioners at 2, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioners, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

31. 139 S. Ct. 682 (2019).

reversed the Indiana Supreme Court.[32] The question presented to the Court asked whether the Eighth Amendment's Excessive Fines Clause is "an 'incorporated' protection applicable to the States under the Fourteenth Amendment's Due Process Clause."[33]

Writing for a unanimous Court, Justice Ginsburg acknowledged that the Bill of Rights only applied to the federal government at its adoption, a principle first set forth in *Barron ex rel. Tiernan v. Mayor of Baltimore*.[34] This changed with the ratification of the Fourteenth Amendment in 1868. Since then, the Court engaged in the selective incorporation of the Bill of Rights to the states on a case-by-case basis. Eventually, most of its provisions were incorporated.[35] The Court made these determinations by reviewing the historical significance of the underlying right under consideration. According to Justice Ginsburg, "[a] Bill of Rights protection is incorporated, we have explained, if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'"[36]

Having identified the Court's methodology for incorporation, Justice Ginsburg then proceeded to review the historical significance of the protection from excessive fines. She traced its lineage to the Magna Carta, the English Bill of Rights, and throughout English history.[37] This protection also found traction in the American colonies as evidenced by the Virginia Declaration of Rights and, eventually, the Eighth Amendment.[38] Justice Ginsburg indicated that when the Fourteenth Amendment was adopted in 1868, most states already granted protection from excessive fines.[39] And today, "acknowledgment of the right's fundamental nature remains widespread."[40]

In addition to the historical record, the Court also considered the Eighth Amendment's practical significance. According to Justice Ginsburg, the protection against excessive fines was necessary to protect against government overreach that could undermine other constitutional liberties.[41] For example, excessive fines could be used "to retaliate against or chill the speech of political enemies."[42] They could also be used as a source of revenue in criminal proceedings, wholly unrelated to "the penal goals of retribution

32. *Id.* at 686–87.

33. *Id.* at 686.

34. *Id.* at 687 (citing Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833)).

35. *Id.*

36. *Id.* (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

37. *Id.* at 687–88.

38. *Id.* at 688.

39. *Id.*

40. *Id.* at 689.

41. *Id.*

42. *Id.*

and deterrence."[43] In sum, both the historical record and practical concerns were overwhelmingly in support of incorporation.

For these reasons, the Court held that the prohibition embodied in the Excessive Fines Clause of the Eighth Amendment was incorporated through the Due Process Clause of the Fourteenth Amendment.[44] And, once a Bill of Rights protection is incorporated, Justice Ginsburg indicated "there is no daylight between the federal and state conduct it prohibits or requires."[45] Therefore, the Eighth Amendment applied with equal force to the states.[46] The case was then remanded to the Indiana state courts for further proceedings.[47]

III. Resurrecting the Privileges or Immunities Clause

Both Justices Gorsuch and Thomas issued concurring opinions in *Timbs*. In his concurrence, Justice Gorsuch agreed that the historical evidence supported the incorporation of the Excessive Fines Clause through the Fourteenth Amendment.[48] Citing to Justice Thomas's prior concurrence in *McDonald v. City of Chicago* and the work of several legal scholars, Justice Gorsuch suggested the Privileges or Immunities Clause may be the more appropriate vehicle for incorporation than the Due Process Clause.[49] Notwithstanding, he noted this distinction would not change the outcome of the Court's decision.[50]

In contrast, Justice Thomas only concurred in the Court's judgment.[51] He acknowledged that the Fourteenth Amendment "makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States."[52] He disagreed, however, on using the Due Process Clause to achieve this outcome:

> Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with 'process,'

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43. *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991)).

44. *Id.* at 687.

45. *Id.*

46. *Id.*

47. *Id.* at 691. The Court also rejected the claim that the Eighth Amendment did not apply to civil in rem forfeiture. According to Justice Ginsburg, "[i]n considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted." *Id.* at 690.

48. *Id.* at 691 (Gorsuch, J., concurring).

49. *Id.* (citing Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163–214 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986)).

50. *Id.*

51. *Id.* (Thomas, J., concurring in judgment).

