

THE WAR ON WOMEN’S FUNDAMENTAL RIGHTS: CONNECTING U.S. SUPREME COURT ORIGINALISM TO RIGHTWING, CONSERVATIVE EXTREMISM IN AMERICAN POLITICS[†]

DONNA J. KING*

*It is rather for us, the living, we here be dedicated to the great task remaining before us—that, from these honored dead we take increased devotion to that cause for which they here, gave the last full measure of devotion—that we here highly resolve these dead shall not have died in vain; that the nation, shall have a new birth of freedom, and that government of the people by the people for the people, shall not perish from the earth.*¹

INTRODUCTION

*“[The Fourteenth] Amendment, first proposed in 1866 and declared ratified in 1868, plays a monumental role in the politics and law of modern America.”*²

There is an expanding social and economic movement in America today that thrives on the devaluation of the unenumerated fundamental rights protected under the Privileges or Immunities Clause of the Fourteenth Amendment of the United States Constitution.³ The ideological belief system, upon which this

[†] *E.g.*, Brad Johnson, *Access to Birth Control is a Fundamental Component of Climate Survival*, THINKPROGRESS (Feb. 10, 2012), <http://thinkprogress.org/green/2012/02/10/423265/access-to-birth-control-is-a-fundamental-component-of-climate-survival/?mobile=nc> (“The conservative war on birth control is a war on women’s rights, and thus on the rights of us all.”); *accord*, *e.g.*, THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 135 (2004) (discussing the libertarian, anti-government ethos of President Reagan’s goal to “get the government off the backs of the American people” and his desire to reduce the threat to individual liberty he believed the government possessed, causing him to push for reductions in federal powers and resources while a second group of conservatives, the Christian Right, mobilized to influence national politics for the first time); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 6-9 (2008) (discussing a historical process of political competition and policy change that, over time, encouraged courts, congressional subcommittees, and bureaucrats to work together to create policy expansion that “made elections increasingly important as sources of large-scale policy change”).

* University of Central Florida, Sociology Doctoral Student; Florida A & M University College of Law, JD, Magna Cum Laude, 2012; University of Central Florida, B.S., 1991. Thank you to Professor Barbara Bernier, FAMU College of Law, for her support every step of the way.

¹ Abraham Lincoln, *Gettysburg Address - “Nicolay Copy”*, LIBRARY OF CONGRESS (Nov. 19, 1863).

² Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003) (emphasis added).

³ *See, e.g.*, U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall

antigovernment movement is founded, is indicative of an aristocratic way of thinking that has historically been supported by the U.S. Supreme Court's precedent of completely rejecting the Reconstruction era and the intentions of its Framers.⁴ As a result, today's political parties are competing over a much broader and more complex range of issues than ever before, particularly intensifying the war on women's fundamental rights.⁵ In order to understand this political dynamic,

abridge the privileges or immunities of citizens of the United States"); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3086 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("Because this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights, or whether the Court's judgment in *Slaughter-House* was correct. Still, it is argued that the mere possibility that the Privileges or Immunities Clause may enforce unenumerated rights against the States creates "'special hazards'" that should prevent this Court from returning to the original meaning of the Clause . . . I reject *Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship.") (quoting Stevens, J., dissenting); CONG. GLOBE, 39TH CONG., 1ST SESS. 1836 (1866) (statement of Rep. Lawrence) ("But conceding, as the courts have held, that the privileges referred to in the Constitution are such as are fundamental civil rights, not political rights nor those dependent on local law, then to what extent shall they be enjoyed by a citizen of one State removing into another? Not simply so far as they may be enjoyed by 'some portion' or 'some description' of citizens, but 'all the privileges and immunities of citizens;' that is, all citizens under the like circumstances. This section does not limit the enjoyment of privileges to such as may be accorded only to citizens of 'some class,' or 'some race,' or 'of the least favored class,' or 'of the most favored class,' or of a particular complexion, for these distinctions were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequalities in which is rank injustice. This clause of the Constitution therefore recognizes but one kind of fundamental civil privileges equal for all citizens. No sophistry can change it, no logic destroy its force. There it stands, the palladium of equal fundamental civil rights for all citizens. Any law that invades its fundamental equality is void, and so it has always been understood."). See also, e.g., Mark Potok et al., *The Second Wave: Return of the Militias*, SOUTHERN POVERTY LAW CENTER, 4 (Aug. 2009), http://www.splcenter.org/sites/default/files/downloads/The_Second_Wave.pdf (discussing the radicalization of the Patriot movement, its anger over the election of President Obama, and the "ostensibly mainstream politicians and media pundits [who] have helped to spread Patriot and related propaganda" regarding topics ranging from conspiracy theories to the president's country of birth); *infra* notes 4, 47 and accompanying text.

⁴ See generally, e.g., *McDonald*, 130 S. Ct. at 3052; *Adamson v. California*, 332 U.S. 46 (1947); *Slaughter-House Cases*, 83 U.S. 36 (1873). See also, e.g., STEPHEN ERIC BRONNER, *BLOOD IN THE SAND* 10-11 (2005) (discussing neoconservatives' continued insistence to assert American hegemony and the fact that "[n]eoconservatism is not simply establishmentarian conservatism writ large; the new worldview is much more radical than its predecessor" of the 1950s); Luke Johnson, *Mitt Romney: 'I'm Not Concerned About The Very Poor'*, THE HUFFINGTON POST (Feb. 2, 2012), http://www.huffingtonpost.com/2012/02/01/mitt-romney-very-poor_n_1246557.html ("Former Massachusetts Gov. Mitt Romney said on Wednesday that he's 'not concerned about the very poor,' citing the social safety net in place for that segment of the populace and adding that he's focused on the middle class."); *Patriot Movement*, WIKIPEDIA, http://en.wikipedia.org/wiki/Patriot_movement (last visited Apr. 8, 2012) ("The patriot movement is a collection of conservative, independent, largely rural (but also in major cities throughout the country), small-government, social movements in the United States that include unorganized militia members, tax protesters, sovereign or state citizens, quasi-Christian apocalypticists, or combinations thereof. Adherents describe the movement as centered on a belief that individual liberties are in jeopardy due to unconstitutional actions taken by elected government officials, appointed bureaucrats, and some special interest groups outside of government, to illegally accumulate power.").

⁵ See, e.g., Devin Dwyer, *Biden: 'War on Women' is Real, Will Intensify*, ABC NEWS (Apr. 12, 2012), <http://abcnews.go.com/blogs/politics/2012/04/biden-war-on-women-is-real-will-intensify/> (describing Vice President Joe Biden's appearance on The Ed Show as "politically-charged" due to Biden's statement that the "Republican-led effort to rollback the rights of women is 'real' and will 'intensify.' 'And look, I'll tell you when it's going to intensify – the next president of the United States is going to get to name one, possibly two or more, members to the Supreme Court,' he added."); see STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 9 (2008).

one must realize the Court's ability to fuel the American political system's imbalance of power, whereby a fierce ideological struggle is causing women to bear the brunt of the current civil rights war.⁶

Throughout history, the Supreme Court has remained a reflection of the economic, political, and social changes in America.⁷ Although not directly responsible for initiating today's conservative extremist war on women, the Court is responsible for creating the legal and political climate, resulting in the war's inception.⁸ Arising as a backlash against what was viewed as the nation's social and moral decline resulting from the civil rights movement, the sexual revolution, second wave feminism, and the gay rights movement in the 1960s, neoconservatism advocated for a return to more traditional family values.⁹

⁶ See, e.g., *Slaughter-House Cases*, 83 U.S. at 128-29 (Swayne, J., dissenting) ("The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. The provisions of this section are all eminently conservative in their character. They are a bulwark of defence [sic], and can never be made an engine of oppression . . . Our duty is to execute the law, not to make it . . . It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power [of the Fourteenth Amendment] is beneficent in its nature, and cannot be abused. It is such an [sic] should exist in every well-ordered system of polity [sic] . . . Without such authority any government claiming to be national is glaringly defective . . . It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted . . . By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment."); see TELES, *supra* note 5, at 6-9. See also, e.g., Dwyer, *supra* note 5 ("Look, I have fought my whole career . . . whether it's the Violence Against Women Act or equal pay' . . . As for the Romney Campaign's claims that women have been disproportionately harmed under the Obama administration — with 92% of job losses being women — Biden dismissed it as bluster. 'Know what that reminds me of?' Biden said. 'Who caused these jobs to be lost — all of them, men and women?' he said, referring to the economic crisis that took hold under Obama's predecessor, former President George W. Bush." (quoting Vice President Joseph Biden)); Tom Shine, *Rep. Darrell Issa Bars Minority Witness, a Woman, on Contraception*, ABC NEWS (Feb. 16, 2012), <http://abcnews.go.com/blogs/politics/2012/02/rep-darrell-issa-bars-minority-witness-a-woman-on-contraception-2/> ("[Rep. Carolyn Maloney, D-N.Y.] criticized the Republican committee chairman, Rep. Darrell Issa, for wanting to 'roll back the fundamental rights of women.'"). See generally, *U.S. v. Morrison*, 529 U.S. 598 (2000) (declaring the Violence Against Women Act, which provided a civil remedy for victims of gender-motivated crimes, unconstitutional on the ground that Congress lacked the authority to enact the law under the Commerce Clause or the Fourteenth Amendment).

⁷ See PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970).

⁸ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (finding that it was unnecessary to determine "sex as a suspect classification, with all of the far-reaching implications of such a holding"). The Court further justified its position by "deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States." *Id.*; Amanda Marcotte, *Phase III of the War on Contraception: Pretend It Was All a Dream*, RH REALITY CHECK (Mar. 25, 2012), <http://www.rhrealitycheck.org/article/2012/03/25/phase-iii-war-on-contraception-pretend-it-was-all-dream> (discussing the various phases of "the long-standing war on women to include attacks on contraception"); *supra* note 5 and accompanying text. See also KURLAND, *supra* note 7, at 170 (discussing the separate and distinct institution of government that is the Supreme Court and the fixed power of authority that is derived from its distinction).

⁹ See, e.g., BRONNER, *supra* note 4, at 119; THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 135 (2004); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 41 (1989) (discussing the reaction to feminism in America as that of a renewed appeal for a return to traditional

Similarly, but more fervently, “[d]ue to the ‘alarming level of antifeminism and overt negativity toward women,’ the Fathers’ Rights Movement arose as a backlash to the Women’s Rights Movement.”¹⁰ Undeniably, this “underworld of misogynists [and] woman-haters” promotes a society that views women as vilified demons.¹¹ As a result, today’s war on women flourishes from rightwing extremists’ ability to exploit the Court’s willingness to express its “‘institutionally entrenched . . . judicial strategies’ that subordinate and subjugate [] women.”¹² Indeed, this subordination of women’s fundamental rights is possible because the Supreme Court prevented the Fourteenth Amendment from providing women its most powerful protections emanating from “the privileges and immunities of citizens of the United States.”¹³ With this “mass of privileges, immunities, and rights,” the

family values); ROBERT C. SMITH, CONSERVATISM AND RACISM, AND WHY IN AMERICA THEY ARE THE SAME 79 (2010). See also, e.g., Mary Bauer, *Testimony to Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights*, SOUTHERN POVERTY LAW CENTER (Apr. 17, 2012), <http://www.splcenter.org/get-informed/news/testimony-to-senate-judiciary-subcommittee-on-the-constitution-civil-rights-and-hu> (“Images from the 1960s, such as Bull Connor’s unleashing of vicious dogs and powerful water hoses on African Americans in the streets of Birmingham, should be a stark enough reminder of the destruction caused when laws are guided by racist intent.”); *American Family Association*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-files/groups/american-family-association> (last visited Apr. 22, 2012) (discussing the anti-gay hate group initially founded in 1977 as the National Federation for Decency which promotes “traditional moral values” through media outlets, making such claims as “‘For the sake of our children and society, we must OPPOSE the spread of homosexual activity! Just as we must oppose murder, stealing, and adultery!’ It continued, ‘Since homosexuals cannot reproduce, the only way for them to ‘breed’ is to RECRUIT! And who are their targets for recruitment? Children!’ In other appeals, the AFA has used a standard propaganda ploy against LGBT individuals: They’re a danger to children.” (quoting an American Family Association fundraising appeal)).

¹⁰ Donna J. King, *Naming the Judicial Terrorist*SM: *An Exposé of an Abuser’s Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153, 162 (Spring 2012) (quoting JOCELYN ELISE CROWLEY, *DEFIANT DADS* 7 (2008)), available at <http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1009&context=rgsj>; accord Arthur Goldwag, *Leader’s Suicide Brings Attention to Men’s Rights Movement*, SOUTHERN POVERTY LAW CENTER, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/a-war-on-women> (last visited Apr. 22, 2012) (“It’s not much of a surprise that significant numbers of men in Western societies feel threatened by dramatic changes in their roles and that of the family in recent decades. Similar backlashes, after all, came in response to the civil rights movement, the gay rights movement, and other major societal revolutions. What is something of a shock is the verbal and physical violence of that reaction.”). See also *infra* notes 11-12, 59 and accompanying text.

¹¹ See Goldwag, *supra* note 10 (“This kind of woman-hatred is increasingly visible in most Western societies, and it tends to be allied with other anti-modern emotions — opposition to same-sex marriage, to non-Christian immigration, to women in the workplace, and even, in some cases, to the advancement of African Americans . . . The men’s rights movement, also referred to as the fathers’ rights movement, is made up of a number of disparate, often overlapping, types of groups and individuals.”); accord King, *supra* note 10, at 162-63 (discussing the “seething underbelly of the Fathers’ Rights Movement, often referred to as ‘male supremacist groups’” (quoting Barry Goldstein, *Recognizing and Overcoming Abusers’ Legal Tactics*, in *DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY* 18-2 & n.2 (Mo Therese Hannah & Barry Goldstein eds., 2010))).

¹² King, *supra* note 10, at 153 (quoting KATHLEEN S. SULLIVAN, *CONSTITUTIONAL CONTEXT* 136 (The Johns Hopkins University Press 2007)); accord Goldwag, *supra* note 10 (“The groups, says Rita Smith, director of the National Coalition Against Domestic Violence, ‘have taken over the way courts deal with custody issues, particularly when there are allegations of abuse[.]’”).

¹³ See CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard) (“A citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws . . . With a view to prevent such confusion and disorder, and to put the

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Framers intended the Amendment to “secure[] to the citizen solely as a citizen of the United States” all fundamental rights, including women’s fundamental rights.¹⁴

There is “an extremist crusade to put a ‘bulls eye on women in America[,]”¹⁵ which began under the pretense for the need to reduce federal

citizens of the several States on an equality with each other as to all fundamental rights, a clause was introduced in the Constitution declaring that ‘the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.’ The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States . . . Such persons were, therefore, citizens of the United States as were born in the country or were made such by naturalization; and the Constitution declares that they are entitled, as citizens, to all the privileges and immunities of citizens in the several States. They are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several States of the Union.”); *accord, e.g.,* *Bradwell v. Illinois*, 83 U.S. 130, 139 (1873) (relying upon the *Slaughter-House Cases*, the Court denied Myra Bradwell a license to practice law in the State of Illinois due to the fact that “the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government”); *Slaughter-House Cases*, 83 U.S. 36, 129 (1873) (Swayne, J., dissenting) (dissenting to the majority opinion’s view that the privileges or immunities clause of the Fourteenth Amendment did not protect the petitioners as business owners, Justice Swayne “objected that the power conferred [in the Amendment] is novel and large. The answer is that the novelty was known and the measure deliberately adopted”). *See also* *Adamson v. California*, 332 U.S. 46, 52-53 (U.S. 1947) (“After declaring that state and national citizenship co-exist in the same person, the *Fourteenth Amendment* forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the *Fourteenth Amendment*. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power.”) (emphasis added). *But cf.* *Colgate v. Harvey*, 296 U.S. 404, 431-432 (1935) (“Reference has been made to numerous cases in which this court has rejected or ignored specific claims under the privileges and immunities clause; but since none of them relates to state legislation even remotely resembling the Vermont law here challenged, their collection and citation is without useful result, unless, as it seems to be thought, these numerous unsuccessful efforts to give the clause applications which fall outside its meaning show or tend to show that the clause itself has become a dead letter. Such a conclusion is, of course, inadmissible; for as we have already said, referring to the *Bradwell* case, there *are* privileges and immunities which belong to a citizen of the United States *as such*; otherwise it would be nonsense to prohibit a state from abridging them.”) (emphasis added).

¹⁴ *See, e.g.,* CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard) (“To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be *added* the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution.”) (emphasis added); *See also* CONG. GLOBE, 39TH CONG., 1ST SESS. 1065 (1866) (statement of Rep. Hale) (“I put it to the gentleman [Mr. BINGHAM] if at a single stride we take such a step as this, if we confer upon the Federal Congress powers, in such vague and general language as this amendment contains, to legislate upon all matters pertaining to the life, liberty, and property of *all the inhabitants* of the several States, I put it to the gentleman, whom I know sometimes at least to be disposed to criticise [sic] this habit of liberal construction, to state where he apprehends that Congress and the courts will stop in the powers they may arrogate to themselves under this proposed amendment.”) (emphasis added).

¹⁵ Devin Dwyer, *Planned Parenthood at Center of Budget Shutdown Threat*, ABC NEWS (Apr. 8, 2011), http://abcnews.go.com/Politics/planned-parenthood-center-budget-shutdown-threat/story?id=13328750#.T1zR7PVUa_w (discussing the Republican agenda to block Title X funding for Planned Parenthood “to provide contraceptives, cancer screenings, and pregnancy and sexually transmitted disease testing at community health centers across the county.”); *See also* Henry Makow Ph.D., *The Hoax of Female Empowerment (Reprise)*, HENRYMAKOW.COM (Mar. 30, 2011),

funding and “‘eliminat[e] default risk emanating from a self-manufactured crisis.’”¹⁶ However, the rightwing, conservative extremist movement existing within America, driven by the distinct purpose of revoking women’s fundamental rights, finds its deep roots of the biased treatment of women predating the recent debt crisis of 2011.¹⁷ Americans must understand that “inequality is a *cause*, not just a symptom, of the current [economic] crisis.”¹⁸ Since the enactment of the Fourteenth Amendment, rightwing, conservative extremists strategized with ultraconservative Supreme Court originalists to create an economic environment in which “people at the bottom rung of the economic ladder” have been prevented from “meaningful participation in the mainstream economy.”¹⁹ As a result, the dominant society’s subordination and subjugation of women intersects with that of race and class, creating women’s nexus to “the Exodus story.”²⁰

<http://www.henrymakow.com/001170.html> (describing female empowerment as a “cruel hoax” and explaining that its purpose is to dissolve families and increase government dependence).

¹⁶ Fareed Zakaria, *The Debt Deal’s Failure*, TIME MAGAZINE, Aug. 15, 2011, at 31, available at <http://www.time.com/time/magazine/article/0,9171,2086858,00.html> (quoting Mohamed El-Erian, “head of Pimco, the world’s largest bond fund, grad[ing] the deal somewhere between an incomplete and a fail”).

¹⁷ See, e.g., JOSEFINA FIGUEIRA-MCDONOUGH ET AL., WOMEN AT THE MARGINS 10 (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002) (“[T]he gendered roots of [the] biased treatment of women preceded and were perpetuated by welfare policies.”); Janet Normalvanbreucher, *Stalking Through the Courts* (1999), *The “Father’s Manifesto” – A Political Platform to Repeal the Women’s Right to Vote*, THE LIZ LIBRARY, <http://www.thelizlibrary.org/liz/FRtactic.html#FM> (last visited Apr. 22, 2012) (“‘We Signatories to the Fathers’ Manifesto, responding to natural and Biblical laws, in defense of our nation and our families, hereby declare and assert our patriarchal role in society. America is an experiment in freedom, and the feminist experiment in freedom, under the guise of ‘equality,’ unleashed a panapoly of social ills which have become a cancer on our land, led to the moral and economic destruction of our nation, made America a house divided unto itself, created a vast underclass with a bleak and bankrupt future, and is the greatest national disaster we have ever faced. Recognizing patriarchy to be the greatest creator of wealth, prosperity, and stability civilization has ever known, we hereby demand that our children, homes, lives, liberty, and property be unconditionally restored to us. We hereby demand replacement of the doctrine of Pares Patria with the Biblical doctrines upon which this nation was founded. We hereby recognize and reaffirm that patriarchy is the order established under God and His Natural Law. We, the posterity of this nation, hereby reclaim our ancestral liberties and God-given rights.’” (quoting *1997 Reaffirmation of the Father’s Manifesto*)); *Equal Protection*, THE CHRISTIAN PARTY, <http://fathersmanifesto.net/14th.htm> (last modified Nov. 2, 2010) (“In 1971 in *Reed v. Reed* the COURT, not the appropriate authority, falsely claimed that the original authors actually intended for [the Fourteenth Amendment] to apply to women.”); *Repeal the Nineteenth Amendment*, THE CHRISTIAN PARTY (Sept. 19, 1998), <http://fathersmanifesto.net/19th.htm> (“We the undersigned, hereby demand that the Nineteenth Amendment to the United States Constitution, which reads: ‘AMENDMENT XIX Passed by Congress June 4, 1919. Ratified August 18, 1920. 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 sex.’ shall be repealed.”).

