AT THE BOTTOM OF PANDORA’S BOX—HOPE FOR INDIGENT PARENTS

By John T. Koch

INTRODUCTION

A child is adopted every forty minutes in America.¹ That amounts to 370 adoptions per day, 2,589 adoptions per week, and approximately 135,000 adoptions per year.² There are several pathways that can lead a child into a state or privately coordinated adoption. Generally, an adoption involves the termination of the biological parent(s) rights to then transition the child to a different permanent home in which the adoptive parents assume the responsibilities and legal rights originally held by the biological parents. Another scenario includes a situation where one parent is granted sole custody, in other words 100% of the parenting time, and the other parent still poses a threat to the safety of the minor child, such as in child abuse situations. In most of these cases, a court facilitates the adoption proceeding by first terminating the parental rights of the biological parent(s). This proceeding, while critical to serving the best interests of the child,³ is one that has invited an extensive roster of Constitutional and statutory challenges within American jurisprudence.⁴

The termination of parental rights is a situation deserving of the most exacting scrutiny,⁵ as the United States Supreme Court has consistently recognized that a parent’s right to direct the care of his

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³ See Holley v. Adams, 544 S.W.2d 367, 372 (stating, "Termination of a parent-child relationship may not be based solely upon what the trial court determines to be the best interest of the child," and listing non-exhaustive list of factors to consider in determining whether termination would be in child's best interest to include: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans of the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent.
⁴ See, e.g., Troxel v. Granville, 530 U.S. 57, 65 (2000) (“The Due Process Clause does not permit a State to infringe on the fundamental rights of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made.”).
⁵ The phrase “most exacting scrutiny” is used to implicate strict scrutiny standards of Constitutional review. First used in a First Amendment context, the Court applies the "most exacting scrutiny" to evaluate the constitutionality
child is one of the oldest and most fundamental rights protected by the Constitution. More specifically, courts have long held the right to raise one’s children is a basic human right protected by due process. The Due Process Clause of the United States provides: “No State shall deprive any person of life, liberty, or property without due process of law.” How the right of parenting is safeguarded, however, when a state seeks to terminate that right permanently—as in the case of an adoption—or temporarily, can vary significantly. A proper best interest analysis, however, always requires a case-by-case determination based upon consideration of numerous factors specifically related to the child (and parent) at issue. As critical as the proceeding may be, there is a wide variety of rights afforded to parents facing termination proceedings when it comes to their ability to afford legal representation. While even prior to the American Revolution, the colonies differed on the extent of a guaranteed right to counsel, several jurisdictions provided this privilege by practice or by statute. Some jurisdictions, while providing a guarantee to the assistance of counsel, fail to go so far as guaranteeing that counsel also be effective. The Tyler, Texas Court of Appeals, for example, has maintained the position of other courts that, while termination proceedings do involve fundamental rights, criminal "effective assistance of counsel" standards do not apply.

In New York City, an indigent parent can receive the assistance of a multidisciplinary legal team—an attorney, a social worker, and a parent advocate—to defend against the City’s request to

\[\text{of the regulation. The basic scrutiny requires that the regulation be a precisely drawn means of serving a compelling state interest. See, e.g., Boos v. Barry, 485 U.S. 312, 321 (1988).}
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\[\text{6 See, e.g., Troxel, 530 U.S. at 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).}
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\[\text{7 See, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).}
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\[\text{8 U.S. CONST. AMEND. XIV § 1}
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\[\text{10 Sharon Finegan, Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice, 58 CATH. U. L. REV. 445 (2009).}
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\[\text{12 A parent advocate, also known as a parent partner or peer mentor, is a parent who was previously involved with the child welfare system but who successfully reunified with his or her child. That parent now serves as a mentor for other parents currently experiencing the child welfare system.}
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temporarily remove a child from her care.\textsuperscript{13} But in Mississippi, that same parent can have her rights to her child permanently terminated without ever receiving the assistance of a single lawyer.\textsuperscript{14} In Washington State, the Legislature has ensured that parents ensnared in child abuse and neglect proceedings will receive the help of a well-trained and well-compensated attorney with a reasonable caseload.\textsuperscript{15} Yet in Tennessee, its Supreme Court has held that although a parent may technically have a right to a lawyer, that lawyer need not be effective.\textsuperscript{16} Under the Texas Family Code, indigent persons have a mandatory right to counsel in state-initiated termination suits.\textsuperscript{17} Those same persons, however, lose that right when a private party brings the termination case; the right to counsel is then left to the discretion\textsuperscript{18} of the trial court.\textsuperscript{19} The New Jersey Supreme Court found an indigent parent facing termination of parental rights in a contested private adoption proceeding has a right to appointed counsel.\textsuperscript{20} Internationally, Many of the same rights are also protected by the Council of Europe's Social Charter, which guarantees certain social and economic rights, including the right to legal and social protection. The right to legal and social protection encompasses the legal status of children, legal protection of the family, the right to childcare, and protection from poverty and social exclusion.\textsuperscript{21}