52. *Id.*

> I would hold that the right to be free from excessive fines is one of the 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.[53]

Justice Thomas previously argued in support of the Privileges or Immunities Clause, and against the Due Process Clause, in *McDonald v. City of Chicago*, a case that involved the incorporation of the Second Amendment and its application to state and local governments. In *McDonald*, Justice Thomas indicated that the Privileges or Immunities Clause appeared to grant U.S. citizens "a certain collection of rights."[54] But, he argued the scope of the Privileges or Immunities Clause had been eviscerated by the Court in the 19th century in the aptly titled *Slaughter-House Cases*.[55] As a result, the Court had used the Due Process Clause as the mechanism for protecting fundamental rights from state encroachment.[56] To Justice Thomas, such an approach was both "curious" and a "legal fiction"—"[t]he notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."[57]

In *Timbs*, Justice Thomas reiterated these criticisms of the Due Process Clause and called on the Court to use the Privileges or Immunities Clause to address fundamental rights.[58] He found the Court's jurisprudence on substantive due process to be "oxymoronic" because it sought to address fundamental rights through a constitutional provision that was meant to address procedural rights.[59] Because of the disconnect between the Due Process Clause and fundamental rights, Justice Thomas argued the Court was continually struggling to identify the scope of these substantive due process rights. He then identified two cases, *Obergefell v. Hodges* and *Planned Parenthood v. Casey*, where he asserted the Court's efforts to define "the universe of 'fundamental rights'" bordered "on meaningless."[60] As a result, Justice Thomas indicated the Court had failed to adhere to any "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."[61]

Because the Court's substantive due process precedents had allowed the Court to fashion fundamental rights without any textual constraints, Justice

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53. *Id.* Justice Thomas's interest in the Privileges or Immunities Clause precedes his tenure on the Court. *See* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989).

54. McDonald v. City of Chicago, 561 U.S. 742, 808 (2010) (Thomas, J., concurring in part and concurring in judgment).

55. *Id.* (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)).

56. *Id.* at 809.

57. *Id.* at 809, 811.

58. *Timbs*, 139 S. Ct. at 691–92 (Thomas, J., concurring in judgment).

59. *Id.* at 692.

60. *Id.* (citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

61. *Id.* (quoting *McDonald*, 561 U.S. at 811).

Thomas stated it was "unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions."[62] He then cited *Dred Scott v. Sandford* and *Roe v. Wade* as two examples.[63]

Having established the failings of the Due Process Clause, Justice Thomas proceeded to resurrect the Privileges or Immunities Clause as the mechanism for applying the Eighth Amendment's prohibition on excessive fines to the states. Through an originalist lens, he noted the words "privileges" and "immunities" were synonymous with rights to the drafters of the Fourteenth Amendment.[64] And, these rights were protected from state infringement through the Privileges or Immunities Clause of the Fourteenth Amendment.[65] Justice Thomas then conducted an extensive review of the historical record, from English common law through the American colonial experience and then from early state practice through the adoption of the Fourteenth Amendment.[66] He concluded that this historical record confirmed the prohibition on excessive fines was an essential right and one entitled to protection from state encroachment: "[a]s a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment's prohibition on excessive fines applies in full to the States."[67]

IV. Rights and Privileges under the Fourteenth Amendment: A Distinction with a Difference

In *Timbs v. Indiana*, the question presented to the Court was relatively simple and uncontroversial: "[i]s the Eighth Amendment's Excessive Fines Clause an 'incorporated' protection applicable to the States under the Fourteenth Amendment's Due Process Clause?"[68] Given the overwhelming historical record in support of incorporation, it is not surprising that the Court's opinion was affirmative and unanimous.

While Justices Gorsuch and Thomas both agreed with the Court's judgment, their reasoning differed. Justice Gorsuch raised, but did not resolve, whether the Privileges or Immunities Clause might serve as "the appropriate vehicle for incorporation" rather than the Due Process Clause.[69] Beyond referencing Justice Thomas's prior reasoning in *McDonald*, Justice Gorsuch did not expand on his own reasoning.

Justice Thomas also expressed a preference for using the Privileges or Immunities Clause in this case. His reasoning, however, extended well beyond the question of incorporation and delved into substantive due process

62. *Id.*

63. *Id.* (citing Roe v. Wade, 410 U.S. 113 (1973); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).

64. *Id.* at 692.

65. *Id.* at 691.

66. *Id.* at 693–98.

67. *Id.* at 698.

68. *Id.* at 686 (majority opinion).