¹⁸ Rana Foroohar, *Struck in the Middle*, TIME MAGAZINE, Aug. 15, 2011, at 26, available at <http://www.time.com/time/magazine/article/0,9171,2086853,00.html> (emphasis added).

¹⁹ CLINT BOLICK, DEATH GRIP xi (2011); accord, e.g., *infra* Part II.

²⁰ See ROBERT MEISTER, AFTER EVIL 101, 108 (Dick Howard ed., 2011) (“In Western political culture, the Exodus story is the prototypical model for liberation movements of all kinds – a model on which most national independence movements, and many separatist movements, continue to rely, either explicitly or implicitly. The point of comparing liberation movements to the Exodus is to chart a conceptual path from victimhood to emancipation to nationhood and, finally, to sovereignty.”); accord FIGUEIRA-MCDONOUGH, *supra* note 17, at 5-14 (explaining that neoconservative ideology and the Reagan administration began the decline into America’s “wide economic inequality” and the beginning

The debt crisis was concocted for multiple rightwing agendas in order to generate economic hysteria among Americans, resulting, *first*, in the war on women's fundamental rights. Without the assistance of Supreme Court originalism, the war on women would not be possible. The purpose of this paper is to highlight the importance of the Privileges or Immunities Clause of the Fourteenth Amendment as the overwhelming source of unenumerated fundamental rights powers. Part I explains the motive of the Supreme Court in eviscerating those powers immediately after the Amendment was ratified in 1868, causing devastating effects for fundamental rights laws still felt today. Throughout Part II, the history of the prejudices surrounding the Court and the executive branch of the government is explained, helping to establish the fact that the economic tragedy of today's debt crisis precipitating the war on women's fundamental rights was not happenstance. Part III analyzes the importance of the Court's decision in the *Slaughter-House Cases* and its effect on the social issues stemming from the evisceration of the Privileges or Immunities Clause of the Fourteenth Amendment that took place as a result of the *Slaughter-House* opinion.²¹ However, Part IV discusses the fundamental rights that developed through the Due Process and Equal Protection Clauses of the Fourteenth Amendment in spite of the *Slaughter-House* decision. Also, Part IV.B focuses on the negative impact of inconsistent Supreme Court principles that form the impetus for the war on women's fundamental rights.

In order to highlight the depths of rightwing, conservative extremism in American government, Part V provides an overview of originalism and its longstanding agenda within the American legal system to reverse the many accomplishments of the civil rights movement. In conclusion, Part VI offers solutions for establishing the jurisprudential process of rebuilding a United States that the Framers of the Fourteenth Amendment envisioned. Indeed, the Framers imagined a nation protected from the many forms of states' abuses that are taking place today.²² Undeniably, the war on women is an indication of the threat of a greater war on civil liberties currently being waged by rightwing, conservative extremism, resulting from the far-right's desire to reestablish an American ideological belief system grounded in a pre-civil rights era, or virtually a pre-Civil War "concept of ordered liberty."²³

of the conservative vision of "a return to a laissez-faire policy that implied a scaling back of regulations and a move toward Lockean restrictions on state interference in the market" greatly affecting poor women's ability to effectively participate in the economy, similarly to that of race).

²¹ See generally *Slaughter-House Cases*, 83 U.S. 36 (1873).

²² See, e.g., *infra* text accompanying note 112; *infra* notes 113, 159 and accompanying text.

²³ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 n.11 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *accord*, e.g., *infra* note 260 and accompanying text.

I. IGNORING THE RECONSTRUCTION ERA: THE INCEPTION OF ORIGINALISM

*“[T]he words equal and equality, as used in the eighteenth century, did not necessarily imply a conflict with the institution of slavery.”*²⁴

Although President Lincoln considered the Civil War as merely an attempt to prevent Southern secession, it actually came to mean much more to America than “an effort to preserve the Union, far beyond ending American Negro slavery, far beyond even ensuring continued western expansion.”²⁵ Indeed, the post-Civil War Amendments, enacted between 1865 and 1870, were intended to “trench directly upon the power of the States, and deeply affect those bodies.”²⁶ In 1868, when the Fourteenth Amendment was ratified, the nation understood that the Constitution, as adopted at the founding of the country in 1787, was inadequately equipped to protect United States citizens from the state governments themselves.²⁷ As a result, the Framers incorporated the provisions of Article IV, Section 2 of the Constitution, which provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States[,]” into the Amendment.²⁸ The purpose of including “the ‘privileges and immunities’ secured by the original Constitution” was to hold each state accountable to the federal government and to prohibit any state from impairing the fundamental rights of *any* citizen of the United States.²⁹

U.S. Supreme Court doctrines imperfectly understand the Fourteenth Amendment because its precedent is not grounded in the Congressional debates of the Reconstruction era.³⁰ Since ultraconservative Supreme Court justices insisted on “originalism” as a method of constitutional interpretation, rather than grounding

²⁴ FORREST McDONALD, *NOVUS ORDO SECLORUM* 53 (1985).

²⁵ RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES* 1 (2003).

²⁶ *Slaughter-House*, 83 U.S. at 125 (Swayne, J., dissenting) (referring to the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution that were “all consequences of the late civil war” *Id.* at 128).

²⁷ *See, e.g., id.* at 124-29 (discussing the history and development of the Constitution and the enactment of the Civil War Amendments); BOLICK, *supra* note 19, at 19.

²⁸ U.S. CONST. art. IV, § 2; *accord* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”); *See also, e.g.,* CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard) (“Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution.”); *supra* note 14 and accompanying text.

²⁹ BOLICK, *supra* note 19, at 19 (quoting Sen. Frederick Frelinghuysen of New Jersey) (“As Justice Clarence Thomas recently observed, ‘At the time of Reconstruction, the term ‘privileges’ and immunities’ had an established meaning as synonyms for ‘rights.’”); *accord, e.g., infra* text accompanying note 143; CONG. GLOBE, 39TH CONG., 1ST SESS. 2765-66 (1866) (statement of Sen. Howard) (“[T]here is no power given in the Constitution to enforce and to carry out any of these guarantees . . . [W]ithout power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”); *supra* note 13 and accompanying text.

³⁰ *E.g.,* Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1202-08 (2009).

their fundamental rights reasoning in the legislative history of the Fourteenth Amendment, the Court's post-Civil War constitutional interpretation became completely disengaged from the Framers' original intent regarding fundamental rights protections.³¹ Resultantly, today's Supreme Court jurisprudence ignores the intent behind the Framers' desire of "the privileges and immunities of [the] citizens of the several States, [or] [] the rights and privileges of all persons, whether citizens or others, under the laws of the United States" to be protected by the Amendment.³² Rather, over the years, the Supreme Court only selectively incorporated certain fundamental rights under the Fourteenth Amendment through the Due Process and Equal Protection Clauses, choosing not to recognize the Amendment's Privileges or Immunities Clause.³³ Yet, the Amendment derives its greatest fundamental rights strength from its Privileges or Immunities Clause, which was intended to assist Congress in enforcing "the second section of the fourth article of the Constitution" and "the first eight amendments of the Constitution" against the States.³⁴ This allows all the privileges and immunities of Article IV, Section 2 of the Constitution to apply to all of the citizens of the United States as a single citizenry, and not as separate, individual state citizens.³⁵

Many of today's white Americans, who believe that the Civil Rights Movement caused a reverse discrimination effect against them from which they now feel the economic effects, still insist that the Civil War resulted in "abuse of presidential power, global adventurism, subjugation of white voters and nationalism run amok."³⁶ These beliefs cause rightwing conservatives to remain

³¹ See GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION 1 (2009) ("Originalism—an exclusive reliance on public understandings of the text at the time it was ratified—has been vigorously championed by judges such as Antonin Scalia, Clarence Thomas, and Robert Bork, and by prominent conservatives such as Edwin Meese[.]"); accord Laurence H. Tribe, *American Constitutional Law*, in LAURENCE H. TRIBE ET AL., IT IS A CONSTITUTION WE ARE EXPOUNDING 28 (2009) (discussing the fact that the process of interpreting the Constitution "cannot be divorced entirely from [the] values or influences extrinsic to the document"). See also *infra* text accompanying note 112.

³² See CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard) (introduction of the Fourteenth Amendment to the Senate on May 23, 1866); accord *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030-31 (2010) (reasoning that a reconsideration of the *Slaughter-House Cases* was unnecessary because the "the question of the rights protected by the *Fourteenth Amendment* against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.") (first emphasis added).

³³ See *infra* note 258 and accompanying text.

³⁴ See CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard); accord, e.g., *supra* notes 28-29; *infra* text accompanying note 143.

³⁵ *Supra* notes 13, 28-29 and accompanying text.

³⁶ Harold Holzer, *An Inescapable Conflict*, 97 A.B.A. J., 38 (2011), available at http://www.abajournal.com/magazine/article/civil_war_ended_slavery_an_inescapable_conflict/ (last visited Apr. 22, 2012); accord, e.g., Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After Ricci and Pics*, 16 MICH. J. GENDER & L. 397, 399-400 (2010) ("Whether the government has a compelling interest in eliminating structural inequality was a key issue that divided the Court in *Parents Involved*. In contingent equal protection cases, the state interest in equality can suspend otherwise-applicable doctrine that would condemn race- or sex-conscious policies. The modifier 'contingent' reflects the fact that the suspension of otherwise-applicable rules lasts only so long as the Court acknowledges the continuing existence of inequality. Contingent equal protection is thus the last

“duly regardful of the scope of authority [they insist] was left to the States even after the Civil War.”³⁷ Undeniably, the legislative history of the Fourteenth Amendment proves this issue was hotly contested and considered carefully among the members of Congress who ultimately adopted the Amendment.³⁸ However, an understanding of the legislative history, coupled with a view of the disingenuous jurisprudence produced after the Fourteenth Amendment’s ratification, provides proof that “the intent of those by whom the instrument was framed and of those by

vestige of the anti-subordination interpretation of the Equal Protection Clause, an interpretation the Supreme Court has largely declined to enforce but has at least permitted Congress and the states to pursue. Because contingent equal protection is still possible, the Court has not (yet) constitutionalized the status quo by forbidding race-conscious or sex-conscious state action intended to promote equality. The ‘yet’ is important. Contingent equal protection is under attack and with it, the state’s ability to pursue the Fourteenth Amendment’s anti-subordination agenda. In *Parents Involved*, the Court came within one vote of holding that there is no compelling state interest in ameliorating de facto racial segregation. Such a holding, combined with aggressive application of disparate impact doctrine, would effectively forbid states or the federal government from adopting policies designed to reduce segregation and structural race inequality.”); Daniel Levitas, *Essay: The White Nationalist Movement*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-files/ideology/white-nationalist/the-white-nationalist-movement> (last visited Apr. 7, 2012) (“Although the question of slavery was settled in the minds of most Americans with the Civil War, the ideology of white supremacy and the accompanying myth of black inferiority remained enshrined in custom and law well into the latter half of the 20th Century. The central holdings of both the *Dred Scott* decision in 1856 (declaring that blacks were not entitled to the full rights of citizenship) and *Plessy v. Ferguson* in 1896 (upholding ‘separate but equal’) were not fully and functionally overturned until the Supreme Court’s 1954 decision in *Brown v. Board of Education of Topeka* and the federal civil rights legislation that followed. At bottom, white nationalism in the modern era owes its allegiance to America’s longstanding segregationist ideals and discriminatory practices, even as the movement was born in response to the actions taken by the federal government to finally enforce the equal rights of black Americans. Those rights had been largely neglected since the collapse of Reconstruction in 1878, but beginning with President Harry Truman’s 1948 declaration ending segregation of the armed forces, a sizable constituency of whites began to see the federal government as the enemy. Integration of the armed forces was followed by the *Brown* decision in 1954, and the use of Army troops to enforce integration at Central High School in Little Rock, Ark., three years later. By the early 1960s it became clear that more than just Southern apartheid was under attack. The 1964 Civil Rights Act and the landmark 1965 Voting Rights Act sealed the fate of Southern segregationists and Northern bigots alike. Viewed through the eyes of both, these developments, along with the Johnson Administration’s ‘War on Poverty,’ signaled that the legal and financial resources of the federal government would now be redistributed to ‘less deserving social groups,’ namely black Americans.”).

³⁷ *Adamson v. California*, 332 U.S. 46, 62 (1947) (“Between the incorporation of the *Fourteenth Amendment* into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the *Fourteenth Amendment* was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively [sic] democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War.”) (emphasis added).

³⁸ See CONG. GLOBE, 39TH CONG., 1ST SESS. 1064-67 (1866). House Representatives debated the specific language of the Fourteenth Amendment and the drastic effects on the interaction between the states and the federal government the Amendment would cause, due to the changes it would create to the Constitutional powers in existence at the time, as well as the reasons for the Amendment. *Id.*

whom it was adopted” has been and is being deliberately destroyed by rightwing extremists.³⁹ Due to a Supreme Court jurisprudence that is not grounded in the legislative history of the Fourteenth Amendment, “the Court is endowed . . . with boundless power . . . to conform [] the Court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental liberty and justice,’” without taking into account the Framers’ intent.⁴⁰ Indeed, rightwing, conservative extremism, historically derived from conservatism and neoconservatism, is founded upon “an unprincipled and [] patently disingenuous jurisprudence” which encourages racism, sexism, and economically exclusionary practices.⁴¹ These exclusionary practices suggest the type of faction manipulation of the democratic process the Founding Fathers warned of before signing the original Constitution.⁴² Unquestionably, “the feminist experiment in freedom,” i.e., women’s advances towards equality, is now greatly jeopardized.⁴³

II. THE HISTORICAL DEVELOPMENT OF RIGHTWING, CONSERVATIVE EXTREMISM IN AMERICA: WHITE SUPREMACISTS, NEOCONSERVATIVES, OR SUPREME COURT ORIGINALISM?

*A century and a half [after the Civil War], the nation-changing saga of slavery, secession, rebellion, emancipation and reunification, and the people caught up in the bloody struggle to re-define America, remain as vivid and compelling as ever—perhaps even more so. And in some cases, the issues over which they fought so bitterly remain unresolved.*⁴⁴

In a country where the Governor of Virginia, in 2010, finds it appropriate to celebrate states’ rights rather than civil rights, “ignoring not only the terrible impact of slavery on U.S. history but also the millions of living African-Americans who trace their roots to enslaved ancestors[,]” one must question the priorities, integrity, and morality of American leadership.⁴⁵ Undeniably, the issues surrounding the

³⁹ See, e.g., *Slaughter-House Cases*, 83 U.S. 36, 129 (1873) (Swayne, J., dissenting); accord BOLICK, *supra* note 19, at 30 (discussing Justice Swayne’s dissent whereby he blasts “the majority for subverting the clear intent of the amendment’s framers”).

⁴⁰ *Adamson*, 332 U.S. at 69 (Black, J., dissenting); accord *id.* at 69 n.1 (Black, J., dissenting).

⁴¹ See, e.g., Geoffrey R. Stone & William P. Marshall, *The Framers’ Constitution*, DEMOCRACY JOURNAL.ORG, Summer 2011, at 61, 64, http://www.democracyjournal.org/pdf/21/the_framers_constitution.pdf; accord, e.g., FIGUEIRA-MCDONOUGH, *supra* note 17, at 12 (discussing emerging norms that denigrate poor women by blaming them for their dependence on the state, labeling them as weak and lazy, and attributing female-headed families to the growing poverty levels in order to deflect attention from deficiencies in the overall redistribution of wealth); SMITH, *supra* note 9, at 79 (“[T]he conservative and neoconservative movements were not purely, or perhaps not even mainly, responses to the civil rights and black power movements. Challenges from other ideas, social changes, movements, and events were ‘fused’ into these movements. However, race and racism were integral in this fusion, both intellectually and politically.”).

⁴² See BOLICK, *supra* note 19, at 41.

⁴³ Normalvanbreucher, *supra* note 17 (quoting *1997 Reaffirmation of the Father’s Manifesto*); accord, e.g., *supra* notes 5-6, 10-12, 17 and accompanying text; *infra* Parts II.B, V.

⁴⁴ Holzer, *supra* note 36, at 38-39.

⁴⁵ *Id.* at 39.

Civil War remain alive and well in the hearts and minds of many Americans, imbedding their wounds into American culture.⁴⁶ The variation of the war that remains is taking place within the United States judicial system and American politics, creating a new era of hostility that is more difficult to ascertain and to regulate.⁴⁷ Americans associating themselves with rightwing radicalization movements believe it is the United States judicial system causing the “greatest threat to individual freedom and liberty in America.”⁴⁸

Due to far right extremists’ infiltration of Congress, “American politics [] have changed forever.”⁴⁹ Extremist factions in existence today are strengthening

⁴⁶ *Id.* at 40.

⁴⁷ See e.g., SMITH, *supra* note 9, at 145 (discussing “post-civil rights era racism” and the fact that hostility towards blacks “has become less overt, more subtle, and more difficult to document”); Mark Potok, *The ‘Patriot’ Movement Explodes*, INTELLIGENCE REPORT, <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/the-year-in-hate-and-extremism> (last visited Apr. 22, 2012) (explaining that the number of radical right hate groups, many of which are based in white supremacy, grew during 2011 due to the “superheated fears generated by economic dislocation . . . the changing racial makeup of America, and the prospect of four more years under a black president who many on the far right view as an enemy to their country”). See also, e.g., *McDonald v. City of Chicago*, 130 S. Ct 3020, 3086-88 (2010) (Thomas, J., concurring in part and concurring in the judgment) (rejecting “Slaughter-House insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship” and explaining that blacks were denied their rights to due process from the enactment of the Fourteenth Amendment through to the violence of the Civil Rights era of the 1960s); David Martosko, *Public Opinion Shifts on Trayvon Martin Case*, THE DAILY CALLER (Mar. 31, 2012), <http://dailycaller.com/2012/03/31/public-opinion-shifts-on-trayvon-martin-case/> (discussing the recent decline in public opinion regarding the arrest of a white man who shot and killed a 17 year-old, unarmed, black teen even though “74 percent of those polled said they believe racial profiling ‘is a problem in America today.’”).

⁴⁸ JB Williams, *Modern Judicial Terrorism Under Obama and His Lapdog Eric Holder*, TERROR NEWS (Nov. 5, 2010), <http://terrornewsbriefs.blogspot.com/2010/11/modern-judicial-terrorism-under-obama.html> (last visited Apr. 6, 2012); accord JB Williams, *So Much for Compassionate Conservatism!*, JB-WILLIAMS.COM (Nov. 13, 2005), <http://www.jb-williams.com/11-13-05.htm> (“We do these things and worse in the name of compromise, tolerance and compassion. But there is nothing compassionate about killing the unborn, nothing secure in tolerating an increasing illegal immigration problem and nothing right about compromising our children’s future freedom for a few pennies from the national treasury. It’s wrong, all of it! The people worked hard to remove socialist liberals from power and it was a step in the right direction. But the people’s work is clearly not done. We must not only continue to remove remaining socialist Democrats from power at every opportunity, we must also begin to replace moderate ‘uncommitted’ Republicans with true conservatives. We need people who will take real action to secure this nation including at our own borders, people who will no longer tolerate the taking of innocent life in the name of convenience or compromise our children’s future freedom for a few pennies from the treasury today. The conservative movement to reinstate real American values is alive and well at American kitchen tables across this great land. If the title neocon bothers you, just remember that this term is coined and used only by neo-socialists. People who never liked anything about America and never will. Accept the title as a compliment . . . While in power, Republicans need to lead this country on the basis of true conservative values, or they need to be replaced at election time by real conservatives who will. Our job began with stopping liberal Democrats from driving this nation further into a secular immoral abyss and fiscal bankruptcy. It needs to be finished by stopping uncommitted Republicans from doing the same by negotiating away the power we gave them.”). See also Potok, *supra* note 47 (discussing various hate groups operating within the United States which arose due to the economic downturn and “an angry backlash [] that included several plots to murder Obama”).