\textsuperscript{14} MISS. CODE ANN. § 43-21-201(2) (2017) (“[T]he youth court judge may appoint counsel to represent the indigent parent or guardian in the proceeding.”) (emphasis added).


\textsuperscript{16} In re Carrington H., 483 S.W.3d 507 (Tenn. 2016), cert. denied, 137 S.Ct. 44 (2016).

\textsuperscript{17} The Texas Family Code grants the following right: “In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests ... of an indigent parent of the child who responds in opposition to the termination.” TEX. FAM. CODE ANN. § 107.013(a)(1) (emphasis added).


\textsuperscript{19} TEX. FAM. CODE ANN. §107.013 , .021.

\textsuperscript{20} In re Adoption of J.E.V., 141 A.3d 254, 264 (2016) (holding “that an indigent parent who faces termination of parental rights in a contested private adoption proceeding has a right to appointed counsel. A poor parent who seeks to protect the fundamental right to raise a child, at a contested hearing under the Adoption Act, is entitled to counsel under the due process guarantee of the New Jersey Constitution.”)

While many state constitutions and family codes provide some basis—even if discretionary—for legal representation as a matter of right, the absence of a federal standard has engendered variation and among state statutes and common law regarding right to counsel. When the Supreme Court did address the right to counsel in the landmark case of *Lassiter v. Department of Social Services*, it held that there is a presumption against the right to counsel in civil cases, and that courts should determine the right on a case-by-case basis using the due process balancing test, giving only vague guidance for determining whether an indigent parent has the right to counsel. Without the guaranteed assistance of counsel, an indigent parent’s confidence in her liberty interest prevailing may be diminished before entering the courtroom. This decline in confidence is no limited to the litigants but impacts the bar and the bench as well.

This article must begin by setting forth three greatly simplified considerations regarding termination proceedings. First, the impact of parental termination is the same whether the state is the party filing for termination. Additionally, participating in such a complicated proceeding without counsel carries a high risk of an erroneous outcome, as demonstrated by the parent’s obstacles cross-examining and calling witnesses in their case. Finally, the state has an interest in protecting the welfare of children and an interest in accurate and just decisions. With these consistencies existing among relatively inconsistent procedures involving the litigation of a fundamental right, there is a clear and present need for federal protection. But a previously unaddressed source of this protection exists beyond the

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24 In re Adoption of J.E.V., 141 A.3d at 265, (stating "right has “been deemed ‘essential’” and is considered “‘far more precious ... than property rights,” (quoting *Stanley v. Illinois*, 405 U.S. 645, 651, (1972)); In re L.C.C. 114 N.E.3d 448, (10th Dist. 2018), (determining “Strict scrutiny applies when the statute draws a class distinction involving a fundamental right. The Supreme Court of Ohio has established “the right to parent one's child is a fundamental right.” (citing In re C.F., 113 Ohio St.3d 73, 862 N.E.2d 816 (Ohio 2007); Harrold v. Collier, 107 Ohio St.3d 44, 836 N.E.2d 1165 (Ohio 2005)).
25 Phrasing adopted from *Schenck v. United States*, 249 U.S. 47 (1919). In his majority opinion, Justice Oliver Wendell Holmes, Jr. introduced the clear and present danger test, which would become an important concept in First Amendment law; but the Schenck decision did not formally adopt the test.
confines of the often pursued procedural due process and equal protection avenues, which this article proposes through the opening of “Pandora’s Box” in family court with the long-awaited revival of the Privileges or Immunities clause of the Fourteenth Amendment.