69. *Id.* at 691 (Gorsuch, J., concurring).

and fundamental rights.[70] According to Justice Thomas, the Privileges or Immunities Clause should not only be used to apply the protections of the Bill of Rights to states. He argued it should also be used to define the nature of these rights. Such an approach would resurrect the Privileges or Immunities Clause from its irrelevance. To Justice Thomas, this would be consistent with the historical understanding of the words "privileges or immunities."[71] And, it would allow the Court to end its problematic reliance on the Due Process Clause to address fundamental rights.[72]

But not all rights would be recognized as "privileges or immunities" subject to constitutional protection. This is the real significance of Justice Thomas's methodology. Unlike the Due Process Clause, Justice Thomas believed the Privileges or Immunities Clause would provide the Court with textual constraints to guide its jurisprudence on fundamental rights.[73] This would provide a "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."[74] Significantly, this methodology would apply to both enumerated and unenumerated rights.

In *Timbs*, for example, a review of English and American history revealed the prohibition on excessive fines "has been consistently recognized as a core right worthy of constitutional protection."[75] As such, Justice Thomas believed it was a "privilege of American citizenship" entitled to protection under the Eighth Amendment.[76]

While other fundamental rights were not at issue in *Timbs*, Justice Thomas offered some ideas on which rights would not be considered a privilege of American citizenship. He cited both *Obergefell v. Hodges* and *Planned Parenthood v. Casey* as cases that reflected the Court's inability to develop or apply a guiding principle for defining fundamental rights.[77] His analysis suggests the rights at issue in those cases—same-sex marriage and abortion—would not be considered privileges of American citizenship entitled to constitutional protection.[78] Justice Thomas also referred to both *Dred Scott v. Sandford* and *Roe v. Wade* as examples "of the Court's most

70. *Id.* at 691–92 (Thomas, J., concurring in judgment).

71. *Id.*

72. *But see* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019) (arguing that an originalist approach to the Due Process Clause can support substantive due process).

73. *Timbs*, 139 S. Ct. at 691–92 (Thomas, J., concurring in judgment).

74. *Id.* (quoting *McDonald*, 561 U.S. at 811 (Thomas, J., concurring in part and concurring in judgment)).

75. *Id.* at 698.

76. *Id.*

77. *Id.* at 692 (citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

78. *See, e.g.*, Tim A. Lemper, *The Promise and Perils of 'Privileges or Immunities':* Saenz v. Roe, 119 S. Ct. 1518 (1999), 23 HARV. J.L. & PUB. POL'Y 295, 319 (1999).

notoriously incorrect decisions" in the realm of substantive due process.[79]

As a rhetorical argument, Justice Thomas's conflation of *Dred Scott*—a case universally recognized as the worst constitutional decision in history—and *Roe* is to be expected. It is a connection that is routinely made by critics of substantive due process.[80] Other justices have made similar connections between *Dred Scott* and reproductive autonomy cases, including *Planned Parenthood*.[81] References to *Dred Scott* also appear in marriage equality cases.[82] And yet, these rhetorical connections are challenged as often as they are raised.[83]

As a legal argument, these connections are also subject to criticism. Many jurists and scholars argue that *Dred Scott* was the foundation for substantive due process.[84] There is certainly some debate on this point.[85] But the flaw in *Dred Scott* was not that substantive due process was arguably used to address fundamental rights. Instead, the Court's flaw was using substantive due process to protect the alleged property rights of slave owners and failing to recognize the liberty rights of African Americans. By comparison, *Roe* acknowledged that reproductive autonomy was an essential right entitled to protection from government encroachment.[86] In other words, *Roe* was correct because it did precisely what the Court in *Dred Scott* failed to do: accord primacy to personal autonomy over the coercive power of government.[87]

The Due Process Clause has long been used to protect a litany of privacy rights as fundamental rights. As Justice Thomas points out, same-sex marriage and abortion are two such rights; but, many more exist. These include the right to procreate, the right to custody of one's children, the right to keep one's family together, and the right to make medical care decisions.[88]

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79. *Timbs*, 139 S. Ct. at 692 (Thomas, J., concurring in judgment) (citing Roe v. Wade, 410 U.S. 113 (1973); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).

80. *See* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011 (2003); Debora Threedy, *Slavery Rhetoric and the Abortion Debate*, 2 MICH. J. GENDER & L. 3, 7 (1994).