⁴⁹ Michael Crowley, *The Tea Party’s Triumph*, TIME MAGAZINE, Aug. 15, 2011, at 36, available at <http://www.time.com/time/magazine/article/0,9171,2086859,00.html>; accord Zakaria, *supra* note 16, at 33 (“[T]he Tea Party’s insistence on holding the debt ceiling hostage in order to force it policies on the country—the first time the debt ceiling has been used this way—was so deeply un-American. The strength of the Tea Party is part of a broader phenomenon: the rise of small, intensely motivated groups that have

and reestablishing their prejudicial ideals and beliefs with the help of the U.S. Supreme Court and rightwing, conservative extremist political leaders.⁵⁰ Indeed, ideological beliefs of the antigovernment Patriot movement are now supported by many elected officials throughout the country and are further fueled by ultraconservative Supreme Court justices.⁵¹ Similar to rightwing, conservative

been able to capture American politics. The causes are by now familiar. The redistricting of Congress creates safe seats, so the incentive is to pander to the extremes to fend off primary challenges, rather than to work toward the center. Narrow cast media amplify strong voices at the ends of the spectrum and make politicians pay a price for any deviation from dogma. A more open and transparent Congress has meant a Congress more easily pressured by small interest groups and lobbyists. Ironically, during this period, more and more Americans identify as independents. Registered independents are at an all-time high. But that doesn't matter. The system in Congress reflects not rule by the majority but rule by the minority—fanatical, organized minorities.”). *See also supra* note 48 and accompanying text.

⁵⁰ *See, e.g.,* U.S. DEP'T OF HOMELAND SEC., (U//FOUO) RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 3 (2009) [hereinafter RIGHTWING EXTREMISM], available at <http://www.fas.org/irp/eprint/rightwing.pdf> (“DHS/I&A assesses that a number of economic and political factors are driving a resurgence in rightwing extremist recruitment and radicalization activity. Despite similarities to the climate of the 1990s, the threat posed by lone wolves and small terrorist cells is more pronounced than in past years. In addition, the historical election of an African American president and the prospect of policy changes are proving to be a driving force for rightwing extremist recruitment and radicalization.”); Potok, *supra* note 3, at 4 (“One law enforcement agency has found 50 new militia training groups — one of them made up of present and former police officers and soldiers. Authorities around the country are reporting a worrying uptick in Patriot activities and propaganda.”); Potok, *supra* note 47 (“The number of hate groups counted by the Southern Poverty Law Center (SPLC) last year reached a total of 1,018, up slightly from the year before but continuing a trend of significant growth that is now more than a decade old. The truly stunning growth came in the antigovernment ‘Patriot’ movement — conspiracy-minded groups that see the federal government as their primary enemy.”).

⁵¹ *See, e.g.,* Potok, *supra* note 3, at 8-9 (“The original movement also had its mainstream backers, but they were largely confined to talk radio; today, Beck is just one of the well-known cable TV news personalities to air fictitious conspiracies and other unlikely Patriot ideas. CNN’s Lou Dobbs has treated the so-called Aztlan conspiracy as a bona fide concern and questioned the validity of Obama’s birth certificate despite his own network’s definitive debunking of that claim. On MSNBC, commentator Pat Buchanan suggested recently that white Americans are now suffering ‘exactly what was done to black folks.’ On FOX News, regular contributor Dick Morris said, ‘Those crazies in Montana who say, ‘We’re going to kill ATF agents because the U.N.’s going to take over’ — well, they’re beginning to have a case.’ At the same time, players like the National Rifle Association, which in the 1990s publicly attacked federal law enforcement agents as ‘jackbooted thugs,’ are back at it. Two months before the election last fall, firearms manufacturers joined forces to promote NRA membership in a national campaign ominously dubbed ‘Prepare for the Storm in 2008.’ Gun shows, too, are back as major venues for militia-like ideology. In a video produced in April by Max Blumenthal, senior writer at the online news site The Daily Beast, one man interviewed at a show said, ‘If Obama tries to get rid of our guns, it’s just a step away from trying to take away everything else.’ Another said show attendees were ‘preparing for the worst.’ Patriot ideology also has crept into the anti-tax ‘tea parties’ that were staged by conservatives around the country in April and July. In addition to protesting government spending and taxation, some demonstrators called for the sovereignty of the states, abolition of the Federal Reserve (a long-time bogeyman of the radical right), and an end to ‘socialism’ in Washington. At the Jacksonville, Fla., July tea party, some protesters carried signs that compared President Obama to Adolf Hitler.”). For example, the issue of gun control—*i.e.*, the ability to continue to own guns—is extremely important to the conservative, rightwing message of preserving limited government. *See* BRONNER, *supra* note 4, at 120 (discussing neoconservatives and their connection to the National Rifle Association). During his 2012 presidential campaign, rightwing candidate Mitt Romney “pledge[d] . . . his commitment to protect the Second Amendment rights for Americans . . . to members of the National Rifle Association” as an issue related to preserving a limited form of government. Rebekah Metzler, *Mitt Romney Shoots for Middle Ground with NRA Speeches*, CHI. TRIB. (Apr. 16, 2012), http://articles.chicagotribune.com/2012-04-16/news/sns-201204161154usnewsusnwr201204130413romneyraapr16_1_mitt-romney-gun-ownership-assault-weapons. Indeed, during the 2010 term, the

extremists' political ideologies, extremist antigovernment factions espouse beliefs against women's fundamental rights which they ground in pre-Civil War constitutional interpretations.⁵² However, unlike political leaders, many of these extremist factions overtly call for the repeal of the Nineteenth Amendment and declare that the Court had no authority to provide women equal protection.⁵³ Indeed, fathers' rights groups, lesser known as an antigovernment movement, strongly denounce government bodies with the sole purpose of purging the government of pro-feminist advocates.⁵⁴

The difficulty in distinguishing the fathers' rights groups' ideological beliefs with those of rightwing, conservative extremist political leaders and government officials is due, in part, to the recent public comments of Supreme Court Justice Scalia.⁵⁵ After twenty-five years as an ultraconservative originalist justice, Scalia pronounced his belief that women do not receive protection under the Fourteenth Amendment, reinforcing rightwing, conservative extremists' commitment—including those of fathers' rights groups—to a constitutional interpretation that stems from an anti-women's fundamental rights political standpoint.⁵⁶ Indeed, both

Supreme Court struck down a local ordinance banning handgun possession in a majority opinion authored by justices subscribing to the constitutional philosophy of originalism. *McDonald*, 130 S. Ct. 3020, 3026-50. Contradicting their originalist agenda, the majority opinion relied upon Fourteenth Amendment legislative history in order to determine that the right to bear arms was protected from state infringement. In doing so, the Court based its decision on the selective incorporation of the Second Amendment of the Constitution. *Id.*

⁵² See, e.g., Crowley, *supra* note 49, at 37 (discussing the Tea Party's core belief that government is "undermining the Constitution and individual liberty, and invariably does more harm than good"); *The American Founding*, THE HERITAGE FOUNDATION, <http://www.heritage.org/initiatives/first-principles/basics#what-is-the-tea-party-is-it-important> (last visited Mar. 4, 2012) [hereinafter HERITAGE, *Tea Party*] ("[T]he Tea Party has been dismissed by some as a fringe element of the Republican Party, the movement is, in fact, based on legitimate arguments."). See also *supra* notes 48, 51 and accompanying text.

⁵³ See, e.g., U.S. CONST. amend. XIX ("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 sex."); *supra* note 17 and accompanying text.

⁵⁴ See, e.g., *A Father's Rights Manifesto*, THE FATHERHOOD COALITION, 5-6 (July 2002); available at <http://www.fatherhoodcoalition.org/cpf/Newsletter/Bulletin0207.pdf> ("The fathers rights movement must seek to put itself inside the minds of our enemies (the courts and all their Domestic Violence/child support/Guardian Ad Litem/DSS/social-services sub-regimes) and influence their very thought processes, to wit: The court must begin to perceive itself as being in a *state of siege* . . . We will *not* play by your rules. We will not seek accommodation with you. You are our enemy, and you must be purged. You must be replaced by people who have not been subjected to decades of feminist drivel and psychobabble indoctrination . . . When the courts realize and accept that they are in a true state of siege, only then will we begin to see real change. It won't happen through education, it will happen through political force. We must wield that power and take this War on Fatherhood to them."); *supra* note 17 and accompanying text; *supra* notes 10-12 and accompanying text. Cf. *supra* notes 47-48 and accompanying text.

⁵⁵ Compare *supra* note 17 and accompanying text with *infra* note 56 and accompanying text.

⁵⁶ See, e.g., Penny Starr, *Feminist, Democrats Say Justice Scalia's Remarks Make It Essential to Pass Constitutional Amendment for Women's Rights*, CNSNEWS.COM (Jan. 7, 2011), <http://cnsnews.com/news/article/feminists-democrats-say-justice-scalia-s-remarks-make-it-essential-pass-constitutional> ("Recently, Supreme Court Justice (Antonin) Scalia stated his opinion that no provision in the Constitution, or the 14th amendment, would provide full and true equality to women and give them protection against sex discrimination," Rep. Carolyn Maloney (D-N.Y.) said. "He also

of these extremists' ideological philosophies, which promote limited self-government and a strong basis in the Founding Fathers' conservative beliefs, endorse the evisceration of women's fundamental rights.⁵⁷ Reminiscent of those in opposition to the Fourteenth Amendment and the Progressivism that reached its climax prior to World War I, conservative extremist political leaders, now bolstered by the recent successes of their bullying tactics with the debt crisis, are suggesting that "what the government can give, the government can take away."⁵⁸

said that if laws were enacted sanctioning discrimination, they would be constitutional.' Scalia, in a recent magazine interview, said it's the job of lawmakers, not the Constitution, to reflect the wishes of an evolving society: 'Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't,' Scalia said in the interview with California Lawyer magazine."); President Ronald Reagan, *The Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House*, in JUSTICE ANTONIN SCALIA ET AL., ORIGINALISM 95 (Steven G. Calabresi ed., 2007) (Sept. 26, 1986).

⁵⁷ See, e.g., *supra* notes 10-12, 17, 56 and accompanying text; *infra* Part IV.B.

⁵⁸ Michele Bachmann: *Obama Contraception Mandate Could Lead To Limit On Births Per Family*, THE HUFFINGTON POST (Mar. 7, 2012), http://www.huffingtonpost.com/2012/03/07/michele-bachmann-obama-contraception-mandate_n_1327781.html [hereinafter *Bachmann*] (quoting Michele Bachmann discussing her belief that "[i]t certainly isn't beyond the pale to think, in light of Kathleen Sebelius, the Health and Human Services secretary – she said that it's important that we have contraceptives because that prevents pregnancy, and pregnancy is more expensive to the federal government.' . . . She then proceeded to argue that the government could ration births. 'Going with that logic, according to our own Health and Human Services secretary, it isn't far-fetched to think that the president of the United States could say 'We need to save health care expenses. The federal government will only pay for one baby to be born in the hospital per family, or two babies to be born per family.' That could happen. We think it couldn't?"); accord CONG. GLOBE, 39TH CONG., 1ST SESS. 1067 (1866) (statement of Rep. Price) ("I have done some good, sir, you see. [Laughter.] I have taught the gentleman from New Jersey, [Mr. Rogers,] who can talk longer and louder than any man upon this floor, [laughter,] that there are some things in the Constitution of our fathers that even he was not aware of before. He has talked about the Constitution of our fathers; and he is not the first man I have heard talk about 'the Constitution as it is,' and when you bring them down to the letter, to the real old English of the Constitution of our fathers, about which they prate so much, these gentlemen are as ignorant of it as they were before they were born. [Laughter.] They never read it. SEVERAL MEMBERS. He said he never read it. Mr. PRICE. Now, sir, is it not time for men to pause upon this question, when we are to listen to harangues an hour and a half in length from men who are the especial defenders, if you are to believe them, of the Constitution and the Government, and the especial defenders of the Administration, at this time particularly. And yet, strange as it may appear, when brought to the test on that very instrument, they stand up in this House and before the country and acknowledge that they have never read the Constitution! [Laughter.]; REBECCA S. SHOEMAKER, THE WHITE COURT 231-32 (2004) ("A reform movement that began in the last years of the nineteenth century and reached the climax of its powers during the years immediately preceding World War I, Progressivism was possessed of a number of varied characteristics. It supported a program of economic, social, and political reforms. Adherents advocated government action to regulate business, to implement social reforms, and to revamp government to make it more responsive to the needs of its citizens . . . Many Progressives believed the key to achieving the reforms needed to improve all aspects of life in the United States in the early twentieth century was the reform of government to make it more honest, more efficient, and more responsive to the needs of the people. Among the initiatives undertaken in this area were attempts to overthrow city political machines, the passage of the *Seventeenth Amendment authorizing direct election of senators*, and the development by the U.S. Supreme Court of the doctrine of administrative discretion, which allowed the creation of specialized government agencies to deal with specific issues. Progressivism did not achieve all its goals, and, in fact, found that some of them were strongly opposed by people who believed them harmful or counterproductive. Overall, however, many aspects of the Progressive reform movement made significant contributions to the nation's successful endeavor to move into the more modern, industrialized twentieth century." (emphasis added)). See also, e.g., Matt Bai, *Tea Party's Push on Senate Election Exposes Limits*, THE NEW YORK TIMES (June 1, 2010), http://www.nytimes.com/2010/06/02/us/politics/02bai.html?_r=1 ("Until recently, hardly anyone ever bothered with the 17th

Undeniably, the war on women's fundamental rights "is 'real' and will 'intensify.'"⁵⁹

A. *Rightwing, Conservative Extremism during the Reconstruction Era: The "slave-state" Supreme Court Gives New Meaning to the Fourteenth Amendment*⁶⁰

*"The Civil War was, after all, a constitutional conflict."*⁶¹

Under the original structure of the Constitution, state governments were free to infringe upon individual civil rights and economic liberties without interference from the Federal Government.⁶² In fact, the slaveowners and landowners in power at the time the Constitution was signed in 1787 thoughtfully established a republican system of government that protected their individual rights, not those of blacks or women.⁶³ Accordingly, the Supreme Court was appointed "the 'guardian' of racism and Lockean laissez-faire capitalism."⁶⁴ However, the passage of the 1866 Civil Rights Act and the Fourteenth Amendment was supposed to forever change the way the three branches of the United States government interacted.⁶⁵

Amendment to the Constitution, which if you don't know, is the one that gives you the right to vote for your United States senator, rather than allowing state legislators to choose a senator for you. *But then came the rise of the Tea Party movement, whose members in several states have been calling for repealing the amendment – and making something of a political mess in the process.*" (emphasis added); Crowley, *supra* note 49, at 36-41 (discussing the fact that the Tea Party's policy implications are brutal for Obama); Zakaria, *supra* note 16, at 31 (referring to the Republican "no-tax agenda"); *supra* note 51 and accompanying text.

⁵⁹ See Dwyer, *supra* note 5; accord Goldwag, *supra* note 10 (describing a 1989 shooting by Marc Lépine, a 25-year-old student, in Montreal, Canada at the Ecole Polytechnique whereby "[h]e walked into a classroom, ordered the men to leave, and lined the women up against a wall. 'I am fighting feminism,' he announced before opening fire. 'You're women, you're going to be engineers. You're all a bunch of feminists. I hate feminists.' By the time he turned the gun on himself, 14 women were dead and 10 were wounded; four men were hurt as well. The suicide note in Lépine's pocket contained a list of 19 'radical feminists' he hoped to kill . . . Today, that kind of rage is often directed at all women, not only perceived feminists . . . 'A word to the wise,' offered the blogger known as Rebuking Feminism. 'The animals women have become want one thing, resources and genes . . . See them as the animals they have become and plan . . . accordingly.'").

⁶⁰ MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 216 (2006); accord LABBÉ & LURIE, *supra* note 25, at 169 ("As congressional Republicans in 1862 set out to remake the Court, the ground was shifting beneath them, and patterns of judicial recruitment were being influenced in ways that would eventually result in a new era in constitutional policy.").

⁶¹ Leon Silverman, *Introduction: The Supreme Court in the Civil War*, in LEON SILVERMAN ET AL., *THE SUPREME COURT AND THE CIVIL WAR* 1 (Jennifer M. Lowe ed., 1996).

⁶² See, e.g., BOLICK, *supra* note 19, at 16; MCDONALD, *supra* note 24, at 3-4, 51; *infra* text accompanying note 143. Cf. *infra* note 159 and accompanying text.

⁶³ See MCDONALD, *supra* note 24, at 51-54.

⁶⁴ SMITH, *supra* note 9, at 46. See also *Classical liberalism*, WIKIPEDIA, http://en.wikipedia.org/wiki/Classical_liberalism (last modified Mar. 8, 2012) ("Classical liberalism is the philosophy committed to the ideal of limited government, constitutionalism, rule of law, due process, and liberty of individuals including freedom of religion, speech, press, assembly, and free markets . . . The term *classical liberalism* was applied in retrospect to distinguish earlier 19th-century liberalism from the newer social liberalism.").

⁶⁵ See, e.g., BROOK THOMAS ET AL., *PLESSY V. FERGUSON* 5-10 (Brook Thomas et al. eds., 1997) ("There were two stages of Reconstruction: presidential and Radical or congressional. The first was led by Andrew Johnson, who assumed the presidency after the assassination of Abraham Lincoln in 1865,

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Indeed, President Johnson and most southerners believed passage of the Fourteenth Amendment “violated two of their most sacred beliefs: white supremacy and states’ rights.”⁶⁶ The conflict of powers between President Johnson and “a group of Republicans known as Radical Republicans, who controlled Congress in the period right after the Civil War[,]” resulted in “a second American revolution.”⁶⁷ The Framers of the Fourteenth Amendment clearly intended to transform “the Constitution of our fathers[,]” which had not provided “equal protection to the citizens of the different States that they were entitled to under the Constitution of our Government.”⁶⁸ The debates on the Amendment are clear that the Framers intended to provide equal protection of civil rights to “all the inhabitants”⁶⁹ of the

toward the end of the war. This stage was relatively uncontroversial and consisted mainly in using the federal government’s power to enforce the Thirteenth Amendment, passed in 1865, which abolished slavery. Abolishing slavery, however, did not eliminate racial hierarchy. Most southern states passed ‘black codes,’ which, although they granted African Americans the right to own property and bring suits in court, still forbade them from serving on juries, testifying against whites, or voting. Some black codes also kept former slaves, or freedmen, in a subservient economic position by requiring that they sign yearly labor contracts. Those who did not were subject to arrest and imprisonment as vagrants. Since in many states prisoners could in turn be leased out at minimal costs as laborers, the black codes allowed a form of disguised slavery. This repression of freedmen sparked new efforts at reform from members of Congress, and in 1866 a Civil Rights Act was passed, effectively voiding practices mandated by black codes by making African Americans full United States citizens and guaranteeing certain rights of citizenship. To ensure the constitutionality of this act, Congress also passed the Fourteenth Amendment, which was ratified by the states in 1868. The passage of the 1866 Civil Rights Act and the Fourteenth Amendment marked the move toward Radical Reconstruction, which was extremely controversial.”); *infra* text accompanying note 112.

⁶⁶ THOMAS, *supra* note 65, at 7; accord SMITH, *supra* note 9, at 45 (“Johnson was probably unfit for the presidency at anytime but for sure in the immediate post civil war period. He was also a vulgar racist, a former slave owner, he opposed secession because he thought slavery was best secured within the union. And he was openly contemptuous of the humanity of Africans and the only American president to express vulgar racism in his official state papers. An example is his veto of an 1866 civil rights bill where he wrote that the legislation would ‘place every spy-footed, bandy-shanked, thick lipped, flat nosed, wooly-haired ebony colored Negro in the country on an equal footing with the poor white man.’”).