Part I of this note will describe the historical background and Constitutional bases for family law issues, generally, and termination of parental rights, specifically; including a brief discussion of the current procedures and deficiencies in rights termination proceedings. Part II will discuss the judicial and statutory influences on parental-rights terminations suits nationally, with specific case references illuminating the current legal framework across the several states. Part III will address the trajectory of the Privileges and Immunities clause in American case law; and specifically, where the current Supreme Court has indicated a possibility of its original meaning being called into action. Part IV explains how Congress can leverage existing federal law to create standard practice in the administration of suits affecting the parent-child relationship, and steps to strengthen parent representation across the country—with the solid backing of the Privileges or Immunities Clause underlying the long overdue federal support for indigent parents. This is not an attempt to artificially separate legal argument from social reality; but an illustration of how a paradigm shift of the former can directly improve the latter.

I. GENERAL BACKGROUND- ALL ROADS LEAD TO THE FOURTEENTH AMENDMENT

A. Termination of Parental Rights—Current State of Unequal Protection

26 In civil contexts a balancing test is used that evaluates the government’s chosen procedure with respect to the private interest affected, the risk of erroneous deprivation of that interest under the chosen procedure, and the government interest at stake. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In Nelson v. Colorado, the Supreme Court held that the Mathews test controls when evaluating state procedures governing the continuing deprivation of property after a criminal conviction has been reversed or vacated, with no prospect of reprosecution. See 137 S. Ct. 1249, slip op. at 6 (2017).

27 In re L.C.C., 114 N.E.3d 448, (stating “In considering whether statutory law violates equal protection, courts apply different levels of scrutiny to different types of classifications.” (citing State v. Thompson, 95 Ohio St.3d 264, 767 N.E.2d 251 (Ohio 2002)).


29 U.S. CONST. AMEND. XIV, SECTION 1, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (emphasis added).
Parental-rights termination suits are specialized legal proceedings with a dynamic history in both state and federal law. Termination of parental rights is the process by which the legal relationship between a parent and child is completely severed.30 Far beyond the effects of other custody proceedings, termination of parental rights “leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development.”31 The parent does not even have the right to know the child's activities or whereabouts.32 Further, the child loses all rights "to support or inheritance from the parent."33 Beyond the lost communication, relationship, and support, termination proceedings are grave in their finality; once the state has deemed the relationship terminated, it can never be restored with the exception of extremely limited situations.34

The Supreme Court has recognized that the Fourteenth Amendment of the United States Constitution protects a parent’s right to direct the care, custody, and control of their child from unnecessary interference by the State.35 Accordingly, the Supreme Court has struck down state statutes infringing upon a parent’s right to choose a school for her child,36 to determine what language a child can learn in school,37 and to decide whether a child can visit with grandparents.38 In each of these cases and others, the Court has safeguarded the fundamental right of parents to raise their children free from interference absent compelling circumstances.39

31 Lassiter, 452 U.S. at 39 (Blackmun, J., dissenting).
33 Id.
34 Lassiter, 452 U.S. at 39 (Blackmun, J., dissenting).
35 See Troxel v. Granville, 530 U.S. 57, 66 (2000) (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”)
38 Troxel, 530 U.S. at 68–69.
39 But see Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (affirming state law prohibiting parents from forcing children to work under certain conditions).
The Equal Protection Clause generates nearly as much modern-day debate as any other constitutional provision, yet the history of its evolution from “the usual last resort of constitutional arguments ... [to] the Court's chief instrument for invalidating state laws” remains to be cemented in casebooks and common law. Prior to 1937, the Equal Protection Clause, construed solely as a rationality test, was invoked sporadically to strike down economic regulation. The *Lochner* era, especially in its waning years, witnessed a Supreme Court erratically strike down approximately 200 regulatory statutes on no apparent ground but the Justices' own policy preferences. The most popular doctrinal vehicle for perpetrating this broad-scale assault upon the basis of the republican form of government was the Due Process Clause. Yet, it was not uncommon, Justice Holmes' famous dictum in *Buck v. Bell* to the contrary notwithstanding, for the Court to employ the Equal Protection Clause to similar effect. The *Lochner* era abruptly ended in 1937 with the Court's precise about-face on substantive due process and Commerce Clause issues, and the arrival of rapidly ensuing influx of Roosevelt appointees. No longer would economic regulation have to run the gauntlet of Supreme Court Justices, as After 1937 the Court declined to consider due process or equal protection challenges to economic regulation. Enter the most famous footnote in constitutional law history.

