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## Reawakening "Privileges or Immunities": An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws

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# Reawakening “Privileges or Immunities”: An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws

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## I. INTRODUCTION

Terrence Johnson, Jim Harris, and Alexander Friedman, all Tennessee residents, have a few things in common. All are convicted felons: Johnson for federal wire fraud, Harris for drug offenses and burglary, and Friedman for assault and aggravated armed robbery.<sup>1</sup>

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1. Complaint at 1–3, *Johnson v. Bredesen*, 579 F. Supp. 2d 1044 (M.D. Tenn. 2008) (No. 3:08cv0187).

All had completed their respective terms of imprisonment, parole, and probation for those offenses by February 2008.<sup>2</sup> But all nevertheless were saddled with various unpaid legal obligations: Johnson with \$40,000 in restitution in connection with his offense and \$1,200 in overdue child support payments; Harris with \$2,500 in overdue child support payments; and Friedman with \$1,000 in restitution in connection with his offenses.<sup>3</sup> Finally, all wished to vote in the 2008 election<sup>4</sup> but could not do so because of a Tennessee statute that conditions the restoration of voting rights for those “rendered infamous” because of a criminal conviction on the payment of court-ordered restitution and child support obligations.<sup>5</sup> The trio filed suit in advance of the election, hoping to invalidate the statute and, in Johnson’s words, “have the opportunity to become . . . fully productive citizen[s] again.”<sup>6</sup> But in September 2008, a federal judge rejected their challenge.<sup>7</sup> As a result, when the November election arrived, these men simply could not vote.

While disenfranchisement laws like Tennessee’s may seem extreme, U.S. courts consistently have rejected challenges to statutes that disenfranchise felons both during and after their terms of incarceration.<sup>8</sup> In the leading case on the subject, *Richardson v. Ramirez*, the Supreme Court confronted the issue of whether a California law excluding ex-felons from the franchise could withstand the strict scrutiny analysis ordinarily required for suspect classifications under the Equal Protection Clause of the Fourteenth Amendment.<sup>9</sup> The Court did not address this question directly, however, instead finding “affirmative sanction” for felon

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2. *Id.*

3. *Id.*

4. *Id.*

5. “[A] person shall not . . . have the right of suffrage restored [after being deprived of it by the fact of conviction], unless the person has paid all restitution to the victim or victims of the offense . . . [and] is current in all child support obligations.” TENN. CODE ANN. § 40-29-202(b)–(c). (West 2009). Until recently, Tennessee’s legal process for restoring the voting rights of felons was the most “confusing and complicated” in the country. Press Release, ACLU, ACLU Sues over Tennessee’s Felon Disenfranchisement Laws (Feb. 25, 2008), <http://www.aclu.org/votingrights/gen/34201prs20080225.html>.

6. Press Release, *supra* note 5.

7. *Johnson*, 579 F. Supp. 2d at 1048.

8. *See, e.g., Wesley v. Collins*, 791 F.2d 1255, 1257, 1263 (6th Cir. 1986) (rejecting challenge to Tennessee’s felon disenfranchisement statute); *Owens v. Barnes*, 711 F.2d 25, 25–26, 28 (3d Cir. 1983) (rejecting challenge to Pennsylvania’s statute denying convicted felons an absentee ballot).

9. 418 U.S. 24, 27, 33 (1974).

disenfranchisement laws in the rarely invoked Section 2 of that Amendment.<sup>10</sup> That Section provides, in pertinent part:

[W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of [the State's] representation [in Congress] shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.<sup>11</sup>

As a result, the Court never subjected these laws to the strict scrutiny analysis that the *Richardson* respondents, convicted felons who had served their terms of incarceration, had argued was required by the Court's voting rights jurisprudence.<sup>12</sup>

There are strong arguments that the majority in *Richardson* erred when it applied Section 2 of the Fourteenth Amendment to resolve the case. First, Justice Thurgood Marshall's dissent in *Richardson* offers a persuasive alternative historical reading of Section 2, suggesting that its Framers did not in fact intend that it permit states to disenfranchise their felons.<sup>13</sup> Second, a number of scholars have argued that subsequent constitutional developments effectively nullified the meaning of Section 2.<sup>14</sup> Third, *Richardson* focused exclusively on the number of states with felon disenfranchisement laws at the time of the enactment of the Fourteenth Amendment, and did not consider subsequent legislative developments in the states.<sup>15</sup> Taken together, these arguments suggest that the Court ought to revisit its application of the Fourteenth Amendment in the context of felon disenfranchisement.

The Court's recent decision in *Saenz v. Roe*,<sup>16</sup> which explored the history of the Privileges or Immunities Clause of the Fourteenth Amendment, may provide an opportunity for such a reexamination. Courts and commentators generally have considered the Privileges or Immunities Clause a nullity since the *Slaughter-House Cases*.<sup>17</sup> In *Saenz*, however, the Supreme Court "breathed new life" into the

10. *Id.* at 54.

11. U.S. CONST. amend. XIV, § 2 (emphasis added).

12. *Richardson*, 418 U.S. at 26, 33. For a discussion of the voting rights case law upon which Respondents in *Richardson* relied, see *infra* note 82.

13. See discussion *infra* Section II.C.1.

14. See discussion *infra* Section II.C.2.

15. See discussion *infra* Section II.C.3.

16. 526 U.S. 489 (1999).

17. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1873). Judge Robert Bork famously likened the Privileges or Immunities Clause of the Fourteenth Amendment to an "ink blot," arguing that the clause "has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 160 (1990).

Clause for the first time since the *Slaughter-House* decision, using it to invalidate a California welfare restriction.<sup>18</sup> The Court reasoned that the California restriction violated the constitutional principle that newly arrived citizens of a state are entitled to the same privileges or immunities as other citizens of the same state.<sup>19</sup> Seven Justices adopted this interpretation, which was novel in its exhumation of a long-dormant constitutional provision.<sup>20</sup>

In dissent, Justice Clarence Thomas, joined by Chief Justice William Rehnquist, strongly disagreed with the majority's broad reading of the Clause.<sup>21</sup> Justice Thomas believed that the Court ascribed a meaning to the Clause that its drafters did not intend, and rejected the notion of a "right to travel" as understood by the Justices in the majority.<sup>22</sup> Nevertheless, Justice Thomas indicated that he would be open to reinterpreting the Clause's meaning in an "appropriate case" concerning a "fundamental right."<sup>23</sup>

This Note argues that a challenge to felon disenfranchisement laws under the Privileges or Immunities Clause of the Fourteenth Amendment would present just such a case. Part II of this Note provides a historical overview of felon disenfranchisement laws in the United States and analyzes the *Richardson* decision. Part III discusses the *Saenz* decision, demonstrates how it opens the door to a reexamination of the Privileges or Immunities Clause of the Fourteenth Amendment, and makes an originalist argument as to why the Constitution preserves the right of felons to vote. Part IV concludes with the proposition that this argument is not inconsistent with the principle of stare decisis.

## II. FELON DISENFRANCHISEMENT LAWS IN THE UNITED STATES

It is undisputed that the states historically have exercised authority in excluding both felons and ex-felons from the franchise.<sup>24</sup> Numerous authors, courts, and researchers have catalogued this

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18. *Saenz*, 526 U.S. at 511 (Rehnquist, C.J., dissenting).

19. *Id.* at 502.

20. *Id.* at 492.

21. *Id.* at 521 (Thomas, J., dissenting).

22. *Id.*

23. *Id.* at 527-28.

24. See *Richardson v. Ramirez*, 418 U.S. 24, 48 (1974) (noting that "29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes" at the time of the adoption of the Fourteenth Amendment).

history,<sup>25</sup> and this Part does not reopen that historical inquiry. It does, however, provide a brief introduction to the wide-ranging effects of these laws in order to demonstrate their seriousness as an issue in the modern era.

### A. History and Impact

Laws denying the franchise to felons are commonplace in the United States. At present, only two states permit incarcerated felons to vote.<sup>26</sup> Two others deny the franchise to all ex-offenders who have completed their sentences; nine others either disenfranchise certain categories of ex-offenders or permit those ex-offenders to apply for a restoration of voting rights after a waiting period.<sup>27</sup> Combined, these laws disenfranchise over five million people in the United States,<sup>28</sup> including a full fourteen percent of the black male voting population.<sup>29</sup> State felon disenfranchisement laws deny the ballot to more people than any other such mechanism in use today.<sup>30</sup>

The impact of these laws on elections is significant. A study on the 2000 presidential election revealed that, had Florida's felon

25. *See id.* at 41–55 (examining a variety of historical sources in noting the prevalence of felon disenfranchisement laws throughout U.S. history); William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 616–18 (2007) (tracing history of felon disenfranchisement laws from Greek and Roman history to prevailing state standards); JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2–6 (1998), [http://www.sentencingproject.org/tmp/File/FVR/fd\\_losingthevote.pdf](http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevote.pdf) (providing a comprehensive overview of felon disenfranchisement laws in the United States).

26. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2008), [http://www.sentencingproject.org/Admin/Documents/publications/fd\\_bs\\_fdlawsinus.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf). State-imposed restrictions on the franchise affect an individual's right to vote in both state and federal elections. State legislatures, not state citizens, are vested with authority to select presidential electors. U.S. CONST. art. 2, § 1, cl. 2. At present, however, all of the states have ceded that authority to the states' citizens, who vote for presidential electors. *Bush v. Gore*, 531 U.S. 98, 104 (2000). Once the legislature has ceded the right to vote for presidential electors to its citizens, that right is treated as fundamental, unless and until the state legislature chooses to reclaim that power for itself. *Id.*

27. THE SENTENCING PROJECT, *supra* note 26, at 1.

28. Erika Wood, *Don't Disenfranchise Millions*, POLITICO.COM, Mar. 4, 2009, <http://www.politico.com/news/stories/0309/19563.html>.

29. Pierre Thomas, *Study Suggests Black Male Prison Rate Impinges on Political Process*, WASH. POST, Jan. 30, 1997, at A3.

30. David Zetlin-Jones, Note, *Right to Remain Silent?: What the Voting Rights Act Can and Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 412 (2006). Notwithstanding this history, the disenfranchisement of felons may well be in decline; at least a dozen states have changed their election laws since 2003 to permit released ex-offenders to vote. Cynthia Dizikes, *More Felons Gaining the Right to Vote*, L.A. TIMES, Oct. 27, 2008, at A8. Collectively, states have restored voting rights to 760,000 felons in the last decade, although it is unclear how many of those individuals have subsequently registered to vote. *Id.*

disenfranchisement laws not been in place, Al Gore would have won the state by more than 31,000 votes, and thus the presidential election.<sup>31</sup> Scholars have found that Richard Nixon's popular vote total in the 1960 election would have surpassed John Kennedy's had contemporary rates of criminal punishment been in effect.<sup>32</sup> Analyzing U.S. Senate elections, scholars have also uncovered evidence that without felon disenfranchisement laws, the Democratic Party, and not the Republican Party, may have held power in the Senate throughout the 1990s.<sup>33</sup>

What is most notable about these disenfranchisement laws, however, is not their potential effect on elections, but rather their actual impact on the ability of individuals to exercise their constitutionally protected rights. Felon disenfranchisement is the only ballot restriction, other than age or mental infirmity, imposed on American citizens.<sup>34</sup> These exceptional laws represent "the sole remaining vestige of states' power to dis[en]franchise their citizens."<sup>35</sup> And they remain in place today because of the case of *Richardson v. Ramirez*.

### B. Richardson: A Historical Anomaly

The *Richardson* case, which presented the Supreme Court with the question of whether felon disenfranchisement laws violate the Equal Protection Clause of the Fourteenth Amendment because of

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31. Jeff Manza & Christopher Uggen, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 793 (2002). The study took into consideration voter preferences and participation rates in reaching this conclusion. *Id.* In the 2000 election, Florida disenfranchised approximately 827,000 potential voters, including 600,000 who had been completely discharged from the criminal system. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004).

32. Manza & Uggen, *supra* note 31, at 792. This calculation accounts for the fact that the percentage of the population consisting of convicted felons was much lower in 1960 than it is today. *Id.*

33. *Id.* at 790.

34. Voter disenfranchisement is the only remaining vestige of the European "culture of 'civil death'" that included "prohibitions on the right to participate in court proceedings, passing on an estate to an heir, or enter into contracts." Michael Fauntroy, *Conservatives and Black Voter Disenfranchisement*, HUFFINGTON POST, June 8, 2007, [http://www.huffingtonpost.com/michael-fauntroy-phd/conservatives-and-black-v\\_b\\_51338.html](http://www.huffingtonpost.com/michael-fauntroy-phd/conservatives-and-black-v_b_51338.html).

The Twenty-Sixth Amendment prevents state governments and the federal government from denying or abridging the right to vote to anyone over the age of eighteen on account of age. U.S. CONST. amend. XXVI, § 1. And a number of states deny the vote to those who are mentally impaired, although they use different language to describe that category of individuals. See Pam Belluck, *States Face Decisions on Who Is Mentally Fit to Vote*, N.Y. TIMES, June 19, 2007, at A1.

35. Zetlin-Jones, *supra* note 30, at 412.

their disproportionate impact on black voters, is central to the debate over the continuing vitality of these laws. The respondents in *Richardson*, like the plaintiffs in the voting rights case discussed in the Introduction, were three convicted felons who had completed their respective sentences and terms of parole.<sup>36</sup> At the time of suit, Article III, Section 1 of the California Constitution prohibited the respondents from voting in California because of their status as former felons.<sup>37</sup> The respondents relied upon a number of voting rights decisions handed down in the decade prior to *Richardson* to argue that access to the franchise was a fundamental right,<sup>38</sup> and that California could assert no compelling interest sufficient to justify the exclusion of felons as a class from access to the ballot box.<sup>39</sup> They argued that the provision, as a result, violated their constitutional guarantee of equal protection.<sup>40</sup>

The *Richardson* majority canvassed the text of the Fourteenth Amendment, the legislative history of Section 2, and the historical record of state disenfranchisement laws in holding for the government. Section 2 was a compromise measure intended to compel states of the former Confederacy to enfranchise blacks granted the rights of citizenship by Section 1.<sup>41</sup> As noted *supra* in the Introduction, Section 2 provides that a state's representation in the U.S. House of Representatives will be reduced in proportion to the state's denial of the franchise to its citizens, "except for participation in rebellion, or other crime."<sup>42</sup> The majority cited statements in support of a plain

36. *Richardson v. Ramirez*, 418 U.S. 24, 26 (1974).

37. This provision held that "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State." CAL. CONST. art. II, § 1 (repealed 1972). Proposition 7, passed at the general election held on November 7, 1972, repealed this section, but replaced it with a substantially similar provision. *Richardson*, 418 U.S. at 28 n.2.

38. Justice Marshall cites a number of these cases in his dissent. *Richardson*, 418 U.S. at 77-78 (Marshall, J., dissenting).

39. *Id.* at 33.

40. *Id.*

41. CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 371-73 (1997); see also JOSEPH T. SNEED III, *FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN: AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT* 325 (1997) (citing the Senate stalemate over the Apportionment Amendment as "proof" that the majority of Congress saw no means to encourage black suffrage in the South other than by enacting the Apportionment Amendment itself).

With respect to citizenship, Section 1 of the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

42. U.S. CONST. amend. XIV, § 2.

reading of the Section's language by several representatives who participated in the debates leading to the Amendment's passage.<sup>43</sup>

The Court further noted that, at the time of the enactment of the Fourteenth Amendment, twenty-nine states had constitutional provisions authorizing, or permitting their respective legislatures to authorize, prohibitions on the exercise of the franchise by convicted felons.<sup>44</sup> The Court used these arguments as evidence that Section 2 provided "affirmative sanction" for states to disenfranchise their felons.<sup>45</sup> In resting its decision on Section 2, however, the Court neither addressed the question of whether these laws violated the Equal Protection Clause nor subjected them to the strict scrutiny analysis that such a violation would entail. This method of analysis, and the consequences resulting from it, opened the door to criticism from scholars and judges alike.

### C. Richardson's Critics

Despite longstanding adherence to the *Richardson* decision by lower courts,<sup>46</sup> the reasoning underlying the majority opinion has been criticized on at least three independent grounds: one historical, one structural, and one jurisprudential. The historical argument relies on the legislative history of Section 2 and rejects the notion that it should be read as a limitation on Section 1.<sup>47</sup> The structural argument holds that the enactment of subsequent amendments effectively rendered Section 2 meaningless.<sup>48</sup> The jurisprudential argument considers the effect of recent developments at the state level that recast the right of felons to vote as fundamental.<sup>49</sup> All three arguments point the way to a reconsideration of the felon disenfranchisement laws that *Richardson* purported to confront.

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43. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2535 (1866) (statement of Rep. Eckley of Ohio):

The only objection I have to the proposition [that convicted criminals should not be permitted access to the ballot box] is that it does not go far enough. I would disenfranchise them forever. They have no right, founded in justice, to participate in the administration of the Government or exercise political power.

44. *Richardson*, 418 U.S. at 48.

45. *Id.* at 54.

46. See Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 251 (2004) (noting that "[c]ourts have adhered rather rigidly to the Ramirez decision, and its precedent has thus far remained untouched").