⁶⁷ THOMAS, *supra* note 65, at 8 (“The White South felt particularly abused in 1867 when Congress passed the Reconstruction Act, which expanded the federal government’s control by dividing the South into military zones and giving federal troops power to enforce regulations emanating from Washington. Johnson promptly vetoed this and other Reconstruction legislation. In response, the House voted to impeach Johnson for what it considered treasonable offenses. As provided in the Constitution, the Senate then tried Johnson, but its vote of thirty-five to nineteen fell one short of the two-thirds majority required to remove him from office. The only president ever to be impeached, Johnson remained in office, but he was virtually powerless for the remainder of his term. Congress continually overrode his vetoes, thus closing out the stage of presidential Reconstruction and instituting the second phase, of Radical Reconstruction.”). During the Reconstruction Era, Republicans fought for “using constitutional powers previously used to support slavery to support the rights of freedmen” whereas Democrats “primarily supported the interests of white southerners and those white laborers in the North who feared competition from African American labor.” *Id.* See also SMITH, *supra* note 9, at 45 (“Johnson’s lack of presidential character led to a confrontation with Congress and its rejection of his plan for ‘Presidential Reconstruction’ and the imposition after the 1866 congressional elections of the much tougher plan of ‘Congressional Reconstruction.’ Presidential Reconstruction involved granting amnesty and restoring civil rights to most of the leaders of the rebellion. The rebels than established state governments that denied blacks voting rights and imposed ‘black codes,’ which restored the emancipated to a status almost akin to slavery.”).

⁶⁸ CONG. GLOBE, 39TH CONG., 1ST SESS. 1067 (1866) (statement of Rep. Price).

⁶⁹ *Id.* at 1065 (1866) (statement of Rep. Hale).

United States “in the coming generations.”⁷⁰ Undeniably, “the institutional pillars of American conservatism,”⁷¹ which sought to protect “the rights of the States[.]” were under attack by the ratification of the Fourteenth Amendment.⁷²

Because the primary reason for the Fourteenth Amendment was to revolutionize the federal system of government, providing Congress greater enforcement powers over the states, its protections greatly affected the rights of women, whether single or married.⁷³ Prior to the enactment of the Amendment, in most states, married women were considered the equivalent of “civilly dead.”⁷⁴ However, with the enactment of the Amendment, the Framers provided women, as citizens of the United States, full protection of its “privileges or immunities,”⁷⁵ which included “the rights of life and liberty” and greater ability to control their

⁷⁰ *Id.* at 1067 (1866) (statement of Rep. Price). *See also, e.g., infra* note 112 and accompanying text; *infra* Part III.B.

⁷¹ SMITH, *supra* note 9, at 45 (“[T]he amendment brought about a ‘quiet revolution’ because ‘[i]t was if the Congress held a second constitutional convention and created a federal government of vastly expanded powers.’”).

⁷² *Infra* note 73 and accompanying text; *accord* SMITH, *supra* note 9, at 45.

⁷³ *See, e.g.,* CONG. GLOBE, 39TH CONG., 1ST SESS. 1089-90 (1866) (statement of Rep. Bingham) (“[B]ut they say, ‘We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed’ . . . Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States? What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! Say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States.”); *Id.* at 1065 (1866) (statement of Rep. Hale) (“Sir, I concede every disposition and every wish on the part of the gentleman to protect the liberty of the citizen – the humblest as well as the highest – the negro, the late slave, as well as others. In every such desire on his part I most fully and cordially concur. But let me warn gentlemen that there are other liberties as important as the liberties of the individual citizen, and those are the liberties and the rights of the States.”); *infra* text accompanying note 73; *infra* note 112; *infra* notes 113, 159 and accompanying text. *See also* Silverman, *supra* note 61, at 4.

⁷⁴ Elizabeth Cady Stanton, *Declaration of Sentiments and Resolutions* (July 1848), available at <http://www.nolo.com/legal-encyclopedia/content/decl-women-rights-doc.html> (“But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their duty to throw off such government and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled.”); *accord* *Married Women’s Property Laws*, LAW LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/awhhtml/awlaw3/property_law.html (last visited Apr. 8, 2012) (“During the nineteenth century, states began enacting common law principles affecting the property rights of married women. Married women’s property acts differ in language, and their dates of passage span many years. One of the first was enacted by Connecticut in 1809, allowing women to write wills. The majority of states passed similar statutes in the 1850s.”).

⁷⁵ CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard) (“[T]he present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed [sic] by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts.”); *accord* *Married Women’s Property Laws*, *supra* note 74 (discussing women’s participation in court proceedings prior to the debates on the Fourteenth Amendment).

own property.⁷⁶ Yet, the same inherent injustices stemming from *Slaughter-House* prevented women from invoking the power of the Privileges or Immunities Clause for their protection as well.⁷⁷ However, the Supreme Court interpreted the Amendment much more narrowly during the post-Civil War era than its Framers intended.⁷⁸ Thus, the Supreme Court's failure to enforce the Privileges or Immunities Clause of the Fourteenth Amendment, as originally intended by its Framers, denies women the Amendment's complete fundamental rights protections, creating the political environment for today's assault against women's fundamental rights.⁷⁹

B. The Dawn of Neo-conservatism & Originalism: Championing Inequality

*"Controversy has always swirled around the Supreme Court."*⁸⁰

Neoconservative ideologies have successfully hijacked governmental institutions, including all three branches of government.⁸¹ Indeed, in order to curtail "anything liberal[,] including federal government spending stemming from the Civil War's reconstruction efforts, ultraconservative William H. Rehnquist introduced his originalism concepts in the 1950s.⁸² During this same time, the conservative movement emerged as a reaction to the social changes occurring with respect to the economy, race, and the international system.⁸³ In the 1960s and 1970s, the neoconservative movement arose as a challenge to the many social

⁷⁶ CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866) (statement of Rep. Bingham) (specifically identifying the universal and independent rights of life and liberty as belonging to every woman whether married or single and responding "[b]ut the gentleman's concern is as to the right of property in married women. Although this word property has been in your bill of rights from the year 1789 until this hour, who ever heard it intimated that anybody could have property protected in any State until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried thither? I undertake to say no one."); accord *Married Women's Property Laws*, *supra* note 74 ("Before the Civil War, married women's property laws were concerned with equity procedures, focusing on the appropriate pleadings a wife should use to file a suit but not altering a husband's privileges granted by prior common law principles. After the Civil War, laws were concerned with equalizing property relations between husband and wife.").

⁷⁷ See BOLICK, *supra* note 19, at 38 ("Not only blacks and butchers, but now women, were precluded from looking to the federal courts for recourse against subjugation by their state governments."). See generally *Bradwell v. Illinois*, 83 U.S. 130 (1872).

⁷⁸ E.g., Silverman, *supra* note 61, at 4.

⁷⁹ E.g., *id.* at 3. See also *infra* Parts III.B., V.B.

⁸⁰ KURLAND, *supra* note 7, at xiv.

⁸¹ See, e.g., FIGUEIRA-MCDONOUGH, *supra* note 17, at 7; SMITH, *supra* note 9, at 143.

⁸² See JAMES E. LEAHY, SUPREME COURT JUSTICES WHO VOTES WITH THE GOVERNMENT 241-45 (1999) (discussing Rehnquist's displays of ultraconservatism prior to his appointment to the Supreme Court including accusing the then "'left-wing philosophers' of the Supreme Court . . . of 'making the Constitution say what they wanted it to say.'"); accord FIGUEIRA-MCDONOUGH, *supra* note 17, at 8 (discussing the neoconservative view of welfare as one regarding it as responsible for the decline of American virtues and a waste of national resources).

⁸³ See SMITH, *supra* note 9, at 79 (discussing the origins of neoconservatism as a variant of conservatism from the 1960s and 1970s).

changes and events fusing together during that time.⁸⁴ Similarly, President Reagan's administration worked on an ideologically conservative agenda throughout the 1980s that purposely hindered America's ability to achieve social and economic equality.⁸⁵ To further this neoconservative agenda, a key and critical addition to the executive branch made by President Reagan in 1985 was the appointment of Attorney General Edwin Meese, III, who brought originalism to the forefront in 1985.⁸⁶ Attorney General Meese's focus was on the Court's 1984 term, which he considered incoherent.⁸⁷ He encouraged the Court's role as "the moral undergirding of the entire constitutional edifice" of America, stating that the Court is the only governmental body that "grapples with the most fundamental political questions and defends them with written expositions."⁸⁸ Indeed, Attorney General Meese, by directing the Court to pursue an agenda of originalism, understood that the Court could invoke an "American republic" traditional ideal "in yet another, more subtle way[.]" i.e. not "by physical force" but "by moral force."⁸⁹ Through his emphasis on a return to federalism, Attorney General Meese's role in the originalists' agenda proved pivotal in ensuring that the privileges and immunities protections from Article IV, Section 2 of the Constitution would not be utilized against the states.⁹⁰ This directive to the Supreme Court from the Executive Branch caused devastating results for continuing advancements in fundamental rights protections, especially for women.⁹¹

⁸⁴ *See id.*

⁸⁵ *See id.* at 143-46 ("When Reagan entered the presidency the climate of expectations was such that he could not—dared not—embrace even a hint of old fashioned white supremacy . . . Reagan and the conservatives and neoconservatives who joined the administration could and did embrace Lockean laissez-faire racism and attempted to thwart any government initiatives to achieve substantive equality between the races.").

⁸⁶ *See, e.g.,* Attorney General Edwin Meese III, *The Great Debate: Attorney General Ed Meese III*, THE FEDERALIST SOCIETY (July 9, 1985) <http://www.fed-soc.org/resources/page/the-great-debate-attorney-general-ed-meese-iii-july-9-1985> [hereinafter *The Great Debate*] (introducing originalism to the American Bar Association on July 9, 1985 and explaining that "[i]t is our belief that only 'the sense in which the Constitution was accepted and ratified by the nation,' and only the sense in which laws were drafted and passed provide a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law." (quoting Attorney General Meese)); *Edwin Meese III*, THE HERITAGE FOUNDATION, <http://www.heritage.org/about/staff/m/edwin-meese> (last visited Apr. 7, 2012) (discussing Meese's lifelong career with Reagan).

⁸⁷ *See The Great Debate, supra* note 86 ("[L]et's consider the Court's work this past year. As has been generally true in recent years, the 1984 term did not yield a coherent set of decisions. Rather, it seemed to produce what one commentator has called a 'jurisprudence of idiosyncrasy.' Taken as a whole, the work of the term defies analysis by any strict standard. It is neither simply liberal nor simply conservative; neither simply activist nor simply restrained; neither simply principled nor simply partisan. The Court this term continued to roam at large in a veritable constitutional forest." (quoting Attorney General Meese)).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See, e.g., supra* notes 5-6 and accompanying text; *infra* Part V.

Chief Justice Rehnquist, with the assistance of successor Court justices, succeeded in his boyhood goal to “change the government” by causing a war of constitutional interpretation ideologies with his originalism theories,⁹² furthering the neoconservative agenda of “rolling back the civil rights gains of the 1960s and 1970s.”⁹³ The radicalized neoconservative agenda, manifesting itself as today’s rightwing, conservative extremism, is based in an ideological belief system that is too politically risky for politicians to clearly and overtly assert through today’s media.⁹⁴ Indeed, the war on women is an indication of a much larger political

⁹² LEAHY, *supra* note 82, at 241; *accord* RALPH A. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE 30 (2006) (“[Supreme Court Justice] Scalia is an eloquent defender of textualism – an ‘original-meaning’ interpretive approach that accords primacy to the text and tradition of the document being interpreted and that declares that the duty of the judge is to apply the textual language of the Constitution or statute when it is clear and to apply the specific legal tradition flowing from that text (i.e., what it meant to the society that adopted it) when it is not. He is an equally fierce critic of judicial activism and what he terms the ‘Living Constitution’ – an interpretative approach asserting that the meaning of a law ‘grows and changes from age to age, in order to meet the needs of a changing society’ and that it is appropriate for the judge to ‘determine those needs and ‘find’ that changing law.’ Scalia’s majority, concurring, and dissenting opinions – now numbering over 600 – are uniformly reflective of his textualist jurisprudence concerning how the Constitution, statutory law, and administrative regulations are to be interpreted. They have also had a profound impact on the overall work product of the Supreme Court.”). *See also, e.g., infra* text accompanying notes 158-59; *infra* Part V.

⁹³ SMITH, *supra* note 9, at 149-50 (“Reagan entered the presidency with what movement conservatives considered a mandate for change, including change in the liberal civil rights, welfare, and antipoverty policies of the 1960s and 1970s . . . As a minimalist, staff-driven president, it would take extraordinary exertions on Reagan’s part to deinstitutionalize civil rights and bring about major civil rights reform . . . [T]he debastardization of Locke with respect to civil rights gave rise to laissez-faire racism, which in the name of Lockean values of individualism and self-reliance delegitimized the welfare and antipoverty programs relevant to dealing with the legacies of Locke’s long bastardization. Partly as a result, Reagan had somewhat more success in reforming welfare and dismantling or cutting back on policies designed to ameliorate racialized poverty.”); *accord supra* note 6 and accompanying text.

⁹⁴ *See* Martin A. Lee, *Patrick Buchanan’s Reform Party Begins to Unravel*, INTELLIGENCE REPORT, Fall 2002, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2002/fall/reforming-right?page=0,1> (discussing former Attorney General Edwin Meese’s ties to Peter Gemma and “the influential and highly secretive Council for National Policy (CNP). Founded in 1981, the CNP meets three times a year to strategize about how to advance a right-wing agenda . . . Past and present CNP members include financiers Nelson Bunker Hunt and Joseph Coors; religious right leaders Pat Robertson, Jerry Falwell, Phyllis Schlafly and the late R.J. Rushdoony; public officials like Sen. Jesse Helms, then-Sen. John Ashcroft and former Attorney General Edwin Meese; militia booster and Gun Owners of America chief Larry Pratt, Catholic reactionary Paul Weyrich . . . black conservative Alan Keyes, and Iran-contra scandal operatives Maj. Gen. John Singlaub and Lt. Col. Oliver North . . . Although he still admires a few individual Republican politicians, Gemma has grown deeply disenchanted with the GOP as a whole, which he sees as the party of ‘big oil and big government’ . . . Mark Cotterill fraternized with the hardest of the neo-Nazi hard-core. He was a political hot potato, and Gemma knew it. When the Washington Post reported that Cotterill was volunteering at the Virginia Reform Party offices, the negative publicity was too much to take — the British white supremacist was summarily tossed out the door by the Buchanan campaign. The housecleaning, however, did not extend to Gemma or Edward Cassidy, another extremist Virginia Reform Party officer who hobnobbed with Cotterill. Cassidy, by his own account, served as one of the Buchanan campaign’s official photographers. Known as ‘Fisheye’ in white nationalist circles, Cassidy also led a local chapter of the Council of Conservative Citizens (CCC), a white supremacist hate group that equates interracial marriage with genocide and lambastes ‘black militants, alien parasites, queer activists . . . Christ haters’ and, since Sept. 11, ‘Dirty Rotten Arabs and Muslims.’”). *See also supra* note 85 and accompanying text.

agenda of the far-right.⁹⁵ The neoconservative devotion creating an indiscriminate economic system of “great wealth and great poverty” evokes a concealed political agenda for the rightwing, conservative extremists’ political platform of hate, reminiscent of the pre-civil rights era.⁹⁶ Although there are multiple “culture-war” fundamental rights battles continuing throughout the United States, the hotly contested fundamental rights issues of immigration, marriage equality, sodomy, abortion and contraception are truly caught in the crossfire.⁹⁷ While Americans’

⁹⁵ See *supra* notes 85-87, 93-94 and accompanying text.

⁹⁶ See FIGUEIRA-MCDONOUGH, *supra* note 17, at 10 (“It was in the context of national economic growth and ineffective welfare performance that the 1996 welfare reform act was passed (Personal Responsibility and Work Opportunity Act). That legislation was especially restrictive for recipients of [Aid to Families with Dependent Children] AFDC, now tellingly relabeled Temporary Assistance to Needy Families (TANF). Beyond the political rhetoric that accompanied it, the shift meant, above all, a retrenchment of the liberal system rather than a reform of an ineffective system. Its base was neoconservative devotion rather than the result of an outcome-and-process evaluation. In the face of the evidence on long-term and deep poverty and the ineffectiveness of the market to improve the situation, residual welfare was tightened and shortened. Most important, the citizenship principle of entitlement was erased. The clock was turned back to pre-New Deal times. An economic system that creates great wealth and great poverty runs the risk of being contested and possibly creating civil unrest. It needs to show evidence of good performance to preserve legitimacy. Indicators of well-being, such as employment rates, are crucial. The acceptance of such indicators conveniently obscures earnings levels, security and length of employment, and who is and is not counted. An efficient strategy of hiding the true victims of the economic restructure is the use of policies intent on constructing these victims as deviants.”); *accord, e.g.*, SMITH, *supra* note 9, at 149-50; Foroohar, *supra* note 18, at 26 (“The debt-reduction deal guarantees that the [wealth] gap will widen.”). See also *supra* notes 85-87, 93-94 and accompanying text.

⁹⁷ *A Dozen Major Groups Help Drive the Religious Right’s Anti-Gay Crusade*, INTELLIGENCE REPORT, Spring 2005, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2005/spring/a-mighty-army> (“In 1993, with gay-rights issues increasingly being contested in the courts, a coalition of 35 Christian Right groups founded the Alliance Defense Fund (ADF). Key founders included D. James Kennedy of Coral Ridge Ministries, Donald Wildmon of the American Family Association, and James Dobson of Focus on the Family. ADF President Alan Sears was a culture-war veteran, having served as executive director of Attorney General Edwin Meese’s *Commission on Pornography during the Reagan Administration*. Sears believed the fundamentalist right needed to get serious after years of liberal court victories: ‘They hit and they hit and they hit, and finally we’re defending.’ Sears claims that the ultimate goal of the gay-rights movement is to ‘silence’ Christians.” (emphasis added)); *accord, e.g.*, Bauer, *supra* note 9 (discussing the fact that many states throughout America passed “misguided state laws [] designed to punish undocumented immigrants . . . Unfortunately, while Jim Crow may be long gone, ‘Juan’ Crow is alive and well.”); Mackenzie Weinger, *Antonio Villaraigosa Backs Gay Marriage Plank*, POLITICO (Mar. 7, 2012), <http://www.politico.com/news/stories/0312/73729.html> (discussing the fundamental right to marry and his support of a marriage equality plank for gay marriage, Democratic Los Angeles Mayor Antonio Villaraigosa “warned that Republicans would lose their status as a top tier party if they continue to harp on divisive social issues instead of embracing the middle. He predicted that the Republican party is moving so far to the right it will ‘become the Whig party of the next millennia.’ ‘Whigs no longer exist, they’re not here anymore as a party,’ Villaraigosa said at the Newseum in Washington. ‘The fact is, when you hear the Republican candidates on immigration, when you see them and hear them talk about contraception, mammograms, abortion and not the economy, it’s clear to me they’re moving farther and farther away from the mainstream.”); Nick Wing, *Rick Santorum: Contraception ‘Should Be Available’ Unless Religious Organizations Object*, THE HUFFINGTON POST (Feb. 16, 2012), http://www.huffingtonpost.com/2012/02/16/rick-santorum-contraception_n_1282339.html (discussing Republican presidential candidate Rick Santorum’s opinion on contraception and sodomy and the fact that “he believe states should have the right to ban [these rights] without the Supreme Court interfering”). See also, *e.g.*, Chip Pitts & William Fisher, *The Liberties We’ve Lost in the “War on Terror” Are Only Lost Temporarily, Right?*, TRUTHOUT (Dec. 12, 2011) http://truth-out.org/index.php?option=com_k2&view=item&id=5433:the-liberties-weve-lost-in-the-war-on-terror-are-only-lost-temporarily-right (“[D]ecades

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distrust in the United States' judiciary is a topic of growing concern, the focus on the Court's decision making process, based on political influence within the United States, remains unchecked.⁹⁸ Undeniably, Supreme Court justices make “[s]ome of the most politically transformative decisions in American government” by determining through their own personal political beliefs and prejudices how and when to utilize Fourteenth Amendment legislative history in rendering their decisions.⁹⁹

Originalism revives the frustration of “bad constitutional bargains . . . result[ing] in coercion, secession, or civil war.”¹⁰⁰ The constitutional conflict that

of gradual progress in expanding rights have been undermined and generations who have fought for hard-won liberties have seen both their liberty and their security dramatically reduced this past decade.”); Todd Starnes, *Judge: Americans Don't Have Right to Drink Cow Milk*, FOX NEWS <http://radio.foxnews.com/2011/10/06/judge-americans-dont-have-right-to-eat-drink-what-the-want/> (last visited Apr. 7, 2012) (“A Wisconsin judge has ruled that Americans do not have a fundamental right to drink milk from their own cow, nor do they have a fundamental right to produce and consume the foods of their choice . . . [T]he idea that an American cannot produce or consume foods of their own choosing has generated outrage across the world.”); *No Right to Homeschool?*, AMERICAN CENTER FOR LAW & JUSTICE, (Mar. 27, 2008), http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/aclj_norighttohomeschool-acljlegalmemo_033108.pdf (discussing a California state court decision determining that “parents simply have no constitutional right to home school their children” and the effect this decision has in chiseling away at the basic fundamental rights of parents recognized by the Supreme Court since the 1920s in the upbringing and education of their children). *See also* Potok, *supra* note 47 (“2011 also saw many politicians and other public figures attacking Muslims, LGBT people and other minorities, effectively taking on some of the issues dear to the radical right. But there was enough of a far-right wind to fill the sails of politicians, hate and Patriot groups, and Tea Parties alike, very likely the result, in large part, of a view of Obama as a dire threat to the country.”).