81. *See, e.g.*, *Planned Parenthood*, 505 U.S. at 1001–02 (Scalia, J., concurring in the judgment in part and dissenting in part); Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

82. *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

83. *See, e.g.*, Amy Davidson Sorkin, *What Does Marriage Equality Have to Do with* Dred Scott, THE NEW YORKER (July 8, 2015), https://www.newyorker.com/news/amy-davidson/what-does-marriage-equality-have-to-do-with-dred-scott [https://perma.cc/RVM4-47GN].

84. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 32 (1990).

85. *See generally* Justin Buckley Dyer, *The Substance of* Dred Scott *and* Roe v. Wade, 16 GEO. J.L. & PUB. POL'Y. 421 (2018); Timothy Sandefur, Dred Scott *and Other Fallacies of Substantive Due Process*, CATO UNBOUND (Feb. 21, 2012), https://www.cato-unbound.org/2012/02/21/timothy-sandefur/dred-scott-other-fallacies-substantive-due-process [https://perma.cc/J4ZB-WQ8A].

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

87. In fact, some scholars argue this desire to distance constitutional interpretation from *Dred Scott* can also explain the Court's reasoning in marriage equality cases. *See, e.g.*, Jack Balkin & Sanford Levinson, *13 Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 60 (2007).

88. *See, e.g.*, Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261 (1990); Moore v. City of E.

Other rights are also protected under the Due Process Clause, including the right of access to courts.[89] Even the Court's jurisprudence on personal jurisdiction has been guided by the Due Process Clause.[90] These are engrained principles of constitutional jurisprudence that could be lost if the Court pivots from the Due Process Clause to the Privileges or Immunities Clause.

Despite his entreaties, Justice Thomas does not offer a convincing explanation for why the Privileges or Immunities Clause would provide any more of a guiding principle for elucidating fundamental rights than the Due Process Clause.[91] In fact, there is none, although Justice Thomas would argue otherwise.[92] But even if the words "privileges" and "immunities" were synonymous with "rights" to the drafters of the Fourteenth Amendment, they still offer no meaningful way for determining *which* "privileges or immunities" are rights subject to protection. Courts would still be required to conduct a review of the historical record, as Justice Ginsburg did through the Due Process Clause in *Timbs*.

Some scholars have offered a guiding principle for applying the Privileges or Immunities Clause, but it is one that eviscerates the fundamental rights subject to constitutional protection. This narrow principle would apply the protections of the Privileges or Immunities Clause only to enumerated rights—those rights appearing in the first eight amendments to the U.S. Constitution.[93] Unenumerated rights would not be considered "privileges or immunities." However, this approach is subject to its own criticisms, as the historical record offers a broader understanding behind the original meaning of the Privileges or Immunities Clause.[94]

Applying the Privileges or Immunities Clause in lieu of the Due Process Clause to address fundamental rights would raise other issues. By its terms, the Clause only addresses "the privileges or immunities *of citizens of the United States*," a point Justice Ginsburg recognized during oral argument in

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Cleveland, 431 U.S. 494 (1977); Stanley v. Illinois, 405 U.S. 645 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923).

89. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971).

90. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

91. *McDonald*, 561 U.S. at 859–60 (Breyer, J., dissenting).

92. *Id.* at 854–55 (Thomas, J., concurring) ("The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited . . . .").

93. *See, e.g.*, LASH, *supra* note 6, at xi; *cf.* Josh Blackman & Ilya Shapiro, *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*, 8 GEO. J.L. & PUB. POL'Y 1, 59–62 (2010).

94. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60–61, 194 (1st ed. 2004); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 49 (1986); Aynes, *supra* note 6, at 1302–03.

Timbs.[95] In his concurring opinion, Justice Thomas repeatedly referred to the rights of "English subjects," "Englishmen," "free m[e]n," and "citizens."[96] This raises the question of whether the Privileges or Immunities Clause would differentiate between the fundamental rights of U.S. citizens and foreign nationals in the United States.[97] Such a distinction finds little support in the Court's existing jurisprudence on fundamental rights.[98] It is, of course, also deeply troubling and may conflict with other constitutional provisions, including the Equal Protection Clause.[99] But to those seeking to limit the constitutional rights of foreign nationals, Justice Thomas offers a methodology to achieve their goal.[100]

Finally, the Privileges or Immunities Clause of the Fourteenth Amendment, by its terms, only applies to states.[101] Applying Justice Thomas's methodology to assess fundamental rights would thus leave the Court with a stark choice: accept that the protection of fundamental rights differs based on the identity of the government actor restricting those rights, or apply the same methodology to both federal and state action because "there is no daylight between the federal and state conduct" that the Constitution prohibits or requires.[102] The former is logically inconsistent and contrary to the Court's modern approach to the Bill of Rights. The latter would result in the profound retrenchment of fundamental rights if the Court accepts a narrow interpretation of the rights protected under the Privileges or Immunities Clause and applies this interpretation to both the federal and state governments.