47. See discussion *infra* Section II.C.1.

48. See discussion *infra* Section II.C.2.

49. See discussion *infra* Section II.C.3.

## 1. Section 2 in Its Historical Context

Justice Marshall's dissent in *Richardson* offers a persuasive alternative reading of the history accompanying the drafting of Section 2. He took issue, in part, with the majority's interpretation of the specific language of Section 2 itself. The Court placed particular emphasis on the fact that Section 2 seemed explicitly to authorize the states to abridge the right of their citizens to vote for "participation in rebellion, or other crime."<sup>50</sup> In response, Justice Marshall pointed out that an earlier version of Section 2 was sent to joint committee without the "or other crime" language and emerged six weeks later with that language "inexplicably tacked on."<sup>51</sup> The joint committee offered no explanation for the inclusion of that language in the final version.<sup>52</sup> Moreover, Justice Marshall noted that the majority cited only a single explanatory reference illuminating the meaning of this language, and even that statement is ambiguous as to the intended purpose of the "other crime" language of Section 2.<sup>53</sup> In short, none of the legislative history demonstrates unequivocally that the drafters of Section 2 intended the provision to reserve to the states the ability to disenfranchise those convicted of any and all crimes.<sup>54</sup>

Justice Marshall's criticism rests on the further proposition that a constitutional provision's unexplained language cannot override

50. *Richardson*, 418 U.S. at 41–43.

51. *Id.* at 72–73 (Marshall, J., dissenting).

52. Two commentators have argued that the addition of this language, when placed in context, makes sense "only as giving the states a broader weapon to use against former Confederates." Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 746 n.158 (1973).

53. *Richardson*, 418 U.S. at 73 (Marshall, J., dissenting).

54. To the contrary, the basic purpose of the Fourteenth Amendment was to expand, not restrict further, voting rights. JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 32 (2006). Until the *Richardson* decision, the "obscure" second Section of that Amendment had been considered a "dead letter." *Id.* at 31.

Adopting a literal reading of the text can also lead to absurd results in the modern context. Disenfranchisement on the basis of a "crime" at the time of the adoption of the Fourteenth Amendment applied only to those convicted of felonies at common law, a much narrower class of offenses than that encompassed by the modern conception of "felony." *Id.* A modern day interpretation of the text that includes all crimes classified as felonies by the states could deprive individuals of the right to vote for committing a felony as minor as conspiring to operate a motor vehicle without a muffler. *Richardson*, 418 U.S. at 75 n.24 (Marshall, J., dissenting).

This interpretation also leaves open the possibility that a state might disenfranchise a citizen for a misdemeanor offense, because Section 2 does not differentiate between felonies and misdemeanors. *Id.* It makes far more sense to place the "other crimes" language in context, and note that it appears along with "participation in rebellion," which suggests, at a minimum, that states may only disenfranchise those convicted of serious crimes akin to treason.

its unambiguous historical purpose.<sup>55</sup> In contrast to the majority's "affirmative sanction" reading of Section 2, Justice Marshall's reading of the Section cast it as a compromise between the Republicans in Congress and the population in the southern states concerned about an explicit grant of suffrage to blacks.<sup>56</sup> Rather than a limitation on other Sections of the Fourteenth Amendment expressly authorizing the states to disenfranchise criminals, Section 2, according to Justice Marshall, calls for reduced representation in Congress as a "special remedy" for a specific type of electoral abuse: the disenfranchisement of blacks.<sup>57</sup> For Justice Marshall, Section 2 plainly "put Southern States to a choice—enfranchise Negro voters or lose congressional representation."<sup>58</sup> Nowhere in the history of the Amendment was it suggested that the provision was intended to serve any broader purpose.<sup>59</sup>

## 2. The Role of the Thirteenth and Fifteenth Amendments

A number of scholars have advanced a structural argument in addition to the historical argument that considers other Amendments in further undermining the *Richardson* majority's reading of Section 2. That argument posits that the continued application of Section 2 is incompatible with the later passage of the Fifteenth Amendment. Section 2, standing alone, permits states to deny the franchise to voters on the basis of race as long as those states are willing to incur a proportionate reduction in their representation in the House of Representatives.<sup>60</sup> A mere two years later, Congress enacted the Fifteenth Amendment, which absolutely prohibited voting restrictions

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55. See Behrens, *supra* note 46, at 257 ("[W]hile the plain text of Section Two may at first appear to sanction felon disenfranchisement, a closer look at the context of the Section reveals that it had a limited historical purpose and the phrase 'or other crime' should not be interpreted in this manner.").

56. *Richardson*, 418 U.S. at 73–74 (Marshall, J., dissenting). This is the prevailing view among those who have studied the enactment of the Fourteenth Amendment. Most of the members of the Thirty-Ninth Congress did not believe that the Fourteenth Amendment extended the franchise to blacks, in part because they did not believe the states of the former Confederacy were prepared, or could be forced, to take that step. SNEED, *supra* note 41, at 325. As discussed *infra* Section III.D, however, that belief ran counter to the beliefs both of those ratifying the Amendment in state conventions, and of the general public, who understood the Fourteenth Amendment to grant the franchise to blacks.

57. *Richardson*, 418 U.S. at 74.

58. *Id.* at 73.

59. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 423 (2d ed. 2005) (describing Section 2 of the Fourteenth Amendment as merely a "Reconstruction-era measure[] of no lasting significance").

60. U.S. CONST. amend. XIV, § 2.

based on “race, color, or previous condition of servitude.”<sup>61</sup> By substituting a total ban on disenfranchisement related to the categories enumerated in the Fifteenth Amendment for the penalty of reduced representation associated with such disenfranchisement embodied in Section 2 of the Fourteenth Amendment, Congress effectively rendered Section 2 “inoperative” for achieving its original purpose.<sup>62</sup>

The Fifteenth Amendment’s “previous condition of servitude” language is particularly noteworthy in this context, as it may be read not only to apply to former slaves or indentured servants, but also to former prisoners. As one scholar has argued, even if the *Richardson* majority were correct in reading the “other crime” provision in Section 2 as permitting felon disenfranchisement, the Fifteenth Amendment’s abolition of restrictions on the right to vote on the basis of “previous condition of servitude” effectively nullified the “other crime” provision of Section 2, at least in the case of felons who have served their sentences but who nevertheless remain disenfranchised.<sup>63</sup>

This structural argument draws further support from the text of the Thirteenth Amendment, which in part prohibits “involuntary servitude” except “as a punishment for crime whereof the party shall have been duly convicted.”<sup>64</sup> The Thirteenth Amendment thus gives meaning to the phrase “involuntary servitude” in such a way as to empower the Fifteenth Amendment to override conflicting portions of the Fourteenth Amendment, including Section 2’s arguable allowance for state felon disenfranchisement schemes.<sup>65</sup> Viewed together, the

61. *Id.* amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

62. See SNEED, *supra* note 41, at 331 (arguing that the Fifteenth Amendment did repeal Section 2 of the Fourteenth Amendment); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 260–62 (2004) (same). Scholars have made the related argument that the Nineteenth Amendment repealed Section 2’s exclusion of states from penalty for disenfranchising women, and that the Twenty-Sixth Amendment repealed Section 2’s exclusion for voters ages eighteen to twenty-one. Behrens, *supra* note 46, at 257–58 & n.145; see also Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1070–71 (declaring Section 2 a “dead letter”).

63. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1903–04 (1999).

64. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

65. See Fletcher, *supra* note 63, at 1904 (arguing that combining the language of these Amendments thus “generates a plausible reading that the Fifteenth Amendment, on its face, prohibits depriving felons of their voting rights simply because they were subject to ‘involuntary servitude’ as punishment for their crime”).

Reconstruction Amendments should be read not to permit states to disenfranchise felons, but in fact explicitly to prohibit them from doing so.

These historical and structural arguments, in contrast to the arguments of the majority opinion in *Richardson*, afford a sincere respect for the basic purpose of Section 2, which was to safeguard the rights of newly enfranchised black voters during Reconstruction.<sup>66</sup> Paradoxically, given the disproportionate percentage of the felon population that is black, *Richardson* succeeded in transforming Section 2 “from a shield protecting the freedman’s voting rights into a sword for the lifetime disenfranchisement of his descendants.”<sup>67</sup> As the next Section demonstrates, it also represents a historical anomaly in the Supreme Court’s voting rights jurisprudence—and one that is ripe for reconsideration.

### 3. *Richardson* and the Right of Felons to Vote

The Supreme Court has held that access to the franchise is a fundamental right.<sup>68</sup> This is true even though many of the Framers of the Constitution, as well as many of those responsible for drafting and enacting the Fourteenth Amendment, did not consider the right to vote to be “fundamental,” in the sense of being a natural right.<sup>69</sup> They believed it instead to be a political right, derived from membership in a republic,<sup>70</sup> although not necessarily derived from the mere fact of citizenship.<sup>71</sup> Because the Court now recognizes the right as

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66. ANTIEAU, *supra* note 41, at 371–72.

67. John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 169 (2004); *see also* Fletcher, *supra* note 63, at 1904:

Because patterns of law enforcement have changed over the years, because the number of felons convicted has greatly increased and because a large percent[age] of those convicted are black, the policy of felon disenfranchisement sharply reduces the voting rights of African Americans. Thus, a constitutional provision designed in 1868 to improve the political representation of blacks has turned out in the 1990s to have precisely the opposite effect.