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42 Recent studies have suggested that the Court during the Lochner period was not as regressive as the conventional wisdom would have it. See e.g., Randy Barnett, *After All These Years, Lochner was Not Crazy—It Was Good*, 16 GEO. J.L. & PUB. POL’Y 437, (2018)
44 See note 35, supra.
46 See, e.g.: Louis Lusky, Minority Rights and the Public Interest, 52 YALE L.J. 1, 11 (1942).
From this rethinking of the Court's constitutional competence emerged Justice Stone's famous footnote four in *Carolene Products.* Justice Stone quite consciously sought to fashion a theory of constitutional interpretation that would preserve judicial review while distancing the Court from the abuses of the *Lochner* era. By 1940 the Court possessed a theory capable of justifying a presumptive rule against racial classifications. Black Americans, for example, now qualified for special judicial protection under paragraph three of the *Carolene Products* footnote owing to their "discrete and insular" status—this protection was one finally consistent with the Reconstructionist intent of the post-Civil War drafting of the Fourteenth Amendment—an intent that also provided the basis for the Privileges or Immunities clause. After the Court waged the Equal Protection Clause against states’ rights regarding racial classifications, it was inevitable that questions would arise as to how the clause would be applied to nonracial classifications. Thus, the modern Court developed a two-tiered system of review: (1) strict scrutiny and (2) rational basis. All classifications based on race were subjected to “strict judicial review,” and they were thus subjected to a means-end test: the classification must be narrowly tailored to effectuate a compelling governmental interest.

Therefore, to evaluate the rights of a classification of people deemed “parents” for the purposes of Equal Protection, courts “must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.”

But, beginning with *Zablocki v. Redhail,* the Court began a merger of scrutiny-based approaches in

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*49 “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth....It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation....Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious... or nations... or racial minorities...: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

*50 See generally Korematsu v. United States, 323 U.S. 214 (1944); and Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).*

*51 Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974).*

*52 See note 35, supra.*
considerations of the violation of Equal Protection and Due Process, marking a movement away from identifying certain minority groups as suspect classifications in terms of Equal Protection in favor of focusing on the protected “liberty interest” at issue via Due Process. Consequently, a suspect classification based upon either indigency or parenthood alone is both historically and contemporarily unlikely to give rise to a court decision on an equal protection basis.

B. Fundamental Rights Receive Procedural Protection.

Due to the severe sanctions that courts can impose on parents in child welfare proceedings, the Supreme Court has sought to ensure that these proceedings adequately protect the procedural due process rights of parents. For example, in Stanley v. Illinois, the Court interpreted the Fourteenth Amendment to require that the State demonstrate that a parent is unfit prior to placing his or her child in foster care. And in Santosky v. Kramer, the Court held that the Constitution required the State to demonstrate that a parent was unfit by clear and convincing evidence before permanently terminating a parent’s rights. In both decisions, the Court recognized the sanctity of the parent-child relationship and the unique ways in which civil child welfare cases threatened that right. Thus, the Court proscribed procedures to ensure that

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53 In Zablocki, the United States Supreme Court struck down a Wisconsin statute which prevented persons who were obligated to support children not in their custody from marrying without a court order. The majority opinion by Justice Marshall held that the statute violated the equal protection clause of the fourteenth amendment to the United States Constitution. Although Justice Marshall analyzed the case within an equal protection framework, the subject matter of the case, the substance of his discussion and many of the cases he cited as precedent indicate that analysis under the due process clause of the fourteenth amendment would have been more appropriate.


55 405 U.S. 645 (1972).

56 Id. at 649.


58 Termination of parental rights requires proof by clear and convincing evidence. This heightened standard of review is mandated not only by the Family Code, see TEX. FAM. CODE § 161.001, but also the Due Process Clause of the United States Constitution. See, e.g., In re J.F.C., 96 S.W.3d 256, 263 (Tex. 2002); see also Santosky, 455 U.S. at 753-54 (recognizing the fundamental liberty interest a parent has in his or her child and concluding that the state must provide a parent with fundamentally fair procedures, including a clear and convincing evidentiary standard, when seeking to terminate parental rights). The Texas Family Code, for example, further defines clear and convincing evidence as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE § 101.007; see J.F.C., 96 S.W.3d at 264.