In sum, there are compelling reasons for why the Due Process Clause is preferable to the Privileges or Immunities Clause in addressing fundamental rights. The Privileges or Immunities Clause does not solve "the guiding principle" problem. In fact, it creates its own problems by having to address the rights of foreign nationals as well as managing the federal-state distinction. There are also practical consequences that cannot be overstated. Countless decisions would be affected, including right to privacy cases,

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95. U.S. CONST. amend. XIV, § 1 (emphasis added); *Timbs* Transcript, *supra* note 5, at 6. Even Indiana raised this point in its briefing to the Court. Brief for Respondent, *supra* note 27, at 15.

96. Timbs v. Indiana, 139 S. Ct. 682, 691, 693, 695 (2019) (Thomas, J., concurring in judgment).

97. Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 62 (2011).

98. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 743 (2008); Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *but see* Mathews v. Diaz, 426 U.S. 67, 78 (1976).

99. U.S. CONST. amend. XIV, § 1; *see, e.g.*, Plyler v. Doe, 457 U.S. 202, 205, 230 (1982); Graham v. Richardson, 403 U.S. 365, 366, 382 (1971); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

100. *See, e.g.*, AMAR, *supra* note 49, at 170.

101. U.S. CONST. amend. XIV, § 1.

102. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019). Or, as Justice Harlan indicated in *Duncan v. Louisiana*, perhaps the provisions of the Bill of Rights apply to states "jot-for-jot and case-for-case" through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

incorporation cases, and even cases addressing personal jurisdiction.[103] By renouncing a century of precedent and dozens of decisions, the Court would also signal the demise of *stare decisis* as its own guiding principle. The Court would cause profound harm to its institutional legitimacy, and its past decisions would be exposed to greater scrutiny and less deference.

Tellingly, the Court laid the foundation for this development in a series of decisions issued after *Timbs*. In *Franchise Tax Bd. of Cal. v. Hyatt*,[104] the Court considered whether to overrule its earlier decision in *Nevada v. Hall* limiting state sovereign immunity.[105] Writing for the Court, Justice Thomas noted that "*stare decisis* is 'not an inexorable command.'"[106] And, significantly, he added that *stare decisis* is "at its weakest when we interpret the Constitution."[107] Justice Thomas then listed four factors the Court considers in deciding whether to overturn precedent: "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[108] Because the Court found its earlier decision in *Hall* was inconsistent with the historical record and contrary to the Court's more recent opinions, it overruled that decision.[109] In dissent, Justice Breyer expressed concern with the Court's reasoning and acknowledged the consequences of disregarding *stare decisis*, including its impact on legal stability and societal expectations.[110] The Court's rejection of *stare decisis* caused Justice Breyer "to wonder which cases the Court will overrule next."[111]

Justice Breyer's query about the future of *stare decisis* was raised anew by Justice Kagan a few weeks later in another case that saw the Court again overturn established precedent. In *Knick v. Twp. of Scott*,[112] the Court overturned decades of precedent and held that property owners are not

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103. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (incorporation); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (privacy); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) (personal jurisdiction).

104. 139 S. Ct. 1485 (2019).

105. *Id.* at 1490. In *Nevada v. Hall*, the Supreme Court held that a state was not immune from civil liability in cases brought by individuals in the courts of another state. Nevada v. Hall, 440 U.S. 410, 414, 426–27 (1979).

106. *Franchise Tax Bd.*, 139 S. Ct. at 1499 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

107. *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

108. *Id.*

109. *Id.*

110. *Id.* at 1506 (Breyer, J., dissenting). It is no coincidence that Justice Breyer cited to the Court's reasoning in *Planned Parenthood of Se. Pa. v. Casey*—a case supporting reproductive autonomy—to address the significance of *stare decisis*. *Id.* In *Planned Parenthood*, the Court identified several factors for determining whether to overturn precedent, including whether the prior decision "def[ies] practical workability," when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

111. *Franchise Tax Bd.*, 139 S. Ct. at 1506 (Breyer, J., dissenting).