68. “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); *see also* *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969) (characterizing statutes distributing the franchise as the “foundation of our representative society”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (finding the franchise to be a “fundamental political right, because [it is] preservative of all rights”).

69. DAVID SKILLEN BOGEN, *PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 14, 49–50 (2003).

70. MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 60 (1999).

71. *Id.* at 61.

fundamental, however, it subjects restrictions on the franchise to strict scrutiny, the most exacting constitutional standard.<sup>72</sup>

In the decade preceding the *Richardson* decision, the Court used strict scrutiny analysis to invalidate a number of statutes placing restrictions on access to the franchise.<sup>73</sup> By finding Section 2 applicable to the special case of felon disenfranchisement, however, the *Richardson* Court distinguished such voting restrictions from the restrictions it had rejected,<sup>74</sup> and never subjected felon disenfranchisement laws to the strict scrutiny they otherwise would have merited.

For the reasons cited *supra* in II.C.1 and II.C.2, the Court should not have applied Section 2 in *Richardson* to uphold California's felon disenfranchisement law. However, simple reliance on the Supreme Court's voting rights jurisprudence would not have saved the respondents in *Richardson*. *Richardson* presented a more specific question than whether access to the franchise was burdened, and answering that specific question is key to its resolution.<sup>75</sup> In particular, the question is not whether the right of persons to vote is fundamental—it plainly is—but whether the right of *felons* to vote is fundamental.

As noted in Part II *supra*, state legislatures historically have enacted laws disenfranchising felons.<sup>76</sup> This history offers strong evidence that the right of felons to vote was not considered fundamental at the time of the enactment of the Fourteenth Amendment. As with the eventual recognition of voting as a fundamental right, however, modern developments can displace historical understandings.<sup>77</sup> At the time of the enactment of the

72. Under this analysis, courts will only uphold a law if it is narrowly tailored to serve a compelling government interest. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007) (stating strict scrutiny standard).

73. See *infra* note 74.

74. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 345, 355–60 (1972) (rejecting Tennessee's durational residency requirement for voting in state elections); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (rejecting poll tax as “not germane to one's ability to participate intelligently in the electoral process”).

75. See *Washington v. Glucksberg*, 521 U.S. 702, 772–73 (1997) (Souter, J., concurring) (discussing the importance of identifying the precise level of generality at which courts should examine claims that particular liberty interests are being violated).

76. See *supra* note 24 and accompanying text.

77. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564 (2004) (citing the fact that thirty states prohibited the death penalty for juveniles as evidence that juveniles had a fundamental right not to be subject to the death penalty); *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002) (citing the fact that thirty states prohibited the death penalty for the mentally retarded as evidence that the mentally retarded had a fundamental right not to be subject to the death penalty). In both *Roper* and *Atkins*, the Court pointed, respectively, not only to the number of states that prohibited the

Fourteenth Amendment, twenty-nine of the existing thirty-seven states<sup>78</sup> had constitutional provisions that either prevented, or authorized their legislatures to prevent, those convicted of felonies or infamous crimes from voting.<sup>79</sup> At present, however, only two states deny the franchise to all ex-offenders who have completed their sentences, and only nine others disenfranchise specific classes of ex-offenders and/or subject those convicted of specific offenses to a waiting period before their right to vote is restored.<sup>80</sup> Since 1997, moreover, nine states repealed or amended their lifetime disenfranchisement laws, two states expanded voting rights to include persons on probation or parole, and five states made it easier for persons deprived of the franchise to regain it.<sup>81</sup> In other words, since the time of the Fourteenth Amendment's enactment, states consistently have amended their laws to lift the voting sanctions they previously had placed on felons. This unmistakable trend reveals an emerging national consensus that a felony conviction, standing alone, should not disqualify someone from access to the franchise.<sup>82</sup>

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death penalty for each of the categories it considered, but also to the "consistency of the direction of change" toward exempting these classes of people from the death penalty in identifying the fundamental rights at issue. *Roper*, 543 U.S. at 565–67; *Atkins*, 536 U.S. at 313–16.

78. THE TIME ALMANAC 653, 655–59, 661–81 (2009).

79. *Richardson v. Ramirez*, 418 U.S. 24, 48 (1974).

80. THE SENTENCING PROJECT, *supra* note 26, at 1.

81. RYAN S. KING, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997–2008, at 1 (2008), [http://www.sentencingproject.org/Admin/Documents/publications/fd\\_statedisenfranchisement.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_statedisenfranchisement.pdf).

82. This Note does not address whether incarcerated felons have a fundamental right to vote, although the fact that forty-eight states and the District of Columbia all prohibit such persons from voting strongly suggests that they do not. *Id.* Nevertheless, much of the logic underlying the voting rights cases that preceded *Richardson* can be applied in equal measure to the issue of felon disenfranchisement. In *Carrington v. Rash*, for example, the Court considered the validity of a Texas constitutional provision prohibiting any member of the U.S. Armed Forces who moved his home to Texas in the course of his military service from voting in any Texas election as long as he remained a member of the Armed Forces. 380 U.S. 89, 89 (1965). Texas justified this provision on the grounds that the "concentrated balloting" of military personnel might collectively overwhelm the voting power of a small local civilian community. *Id.* at 93. Underlying this provision was the fear that a base commander opposed to local policy might wield disproportionate political influence in coercing his men to vote out officials responsible for that policy. *Id.*

The Court rejected this argument, reasoning that mere fears of how a group might vote could not justify such a restriction. *Id.* at 94. While a local community might also fear that a disaffected group of felons in local prisons would, if given access to the franchise, form a "cell bloc" designed to disrupt local policies through the voting booth, such concerns, standing alone, that a certain group of voters will vote in a certain way cannot sustain the restriction of a right as fundamental as voting. *Id.* at 91–94. Moreover, there is no evidence to suggest that felons would even consider voting disruptively. See Scott M. Bennett, *Giving Ex-Felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1, 6 (2004) ("[T]here is no realistic possibility that convicted felons

Combining the historical and structural arguments that Section 2 is inoperative for the purpose of permitting states to disenfranchise felons, and the jurisprudential argument that the states have moved consistently to strike down their felon disenfranchisement statutes, yields the conclusion that the *Richardson* case was wrongly decided. Despite the abrupt about-face in voting rights jurisprudence that *Richardson* represents, lower courts have dutifully applied its holding for more than thirty years.<sup>83</sup> Stare decisis counsels that the *Richardson* decision should not be disturbed, regardless of whether it reached the wrong result. But the Supreme Court's recent decision in *Saenz v. Roe*<sup>84</sup> may provide an opportunity for the Court both to invalidate felon disenfranchisement laws without having to confront the equal protection question raised in *Richardson* and restore meaning to a long-dormant provision of the Fourteenth Amendment in the process.

### III. SAENZ V. ROE: REVIVING A DEAD LETTER?

The case of *Saenz v. Roe*<sup>85</sup> potentially marks the beginning of a new chapter in the Court's understanding and application of the Privileges or Immunities Clause of the Fourteenth Amendment. The *Saenz* decision is of principal importance, for the purposes of this Note, in demonstrating that the Court has indicated an openness to a broader interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment than history has afforded it. This new interpretation, in addition, is arguably capacious enough to bring the issue of felon disenfranchisement within its ambit.<sup>86</sup>

In *Saenz*, for the first time in sixty-four years and for only the second time in the history of American jurisprudence, the Supreme Court relied upon the Privileges or Immunities Clause to invalidate a

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could alter the content or administration of most aspects of the criminal law, even if they wanted to . . .").

83. Behrens, *supra* note 46, at 251.

84. 526 U.S. 489 (1999).