⁹⁸ *See, e.g.*, *Perlow v. Berg-Perlow*, 875 So.2d 383, 408 (Fla. 2004) (Lewis, J., specially concurring). (discussing the Court’s “growing concern that we are alienating the public’s trust in the judiciary as a body capable of seeking truth and bringing thoughtful, just, predictable, and certain resolution to a host of human problems”); ISAAC UNAH, *THE SUPREME COURT IN AMERICAN POLITICS* 137 (2009) (discussing the concept that a justice’s values “or preferences over a range of social or political issues” affects how a justice will decide a particular case). *See also* ROSSUM, *supra* note 92, at 43-46 (attributing Scalia’s influence over the nation’s judiciary and legislature towards the drastic decline in the utilization of legislative history in determining the outcome of cases state that “With Justice Scalia breathing down the necks of anyone who peeks into the *Congressional Record* or Senate reports, the other members of the Court may have concluded that the benefit of citing legislative history does not outweigh its costs . . . No one likes an unnecessary fight, especially not one with as formidable an opponent as Justice Scalia.”).

⁹⁹ UNAH, *supra* note 98, at 135, 137, 143-45 (“Within a capitalist democracy, conservatives believe that the government that governs the least is the best so as to encourage cherished American values . . . The overriding philosophy of liberals . . . is that in order for the promise of American democracy to be realized, government has a role to play in promoting safety and showing compassion by helping families and particularly citizens who are incapable of protecting themselves.”); *accord, e.g.*, *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030 (2010) (determining that there was no need to reconsider *Slaughter-House* due to petitioners inability to identify the full scope of the Privileges or Immunities Clause’s protected rights); *Id.* at 3051 (Scalia, J., concurring) (discussing abortion and homosexual sodomy as two of the several rights that “could not pass muster” under Justice Stevens theory of incorporation articulated in *Palko v. Connecticut*, 302 U.S. 319 (1937)); *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring in part and concurring in the judgment) (suggesting that the Privileges or Immunities Clause would not protect certain controversial unenumerated rights even if the *Slaughter-House* decision were to be overturned).

¹⁰⁰ GRABER, *supra* note 60, at 217; *accord, e.g., supra* note 20 and accompanying text; *infra* note 191 and accompanying text.

initiated the Civil War is resurrected when Supreme Court justices refuse to consider the process of constitutional interpretation allowing for “new ideas, [] new situations, as well as call[ing] people back to contemplate [the Constitution’s] original ideals and meanings.”¹⁰¹ The Fourteenth Amendment’s framers realized that without a major change to the decentralized system of government the original Constitution created, another Civil War conflict was inevitable.¹⁰² Still today, political leaders fiercely battle over the very topic that is resolved through existing Constitutional Amendment.¹⁰³ The war on women’s fundamental rights is an example of political rhetoric directed at the American populace for the purpose of continuing to deprive them of their fundamental rights.¹⁰⁴ Today’s conservative extremists argue that the Amendment’s protections “never applied to any group other than slaves.”¹⁰⁵ However, a study of the legislative history of the Fourteenth Amendment reveals a different truth.¹⁰⁶

Today, Chief Justice John Roberts and Associate Justices Antonin Scalia, Samuel Alito, and Clarence Thomas adhere to “the originalist creed” whose duty is to “constitutionally limit . . . government itself.”¹⁰⁷ However, this rightwing tactic is inconsistent with the “connection between the American people and their legal order that is still evolving.”¹⁰⁸ Indeed, some current Supreme Court justices, who are staunch proponents of originalism, associate themselves with radical political activists, raising public concerns of ethical breaches.¹⁰⁹ Supreme Court justices

¹⁰¹ Silverman, *supra* note 61, at 2 (“When Taney looked at original intent he saw the constitution as a structure, a system of rules set down in the past which must be followed faithfully by all succeeding generations. But Lincoln had a different view of what it was. He thought that it was a process . . . [which] could respond to new ideas, meet new situations, as well as call people back to contemplate its original ideals and meanings.” (quoting University of Kansas Professor Phillip Paludan)).

¹⁰² See *infra* text accompanying note 112; *infra* Part III.B.; *infra* notes 113, 159 and accompanying text.

¹⁰³ See, e.g., U.S. CONST. amend. XIV.; *infra* text accompanying note 112; *infra* Part III.B.; *infra* notes 113, 159 and accompanying text. See also, e.g., *supra* text accompanying notes 15-20; discussion *supra* Part I.

¹⁰⁴ See *supra* notes 48-49, 51 and accompanying text.

¹⁰⁵ See *Equal Protection*, *supra* note 17.

¹⁰⁶ See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 1064-65 (1866) (statements of Rep. Hale and Rep. Bingham) (“Mr. HALE. It is claimed that this constitutional amendment is aimed simply and purely toward the protection of ‘American citizens of African descent’ in the States lately in rebellion. I understand that to be the whole intended practical effect of the amendment. Mr. BINGHAM. It is due to the committee that I should say that it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment.”); *infra* note 129 and accompanying text.

¹⁰⁷ Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, in ORIGINALISM, *supra* note 56, at 2; accord Justice Antonin Scalia, *Forward*, in ORIGINALISM, *supra* note 56, at 43-44; see also LIU, *supra* note 32, at 1.

¹⁰⁸ See, e.g., LABBÉ & LURIE, *supra* note 25, at 1; accord *supra* note 97 and accompanying text.

¹⁰⁹ See, e.g., Crowley, *supra* note 49, at 36-41 (referring to Michele Bachman as one of “the conservative members of Congress who are aligned with the Tea Party [who] rejected dire warnings that failure to raise the debt limit would rock global markets and cut off Social Security payments to senior citizens.”); Marcia D. Greenberger, *Will Scalia Tell Congress that the Constitution Leaves Women Out?*, NATIONAL WOMEN’S LAW CENTER (Jan. 24, 2011), <http://www.nwlc.org/our-blog/will-scalia-tell->

who embrace the idea that the Amendment was never intended to protect women galvanize rightwing, conservative extremists' ideological beliefs, causing a political atmosphere in which women's fundamental rights are directly threatened.¹¹⁰

III. THE IMPORTANCE OF THE *SLAUGHTER-HOUSE CASES*:¹¹¹ LOSING THE PRIVILEGES OR IMMUNITIES CLAUSE AND ITS LASTING IMPACT ON AMERICAN SOCIAL ISSUES

*I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon these fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining.*¹¹²

In 1866, during the House debates on the Fourteenth Amendment, members of Congress admitted that the existing Constitution did not provide United States citizens equal protection of the law.¹¹³ Indeed, the Framers intended the

congress-constitution-leaves-women-out (discussing United States Supreme Court Justice Antonin Scalia's speaking engagement "at an event organized by Tea Party leader Rep. Michele Bachmann and her 'Constitutional Conservative Caucus.'"); Laurie Whitwell, *Supreme Court Justice 'failed to disclose his wife's \$700,000 salary from conservative think tank'*, MAIL ONLINE (Sept. 30, 2011), <http://www.dailymail.co.uk/news/article-2043607/Supreme-Court-Justice-Clarence-Thomas-failed-disclose-wifes-700-000-salary.html> (reporting a possible "federal investigation into allegations [that] Supreme Court Justice Clarence Thomas violated ethics rules" due to his failure to report his wife's earnings from "the Heritage Foundation" and "Liberty Central, a conservative group with Tea Party ties she co-founded in January 2009"); see also, e.g., HERITAGE, *Tea Party*, *supra* note 52 ("The Tea Party movement has already had a tremendously significant effect on national politics."); LIU, *supra* note 32, at 1 (referring to Justices Antonin Scalia and Clarence Thomas).

¹¹⁰ See, e.g., King, *supra* note 10, at 165 ("If successful, [the father's rights groups'] political agenda will 'turn the clock back on women's [fundamental] rights,' creating a political atmosphere in which 'the feminist experiment in freedom' is abolished." (quoting Janet Normalvanbreucher, *Stalking Through the Courts*, THE LIZ LIBRARY (1999), <http://www.thelizlibrary.org/liz/FRtactic.html#FM> (last visited July 30, 2012) (quoting 1997 Reaffirmation of the Father's Manifesto)); *supra* note 6 and accompanying text.

¹¹¹ *Slaughter-House Cases*, 83 U.S. 36 (1873).

¹¹² CONG. GLOBE, 39TH CONG., 1ST SESS. 2766 (1866) (statement of Sen. Howard at the Introduction of the Fourteenth Amendment to the U.S. Senate on May 23, 1866).

¹¹³ See, e.g., *id.* at 1064-66 (1866) (statement of Rep. Hale) ("If it be true that the construction of this amendment, which I understand to be claimed by the gentleman from Ohio, [Mr. BINGHAM,] who introduced it, and which I infer from his question is claimed by the gentleman from Pennsylvania, [Mr. STEVENS:] if it be true that that is the true construction of this article, is it not even then introducing a power never before intended to be conferred upon Congress? For we all know it is true that probably every State in this Union fails to give equal protection to all persons within its borders in the rights of life, liberty, and property. It may be a fault in the States that they do not do it. A reformation may be desirable, but by the doctrines of the school of politics in which I have been brought up, and which I

Amendment to provide its “vague and general language . . . pertaining to the life, liberty, and property [to] all the inhabitants of the several States.”¹¹⁴ “[T]he extremely vague, loose, and indefinite provisions of the proposed amendment” were intended to offer protections to all classes of persons, including women.¹¹⁵ Because of the intent of the Amendment and the broad provisions its text provides to all members of American citizenry, conservative extremists viewed it then—as they do today—as “the most dangerous” threat to state sovereignty.¹¹⁶ As a result, the Supreme Court determined in the *Slaughter-House Cases* that the Fourteenth Amendment did not provide the broad protections the Framers intended for the Amendment, proving the dissenters’ fears of “serious and far-reaching” consequences.¹¹⁷ The *Slaughter-House* Court provided the economic, political and social climate for today’s war on women’s fundamental rights which the Framers of the Fourteenth Amendment intended to prevent.¹¹⁸

In 1873, the U.S. Supreme Court, in the *Slaughter-House Cases*, took its first opportunity to immediately strip the Fourteenth Amendment of the broad protections for all United States citizens that the Amendment was meant to provide.¹¹⁹ Rather than searching for the protections afforded by the Fourteenth

have been taught to regard was the best school of political rights and duties in this Union, reforms of this character should come from the States, and not be forced upon them by the centralized power of the Federal Government.”); *id.* at 1066-67 (1866) (statement of Rep. Price) (“Now, if the Constitution had protected the rights of citizens of one State in going into another, that Constitution is all that I would have wanted, and I do think that a fair interpretation of it, and a just enforcement of its provisions would have brought about that protection. But experience, though it may be a dear school, is one of the best that any man, whether he be foolish or wise, was ever taught in, and the experience of the last quarter of a century ought to have satisfied any gentleman that the Constitution has not afforded that protection. And now, while we are in the course of reconstruction, laying anew, as it were, the foundations of this Government, I want to see such a guarantee placed in the Constitution as will protect all citizens.”).

¹¹⁴ *Id.* at 1065.

¹¹⁵ *Id.* at 1064.

¹¹⁶ *Id.* at 1065 (“It seems to me, sir, that this is, of all kinds of legislation, the most dangerous. I believe that the tendency in this country has been from the first too much toward the accumulation and strengthening of central Federal power. During the last five years of war and rebellion, that tendency has necessarily and inevitably increased. It must always happen that when the life of the nation is menaced the strength and extent of central power will be augmented.”).

¹¹⁷ *Slaughter-House Cases*, 83 U.S. 36, 130 (1873) (Swayne, J., dissenting); *accord id.* at 57-83 (construing the interpretation of the privileges or immunities clause of the Fourteenth Amendment “much too narrow[ly].” *Id.* at 129 (Swayne, J., dissenting)).

¹¹⁸ *See id.* at 82 (“[W]e do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statement have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.”); *but cf.* CONG. GLOBE, 39TH CONG., 1ST SESS. 2765-66 (1866) (statement of Sen. Howard) (“A citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws . . . The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States . . . [H]ere is a mass of privileges, immunities, and rights . . . [T]here is no power given in the Constitution to enforce and to carry out any of these guarantees . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”).

¹¹⁹ *See* BOLICK, *supra* note 19, at 17-22; *see generally Slaughter-House*, 83 U.S. 36.

Amendment through its Privileges and Immunities Clause, the *Slaughter-House* Court narrowly construed the protections provided for through the Amendment and rendered the Clause a nullity.¹²⁰ Consequently, when facing difficult social questions and interpreting the Amendments' application to discrimination, the Court chose to deal with answering these questions by "adopt[ing] the approach of selective incorporation" rather than looking to the "inconvenient history [it chose to] simply cast to one side."¹²¹ The result forced a jurisprudence of Court doctrines stemming solely from the Due Process and Equal Protection Clauses of the Amendment.¹²² However, these Court-developed doctrines are not based in the legislative history of the Amendment, weakening their current precedential strength.¹²³ Resultantly, the Court's failure to ground its Fourteenth Amendment precedents in the lengthy and complex debates provides the framework for originalist justices to ignore the protections the Reconstruction Congress intended to afford women through the Privileges or Immunities Clause.¹²⁴

A. *The Slaughter-House Court: "With All Deliberate Speed"*¹²⁵

*"The gentleman did not utter a word against the equal right of all citizens of the United States in every State to all privileges and immunities of citizens, and I know any such denial by any State would be condemned by every sense of his nature."*¹²⁶

¹²⁰ See BOLICK, *supra* note 19, at 26.

¹²¹ Friedman, *supra* note 30, at 1202-08.

¹²² *Id.* at 1202-06.

¹²³ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 958, 949-953 (2001-2002) ("[T]he modern law of sex discrimination is limited, in constitutional authority and critical acuity, by the ahistorical manner in which the Court derived it from the law of race discrimination."); *cf.* McDonald v. City of Chicago, 130 S. Ct. 3020, 3057-3058 (2010) (Scalia, J., concurring) (abandoning his long-standing originalism ideology and advocating for historical analysis, in *McDonald v. City of Chicago*, stating "[T]he question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world. Or indeed, even more narrowly than that: whether it is demonstrably much better than what Justice Stevens proposes. I think it beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process. It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor. In the most controversial matters brought before this Court—for example, the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty—any historical methodology, under any plausible standard of proof, would lead to the same conclusion.").

¹²⁴ See, e.g., Friedman, *supra* note 30, at 1208 ("The present obsession in some quarters with originalism can be traced back to the rise of conservatism in the 1970s and 1980s."); *supra* Part II.B; *infra* Part V.

¹²⁵ Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) ("[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.").

¹²⁶ CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866) (statement of Rep. Bingham) (referring to Rep. Hale).

The Amendment's text is deliberately broad and inclusive, suggesting that its civil rights protections extend well beyond race.¹²⁷ Because of the critical text deliberately provided by the Framers to the Fourteenth Amendment, agreed upon following lengthy Congressional debates and ratification in 1868, the Amendment became an immediate source of great legislative power for a "free-state" Congress.¹²⁸ The Framers intended Section One of the Fourteenth Amendment to provide equal protection to "[a]ll persons" within the United States, including women.¹²⁹ As a result, the "slave-state" Supreme Court was highly motivated to betray the original intentions of the Framers' intent of the Fourteenth Amendments' protections.¹³⁰ Therefore, the Amendment's powerful "privileges and immunities clause . . . was given a limited construction . . . and has since remained dormant."¹³¹

The Framers of the Fourteenth Amendment intended the Privileges or Immunities Clause of the Fourteenth Amendment to be its "major source for constitutional protection of both civil liberty and civil equality."¹³² Nevertheless, just five years after the Amendment's enactment in 1868, "the U.S. Supreme Court drained the privileges or immunities clause of nearly all its meaning" in an opinion that is still considered today as "one of the worst decisions in the history of

¹²⁷ See *id.* at 1064 (1866) (statement of Rep. Hale) ("[W]e all know it is true that probably every State in this Union fails to give equal protection to all persons within its borders in the rights of life, liberty, and property . . . The language of the section under consideration gives to *all persons* equal protection."); *id.* (statement of Rep. Stevens) ("When a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality."); see also Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 465, 469 (1994-1995) ("The Fourteenth Amendment does not mention race . . . Section One of the Fourteenth Amendment does not, in its words at least, treat race discrimination as different from gender discrimination.").

¹²⁸ GRABER, *supra* note 60, at 216; *accord, e.g., supra* note 112 and accompanying text; *infra* Part III.B; ROBERT H. BORK, *THE TEMPTING OF AMERICA* 36 (1990) ("[T]he Republic, now began to face the challenge of new kinds of legislation, some of it designed to further economic development through public expenditures, some of it designed to curb what were thought to be the abuses of a free enterprise system.").

¹²⁹ U.S. CONST. amend. XIV, § 1; CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866) (statement of Rep. Bingham) ("But, says [Rep. Hale], if you adopt this amendment you give to Congress the power to enforce all the rights of married women in the several States . . . Those rights which are universal and independent of all local State legislation belong, by the gift of God, to every woman, whether married or single. The rights of life and liberty are theirs whatever States may enact.").

¹³⁰ See generally GRABER, *supra* note 60, at 216; *accord, e.g.,* LABBÉ & LURIE, *supra* note 25, at 169 ("As congressional Republicans in 1862 set out to remake the Court, the ground was shifting beneath them, and patterns of judicial recruitment were being influenced in ways that would eventually result in a new era in constitutional policy."); Silverman, *supra* note 61, at 4 ("For many," says Kennedy, "the history of the Supreme Court's early interpretations of the Reconstruction Amendments is a two-chapter story of tragic betrayal. In chapter one, the Reconstruction Amendments make overdue but nonetheless grand promises that henceforth the federal government would guarantee racial equality. In chapter two, the Supreme Court undermines those promises by construing them too narrowly[.] "' (quoting Professor Randall Kennedy of the Harvard Law School)).

¹³¹ See BORK, *supra* note 128, at 37.

¹³² Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT 317 (2007); *accord, e.g., supra* text accompanying note 112; *infra* Part III.B.

American law.”¹³³ The *Slaughter-House Cases*, on its face, did not deal with race or fundamental rights; however, the decision profoundly affected the “principles of universal freedom and equality” for all members of society.¹³⁴ The Supreme Court justices who decided the *Slaughter-House Cases* had all witnessed the Civil War destroy and redefine the country.¹³⁵ The horrors they witnessed and shared “reshaped the legal environment in which they operated.”¹³⁶

In order to understand the ultimate decisions reached in *Slaughter-House*, it is necessary to grasp the entire “sense of the transformed context in which the Court operated from 1865 to 1873.”¹³⁷ The Court’s majority decision in *Slaughter-House*, determined by a 5-4 vote, was not well received by the justices who wrote the dissents and was considered one that would have dire future consequences for the country.¹³⁸ Indeed, because the *Slaughter-House* Court determined that “one of the most important and beneficial products of the Civil War[.]” the Privileges or Immunities Clause of Fourteenth Amendment, was eviscerated,¹³⁹ the vulnerable members of society the Amendment was intended to protect were, once again, susceptible to “the heretical and dangerous doctrine of State sovereignty.”¹⁴⁰

B. Stripping the Framers’ Intent: The Substantive Importance of the Privileges or Immunities Clause of the Fourteenth Amendment

*The great object of the [privileges or immunities clause] is to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.*¹⁴¹

The Privileges or Immunities Clause, introduced to the Senate by Senator Jacob Howard on May 23, 1866, was intended to restrict “the power of the States.”¹⁴² Senator Howard detailed his introduction of the Amendment by explaining that:

[T]he present settled [U.S. Supreme Court] doctrine is, that all these immunities, privileges, rights, thus guaranteed [sic] by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United

¹³³ BOLICK, *supra* note 19, at x.

