

V. Privileges or Immunities Clause

In the third edition of his treatise, *American Constitutional Law* (2000), Larry Tribe calls the Privileges or Immunities Clause of the 14th Amendment the Constitution's "tell-tale heart." The Supreme Court buried the Clause under the floorboards in its 1873 *Slaughter-House Cases*. But there are signs that more and more people are starting to hear the steady beat of the Privileges and Immunities Clause, and are interested in resurrecting it and letting it, finally, do its constitutional work.

Tribe, for example, devotes an entire chapter to advocating for the overruling of the Supreme Court's 1873 opinion in the *Slaughter-House Cases* "lock, stock, and barrel" and the resurrection of the Privileges or Immunities Clause as a substitute for substantive due process and as the vehicle through which fundamental rights and liberties receive constitutional protection. Similar arguments about the Privileges or Immunities Clause have been at the center of important recent books by prominent scholars across the ideological spectrum including: Charles Black, *A New Birth of Freedom* (1997); Akhil Amar, *The Bill of Rights* (1998) and *America's Constitution* (2005); and Randy Barnett, *Restoring the Lost Constitution* (2004).

More intriguingly, in 1999, in *Saenz v. Roe*, 526 U.S. 489, a six-justice majority led by Justice Stevens found that a California restriction on the welfare payments received by new residents violated the Privileges or Immunities Clause, forcing bar review course instructors throughout America to abandon the joke that "the Privileges or Immunities Clause of the 14th Amendment is always the wrong answer." Justice Thomas dissented, but wrote separately to opine: "Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case."

What should we make of all this activity and this agreement across the ideological spectrum? Is the Privileges or Immunities Clause a panacea that could cure all that ails constitutional law or a Pandora's Box, which will open the door to a new round of liberal or conservative judicial activism? If the Privileges or Immunities Clause is to be resurrected, what is the appropriate case? For Justice Thomas, it may just be the question of whether the Second Amendment is incorporated against the states. If so, how should progressives respond?