85. *Id.*

86. See David H. Gans, *The Unitary Fourth Amendment*, 56 EMORY L.J. 907, 927–28 (2007) (proposing a “unitary” reading of Section 1 of the Fourteenth Amendment that would “reinvigorate” the Privileges or Immunities Clause and make it the “basis” for the protection of fundamental rights). *But see* John Yoo, *The Supreme Court Rediscovered an Old Clause*, WALL ST. J., May 24, 1999, at A31 (“Liberals[,] academics and lawyers are already rushing to embrace *Saenz* because they hope to rejuvenate their quest to use the Constitution to promote their visions of social justice.”).

state statute.<sup>87</sup> Respondents in *Saenz* successfully challenged a California law limiting families who recently had arrived in the state to the welfare benefits of their state of prior residence for a twelve-month period, rather than immediately providing them the benefits to which they otherwise would be entitled as California residents.<sup>88</sup> The Court invalidated the statute on the grounds that it “tolerate[d] a hierarchy of . . . similarly situated citizens based on the location of their prior residence,” which the Privileges or Immunities Clause would not permit.<sup>89</sup> In doing so, the Court “breathe[d] new life” into this historically underused Clause.<sup>90</sup>

Of more specific relevance to the issue of felon disenfranchisement, however, is the qualified objection to the majority’s holding that Justice Thomas offered in his dissent. Specifically, Justice Thomas opined that the drafters of the Clause did not intend to include the “right to travel” meaning the majority in *Saenz* attributed to it.<sup>91</sup> Referencing the “landmark” opinion of Justice Bushrod Washington in *Corfield v. Coryell*,<sup>92</sup> which the principal drafters repeatedly invoked in legislative debate,<sup>93</sup> Justice Thomas rejected the notion that the Clause referred to public benefits established by positive law, which he believed the statute at issue granted to California residents.<sup>94</sup> Justice Thomas argued instead that the drafters of the Fourteenth Amendment understood “privileges or immunities” to mean “fundamental rights.”<sup>95</sup> Such privileges and immunities—as enumerated by Justice Washington—included, for example, the enjoyment of life and liberty, the right to acquire and possess property, and the right to file suit in the courts of a state.<sup>96</sup> Justice Washington’s list also included, notably, “the elective

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87. 526 U.S. at 511 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist further noted that the only other decision in which the Court invoked the Clause was overruled just five years later. *Id.*

88. CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1999), *invalidated by Saenz v. Roe*, 526 U.S. 489 (1999).

89. *Saenz*, 526 U.S. at 506–07.

90. *Id.* at 511 (Rehnquist, C.J., dissenting); *see also id.* at 527 (Thomas, J., dissenting) (noting that the majority “appears to breathe the new life into the Clause”).

91. *Id.* at 521 (Thomas, J., dissenting).

92. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230).

93. FARBER & SHERRY, *supra* note 59, at 428–29.

94. *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

95. *Id.*

96. *Corfield*, 6 F. Cas. at 551–52.

franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.”<sup>97</sup>

Justice Thomas’s dissent in *Saenz* is even more remarkable, however, for what it portends about the willingness of the conservative Justices on the Supreme Court to reconsider the significance of the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>98</sup> Justice Thomas rejected the manner in which the majority sought to redeploy the Clause as out-of-step with its historical underpinnings.<sup>99</sup> But he did not indicate an aversion to reawakening the Clause per se; to the contrary, and notwithstanding his dissent, he declared that he would be “open to reevaluating [the Clause’s] meaning in an appropriate case” concerning a fundamental right as understood by those enacting the Fourteenth Amendment.<sup>100</sup>

In Sections III.A-E, this Note accepts Justice Thomas’s invitation to reevaluate the historical meaning of the Clause through an originalist lens. Section III.A briefly introduces the concept of originalist analysis in this context. Section III.B argues that a straightforward reading of the relevant constitutional text empowers the federal government to prevent states from denying their citizens the ability to exercise fundamental rights. Section III.C concedes that the majority of the members of the Thirty-Ninth Congress did not believe that the Privileges or Immunities Clause prevented states from disenfranchising certain classes of their citizens, but Section III.D counters that a majority of those in the state ratifying

97. *Id.* at 552. “Regulation” here is given its ordinary meaning in the context of elections, as referring to such state requirements as residency and registration with local voting precincts. It is not taken to mean any restriction that a state wishes to place on access to the ballot box. *But see* Eric R. Claeys, *Blackstone’s Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 800 (2008) (criticizing Justice Washington’s inclusion of access to the franchise among the rights protected by the Privileges or Immunities Clause of the Fourteenth Amendment).

98. Chief Justice Rehnquist joined Justice Thomas in his dissent. *Saenz*, 526 U.S. at 521 (Thomas, J., dissenting). The remaining seven Justices signed on to a broad reading of the Privileges or Immunities Clause in the “right to travel” context. *Id.* at 492. Justice Thomas also indicated that he considered the demise of the Clause to be a contributing factor in the “disarray” of Fourteenth Amendment jurisprudence. *Id.* at 527–28 (Thomas, J., dissenting).

99. Justice Thomas was also voicing, in part, his aversion to the Court’s historically broad reading of the Due Process Clause of the Fourteenth Amendment. He specifically lamented what he considers the Court’s use of the Due Process Clause as a “convenient tool for inventing new rights, limited solely by the ‘predilections of those who happen at the time to be Members of this Court.’” *Id.* at 528 (Thomas, J., dissenting) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 502 (1977)).

100. *Id.* Justice Thomas has not given up on the possibility that a reevaluation will ultimately occur. *See Troxel v. Granville*, 530 U.S. 57, 80 n.\* (2000) (Thomas, J., concurring) (“This case also does not involve a challenge based upon the Privileges [or] Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause.”).

conventions did believe that the Clause prevented states from doing so. Section III.E concludes with an argument for overruling the *Slaughter-House Cases*, the last remaining hurdle to an application of the Privileges or Immunities Clause consistent with the meaning history imputes to it. The overall thrust of these Sections is that an originalist reading of the Clause makes it a plausible tool for invalidating felon disenfranchisement laws.

#### A. Originalism in the Privileges or Immunities Context

The notion of “originalism” in constitutional interpretation is itself open to a variety of interpretations.<sup>101</sup> The central requirement in conducting an originalist analysis, however, is that a judge apply the generally accepted, objective understanding of a constitutional text at the time of the text’s enactment in considering how that language answers modern-day constitutional questions.<sup>102</sup> Justice Thomas’s dissent in *Saenz*, which considered the origin of the phrase “privileges or immunities” in American law and the understanding of that phrase by both American colonists and the members of the Thirty-Ninth Congress,<sup>103</sup> provides ample evidence of the sort of searching historical inquiry he would undertake in evaluating the original meaning of the Privileges or Immunities Clause.<sup>104</sup> Importantly, substantial historical evidence of the sort to which Justice Thomas<sup>105</sup> and other originalists traditionally turn exists to support the notion that the Privileges or Immunities Clause was intended to apply to the franchise.<sup>106</sup>

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101. See generally GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 17–37 (1992) (canvassing various types of originalist analysis).

102. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 16–18, 23–25, 37–41 (Amy Gutmann ed., 1997).

103. *Saenz*, 526 U.S. at 522–27.

104. One biography described his dissent in *Saenz* as “the most thorough treatment of the [Privileges or Immunities] [C]ause in a Court opinion since the *Slaughter-House Cases*.” ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 563 (2001).

105. In writing his opinions, Justice Thomas frequently “relies on historical sources, founding documents, contemporaneous evidence . . . and timeless principles of natural law.” HENRY MARK HOLZER, THE SUPREME COURT OPINIONS OF CLARENCE THOMAS, 1991–2006: A CONSERVATIVE’S PERSPECTIVE 156 (2007). Professor Holzer further notes that “[i]n no opinions [he has] read, especially in modern times, has there been the consistent originalism and dedication to founding principles and documents that one sees in the Supreme Court jurisprudence of Justice Thomas.” *Id.* at 155.

106. The fact that the Privileges or Immunities Clause has been so underused over time has had another effect on understanding the historical meaning of the clause: “that scholarship has only begun to scratch the surface of a complicated historical reclamation project.” Claey, *supra* note 97, at 820.

### B. Constitutional Text

Understanding the plain-text meaning of the Privileges or Immunities Clause requires some historical unpacking. On the one hand, the language of the Clause seems to guarantee the protection of the privileges or immunities of United States citizens as such:<sup>107</sup> “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>108</sup> At first blush, this suggests that the Clause was meant only to prevent the states from enacting legislation that infringed upon the privileges or immunities of national citizenship, not to prevent state legislatures from denying their own citizens certain privileges or immunities of state citizenship.<sup>109</sup>

An equally plausible reading, however, is not that the Clause drove a wedge between state and national citizenship, but that in fact it effectively “staple[d] them together” by folding the possession of the rights of state citizenship into a right of national citizenship.<sup>110</sup> As noted by Senator George Boutwell during the debate on the Civil Rights Act of 1875, “As a citizen of the United States, the first right of the citizen of the State is that he shall enjoy all the privileges and immunities of a citizen of the State.”<sup>111</sup>

Senator Boutwell’s view reflects the fact that, after Reconstruction, the rights of state citizenship were to be understood not as distinct from national citizenship, but instead as derivative of national citizenship.<sup>112</sup> This view is further supported by comparing

107. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873):

[W]e wish to state here that it is only the [privileges and immunities of a citizen of the United States that] are placed by this clause under the protection of the Federal Constitution, and that [those of a citizen of a State], whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

108. U.S. CONST. amend. XIV, § 1.

109. See *Slaughter-House Cases*, 81 U.S. at 74:

It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.

110. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1415 (1992); see also Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, 1972 WASH. U. L.Q. 405, 414–15 (arguing that even if the Privileges or Immunities Clause were read narrowly to avoid removing the regulation of the affairs of U.S. citizens from the states to the federal government, “other means”—namely, the Due Process and Equal Protection Clauses of the Fourteenth Amendment—have since been employed to accomplish that objective).

111. 2 CONG. REC. 4116 (1874).