¹³⁴ SMITH, *supra* note 9, at 46.

¹³⁵ See LABBÉ & LURIE, *supra* note 25, at 169.

¹³⁶ *Id.* at 169.

¹³⁷ *Id.* at 169.

¹³⁸ BOLICK, *supra* note 19, at 22.

¹³⁹ *Id.* at xi.

¹⁴⁰ CONG. GLOBE, 39TH CONG., 1ST SESS. 1065 (1866) (statement of Rep. Hale) (“It is true that this doctrine of State rights, like any other doctrine carried beyond its due measure, may, when pushed to extremes, generate evil. It is true that the orthodox, sound, fundamental doctrine of State rights may, by progressing beyond the proper line, become the heretical and dangerous doctrine of State sovereignty. Thank God, sir, that heresy has been put down.”).

¹⁴¹ *Id.* at 2766.

¹⁴² *Id.*; accord Balkin, *supra* note 132, at 313.

States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation.¹⁴³

Senator Howard was describing the existing “character of the privileges and immunities . . . in the second section of the fourth article of the Constitution.”¹⁴⁴ Indeed, prior to the ratification of the Fourteenth Amendment in 1868, Congress was “without power . . . to give [the privileges and immunities of a citizen of the United States] full effect.”¹⁴⁵ The Framers of the Amendment specifically intended to empower Congress with the ability to enforce Article IV, Section 2 of the Constitution and the Bill of Rights against all of the states.¹⁴⁶

When Senator Howard introduced the Fourteenth Amendment to the U.S. Senate, the usage of “privileges or immunities” was incorporated into the first section of the Amendment and was regarded “as very important.”¹⁴⁷ Because he “was a member of the Joint House-Senate Committee on Reconstruction (the Committee of Fifteen) that drafted the Amendment,”¹⁴⁸ Senator Howard had a unique perspective on “the amendment of the Constitution of the United States [then] under consideration.”¹⁴⁹ Undeniably, the Committee determined that:

[I]t was necessary, in order to restore peace and quiet to the country and again to impart vigor and efficiency to the laws, and especially to obtain something in the shape of a security for the future against the recurrence of the enormous evils under which the country has labored for the last four years, that the Constitution of the United States ought to be amended; and the project which they have now submitted is the result of their deliberations upon that subject.¹⁵⁰

Senator Howard explained that, prior to May 23, 1866, the Supreme Court had never undertaken to “define either the nature or extent of the privileges and immunities thus guaranteed” under the Constitution.¹⁵¹ He went on to explain that U.S. Circuit Court Judge Washington, in *Corfield v. Coryell*,¹⁵² provided some insight into the character of the privileges and immunities, stemming from Article IV, Section 2 of the Constitution, although Senator Howard acknowledged that they could not “be fully defined in their entire extent and precise nature.”¹⁵³

¹⁴³ CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2765-66.

¹⁴⁶ *See, e.g., supra* text accompanying note 34; *supra* notes 28-29 and accompanying text.

¹⁴⁷ CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard).

¹⁴⁸ Balkin, *supra* note 132, at 313.

¹⁴⁹ CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard) (discussing the great deal of attention and inquiry that was given to the drafting of the joint resolution including inquiry “into the political and social condition of the insurgent States”).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

¹⁵³ CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard).

The Fourteenth Amendment was understood by the general public during the Reconstruction era to provide the power to Congress to enforce the Bill of Rights against the States; but, it was Article IV, Section 2 that provided Congress the power to enforce *unenumerated* fundamental rights against the States.¹⁵⁴ However, no other language within the Amendment, other than the Privileges or Immunities Clause, would accomplish the task of ensuring that the civil rights and great fundamental guarantees, derived from Article IV, Section 2 of the Constitution, would be enforced against the states.¹⁵⁵ Indeed, the *Slaughter-House* Court immediately stripped the Amendment of its Privileges or Immunities Clause due to the massive powers its Framers provided through the Clause, leaving the Amendment shattered and helpless to effectively invoke any social change through the protections of Article IV, Section 2 of the Constitution, the Bill of Rights, or any other federally enacted civil rights legislation.¹⁵⁶

IV. “[I]T IS A CONSTITUTION WE ARE EXPOUNDING:”¹⁵⁷ THE FRAMERS’ INTENT FOR
WOMEN NEVER CHANGED

Upon graduating from law school, Rehnquist obtained a clerkship in the office of Justice Robert H. Jackson for the 1952 term of the United States Supreme Court. During that term, while the issues of Brown v. Board of Education . . . [the school desegregation case] were under consideration, a memorandum bearing Rehnquist’s initials was written for Justice Jackson and stated:

¹⁵⁴ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3073 (2010) (Thomas, J., concurring in part and concurring in the judgment) (discussing a speech delivered by Rep. John Bingham “arguing that a constitutional amendment was required to give Congress the power to enforce the Bill of Rights against the States”). See also, e.g., *supra* note 112; CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard) (“[H]ere is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution.”).

¹⁵⁵ See, e.g., *supra* notes 112, 113, 116, 118, 127, 140, 149 and accompanying text; *supra* text accompanying notes 126, 141, 143, 150.

¹⁵⁶ See BOLICK, *supra* note 19, at 32-34 (discussing the many unfortunate consequences of *Slaughter-House*, yet stating that “[a]mong the rights recognized under the due process clause is abortion, which would have been very difficult to have found in the definition of privileges or immunities. Ironically, conservatives like Bork who have commended *Slaughter-House* as an exercise in judicial restraint have over-looked the perverse jurisprudential by-product it spawned.”).

¹⁵⁷ *McCulloch v. Md.*, 17 U.S. 316, 406-07 (1819) (“Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language . . . [W]e must never forget, that it is a constitution we are expounding.”).

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by “liberal” colleagues, but I think *Plessy v. Ferguson* [the “separate but equal” decision] was right and should be reaffirmed. . . .

*Justice Jackson did not heed the advice of his clerk. He joined a unanimous Court in declaring that segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.*¹⁵⁸

The struggle for the realization of civil rights and liberties freedom since the Civil War remains an ongoing battle today even though the Fourteenth Amendment’s Framers clearly intended to prevent such instability.¹⁵⁹ Because the text of Section One of the Fourteenth Amendment reflects the broad vision of the persons its Framers intended to protect, “[it] became . . . the great engine of judicial power.”¹⁶⁰ However, the *Slaughter-House* Court prevented the Amendment from forever protecting all United States citizens from the states “trenching upon [their unenumerated] fundamental rights and privileges.”¹⁶¹ Indeed, those members of the Supreme Court and the other branches of government intent on stymieing the civil rights the Amendment was enacted to protect actively pursue an agenda to prevent the Amendment from realizing its intended purposes and enforcement powers.¹⁶²

¹⁵⁸ LEAHY, *supra* note 82, at 243.

¹⁵⁹ *See, e.g.*, CONG. GLOBE, 39TH CONG., 1ST SESS. 1067 (1866) (statement of Rep. Price) (“I now aver, most honestly and sincerely, as one great reason why the resolution should pass, that if it is possible, in the reconstruction of the Government and in the readmission of the States lately in rebellion, to so amend our Constitution as that each citizen of every State shall have the same rights and privileges as the citizens of every other State, then in the name of justice and humanity we ought to attend to that duty. Heretofore in the history of this country that has not been the case. I but state a fact which no gentleman dare call in question, and of which no successful contradiction can be made, when I state that *up to this time there has not been that equal protection to the citizens of the different States that they were entitled to under the Constitution of our Government.* And this resolution is intended to give force and effect to that idea and principle. And for that reason I am in favor of this joint resolution, and hope that by all means this House will adopt it; *and not only this, but any and every resolution that will give force and strength to that instrument, so that in the coming generations of time we may never have occasion again to lament the occurrence of such a war as the one we have just passed through.* I trust that the Constitution, upon which all our civil and religious institutions are based, will have given to it sufficient stability and solidity to bear any burden that may be placed upon it, and give to us what we propose to have – equal rights and equal privileges from one end of this continent to the other.” (emphasis added)); *Palko v. Connecticut*, 302 U.S. 319, 327 (U.S. 1937) (“[T]he domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.”); *supra* notes 36, 65 and accompanying text.

¹⁶⁰ *See* BORK, *supra* note 128, at 36; *accord* CONG. GLOBE, 39TH CONG., 1ST SESS. 1064 (1866) (statement of Rep. Hale) (discussing “the extremely vague, loose, and indefinite provisions of the proposed amendment”).

¹⁶¹ CONG. GLOBE, 39TH CONG., 1ST SESS. at 1064 (statement of Sen. Howard); *accord* *Slaughter-House Cases*, 83 U.S. 36, 129 (1873) (Swayne, J., dissenting) (“By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment.”).

¹⁶² *See, e.g.*, *supra* Part II.B.; *supra* text accompanying note 158 (suggesting that Chief Justice William H. Rehnquist was motivated to “change the government” due to his beliefs that *Brown v. Board of Education* was wrongly decided).

The Reconstruction era and Congress' enactment of the Civil War Amendments is often referred to as "America's Second Founding."¹⁶³ In 1787, the time of the signing of the United States Constitution and Bill of Rights, "slavery was a widely accepted social norm."¹⁶⁴ Undeniably, in 1787, "[s]laves did not have standing in law equal to that of freemen, [and] neither did women."¹⁶⁵ However, "[i]n the wake of the Civil War, [this] once-stable constitutional order was left chaotic, unsettled, and negotiable."¹⁶⁶ In addition to slavery, "[t]he war . . . called into question traditional norms that formed the foundations of the American Constitution, such as state sovereignty and limited federal power."¹⁶⁷ Indeed, one of the distinct purposes of the Fourteenth Amendment was to place "a restriction upon the States" and to "confer [] power upon Congress."¹⁶⁸

A. The Development of Federal Powers and Fundamental Rights in Spite of Slaughter-House

*"Like a contract, or a statute, the Constitution is a document that can be added to over time in ways that change the original meaning."*¹⁶⁹

The Framers involved with the adoption of Section One of the Fourteenth Amendment were well aware of "the legal significance of the language they employed," so they paid close attention to the debates and the language of Section One.¹⁷⁰ Congressman John A. Bingham, the man credited as "the author and champion of [the] critical and important parts of Section [O]ne of the Fourteenth Amendment,"¹⁷¹ specifically intended the Amendment to protect women relative to their "fundamental rights and liberties[.]"¹⁷² including "the rights of life and liberty."¹⁷³ By stripping the Amendment of its major source of protection of civil liberties and equality within five years of its enactment, the *Slaughter-House* Court forced lawyers arguing for fundamental rights to do so under the protections of the Amendment's Due Process and Equal Protection Clauses.¹⁷⁴ As a result, lawyers were unsuccessful in convincing the Supreme Court of the Amendment's civil rights protections until the mid-twentieth century.¹⁷⁵

¹⁶³ Friedman, *supra* note 30, at 1207; *accord, e.g.*, U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV. *See also supra* note 113 and accompanying text.

¹⁶⁴ *See* McDONALD, *supra* note 24, at 3, 51.

¹⁶⁵ *Id.* at 54.

¹⁶⁶ *See* Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution"*, 76 N.Y.U. L. REV. 1456, 1470 (2001).

¹⁶⁷ *Id.* at 1456.

¹⁶⁸ *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2766 (1866) (statement of Sen. Howard).

¹⁶⁹ Friedman, *supra* note 30, at 1215.

¹⁷⁰ Earl M. Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J. L. & PUB. POL'Y 451, 453 (1995-1996).

¹⁷¹ Aynes, *supra* note 2, at 590.

¹⁷² *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2766 (1866) (statement of Sen. Howard).

¹⁷³ *Id.* at 1089 (statement of Rep. Bingham).

¹⁷⁴ *See, e.g.*, Balkin, *supra* note 132, at 317; BORK, *supra* note 128, at 37.

¹⁷⁵ *See e.g.*, BORK, *supra* note 128, at 37.

Historical analysis of the Court provides evidence that “the times in which the chief justices and their brethren work” produces differences in the outcomes of the Court’s rulings.¹⁷⁶ Indeed, a “more stable” Court, “both in the low rate of turnover among members and in the lack of dramatic changes in its interpretation of the Constitution and of federal laws[,]” might produce an “emphasis on the concepts of limited government and judicial supremacy.”¹⁷⁷ On the other hand, a more dynamic Court, “while by no means liberal[,]” might be “more willing to accept an expanded interpretation of the Constitution to allow for modernization and changing times.” This type of Court may “approve[] a large percentage of regulatory measures that expand[] government power.”¹⁷⁸ When these “two Courts [hold] much in common in the types of issues they [are] called upon to address, and in the views of the Constitution on which they base[] their rulings[,]” their outcomes become the basis for Court-developed doctrines of Constitution law.¹⁷⁹

Throughout the history of the United States, African Americans and American women have encountered similar background structural injustices—i.e., “moral slavery”—and these similarities became the foundation for the Supreme Court’s sex discrimination jurisprudence.¹⁸⁰ In order to create a balance between protecting individual property rights and “looking after the welfare of society,” the Court began to veer away from its history of being “averse to creating too great a disruption to the status quo.”¹⁸¹ Indeed, even today, there exists a social and economic struggle between an extreme rightwing court and justices eager to employ the balance of the Fourteenth Amendment’s post-*Slaughter-House* powers.¹⁸²

Because of the rich, deeply complicated history of the Civil War Amendments and the difficulty in accessing their legislative history, the Supreme Court did not take full account of the Reconstruction era during the nineteenth and twentieth centuries.¹⁸³ This lack of attention to the legislative history of the Reconstruction era created a constitutional jurisprudence that is inconsistent with the Framers’ intent of the Fourteenth Amendment’s protections.¹⁸⁴ As a result of this failure to rely on the legislative history of the Amendment, constitutional doctrines and precedents relied upon today are not grounded in an analysis of the Framers’ intent, allowing for inconsistent interpretations of the Constitution which

¹⁷⁶ SHOEMAKER, *supra* note 58, at 32.

¹⁷⁷ *Id.* at 32.

¹⁷⁸ *Id.* at 33.

¹⁷⁹ *Id.*

¹⁸⁰ *See, e.g.*, DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION 267-69 (1998); Siegel, *supra* note 123, at 957.

¹⁸¹ SHOEMAKER, *supra* note 58, at 11; *accord* Friedman, *supra* note 30, at 1202-08.

¹⁸² *See generally* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

¹⁸³ *E.g.*, Friedman, *supra* note 30, at 1202-08.

¹⁸⁴ *E.g., id.* at 1208.

fuels political debate over fundamental rights.¹⁸⁵ Indeed, one might assume that the Constitution suddenly changed its meaning in the early 1970s when the Supreme Court determined, for the first time, that a state law violated the Fourteenth Amendment on the basis of sex discrimination.¹⁸⁶ However, it was not a change to the Constitution that caused the Court to suddenly determine that a state law was unconstitutional because it discriminated on the basis of sex; rather, it was a change in the Court's attitude, pressures from a changing society, and a shift to a legal argument analogous to race discrimination doctrine that convinced the Court to begin the process of developing its sex discrimination doctrine.¹⁸⁷ Still, sex discrimination doctrine, similar to race discrimination doctrine, is not grounded in the legislative history of the Fourteenth Amendment, nor is it supported by the Privileges or Immunities Clause of the Fourteenth Amendment.¹⁸⁸ Sex discrimination doctrine derives its principles from the Due Process and Equal Protection Clauses of the Amendment, causing women's fundamental rights to become more susceptible to state action.¹⁸⁹ Indeed, ultraconservative originalist Court justices assert that women's fundamental rights are not supported by the Fourteenth Amendment.¹⁹⁰

¹⁸⁵ See Siegel, *supra* note 123, at 960 ("The body of sex discrimination doctrine the Court developed in the 1970s played a pivotal role in modernizing Fourteenth Amendment jurisprudence so that the Equal Protection Clause might speak to questions of gender justice in the twentieth century. Yet the manner in which the Court derived sex discrimination doctrine from the race discrimination paradigm produced foundational weaknesses in this body of law that continue to haunt it to the present day. Many of these weaknesses - in constitutional authority and critical acuity - flow from the ahistorical manner in which the case law reasons about questions of equal citizenship for women as it derives sex discrimination doctrine from race discrimination doctrine.").

¹⁸⁶ See generally, *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁸⁷ See Siegel, *supra* note 123, at 960-61 ("In arguing that equal protection doctrine concerning race discrimination ought be extended to cover the analogous case of sex discrimination, Justice Brennan's pathbreaking opinion in *Frontiero* emphasized commonalities between race and sex discrimination. . . . Justice Brennan's plurality opinion in *Frontiero* discusses the history of women's treatment in the American legal system as it makes the argument for applying heightened scrutiny to sex-based state action. The opinion points to the nation's 'long and unfortunate history of sex discrimination' in an effort to demonstrate that sex discrimination is sufficiently like race discrimination to warrant similar doctrinal treatment under the Equal Protection Clause. Justice Brennan completes the analogy by arguing that sex, like race, is 'an immutable characteristic determined solely by accident of birth' and 'frequently bears no relation to ability to perform or contribute to society.'" (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)). *But cf.* *Goesaert v. Cleary*, 335 U.S. 464 (1948) (denying women the right to own or operate a bar); *Minor v. Happersett*, 88 U.S. 162 (1875) (denying women the right to vote); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (denying Myra Bradwell the license to practice law).

¹⁸⁸ See *supra* notes 123, 185, 187 and accompanying text.

¹⁸⁹ See *infra* Parts IV.B., V.B.

¹⁹⁰ *Id.*

B. The Negative Impact of Inconsistent Supreme Court Principles Causing “[T]he Exodus”¹⁹¹ of Women’s Fundamental Rights

“[C]ourts must construe [the law] through a process of reasoning that is replicable, that remains fairly stable, and that is consistently applied.”¹⁹²

Although the U.S. Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, “recognized the meaning of liberty as ‘the right to define one’s own concept of existence’ and stated that ‘[t]he destiny of the woman must be shaped . . . on her own conception of . . . her place in society[.]’” today’s economic, political and social climates echo anything other than women’s control over their own futures.¹⁹³ The rightwing, conservative extremists’ ideological force, seeking to strip women of their fundamental right to control their reproductive health, bears greater overall meaning for the scope of American civil rights.¹⁹⁴ Indeed, “[a]n exclusively masculine ideal of liberty” shapes the laws that govern today’s United States judicial system, greatly influencing the American political process.¹⁹⁵ Undeniably, one of the many fallacies of sex discrimination doctrine is that it only deals with some forms of state action—particularly those regulating the social position between the sexes—while ignoring all others.¹⁹⁶

The Fourteenth Amendment’s protections relevant to women are not fairly and consistently applied.¹⁹⁷ The *Slaughter-House* Court never gave the Privileges

¹⁹¹ Compare MEISTER, *supra* note 20, at 108 (“Despite the *disanalogy* between the U.S. Civil Rights movement (which sought integration) and the Exodus (which implies separatism), most chroniclers of black liberation have invoked what the political theorist Michael Walzer calls ‘Exodus politics’ to describe the uneasy cohabitation of freed slaves with the ongoing beneficiaries of their former oppression. In Exodus politics, liberation consists of two elements: manumission (“Let my people go”) and nation building.” (quoting MICHAEL WALZER, EXODUS AND REVOLUTION (1985)); with Shine, *supra* note 6 (“[Rep. Carolyn Maloney, D-N.Y.] criticized the Republican committee chairman, Rep. Darrel Issa, for wanting to ‘roll back the fundamental rights of women.’”), and Starr, *supra* note 56 (“[T]he Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t.” (quoting Justice Antonin Scalia during an interview with *California Lawyer* magazine)).

¹⁹² TRIBE, *supra* note 31, at 32.

¹⁹³ See King, *supra* note 10, at 159 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851-52 (1992)); accord *supra* notes 5-6, 97 and accompanying text.

¹⁹⁴ See, e.g., *supra* notes 5-6 and accompanying text; SMITH, *supra* note 9, at 149-50.

¹⁹⁵ See, e.g., King, *supra* note 10, at 161 (discussing the basis of the American common law in state family courts that is built on the “‘legal nonentity of women’” (quoting Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, in 1 WOMEN AND THE AMERICAN LEGAL ORDER 1-2, 18-19 (Karen J. Maschke ed., 1997)); accord, e.g., TELES, *supra* note 5 (discussing the political influence of parties through “coordinating the behavior of actors across society and among the different branches and levels of government.”); *supra* note 6 and accompanying text.