59 Id. at 769 (holding that, in cases involving Indian children, the Indian Child Welfare Act requires the State to prove grounds for termination of parental rights beyond a reasonable doubt). See 25 U.S.C. § 1912(f) (1978).
the State was not haphazardly compromising that right. This judicial doctrine has evolved into what is commonly referred to “procedural” due process.60

The language of the Fourteenth Amendment requires the provision of due process when an interest in one’s “life, liberty or property” is threatened.61 Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.62 In the 1960s, however, the Court began a rapid expansion of the “liberty” and “property” aspects of the clause to include such non-traditional concepts as conditional property rights and statutory entitlements. Since then, the Court has followed an inconsistent path of expanding and contracting the breadth of these protected interests. The “life” interest, on the other hand, although often important in criminal cases, has found little application in the civil context.

The Court has applied a flexible due process standard to the provision of counsel. Although enumerated as a right in criminal proceedings, counsel is not invariably required in all proceedings. Comparatively, a state should not be expected to provide counsel in all parts to a proceeding affecting the parent-child relationship. The state should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be

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60 Compared with the mythical notion of “substantive” due process, the idea that due process not only protects certain legal procedures, but also protects certain rights unrelated to procedure. Substantive due process has been interpreted to include things such as the right to work in an ordinary kind of job, marry, and to raise one’s children as a parent. In *Lochner v New York* (1905), discussed *supra*, the Supreme Court found unconstitutional a New York law regulating the working hours of bakers, ruling that the public benefit of the law was not enough to justify the substantive due process right of the bakers to work under their own terms. The author believes that Substantive Due Process has all but dissipated considering the *Zablocki* transition in approaches coupled with the “fundamental liberty interest” considerations consistent with *Lawrence v. Texas*.

61 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1982). “The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.” *Board of Regents v. Roth*, 408 U.S. 564, 569–71 (1972).

62 For instance, at common law, one’s right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law, and only for offenses deemed by a legislative body to be particularly heinous. One’s liberty, generally expressed as one’s freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One’s ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.
provided where the person requests counsel, based on a timely claim that he has not committed the alleged violation, that the basis for the proceeding are unfounded or arbitrary, or if there are reasons in justification or mitigation that might make revocation or termination of rights inappropriate.63

But whether this right to counsel is one of a fundamental nature since it stems from the liberty interest of raising children, or is one of a procedural nature merging the Constitutional civil-criminal distinction,64 is clarified through an 1873 dissenting opinion of Justice Stephen J. Field.65 Justice Field wrote that “the Due Process Clause protected individuals from state legislation that infringed upon their “privileges and immunities” under the federal Constitution.”66 From this perspective, it appears that there was some belief that the Clauses were designed to work in tandem.

C. From Corfield should come Counsel

The origin of the Fourteenth Amendment’s Privileges or Immunities Clause is deeply rooted in the nation’s beginnings.67 Article IV of the Articles of Confederation provided that “free inhabitants of each of these States . . . [were] entitled to all privileges and immunities of free citizens in the several States.”68 Nearly a decade later, the Privileges and Immunities Clause made its way into the Philadelphia Convention. There, the Framers set forth that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”69 Nearly forty years would pass until Justice

64 U.S. Const. Amend. VI, “In all criminal prosecutions, the accused shall enjoy the right...[t]o have the Assistance of Counsel for his defence.”
65 The Slaughterhouse Cases, 83 U.S. 36, (1873), a series of cases in which the Court expressed its first interpretation of the privileges and immunities clause of the Fourteenth Amendment. The majority interpreted this clause as protecting the rights people have by virtue of their US citizenship, not by virtue of their citizenship of a state. It then defined the rights of US citizens narrowly, excluding civil rights.
66 The Slaughterhouse Cases, 86 U.S. at 108.
68 Articles of Confederation of 1777, art. IV, para. 1.
Bushrod Washington elaborated on the Framers’ words in *Corfield v. Coryell.* He described “privileges and immunities” as “fundamental.” They include: “Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety;” “the writ of habeas corpus;” the right to “maintain actions of any kind in the courts;” and the right to “take, hold and dispose of property.”