112. ANTIEAU, *supra* note 41, at 6 (noting that, with the passage of the Fourteenth Amendment, state citizenship would thereafter be subordinated to national citizenship).

the Privileges or Immunities Clause of the Fourteenth Amendment with the Privileges and Immunities Clause found in Article IV, Section 2.<sup>113</sup> While the latter Clause protects the privileges and immunities of citizens of the "several States," the former Clause protects the privileges and immunities of citizens of the "United States."<sup>114</sup> The broad reference in the Fourteenth Amendment's provision reflects the general thrust of the Amendment, as recognized by the Court's incorporation of most of the provisions in the Bill of Rights against the states,<sup>115</sup> which ensures that states may not use federalism as a tool to avoid enforcing rights recognized as fundamental.

This reading of the Clause explains how it may be used to strike down not only state statutes infringing on the rights of state citizenship, but also the rights of national citizenship. As discussed *infra* Section III.E, understanding the Clause in this way destroys a basic premise of the *Slaughter-House Cases* and frees a significant millstone from around the Clause's jurisprudential neck. However, understood in conjunction with the meaning ascribed to it by those responsible for its passage, as discussed *infra* Sections III.C and III.D, such a reading also explains how the Clause can be used to invalidate state laws that abridge the right to vote in both state and federal elections.

### *C. Divining Meaning: The Understanding of the Members of the Thirty-Ninth Congress*

Apart from the text itself, the starting point for understanding the meaning of the Privileges or Immunities Clause is the words of those responsible for drafting and passing the Fourteenth Amendment: the members of the Thirty-Ninth Congress. Upon initial inspection, the history does not frame the Clause as an enfranchising measure; the general consensus within the Thirty-Ninth Congress was that the term "privileges or immunities" did not encompass the right

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According to Sneed, the "prevailing view" at the time is exemplified by Rep. Reverdy Johnson's statement during the debates of the Thirty-Ninth Congress over the proposed Amendment that "there is no definition as to how citizenship can exist in the United States except through the medium of citizenship in a State." SNEED, *supra* note 41, at 386.

113. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

114. U.S. CONST. amend. XIV, § 1.

115. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (noting that "many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment").

to vote.<sup>116</sup> Representative John Bingham of Ohio, the principal draftsman of the Fourteenth Amendment,<sup>117</sup> indicated that the Amendment did “not give, as [Section 2 of the Amendment] shows, the power to Congress of regulating suffrage in the several States.”<sup>118</sup> Likewise, Senator Jacob Howard of Michigan flatly declared upon introducing the proposed Amendment in the Senate that “[t]he right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution.”<sup>119</sup> The understanding of these congressional leaders that neither privileges nor immunities extended to voting was echoed by other members of both the House<sup>120</sup> and the Senate,<sup>121</sup> although it was not universally held.<sup>122</sup>

The statements of these members, however, must be squared with the content of *Corfield v. Coryell*,<sup>123</sup> upon which many of them relied in supplying meaning for the term “privileges or immunities.”<sup>124</sup> *Corfield* is notable not for its subject matter—the opinion offers a dry evaluation of the constitutionality of a New Jersey statute restricting

116. See ANTIEAU, *supra* note 41, at 22 (“Nevertheless, it must be recognized that the leaders in both houses of the Thirty-Ninth Congress thought that the time was not yet ripe for conferring the suffrage upon the freedmen.”).

117. FARBER & SHERRY, *supra* note 59, at 440, 622.

118. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

119. *Id.* at 2766.

120. See, e.g., *id.* at 2462 (statement of Rep. Garfield) (lamenting the fact that the Amendment did not touch upon the right to vote).

121. See, e.g., *id.* at 599 (statement of Sen. Trumbull) (indicating that the Civil Rights Bill of 1866, of which the passage of the Fourteenth Amendment was intended in part to justify, “ha[d] nothing to do with the right of suffrage”).

122. Rep. Julian of Indiana, for example, argued that the right to vote was a natural right. SNEED, *supra* note 41, at 93. Sen. Morrill similarly argued that “[t]o deprive the freedmen of the vote was against republican principles.” *Id.* at 160. Even Rep. Bingham appeared to support this position from time to time, arguing that freed slaves, as free persons, were entitled to the right to vote. *Id.* at 113–14. Bingham also noted that the inclusion of a penalty in Section 2 for disenfranchising blacks suggested not that the Constitution authorized such disenfranchisement, but that it repudiated it. *Id.* at 115.

Lastly, even if voting were not considered to be a fundamental natural right prior to the enactment of the Fourteenth Amendment, legislative history exists to suggest that the Amendment was meant to secure both civil and political rights to freed blacks. See 2 FRANCIS FESSENDEN, LIFE AND PUBLIC SERVICES OF WILLIAM PITT FESSENDEN 80–82 (Da Capo Press 1970) (1907) (discussing the rights of the newly freed slaves by the Joint Committee on Reconstruction).

123. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

124. Rep. Bingham made frequent appeals to *Corfield*’s language in congressional debate, as he was very familiar with the opinion of his “mentor,” Justice Washington. ANTIEAU, *supra* note 41, at 49. Likewise, Sen. Howard answered the question of what rights were encompassed by the term “privileges or immunities” by reading “what that very learned and excellent judge says about these privileges and immunities of the citizens of each State in the several States.” CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Sen. Howard in this instance was reading directly from Justice Washington’s decision in *Corfield*. *Id.*

the ability of citizens to dredge for oysters in the state's public waters<sup>125</sup>—but rather for its lengthy treatment of the common understanding at the time of what the “privileges and immunities” of state citizenship entailed.<sup>126</sup> The opinion made two important observations in this regard: first, that the Privileges and Immunities Clause found in Article IV, Section 1 referred only to privileges and immunities deemed “fundamental”;<sup>127</sup> and second, that the list of those fundamental privileges and immunities “clearly embraced” the elective franchise.<sup>128</sup>

While *Corfield* is significant for providing a list of the privileges and immunities understood as such at the time of the drafting of Article IV, it is even more important in the present context for its repeated invocation during legislative debate by the principal drafters of the Fourteenth Amendment.<sup>129</sup> The fact that members of the Thirty-Ninth Congress not only regularly invoked, but held in high regard, an opinion specifically identifying the elective franchise as a privilege or immunity of citizenship, without ever disavowing this inclusion, offers at least some evidence that they also counted the franchise among those privileges and immunities.

It is possible that those members invoking *Corfield* were trying to have it both ways; namely, by rooting their own understanding of privileges and immunities in a well-known opinion by the respected Justice Washington while simultaneously turning a blind eye to his inclusion of a right they were not prepared to recognize.<sup>130</sup> But the history accompanying the passage of the Fourteenth Amendment offers a second possibility: that those members of Congress rejecting the notion that the Clause encompasses the right of suffrage were

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125. 6 F. Cas. at 548.

126. *Id.* at 551–52. *Corfield's* discussion of the privileges and immunities of the citizens of the several states was in reference to the Privileges and Immunities Clause of Article IV of the Constitution, as the Fourteenth Amendment had not been enacted at the time of the decision. *Corfield* is relevant nevertheless, not merely because this Note is primarily concerned with the privileges and immunities of state (and not national) citizenship, but because its text was repeatedly invoked by the Framers of the Fourteenth Amendment when they drafted a Privileges or Immunities Clause of their own.

127. *Corfield* further defines “fundamental” as having “at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” *Id.* at 551.

128. *Id.* at 552.

129. “When Congress gathered to debate the Fourteenth Amendment, members frequently, if not as a matter of course, appealed to *Corfield*, arguing that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified in his opinion.” Saenz v. Roe, 526 U.S. 489, 526 (1999) (Thomas, J., dissenting).

130. Claeys, *supra* note 97, at 800–01.

making that argument in the context of race alone.<sup>131</sup> They were, in effect, arguing that the Fourteenth Amendment was not doing for blacks what the Fifteenth Amendment would later do for them: expressly preventing the states from denying or abridging the right of its citizens to vote on the basis of color.

The ratification of the Fifteenth Amendment, however, is evidence not that the Fourteenth Amendment should not—or could not—preserve access to the ballot for state citizens, but that a subsequent Amendment was required to make that guarantee explicit. The Fifteenth Amendment, therefore, does as much to reinforce the enfranchising elements of Section 1 of the Fourteenth Amendment as it does to dismantle the disenfranchising elements of Section 2.<sup>132</sup>

#### *D. Divining Meaning: The Understanding of the Ratifiers*

The words of the members of the Thirty-Ninth Congress are not the only source for understanding the content of “privileges or immunities,” however. A second, and arguably more potent,<sup>133</sup> means for understanding the original significance of the phrase emerges from an analysis of the debates of the state legislatures charged with ratifying the Fourteenth Amendment. On that score, it is widely apparent that whatever the members of the Thirty-Ninth Congress believed, there was “broad belief” in the states that the Amendment would extend the franchise to blacks.<sup>134</sup> In the Pennsylvania Senate, George Landon announced that the Amendment would “guarantee to all persons born on American soil . . . the immunities of impartial suffrage before the law.”<sup>135</sup> His colleague, W. A. Wallace, opposed the Amendment because it would force the states to give up their right to regulate suffrage.<sup>136</sup> Likewise, in the Pennsylvania House of Representatives, H.B. Rhoads complained that the “main idea” of the Amendment was to “make a citizen of the Negro and give him the right of suffrage.”<sup>137</sup>

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131. See SNEED, *supra* note 41, at 371 (rejecting the notion that the Fourteenth Amendment represented the willingness or desire of the states to enfranchise blacks).