¹⁹⁶ See Siegel, *supra* note 123, at 959 (“When equal protection doctrine sees sex discrimination in a law that prevents boys from buying watered-down beer when girls of the same age can - but does not see sex discrimination in a law that denies pregnant workers employment benefits or a law that criminalizes abortion or a law that allows rape or assault in marriage - we can safely say that equal protection doctrine constrains only some of the forms of state action that regulate the social position of the sexes. The sex discrimination paradigm is thus a lens that makes visible certain features of social practice and utterly occludes others.”).

¹⁹⁷ Compare TRIBE, *supra* note 31, at 32 (“[C]ourts must construe [the law] through a process of reasoning that is replicable, that remains fairly stable, and that is consistently applied.”), and GRABER,

or Immunities Clause an opportunity to provide women any fundamental rights guarantees.¹⁹⁸ Consequently, inconsistent Supreme Court jurisprudence currently threatens women's fundamental rights.¹⁹⁹ "Constitutional doctrines created by courts . . . flesh out and implement the constitutional text and underlying principles. But they are not supposed to replace them."²⁰⁰ The Framers of the Fourteenth Amendment understood that women's fundamental rights "are universal and independent of all local State legislation."²⁰¹ "*The rights of life and liberty are theirs whatever States may enact.*"²⁰² Even Justice Scalia admits that "'many provisions of the Constitution . . . are necessarily broad—such as due process of law . . . [and] equal protection of the laws.'"²⁰³ Nevertheless, he stated "'the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't.'"²⁰⁴ Scalia further explained that "'[i]f the current society wants to outlaw discrimination by sex,'" a change to the Constitution is necessary.²⁰⁵ These types of comments from a rightwing originalist justice create the sort of political atmosphere that fuels the war on women's fundamental rights.²⁰⁶ There is no need for the current society to change the Constitution "to outlaw discrimination by sex" as Justice Scalia suggests, because the Privileges or Immunities Clause of the *existing* Fourteenth Amendment of the United States Constitution *already* protects United States citizens from such state action.²⁰⁷

By not grounding its reasoning in the legislative history of the Fourteenth Amendment, sex discrimination doctrine is an extremely vulnerable constitutional rule of law.²⁰⁸ "[T]he scope of [today's] constitutional protections against sex discrimination . . . depend[s] upon which day of the week you happen to catch a Supreme Court Justice."²⁰⁹ The notion of challenging discriminatory state laws

supra note 60, at 217 with Friedman, *supra* note 30, at 1204-05 (discussing the inconsistency of originalism in constitutional interpretation in overlooking the reconstruction era), and Amy K. Matsui, *Justice Scalia Before Senate Judiciary Committee: Maybe the Constitution Protects Against Sex Discrimination After All*, NATIONAL WOMEN'S LAW CENTER (Oct. 12, 2011), <http://www.nwlc.org/our-blog/justice-scalia-senate-judiciary-committee-maybe-constitution-protects-against-sex-discrimin> ("The Fourteenth Amendment's prohibition against sex discrimination is the law of the land, and it should be consistently and fairly enforced.")

¹⁹⁸ See *supra* note 13 and accompanying text. See generally *Slaughter-House Cases*, 83 U.S. 36 (1873). See also *supra* Part III.

¹⁹⁹ See, e.g., *supra* note 6 and accompanying text; *infra* Part V.B.

²⁰⁰ Balkin, *supra* note 132, at 306-307.

²⁰¹ CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866) (statement of Rep. Bingham).

²⁰² *Id.* (emphasis added).

²⁰³ Starr, *supra* note 56 (quoting Scalia, J.).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See, e.g., *supra* Parts I, II.B.; *infra* Part V.

²⁰⁷ Starr, *supra* note 56 (quoting Scalia, J.); accord *supra* Part III (emphasis added).

²⁰⁸ See, e.g., *supra* note 123 and accompanying text; Stone & Marshall, *supra* note 41, at 64.

²⁰⁹ Matsui, *supra* note 197.

threatening women's fundamental rights is more tenuous than ever before.²¹⁰ The possibility of a rightwing, conservative extremist Court reducing the fundamental rights of women is real and intensifying.²¹¹ Consequently, today's political debates over proposed legislation suggest that the current trend is to enact laws impeding on women's fundamental rights, initiating an exodus of rights at the hands of conservative political leaders.²¹²

V. IMPLEMENTING ORIGINALISM: ENSURING U.S. SUPREME COURT JURISPRUDENCE WOULD REFLECT PRE-RECONSTRUCTION ERA IDEOLOGIES

*"Originalism . . . is fundamentally flawed."*²¹³

The aftermath of the Civil War created an environment for the United States Supreme Court to manipulate its own jurisprudence unsupported by the legislative history of the Reconstruction Era.²¹⁴ Because the country "turned its back on the work of the Reconstruction Congress" by the early 1880s,²¹⁵ originalism takes advantage of an American history fueled by ideals inconsistent with the Framers' intent of the Fourteenth Amendment, allowing for inconsistency in Supreme Court precedents and many established constitutional guarantees, rights, and protections.²¹⁶ Through the process of interpreting constitutions as classical contracts, originalist justices are able to "project onto the Framers their own personal and political preferences."²¹⁷ Although Justice Scalia admits that he is forced to rely upon "nonoriginalist precedents [] not consistent with originalism," he asserts that this inconsistency in constitutional interpretation is a series of errors that "would now be too embarrassing to correct."²¹⁸ So, he has reconciled himself to accept these inconsistencies as a "pragmatic exception" and, instead, implements his originalism to adjust for these inconsistencies through any and all

²¹⁰ See, e.g., Leila Abolfazli, *3 Bad Opinions: A Frustrating Week for Women Rights and Health*, NATIONAL WOMEN'S LAW CENTER (Aug. 2, 2012), <http://www.nwlc.org/our-blog/3-bad-opinions-frustrating-week-women%E2%80%99s-rights-and-health> (discussing recent court decisions negatively impacting women's reproductive health); *supra* notes 123, 197 and accompanying text.

²¹¹ See *supra* notes 5-6, 210 and accompanying text.

²¹² See, e.g., Igor Volsky, *Democratic Women Slam GOP's Radical Contraception Amendment Claim It 'Opens Door to Discrimination'*, THINK PROGRESS (Feb. 15, 2012) <http://thinkprogress.org/health/2012/02/15/425326/democrat-women-slam-gops-radical-contraception-amendment-claim-it-opens-door-to-discrimination/?mobile=nc> (discussing the fact that a proposed Congressional amendment "would permit insurers and employers to discriminate against women."); *supra* notes 5-6 and accompanying text.

²¹³ Stone & Marshall, *supra* note 41, at 64.

²¹⁴ See *supra* notes 6, 13, 161 and accompanying text.

²¹⁵ Friedman, *supra* note 30, at 1205.

²¹⁶ See Balkin, *supra* note 132, at 297-98 (discussing the inconsistency of originalism with interpretations of the "constitutional guarantees of sex equality for married women, with constitutional protection of interracial marriage, with the constitutional right to use contraceptives, and with the modern scope of free speech rights under the First Amendment."). See also ROSSUM, *supra* note 92, at 40 ("Scalia invariably criticizes his colleagues for turning to 'committee reports, floor speeches, and even colloquies between Congressmen' to ascertain what a law means.").

²¹⁷ Stone & Marshall, *supra* note 42, at 64; accord GRABER, *supra* note 60, at 213.

²¹⁸ Balkin, *supra* note 132, at 303.

means possible.²¹⁹

For thirty years, certain Supreme Court justices have been promoting originalism as a mission of central importance and ensuring it is utilized by the Court when interpreting the Constitution.²²⁰ The controversial concept of originalism became public when the Federalist Society was founded in 1982.²²¹ Attorney General Edwin Meese, III, appointed in 1985 by President Reagan, introduced originalism as “a Jurisprudence of Original Intention” to the American Bar Association on July 9, 1985.²²² In his speech, Attorney General Meese directed the Court to focus on three main areas of case law for much needed improvement: (1) federalism, (2) criminal law, and (3) religion.²²³ He emphasized “the rule of law and the proper limits of governmental power.”²²⁴

Originalism adheres to a rule of “simply follow[ing] the text of the Constitution” without taking into account the intent of the Framers or ratifiers of the Constitution or its Amendments.²²⁵ Originalism is “rooted in the moral perceptions *of the time*”²²⁶ the text was written and “asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense.”²²⁷ It opposes a method of constitutional interpretation whereby the Constitution’s “meaning changes to suit the times.”²²⁸ Supreme Court justices advocating originalism profess “[t]he interpretive philosophy of the ‘living Constitution’” as one that provides “seductive and judge-empowering” strength.²²⁹ Accordingly, originalists take it upon themselves to “wean the public, the professoriate, and (especially) the judiciary away from” the “‘living Constitution’” philosophy.²³⁰

²¹⁹ Antonin Scalia, *Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 140 (Amy Guttman ed., 1997); *accord* Scalia, *supra* note 107, at 43-45.

²²⁰ *See* Calabresi, *supra* note 107, at 1-2 (identifying John Roberts, Reagan administration alumni, and Samuel Alito as the most recently added justices believed to be sympathetic to originalism).

²²¹ *See id.* at 1 (discussing the debate on originalism taking place in American law schools throughout the country prior to 1985 but which became much louder and more public after Meese’s announcement).

²²² *See id.* *See also* *The Great Debate*, *supra* note 86 (“Our view is that federalism is one of the most basic principles of our Constitution. By allowing the States sovereignty sufficient to govern, we better secure our ultimate goal of political liberty through decentralized government.”).

²²³ *See* Calabresi, *supra* note 107, at 5-6; *see also* *The Great Debate*, *supra* note 86.

²²⁴ *The Great Debate*, *supra* note 86.

²²⁵ *E.g.*, Doug Kendall & Jim Ryan, *The Case for New Textualism*, DEMOCRACY JOURNAL.ORG, 67 (Summer 2011) http://www.democracyjournal.org/pdf/21/the_case_for_new_textualism.pdf.

²²⁶ Balkin, *supra* note 132, at 296 (quoting Scalia, *supra* note 219).

²²⁷ *Id.*

²²⁸ Scalia, *supra* note 107, at 43.

²²⁹ *Id.*

²³⁰ *Id.*

A. Justice Scalia's Judicial Activism: "[W]e are all originalists now."²³¹

"Bad originalism is originalism nonetheless, and holds forth the promise of future redemption."²³²

By his own account, the fact that Justice Antonin Scalia was the first originalist confirmed to the United States Supreme Court was a secret.²³³ At the time he took the bench in 1986, most legal counsel appearing before the Court "did not know [Justice Scalia] was an originalist—and indeed, probably did not know what an originalist was."²³⁴ Consequently, Justice Scalia, through diligent research and the assistance of fellow originalist Justice Clarence Thomas, ensured "[o]riginalism [was] in the game."²³⁵ The goal was for "originalism [to] gain[] a foothold."²³⁶ Indeed, Justice Scalia intended to replace the "American constitutional evolutionism" he believed had "metastasized [and] infect[ed] courts around the world" with his own "originalist thinking."²³⁷ He vowed to inculcate future lawyers on originalism, "through lectures and symposia sponsored by the Federalist Society."²³⁸ In fact, Justice Scalia is using the Supreme Court as a mechanism to propagate his originalist message.²³⁹ Essentially, he has successfully implemented originalism's mission and continues to ensure that "upcoming generations of judges and lawyers [are] exposed to originalist thinking . . . through the reading of originalist Supreme Court opinions and dissents."²⁴⁰ Indeed, if Justice Scalia were to have his way, the legislative history supporting the Framers' true intentions of the Fourteenth Amendment's protections for unenumerated fundamental rights will never be properly understood by United States Supreme Court justices, lower courts, legal counsel, the professoriate, law students, or any of the "ignorant masses" he refers to in his opinions.²⁴¹ Undeniably, Justice Scalia believes that everyone in America should interpret the Constitution "according to 'the original meaning of the text, not what the original draftsmen intended.'"²⁴²

²³¹ ROSSUM, *supra* note 92, at 2 (quoting Ronald Dworkin, professor of law at New York University and professor of jurisprudence at Oxford University and a critic of Scalia).

²³² Scalia, *supra* note 107, at 44.

²³³ *See id.* at 43-44. *See also, e.g., The Great Debate*, *supra* note 86; Reagan, *supra* note 56, at 95-97. The Investiture of Chief Justice Rehnquist and Justice Scalia occurred on September 26, 1986. Rehnquist was already an Associate Justice who took the position of Chief Justice, so although he was an originalist at the time of Scalia's confirmation, he was already sitting the bench. Therefore, technically, Scalia was the first Supreme Court justice to be confirmed to the Court after Meese's announcement in 1985. *Id.*

²³⁴ *See* Scalia, *supra* note 107, at 43.

²³⁵ *Id.* at 44.

²³⁶ *Id.*

²³⁷ *Id.* at 45.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3052 (2010) (Scalia, J., concurring); *accord, e.g.,* Jack M. Balkin, *Fidelity to Text and Principle*, in JACK M. BALKIN ET AL., *THE CONSTITUTION IN 2020* 12 (Jack M. Balkin & Reva B. Siegel eds., 2009).

²⁴² Balkin, *supra* note 241, at 12 (quoting Antonin Scalia, *Common Law Courts in a Civil-Law*

Justice Scalia's originalism bullying tactics have even influenced Congress' decisionmaking process and the language used in proposed legislation.²⁴³ In 1996, Justice Scalia delivered a lecture in Rome, Italy whereby he provided insight into his theories of democracy.²⁴⁴ His beliefs are reminiscent of pre-Civil War ideologies supporting the notion that minorities are only entitled to "protection" when the majority determines that they deserve it.²⁴⁵ Nevertheless, Justice Scalia's contemporary comments fail to recognize that Section One of the Fourteenth Amendment *already* protects minority groups—and indeed, all citizens—causing one to question his originalist "agenda . . . of limited yet energetic powers."²⁴⁶ Just what form of "redemption" are Justice Scalia and his fellow originalists seeking through their originalism credo, driving them to ensure originalism is in the game?²⁴⁷

B. The Hypocrisy of Originalism: Supreme Court Justices' Selective Analysis Applied to Fourteenth Amendment Legislative History

*"The Bingham's of the world create headaches for the originalist."*²⁴⁸

Prior to the formal announcement of originalism in 1982, the general public's perception was that the Supreme Court did not create the problems it was asked to resolve; rather, it was America's complex society that produced the various issues heard by the Court.²⁴⁹ Nonetheless, the Court ruled hypocritically relative to women by refusing to provide women equal protection of the laws until 1971.²⁵⁰

System: The Role of the United States Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Guttmann ed., 1997)).

²⁴³ See ROSSUM, *supra* note 92, at 37-44 ("Scalia has influenced members of Congress no less than his colleagues on the Supreme Court. When the House Judiciary Committee was drafting a 1991 anti-crime bill, *Congressional Quarterly* reported that 'some members suggested resolving a dispute by putting compromise language into a committee report, which accompanies a bill to the floor. But Barney Frank, D-Mass., warned off his colleagues with just two words, 'Justice Scalia.'").

²⁴⁴ See ROSSUM, *supra* note 92, at 36 ("Scalia is criticized for having a 'vulgar majoritarian' understanding of democracy. This criticism is based in large part on a lecture he gave in May 1996 at the Gregorian University in Rome . . . Scalia declared that 'it just seems to me incompatible with democratic theory that it's good and right for the state to do something that the majority of the people do not want done. Once you adopt democratic theory, it seems to me, you accept that proposition. If the people, for example, want abortion the state should permit abortion. If the people do not want it, the state should be able to prohibit it.' He went on to declare that 'the whole theory of democracy . . . is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines that there are certain minority positions that deserve protection.'").

²⁴⁵ See *supra* Parts II., III.

²⁴⁶ *The Great Debate*, *supra* note 86.

²⁴⁷ See *supra* text accompanying note 232.

²⁴⁸ Wade Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1255 (2000).

²⁴⁹ See, e.g., KURLAND, *supra* note 7, at xv; *accord*, e.g., Friedman, *supra* note 30, at 1202-08; *supra* discussion Part V.

²⁵⁰ See BOLICK, *supra* note 19, at 38 ("Bradley and two of his fellow justices, who so boldly and expansively had proclaimed the privileges or immunities of citizenship in *Slaughter-House*, at the very same time demonstrated [in *Bradley v. Illinois*] that they could be every bit as hypocritical as the members of the court they had assailed in that decision, in this instance by draining the term citizenship of meaning for half the nation's population."). See also *supra* Part IV.B.

Indeed, the Court had the power to either exacerbate or alleviate the societal problems proving too difficult for state governments and the other federal branches of government to resolve.²⁵¹ Still, the Court was specifically limited to hearing only the social issues brought before it by lower state and federal courts in which litigants requested a judgment of “the construction of the Constitution [] to be enforced on behalf of those who [did] not invoke a judicial forum.”²⁵²

Throughout American history, conservatives mainly controlled the constitutional interpretation of social issues limiting civil rights, including women’s fundamental rights.²⁵³ Prior to the institution of originalism throughout the legal system, neoconservatism worked to subordinate and subjugate women through mainstream media.²⁵⁴ However, today’s indoctrination of originalism was implemented by ultraconservative Supreme Court justices in order to “initiate[] the practice of imitating the legislature.”²⁵⁵ By continuously ensuring that the Fourteenth Amendment’s legislative history is ignored, thus disregarding society’s fundamental rights provided through the Privileges or Immunities Clause, Justice Scalia and other originalist justices control evolving modern issues.²⁵⁶ Since Justice Scalia’s appointment to the Court, he has invoked originalism to justify his position that the Fourteenth Amendment does not protect women, or any “wronged” individual, from discrimination.²⁵⁷

Justice Scalia and his originalist colleagues on the Court believe that it is the Court’s duty to protect *only* the United States citizens’ unenumerated fundamental rights “long recognized by the people and specified in the Constitution.”²⁵⁸ Indeed,

²⁵¹ See KURLAND, *supra* note 7, at xv.

²⁵² *Id.* at xxi.

²⁵³ See *supra* Part II.

²⁵⁴ See OKIN, *supra* note 9, at 41-42 (discussing many magazines and books as well as “George Bush’s stress in the 1988 presidential campaign on the family and its ‘traditional values’”).

²⁵⁵ See KURLAND, *supra* note 7, at 170-206 (discussing the Warren Court and its expanding of powers in providing broader protections under the Fourteenth Amendment “is behaving more and more like a legislative body and less and less like a court”); *accord supra* note 239 and accompanying text (discussing Justice Scalia’s influencing of members of Congress in drafting legislation).

²⁵⁶ See, e.g., ROSSUM, *supra* note 92, at 47; *supra* Parts II.B., IV.B., V.A.; *supra* discussion Part V.

²⁵⁷ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *accord Starr*, *supra* note 56 (Justice Scalia discussing the lack of protection stemming from the Constitution relative to sex discrimination and sexual orientation based on his belief that “[n]obody ever voted for that.” (quoting Justice Scalia)).

²⁵⁸ See ROSSUM, *supra* note 92, at 165; *accord McDonald v. City of Chicago*, 130 S. Ct. 3020, 3051 (2010) (Scalia, J., concurring) (discussing abortion and homosexual sodomy as two of the several rights that “could not pass muster” under Justice Stevens theory of incorporation articulated in *Palko v. Connecticut*, 302 U.S. 319 (1937)); *McDonald*, 130 S. Ct. at 3034-35 (“While Justice Black’s theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of ‘selective incorporation,’ *i.e.*, the Court began to hold that the *Due Process Clause* fully incorporates particular rights contained in the first eight Amendments . . . The decisions during this time abandoned three of the previously noted characteristics of the earlier period . . . The Court also shed any reluctance to hold that rights guaranteed by the *Bill of Rights* met the requirements for protection under the *Due Process Clause*. The Court eventually incorporated almost all of the provisions of the *Bill of Rights*. Only a handful of the *Bill of Rights* protections remain unincorporated.”); *supra* note 3 and accompanying text. (emphasis added) (internal citations omitted).

these ultraconservative Court justices specifically refer, *merely*, to those “particular” fundamental rights that are already protected under the Fourteenth Amendment through its Due Process Clause, refusing to take into account the unenumerated fundamental rights protected by the Privileges or Immunities Clause that have never been considered by the Court.²⁵⁹ While these originalist justices explain that the Court, historically, “never retreated from the proposition that the Privileges or Immunities Clause and the *Due Process Clause* present different questions,” they assert that the “process of ‘selective incorporation,’ . . . fully incorporates [only] *particular* rights contained in the first eight Amendments.”²⁶⁰ Remarkably, even the ultraconservative originalist justices confirm that Fourteenth Amendment jurisprudence is inherently flawed because its development lacks meaningful consideration of the Privileges or Immunities Clause.