112. 139 S. Ct. 2162 (2019).

required to seek compensation under state law in state court before bringing a federal takings claim.[113] In her dissenting opinion, Justice Kagan referenced Justice Breyer's query about the future of *stare decisis* and noted, "[w]ell, that didn't take long."[114] She then added, "[n]ow one may wonder yet again."[115]

V. Conclusion

For over 160 years, the Supreme Court has interpreted the Due Process Clause to protect a discrete set of fundamental rights and no more.[116] For over 140 years, the Supreme Court has interpreted the Privileges or Immunities Clause to protect an even narrower set of rights.[117] To now replace the Due Process Clause with the Privileges or Immunities Clause would run counter to this robust history and jurisprudential tradition.[118]

For decades, the Supreme Court has rejected the distinction between rights and privileges in constitutional analysis.[119] It would be regrettable if the Court resurrects this distinction to limit fundamental rights through the Privileges or Immunities Clause. That this reasoning is found in *Timbs v. Indiana*—a decision that sought to curtail government overreach—is somewhat ironic. In the realm of the Fourteenth Amendment, rights and privileges are a distinction with a difference.

Postscript

In Fall 2019, the Supreme Court will hear argument in *Ramos v. Louisiana* to address whether the Sixth Amendment guarantee of a unanimous jury verdict applies in state courts.[120] The text of the Sixth Amendment does not refer to jury unanimity; it is, however, a principle the Court has long accepted.[121] While the Court has previously held this requirement applies in the case of six person juries, it has also held that it

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113. *Id.* at 2179.

114. *Id.* at 2190 (Kagan, J., dissenting).

115. *Id.* The debate over *stare decisis* appeared yet again in *Kisor v. Wilkie*, although the Court applied the principle in that case to uphold its prior decisions. 139 S. Ct. 2400, 2408 (2019).

116. *See* CHEMERINSKY, *supra* note 4, at 949.

117. *Id.* at 548.

118. *But see* Ilya Shapiro & Josh Blackman, *The Once and Future Privileges or Immunities Clause*, 25 GEO. MASON L. REV. (forthcoming 2019) (manuscript at 25).

119. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); *see also* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 69 (1982); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439–42 (1968); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1245–46 (1965).

120. State v. Ramos, 231 So. 3d 44 (La. Ct. App. 2017), *cert. granted*, 139 S. Ct. 1318 (U.S. Mar. 18, 2019) (No. 18-5924).

121. U.S. CONST. amend. VI; *see, e.g.*, Johnson v. Louisiana, 406 U.S. 366, 369 (1972).

does not apply in cases of eleven or twelve person juries.[122] By granting certiorari in *Ramos*, at least four members of the Court have expressed an interest in again revisiting the incorporation of the Bill of Rights.

In briefing, Ramos argues the requirement of a unanimous jury verdict is fully incorporated through the Due Process Clause.[123] He also argues the same outcome is required by the Privileges or Immunities Clause. In contrast, Louisiana rejects the assertion that unanimity is required under either provision.[124]

Constitutional revolutions seldom happen without warning. They are often the result of a gradual process that culminates in a moment of profound change. Given renewed interest in the Privileges or Immunities Clause, it is evident this issue will be raised anew in *Ramos*, thereby offering Justices Thomas and Gorsuch another opportunity to convince their colleagues to the ascension of privileges and the erosion of rights.

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122. *Compare* Apodaca v. Oregon, 406 U.S. 404, 411 (1972) (perceiving "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one"), *with* Burch v. Louisiana, 441 U.S. 130, 139 (1979) (holding that when a state has reduced the size of its juries to the minimum number permitted under the Constitution, the verdict must be unanimous to protect constitutional principles that initially led to the six-juror threshold). In *Timbs*, Justice Ginsburg acknowledged the unique nature of the Court's decision in *Apodaca,* where the Court accepted a difference in the application of the Sixth Amendment to state governments: "As we have explained, that 'exception to th[e] general rule . . . was the result of an unusual division among the Justices,' and it 'does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.'" Timbs v. Indiana, 139 S. Ct. 682, 687 n.1 (2019) (alteration in original) (quoting McDonald v. City of Chicago, 561 U.S. 742, 766 n.14 (2010)).

123. *See* Brief for Petitioners, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

124. *See* Brief for Respondent, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).