132. See discussion *supra* Section II.C.2.

133. “[T]he intention of the ratifiers, not the Framers, is in principle decisive . . .” Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981).

134. ANTIEAU, *supra* note 41, at 24. This belies the argument that the states were simply not prepared to extend the franchise to blacks after the Civil War. See BOGEN, *supra* note 69, at 49.

135. PA. LEG. RECORD FOR 1867, app. at vi.

136. *Id.* at xiii.

137. ANTIEAU, *supra* note 41, at 24 (citing PA. LEG. RECORD, *supra* note 135, app. at liv).

The belief that the Amendment's "privileges or immunities" language included the franchise extended beyond Pennsylvania. Legislators in Arkansas,<sup>138</sup> Florida,<sup>139</sup> Indiana,<sup>140</sup> New Hampshire,<sup>141</sup> New Jersey,<sup>142</sup> North Carolina,<sup>143</sup> Ohio,<sup>144</sup> and Tennessee<sup>145</sup> believed that the proposed Amendment would extend the franchise to blacks as well. The governors of Indiana,<sup>146</sup> Massachusetts,<sup>147</sup> New Hampshire,<sup>148</sup> and South Carolina<sup>149</sup> also adopted this interpretation.

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138. "[Section 2 of the Amendment] is but an effort to force Negro suffrage upon the States, and, further intended or not, it leaves the power to bring this about, whether the States consent or not . . ." ANTIEAU, *supra* note 41, at 29 (citing ARK. S.J. FOR 1866, at 259).

139. The Florida House Committee on Federal Relations reported that the proposed Amendment gave blacks the privileges and immunities of citizenship, including the "elective franchise." ANTIEAU, *supra* note 41, at 29 (citing FLA. H.J. FOR 1866, at 76).

140. Indiana state representatives Honneus and Ross opposed ratification in the belief that the Amendment would grant suffrage to blacks. ANTIEAU, *supra* note 41, at 25 (citing 1 IND. H.J. FOR 1867, 101-05); 9 BREVIER LEGISLATIVE REPORTS 80 (Ariel & W.H. Drapier eds., 1867).

141. "[T]he only occasion and real design of the proposed amendment is to accomplish indirectly what the general government has and should have no power to do directly, namely, to interfere with the regulation of the electoral franchise of the States, and thereby force Negro suffrage upon an unwilling people." N.H. S.J. FOR 1866, 72.

142. In introducing a joint resolution to ratify the Amendment, Assemblyman Scovel declared that "it is right that Congress should have the paramount power of regulating the suffrage and representation of the States . . . if the Negro cannot vote, no one shall vote for him." ANTIEAU, *supra* note 41, at 28 (citing TRENTON DAILY TRUE AM., Sept. 12, 1866).

143. The Joint Select Committee on Federal Relations of the North Carolina Legislature informed the whole Legislature that Congress would likely construe the Amendment to give it power to regulate suffrage. ANTIEAU, *supra* note 41, at 29 (citing N.C. S.J., 1866, at 96).

144. Early in 1868, Ohioans attempted to rescind their ratification of the Amendment because "one of the objects to be accomplished by said proposed amendment was to enforce negro suffrage and negro political equality in the States." *Another Infamy Contemplated*, CLEVELAND PLAIN DEALER, Jan. 13, 1868.

145. Anticipating that the Amendment might extend the franchise to blacks, the Tennessee Legislature attempted, unsuccessfully, to include a qualification that the Amendment "not be so construed as to confer the right of suffrage upon a negro." ANTIEAU, *supra* note 41, at 29 (citing TENN. S.J., Extra Sess. 1866, at 23).

146. In his address to the Indiana Legislature on the proposed Amendment, Governor Oliver P. Morton declared his belief that suffrage was a natural right and that the Amendment protected its free exercise. ANTIEAU, *supra* note 41, at 25 (citing 1 IND. DOCUMENTARY J. FOR 1867, at 21).

147. Governor Alexander H. Bullock described the Amendment in his message to the Legislature as "the opportunity of this generation . . . to vindicate American ideas by enfranchising a race of men." ANTIEAU, *supra* note 41, at 26 (citing LEGIS. DOCS. MASS. S. 1867, NO. 1, at 67).

148. Governor Walter Harriman, in addressing the New Hampshire Legislature on the proposed Amendment, told them, "Not for caste, or race, or color, can any man be debarred from the ballot box . . ." N.H. S. & H. REP. FOR 1867, app. at 609.

149. Governor James L. Orr informed the South Carolina Legislature that the Amendment "confer[red] upon Congress the absolute right of determining who shall . . . exercise the elective franchise." S.C. H.J., Nov. 27, 1866, at 34.

And newspapers in Pennsylvania<sup>150</sup> and Ohio<sup>151</sup> reported that enactment of the Amendment would enfranchise blacks. While it is true that not everyone in the states believed that the proposed Amendment would extend suffrage to blacks,<sup>152</sup> the great weight of evidence at the state level suggests that those ratifying the Amendment understood that they were enfranchising black Americans. After Reconstruction, in other words, the privilege of citizenship would include the right to vote.

### *E. Slaughtering Slaughter-House*

Both the text and the meaning underlying the text of the Privileges or Immunities Clause cast the Clause as a powerful constitutional source of individual rights, including the right to vote. But the extraordinary potential of the Clause was extinguished only five years after its enactment by the *Slaughter-House Cases*.<sup>153</sup> The *Slaughter-House* Court considered the constitutionality of a Louisiana statute forbidding the slaughter of cattle, pigs, and chickens within certain state jurisdictions, except as carried out by a state-chartered slaughterhouse company.<sup>154</sup> Notably, the Court did not reject *Corfield's* characterization of the underlying meaning of “privileges or immunities” in the constitutional context; to the contrary, the Court turned to that opinion as the “first and leading case on the subject.”<sup>155</sup>

150. The Philadelphia Daily News informed its readers that the proposed Amendment would enfranchise negroes. ANTIEAU, *supra* note 41, at 24–25 (citing PHILA. DAILY NEWS, Oct. 3, 1866, at 2; PHILA. DAILY NEWS, Oct. 9, 1866, at 2).

151. The *Cleveland Plain Dealer* reported on a provision in an Ohio bill to rescind the legislature’s 1867 joint resolution ratifying the Fourteenth Amendment, which read in part that the joint resolution “was a misrepresentation of the public sentiment of the people of Ohio, and contrary to the best interests of the white race, endangering the perpetuity of our free institutions.” *Another Infamy Contemplated*, *supra* note 144.

152. See, for example, Pennsylvania State Rep. Harrison Allen’s statement that he did not understand the proposed Amendment to confer upon the “Negro” the right to suffrage, ANTIEAU, *supra* note 41, at 25 (citing PA. LEGIS. REC. FOR 1867, app. at xvi), West Virginia Governor Arthur Boreman’s message to the State Legislature that the proposed Amendment “leaves this question of suffrage as at present, to the States,” ANTIEAU, *supra* note 41, at 30 (citing J. H.R. W.V., 1867, at 18–21), and the Providence Evening Press’s explanation to its readers that “[w]hatever may be the abstract right or wrong of the question of lifting the late slave and present freedman into an equal voting citizen with his white neighbor, that question is not raised in the proposed constitutional amendment,” ANTIEAU, *supra* note 41, at 27 (citing PROVIDENCE EVENING PRESS, Oct. 3, 1866, at 2).

153. 83 U.S. (16 Wall.) 36 (1873).

154. *Id.* at 59–60. The Court framed the issue broadly as whether “any exclusive privileges [could] be granted to any of its citizens, or to a corporation, by the legislature of a State[.]” *Id.* at 65.

155. *Id.* at 75.

A bare 5-4 majority nevertheless reasoned that the Amendment's explicit reference to the "privileges or immunities of citizens of the *United States*"<sup>156</sup> offered no more protection to state citizens against acts of their own legislature than did the "privileges and immunities" language in Article IV, Section 1.<sup>157</sup> In one stroke, the Court thus succeeded in depriving the Clause of all significance.<sup>158</sup>

Scholars have offered two potent objections to this understanding of the Clause. The first common objection is that by "interpreting" the Clause in this way, the Court ignored a basic presumption of constitutional construction: that when Congress drafts a constitutional amendment, it does not include superfluous language.<sup>159</sup> Nor is it reasonable to assume that Congress will include language in a proposed amendment whose meaning is already reflected elsewhere in the text of the document. By reading the Privileges or Immunities Clause of the Fourteenth Amendment as mere redundancy,<sup>160</sup> however, the Court managed to read out of the Constitution not only the Clause itself but also the legislative intent ostensibly supporting it.