The “mass of privileges, immunities, and rights” intended by the Framers to derive from Article IV, Section 2 of the Constitution, to date, offers no protection to United States citizens as to unenumerated fundamental rights even though the Fourteenth Amendment was enacted for that very specific purpose.²⁶¹ Indeed, the *Slaughter-House* Court virtually read the Privileges or Immunities Clause out of the Constitution.²⁶² Because of *Slaughter-House*, existing Supreme Court precedents and doctrines do not consider the Privileges or Immunities Clause.²⁶³ As a result, any unenumerated fundamental rights jurisprudence from 1873 to the present day lacks the proper Fourteenth Amendment analysis from a Framers’ original intent perspective, including any fundamental rights protections for women. Obviously, the “recent cases addressing unenumerated rights,” cases in which the Court “required that a right also be ‘implicit in the concept of ordered liberty,’”²⁶⁴ could

²⁵⁹ See, e.g., *supra* note 256 and accompanying text. See also ROSSUM, *supra* note 92, at 157-65 (discussing Scalia’s notion of protecting rights that are consistent with “‘longstanding national traditions’” (quoting Scalia in *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994)). Cf. *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring in part and concurring in the judgment) (discussing the fact that overturning *Slaughter-House* does not create an implied special hazard of “granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts”).

²⁶⁰ *Id.* at 3034 n.11 and 3022 (emphasis added); *accord supra* note 256 and accompanying text. See also *id.* at 3034-35 (2010) (“The Court eventually incorporated *almost* all of the provisions of the *Bill of Rights*.” (emphasis added)).

²⁶¹ See CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard); *accord, e.g., supra* notes 28, 154 and accompanying text; *supra* text accompanying note 143.

²⁶² See BOLICK, *supra* note 19, at 27.

²⁶³ See *id.* (discussing the fact that the Privileges or Immunities Clause is unique among constitutional provisions because it “‘enjoys the distinction of having been rendered a ‘practical nullity’ by a single decision of the Supreme Court within five years after its ratification.’” (quoting Professor Edward Corwin)).

²⁶⁴ See *McDonald*, 130 S. Ct. at 3034 n.11 (citing to *Wash. v. Glucksberg*, 521 U.S. 702, 720-21 (1997) which states that “Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’), and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor

not possibly have considered the “mass of privileges, immunities, and rights” protected by the Privileges or Immunities Clause; rather, the Court has looked to inherently *limited* enumerated fundamental rights already approved by the Court, either through the Bill of Rights or under the Due Process Clause.²⁶⁵ The Bill of Rights does not contain the unenumerated fundamental rights the Framers provided to the Amendment through the Privileges or Immunities Clause they delineated through Article IV, Section 2 of the Constitution.²⁶⁶ Indeed, since *Slaughter-House*, the Court has provided only enumerated fundamental rights derived from the Bill of Rights through the Due Process Clause, to the exclusion of all unenumerated fundamental rights sought to be protected for the citizenry of the United States.²⁶⁷

Justice Scalia’s perception of the Fourteenth Amendment is that its function is to maintain a certain status quo rather than to allow its fundamental rights powers to progress.²⁶⁸ He also believes that it would be contrary to the democratic process for the Court to expand any set of fundamental rights for individuals or groups and that it should be left to elected representatives to determine the fate of fundamental rights instead.²⁶⁹ Indeed, for over twenty-five years, Justice Scalia has led the originalists’ battle against fundamental rights for minorities, homosexuals, and

justice would exist if they were sacrificed,’ *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277-78 (1990). Our Nation’s history, legal traditions, and practices thus provide the crucial ‘guideposts for responsible decisionmaking,’ *Collins*, 503 U.S. at 125, that direct and restrain our exposition of the Due Process Clause.” *Wash.*, 521 U.S. at 720-21 (1997)).

²⁶⁵ CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard); *accord, e.g., McDonald*, 130 S. Ct. at 3034-3035 (“The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated.”); *id.* at 3084 (Thomas, J., concurring in part and concurring in the judgment) (“I do not endeavor to decide in this case whether, or to what extent, the Privileges or Immunities Clause applies any other rights enumerated in the Constitution against the States.”).

²⁶⁶ See CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Sen. Howard) (“To these privileges and immunities, whatever they may be - for they are not and cannot be fully defined in their entire extent and precise nature - to these should be added the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution: such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.”).

²⁶⁷ See, e.g., *supra* note 265 and accompanying text; *McDonald*, 130 S. Ct. at 3035 n.12 & 13 (listing all of the incorporated and unincorporated rights the Court identifies through the Bill of Rights); ROSSUM, *supra* note 92, at 157-65 (discussing Scalia’s notion of protecting rights that are consistent with “longstanding national traditions” (quoting Scalia in *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994))).

²⁶⁸ See ROSSUM, *supra* note 92, at 161 (discussing Scalia’s view that the Court’s function is to preserve equal protection, not revise it).

²⁶⁹ See *id.* at 165.

women.²⁷⁰ Undeniably, Justice Scalia and other originalist justices have an agenda of excluding and eliminating specific fundamental rights from the current list of protected rights.²⁷¹ These ultraconservative Court justices continue to focus on promoting an extreme rightwing agenda, rather than aiming to incorporate all of the unenumerated fundamental rights that would be more representative of society as a whole.²⁷²

VI. REPAIRING THE FOURTEENTH AMENDMENT: INITIATING A FUNDAMENTAL RIGHTS MOVEMENT THAT FOCUSES ON BUILDING UNENUMERATED FUNDAMENTAL RIGHTS JURISPRUDENCE GROUNDED IN THE PRIVILEGES OR IMMUNITIES CLAUSE

*“Sovereignty is a historic concept born of an era when society consisted of rulers and subjects, not citizens.”*²⁷³

In order to begin the process of repairing the damage the *Slaughter-House* Court did to the Fourteenth Amendment and its subsequent jurisprudence, the United States judicial system must begin to realize that its understanding—or lack thereof—of the Privileges or Immunities Clause is fundamentally flawed.²⁷⁴ The debates on the Fourteenth Amendment indicate that the federal government was intended to become strengthened and more centralized; however, the Court altered that plan in *Slaughter-House*.²⁷⁵ As a result, the concept of state sovereignty survived, and the federal government has failed to protect fully civil rights for all citizens, despite the Framers’ intent.²⁷⁶ Indeed, to alter the Court’s jurisprudence relative to the unenumerated fundamental rights protected by the Privileges or Immunities Clause, it is necessary to recognize that the basis of the interpretation thus far is inherently imperfect.²⁷⁷ To realize the Framers’ intent of securing fundamental rights for all citizens, it is essential to implement a Fundamental Rights Movement which will reframe constitutional analysis with an eye toward the legislative history of the Reconstruction era.²⁷⁸

²⁷⁰ See *id.* at 157-65.

²⁷¹ See *supra* notes 99, 191 and accompanying text.

²⁷² See *supra* notes 97, 99 and accompanying text.

²⁷³ GEORGE SOROS, *THE BUBBLE OF AMERICAN SUPREMACY* 100 (2004).

²⁷⁴ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030-31 (2010) (“For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.”); *infra* note 292 and accompanying text; SOROS, *supra* note 273, at 191.

²⁷⁵ See *supra* Part III.

²⁷⁶ See *supra* notes 113, 159 and accompanying text; *supra* text accompanying note 112; *supra* Part III.B. See also BOLICK, *supra* note 19, at 43.

²⁷⁷ See, e.g., *McDonald*, 130 S. Ct. at 3060 (Thomas, J., concurring in part and concurring in the judgment) (describing the “circular reasoning” the Court utilized in *United States v. Cruikshank*, 92 U.S. 542 (1876), which “has been the Court’s last word on the Privileges or Immunities Clause.”); SOROS, *supra* note 273, at 191-93 (discussing the “inherently imperfect” world in which we live and the reliant factors upon which this imperfection depends).

²⁷⁸ See Friedman, *supra* note 30, at 1209-10 (“One perfectly plausible reason for the relative inattention of originalist scholars [to the legislative history] is that a focus on the Fourteenth

A. *Overturning Slaughter-House: Initiating Social Restitution through the Privileges or Immunities Clause*

“[W]hen the law is tied to narrow interests, it fails to uphold the fundamental conception of justice as a principle of fairness based on human equality. For the law genuinely to uphold justice, it must protect universal human rights.”²⁷⁹

The Supreme Court’s function is to reconcile the law with ongoing change and to reformulate “bad constitutional bargains.”²⁸⁰ Indeed, a historical analysis of the Court’s leadership explains that “the requirements of a rapidly modernizing society” cause the Court to look to its own precedents for answers.²⁸¹ However, today’s ultraconservative Court is creating the backslide towards the same constitutional bargains which initiated the Civil War that the Framers diligently worked to prevent.²⁸² Instead of progressing in its attitudes towards liberty and social progress, the Court is digressing and revoking the social and economic benefits that resulted from the revolutionary politics stemming from the United States’ post-Civil War history.²⁸³

The ruling in *Slaughter-House* is well known as “the worst holding, in its effect on human rights, ever uttered by the Supreme Court.”²⁸⁴ Recent Supreme Court opinions indicate that the Court is ready to reconsider *Slaughter-House* under the right circumstances.²⁸⁵ However, the originalist Supreme Court justices of today will not consider certain fundamental rights—including women’s fundamental rights—as those protected by the Privileges or Immunities Clause.²⁸⁶ Thus, even if *Slaughter-House* is overturned, the war on women’s fundamental

Amendment and its cousins would invigorate the constitutional movement of those on the political left. Though there are originalist stirrings on the ideological left, in the main the enterprise of original understanding has been one for conservatives. Yet, the bold themes of Reconstruction, the equality and rights of American citizens and those within our jurisdictional grasp, certainly resonate most with the left’s agenda.”)

²⁷⁹ HIS HOLINESS THE DALAI LAMA, *BEYOND RELIGION* 60 (2011).

²⁸⁰ GRABER, *supra* note 60, at 217; accord LABBÉ & LURIE, *supra* note 25, at 2.

²⁸¹ SHOEMAKER, *supra* note 58, at 33; Friedman, *supra* note 30, at 1202-08.

²⁸² See, e.g., MEISTER, *supra* note 20, at 104-05; *supra* Part III.

²⁸³ See MEISTER, *supra* note 20, at 103-06 (“After evil, a humbled nation in recovery must split the concept of social justice into a backward-looking therapy for the injustice of the past and a forward-looking approach to the distribution of the remainders of that injustice.”).

²⁸⁴ BOLICK, *supra* note 19, at 32 (quoting Yale Law Professor Charles Black).

²⁸⁵ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3086 (2010) (Thomas, J., concurring in part and concurring in the judgment) (“I reject *Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship.”). See also BOLICK, *supra* note 19, at 72 (“Thomas’s opinion is the most scathing condemnation of *Slaughter-House* ever written by a contemporary Supreme Court justice . . . And far from closing the door to reconsidering *Slaughter-House*, Alito’s opinion—joined in part by Thomas and in its entirety by Chief Justice John Roberts and Justices Scalia and Kennedy—more sharply questioned its underpinnings than has any other majority decision by the court.”).

²⁸⁶ See *supra* note 99 and accompanying text. See also BOLICK, *supra* note 19, at 72 (discussing that overturning *Slaughter-House* would open a “Pandora’s Box” to constitutional rights).

rights will ensue.²⁸⁷ A new specialized area of law must be developed in order to focus on the unenumerated fundamental rights available within the powers protected under this particular clause of the Fourteenth Amendment.

B. Selectively Incorporating Article IV, Section 2 of the Constitution: Inserting Privileges and Immunities back into the Fourteenth Amendment

“The Congress that drafted the Fourteenth Amendment assumed that its guarantees applied to all persons, men and women alike, and that men and women were civil equals.”²⁸⁸

Extreme rightwing political leaders boast a political platform “designed to protect states’ rights,” all the while claiming to represent “individual liberties.”²⁸⁹ But, this political platform is misleading to the unsuspecting—indeed, the “ignorant masses.”²⁹⁰ Truly, conservative extremists neglect to inform Americans that “had [the federal government] done more to prevent inequality,” the debt-reduction deal might not have been necessary.²⁹¹ Inequality is not a new problem for America, but it has been greatly aggravated by the nation’s recent economic crisis, exaggerated by the debt crisis.²⁹² American citizens must understand that unenumerated fundamental rights are greatly threatened by the economic downturn, and the war on women’s fundamental rights is the first indicator of an exodus of many more rights.²⁹³ To prevent further erosion of fundamental rights, and to protect unenumerated fundamental rights as fully as the Framers intended, Article IV, Section 2 of the Constitution must be selectively incorporated into the Fourteenth Amendment.²⁹⁴ According to Senator Howard when introducing the Fourteenth Amendment on May 23, 1866, the fundamental guarantees protected by the “privileges or immunities” were so massive, they could not be defined or listed.²⁹⁵ By selectively incorporating Article IV, Section 2 of the Constitution, the

²⁸⁷ See, e.g., BOLICK, *supra* note 19, at 72; *supra* note 99 and accompanying text; *supra* Part IV.B.

²⁸⁸ Balkin, *supra* note 132, at 320.

²⁸⁹ *Ten Core Beliefs of the Modern-Day Tea Party Movement*, TEA PARTY PLATFORM, <http://www.teaparty-platform.com> (last visited Mar. 11, 2012).

²⁹⁰ *McDonald*, 130 S. Ct. at 3052 (Scalia, J., concurring) (emphasis added).

²⁹¹ Foroohar, *supra* note 18, at 26 (“What’s interesting is that if we had done more to prevent inequality, we might not have ended up where we are. A recent report from the IMF looked at the causes of the two major U.S. economic crises over the past 100 years – the Great Depression of 1929 and the Great Recession of 2007. There are two remarkable similarities in the eras that preceded these crises: both saw a sharp increase in income inequality and household-debt-to-income ratios. In each case, as the poor and the middle classes were squeezed, they tried to cope by borrowing to maintain their standard of living. The rich, in turn, got richer by lending and looked for more places to invest, bidding up securities that eventually exploded in everyone’s face. In both eras, financial deregulation and loose monetary policy played roles in creating the bubble. But inequality itself – and the political pressure not to reverse it but to hide it – was a crucial factor in the meltdown. The shrinking middle isn’t a symptom of the downturn. It’s the source of it.”).

²⁹² See, e.g., *id.*; Zakaria, *supra* note 16, at 31.

²⁹³ See *supra* Parts I., II.B., IV.B.

²⁹⁴ U.S. CONST. art. IV, § 2; *supra* Part III.B.

²⁹⁵ See *supra* Part III.B.

source of unenumerated fundamental rights—the very rights the Framers of the Fourteenth Amendment intended to protect from state abuses—will once again be established within the Amendment.²⁹⁶

CONCLUSION

*I've seen too much hate to want to hate, myself, and every time I see it, I say to myself, hate is too great a burden to bear. Somehow we must be able to stand up against our most bitter opponents and say: We shall match your capacity to inflict suffering by our capacity to endure suffering. We will meet your physical force with soul force. Do to us what you will and we will still love you But be assured that we'll wear you down by our capacity to suffer, and one day we will win our freedom. We will not only win freedom for ourselves; we will appeal to your heart and conscience that we will win you in the process, and our victory will be a double victory.*²⁹⁷

Within today's materialistic society, massive disparities between the very poor and the very wealthy can cause distressing social tensions.²⁹⁸ The concept of hate is developing among economic lines in proportions the nation has never seen before.²⁹⁹ Indeed, America's ongoing social and economic political disputes, which are grounded in hate, are deeply rooted in its history.³⁰⁰ However, "from a compassionate concern for the welfare of others . . . ethical values and principles arise, including that of justice."³⁰¹ Still, Americans must realize that the war on women's fundamental rights is driven by a deep-seeded hate that is not apparent to the general population.³⁰² Through addressing the ethical concerns the United States is facing, relative to its hate movements, its politics, and its judicial support of both, the nation will address its comprehensive fundamental rights issues as

²⁹⁶ *Id.*

²⁹⁷ Martin Luther King, Jr., *A Christmas Sermon for Peace on Dec 24, 1967*, THE QUOTATIONS PAGE <http://www.quotationspage.com/quote/33603.html> (last visited Apr. 20, 2012).

²⁹⁸ See HIS HOLINESS THE DALAI LAMA, *supra* note 279, at 91.

²⁹⁹ See Potok, *supra* note 47 ("The worse the economy gets, the more the groups are going to grow," he said. "White people are arming themselves — and black people, too. I believe eventually it's going to come down to civil war. It's going to be an economic war, the rich versus the poor. We're being divided along economic lines.") (quoting August Kreis, "a longtime neo-Nazi who in January [2012] stepped down as leader of an Aryan Nations faction after being convicted of fraud related to his veteran's benefits . . .").

³⁰⁰ See, e.g., HIS HOLINESS THE DALAI LAMA, *supra* note 279, at 83-84 ("The seeds of ethnic violence, rebellion, and war, for example, almost invariably date back decades or even centuries. But still, if we are really interested in tackling our problems at their roots — whether we are talking about human conflict, poverty, or environmental destruction — we have to recognize that they are ultimately related to issues of ethics."); *supra* Parts II., V. See also Martin Luther King, Jr., *Loving Your Enemies*, CLASS OF NONVIOLENCE (Dec. 25, 1957) available at <http://www.salsa.net/peace/conv/8weekconv4-2.html> ("Like an unchecked cancer, hate corrodes the personality and eats away its vital unity. Hate destroys a man's sense of values and his objectivity. It causes him to describe the beautiful as ugly and the ugly as beautiful, and to confuse the true with the false and the false with the true.").

³⁰¹ HIS HOLINESS THE DALAI LAMA, *supra* note 279, at 71.

³⁰² See *supra* notes 10-12, 59 and accompanying text.

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well.³⁰³ Although fighting social injustice is not always convenient, simple, or popular, initiating a Fundamental Rights Movement to collectively work towards an unenumerated fundamental rights solution must be realized.³⁰⁴ The various fundamental rights issues of the “culture war” may be different, but the battles against rightwing, conservative extremists can be fought similarly so that a stronger, lasting result is finally accomplished.³⁰⁵ The conservative view of the Privileges or Immunities Clause is completely at odds with how its authors intended the clause to function. The Framers envisioned a centralized government which would have protected all inhabitants’ undefined civil liberties from state abuses;³⁰⁶ however, today’s ultraconservative Supreme Court justices seek to further decentralize the government through originalism.³⁰⁷ The developing area of law relative to the Privileges or Immunities Clause of the Fourteenth Amendment must not be ignored by those seeking to broaden the scope of unenumerated fundamental rights. Indeed, the Privileges or Immunities Clause holds the strength and power to lessen the subjugation and oppression of all inhabitants of the United States.³⁰⁸

³⁰³ HIS HOLINESS THE DALAI LAMA, *supra* note 279, at 83-85; *supra* notes 46-51 and accompanying text; *supra* Parts I., II., III., IV.B., V.

³⁰⁴ *Id.* at 137-143 (“[R]eflecting on the fact that everything depends on a great many causes and conditions can do much to help us tolerate the wrongs inflicted on us by others.”).

³⁰⁵ *See supra* note 97 and accompanying text.

³⁰⁶ *See* CONG. GLOBE, 39TH CONG., *supra* note 113 and accompanying text.

³⁰⁷ *See, e.g.,* Arizona v. U.S., 132 S. Ct. 2492, 2511-12 (2012) (Scalia, J., concurring in part and dissenting in part) In his dissent, Justice Scalia discusses the power of state sovereignty relative to the Privileges and Immunities of Citizens, U.S. CONST. art. IV, § 2, cl. 1, without acknowledging that the Fourteenth Amendment provided Congress the ability to abridge states’ powers when state laws “trench[] upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.” (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 2766 (1866) (statement of Sen. Howard)).

³⁰⁸ *See* CONG. GLOBE, 39TH CONG., 1ST SESS., *supra* note 14 and accompanying text.