Addressing this point in his *Slaughter-House* dissent, Justice Stephen Johnson Field noted the absurdity of a construction that would deprive the Clause of all meaning, famously opining that the majority's reading rendered the Clause "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."<sup>161</sup> In his view, the Clause simply assumed that all citizens, of right, possessed certain privileges and immunities, and instructed that states not abridge them by legislative enactment.<sup>162</sup> The advantage of this reading over that of the majority is twofold: first, it pays appropriate respect to the intense and prolonged efforts of the drafters of the Fourteenth Amendment; and

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156. *Id.* at 74 (emphasis added).

157. *Id.*

158. Justice Thomas noted ruefully in *Saenz* that this reading "sapped the Clause of any meaning." *Saenz v. Roe*, 526 U.S. 489, 527 (1999) (Thomas, J., dissenting).

159. "[T]here is not a bit of legislative history that supports the view that the Privileges or Immunities Clause was intended to be meaningless." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22 (1980).

160. *Slaughter-House Cases*, 83 U.S. at 74.

161. *Id.* at 96 (Field, J., dissenting.).

162. *Id.* Professor Ely restates Justice Field's claim by proposing that the Clause "define[s] the class of rights rather than limit[s] the class of beneficiaries." ELY, *supra* note 159, at 25. He continues, "Since everyone seems to agree that such a construction would better reflect what we know of the purpose, and since it is one the language will bear comfortably, it is hard to imagine why it shouldn't be followed." *Id.*

second, it offers a more faithful adherence to the historical underpinnings of the Clause itself than that offered by the majority.<sup>163</sup>

The second common objection to the *Slaughter-House* opinion is that the Court has not, over time, bound itself to that opinion's similarly narrow reading of the Equal Protection Clause of the Fourteenth Amendment.<sup>164</sup> The *Slaughter-House* majority assumed that the Amendment's reference to equal protection was applicable solely in the context of racial discrimination.<sup>165</sup> This assumption has since been soundly undermined by the Court's subsequent invalidation of state laws classifying individuals on the basis of, for example, sex,<sup>166</sup> sexual orientation,<sup>167</sup> and mental retardation.<sup>168</sup> The *Slaughter-House* Court's failed prognostication on the scope of the Equal Protection Clause must place in serious jeopardy its proffered understanding of the Privileges or Immunities Clause. History counsels that the Court abandon blind adherence to such a nearsighted oracle.<sup>169</sup>

#### IV. RECONCILIATION

The Supreme Court's decision in *Saenz v. Roe* provides an opportunity for courts, scholars, and litigators to reexamine the historical understanding and application of the Privileges or Immunities Clause of the Fourteenth Amendment. Justice Thomas, as noted *supra* Part I, indicated his openness to reevaluating the meaning of the Clause in an "appropriate case" concerning a "fundamental right."<sup>170</sup> The preceding analysis relies upon the

163. See discussion *supra* Sections III.B–D.

164. "Later Courts, correctly diagnosing a case of overreaction, have backed away, with a vengeance, from *Slaughter-House's* comparably narrow interpretation of the Equal Protection Clause. Yet the Court hasn't moved an inch on Privileges or Immunities." ELY, *supra* note 159, at 23.

165. "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Slaughter-House Cases*, 83 U.S. at 81.

166. *United States v. Virginia*, 518 U.S. 515, 555–56 (1996).

167. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

168. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47, 450 (1985).

169. "Everyone agrees" that the *Slaughter-House Cases* were wrongly decided. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 n.4 (1994). "Indeed, the majority's mistake was so egregious as to make one wonder whether it was willful." PERRY, *supra* note 70, at 58; see also Gans, *supra* note 86, at 927 (arguing that adopting a "unitary" reading of Section 1 of the Fourteenth Amendment would lead the Court to overrule the *Slaughter-House Cases* and "reinvigorate the Privileges or Immunities Clause, making it the basis for protecting fundamental human liberties").

170. *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting).

historical,<sup>171</sup> structural,<sup>172</sup> and jurisprudential<sup>173</sup> inadequacies and inaccuracies of the *Richardson* decision—as well as originalist arguments that the Clause was intended to protect the right to vote<sup>174</sup>—to demonstrate why a challenge to felon disenfranchisement laws would constitute an “appropriate case” as understood by Justice Thomas.<sup>175</sup> It proposes felon disenfranchisement laws, in particular, because of their effect on what the Court has described as the most fundamental of fundamental rights: the right to vote.<sup>176</sup>

Invalidating felon disenfranchisement laws by this method, moreover, offers an additional advantage: minimizing the *stare decisis* problem that a reassessment of *Richardson* would raise. The Court is understandably sensitive to the prospect of overturning its own precedent.<sup>177</sup> The argument advanced by this Note, however, would require not that the Court completely overturn *Richardson* and confront the equal protection question initially raised in the case,<sup>178</sup> but instead that it simply identify the Privileges or Immunities Clause as an alternative constitutional source for the right to vote.

Applying the Clause in this way, in addition, need not disembowel prior Court opinions preserving fundamental rights under other provisions of the Fourteenth Amendment. While transposing equal protection or substantive due process analysis to the privileges or immunities context is an option the Court might explore further,<sup>179</sup> it is by no means the required course under this Note’s analysis. Such

171. See discussion *supra* Section II.C.1.

172. See discussion *supra* Section II.C.2.

173. See discussion *supra* Section II.C.3.

174. See discussion *supra* Part III.

175. There is some evidence that Justice Thomas himself is already predisposed to believe that the Fourteenth Amendment implicates the franchise, in that it was intended in part to secure blacks the right to vote. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2783 n.19 (2007) (Thomas, J., concurring) (“I have no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members.”).

176. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (holding the franchise to be “preservative of all rights”).

177. A Court that constantly repudiates its past decisions necessarily calls into question the validity of its future decisions. As Justice O’Connor asserted, “Liberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (rejecting opportunity to overrule *Roe v. Wade*, 410 U.S. 113 (1973)). *But see Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (“I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe we should be consistent rather than manipulative when invoking . . . doctrine.”).

178. See discussion *supra* Section II.B.

179. “We should . . . consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.” *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).

an application would signal, however, the beginning of an honest appraisal of the ever-broadening application of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as compared with the virtual non-application of the first Clause in the series: that protecting privileges and immunities.

Rooting access to the franchise in the Privileges or Immunities Clause would, of course, subject felon disenfranchisement laws to strict scrutiny analysis as abridgements of a fundamental right. This Note does not address the question of whether felon disenfranchisement laws would satisfy strict scrutiny except to say that proponents of these laws have advanced several arguments to justify them, while their opponents have advanced persuasive arguments in response.<sup>180</sup> Suffice it to say that, as noted *supra* Section II.A, felon disenfranchisement is the only means other than age or mental infirmity by which states continue to disenfranchise their citizens,<sup>181</sup> and this mechanism only remains in place today because of the *Richardson* decision. It seems highly unlikely that the Court would exhume the Privileges or Immunities Clause to preserve the franchise, only to find that felon disenfranchisement laws

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180. One justification relies upon social contract theory, positing that, by engaging in criminal activity, the criminal forfeits his right to participate in the political process. See *Green v. Bd. of Elections of the City of New York*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.) (“A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.”). Denying felons the full rights of citizenship, however, makes it that much more difficult for them to perform the duties of citizenship and thus to uphold the social contract. Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS 281, 283 (2006); see also Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993):

[T]he vote should be protected not simply because it enables individuals to pursue political ends, but also because voting is a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity.

A second justification characterizes felons as a threat to the “purity of the ballot box,” in that they may undermine the voting process, see Fletcher, *supra* note 63, at 1899, may vote irresponsibly, see Bennett, *supra* note 82, at 4, or may effect harmful changes in the law, see *id.* at 5. Even if felons, as a voting bloc, were to attempt to effect such change, the likelihood of an extremely soft-on-crime politician getting elected and persuading other legislators to adopt his positions is slim. Behrens, *supra* note 46, at 263.

A final justification relies on traditional criminal law notions of deterrence and retribution. See *id.* (identifying “stigma” and “warning” purposes of felon disenfranchisement). These laws appear to have no meaningful deterrent effect, however, see Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 161 (1999), even when criminals are aware of them, see Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,”* 102 HARV. L. REV. 1300, 1307 (1989) (describing the “extremely low visibility” of these laws).

181. Belluck, *supra* note 34.

nevertheless satisfied the strict scrutiny standard accompanying such exhumation.

The short of it is this: the Court found itself a shovel in *Saenz v. Roe*. The time has finally come to begin the dig.

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