During post-war Reconstruction, freed slaves continued to face deprivation of their rights. In response, Congress passed the Civil Rights Act of 1866 to protect citizens’ “privileges or immunities.” The 39th Congress proposed a new Fourteenth Amendment to provide a solid basis to ensure the protection of these rights. The cornerstone of this Amendment would be the Privileges or Immunities Clause. It provides: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” During ratification debates over this provision, Senators relied on Justice Washington’s interpretation of the antecedent provision. However, the Supreme Court would soon reject any broad reading of “privileges or immunities” in the *Slaughter-House Cases.* Constitutional scholars from across the spectrum, including Professors Jack Balkin and Randy Barnett argue that the Supreme Court misinterpreted the Fourteenth Amendment in *Slaughter-House.* With few exceptions, the Supreme Court continued to all but ignore the clause, until a 1999 dissent from Justice

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70 Justice Washington was a nephew of the first President of the United States, George Washington. President John Adams nominated Washington to the Supreme Court of the United States on December 19, 1798. The Senate confirmed the appointment the following day. Washington served on the Supreme Court for thirty years.
71 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230)
72 *Id.* at 551.
73 *Id.* at 551-52.
Thomas served as a brief but poignant reminder of how powerful the clause was intended to be. In *Saenz*, the Court struck down a California law that set welfare benefits for new residents and citizens of California at the level provided by their former state for the first year of their California residency. The Court concluded that one aspect of the right of travel, the right of new state citizens “to be treated like other citizens of that State,” is one of the privileges or immunities of national citizenship. Concluding his departure of the majority, Justice Thomas recognized the importance of reevaluating Fourteenth Amendment jurisprudence, and a possible resurrection of the Privileges or Immunities Clause.

II. ORIGINAL INFLUENCES, CONTEMPORARY COMPLICATIONS

A. Considering the Modern Parent’s Interests

Termination of parental rights is unique because it is the only civil penalty that permanently breaks apart the family relationship. It has been described as “tantamount to a civil death penalty.” While the “best interests of the child” is a phrase commonly used in pleadings and opinions when framing a request or analysis, courts often struggle in balancing the equally prevalent interest of the parents. Concerning the parents’ interests, some have been subjected to erratic suits regarding the right to raise their children, exploited due to their poverty, and may face further future limitations on how to raise their children. Toward the turn of the century cases captured media attention when children across the country began filing parental-rights termination suits against their own parents seeking what was termed a “divorce.”

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78 *Id.* at 500.
79 *Id.* at 527-28, (Thomas, J. dissenting, “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.”)
80 Emphasis on penalty, as to indicate involuntary imposition
81 *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (internal quotations omitted).
82 See *Troxel*, Note 4 supra.
84 *See, e.g.*, *Kingsley*, 623 So. 2d at 782, 790; *Twigg*, 1993 WL 330624, at *2;
The Obama administration previously advocated for ratification of the United Nations Convention on the Rights of the Child (CRC), which would drastically limit parents' rights in raising their children.\(^85\) The CRC contains a section regarding the government's duty and ability to unilaterally determine the “best interest of the child.”\(^86\) Due to the increased government involvement in the family under the CRC, it has been harshly criticized as “nationalizing parenting”\(^87\) and allowing intrusion "into the family sphere to an unprecedented degree."\(^88\) Alternatively, others support the CRC for its recognition of "children's rights of participation, voice, and agency" as they gradually mature, which "is consistent with social and developmental realities."\(^89\) On the other side of the coin, there must be some limits to the protection of parental rights when it involves the safety and well-being of the child.\(^90\)

**B. If You’re not First, You’re Lassiter**

The right to parenthood has long been held a fundamental right of all Americans.\(^91\) Therefore, "[i]t is not disputed that state intervention to terminate the relationship between [a parent] and her child must be accomplished by procedures meeting the requisites of the Due Process Clause."\(^92\) Due to the constitutional consideration of the right at stake, the ability for parents to have attorney assistance to protect those rights is one of extreme importance, though the U.S. Supreme Court has addressed it on

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\(^{87}\) Rosemond, supra note 58.


\(^{90}\) See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923); see also, e.g., Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court"); Santosky v. Kramer, 455 U.S. 745, 759 (1982) ("[A] parental rights termination proceeding . . . [does] not merely infringe that fundamental liberty interest, but ... end[s] it"); In re L.M.I., 119 S.W.3d 707, 733 (Tex. 2003) ("termination of parental rights, fundamental and constitutional in their magnitude"); Holick v. Smith, 685 S.W.2d 18, 20 (Tex. 1985) ("This natural parental right has been characterized as . . . 'a basic civil right of man,' and 'far more precious than property rights.'").


only a few occasions. While the Court's holdings provide the blueprints for the legal framework on which parental-rights termination debates have commenced, they have not gone far enough to demand uniformity among the states regarding the constitutionality of the right to counsel.

The epic of an indigent person's right to counsel first began in 1967 with the Supreme Court's holding in *In re Gault.* In a juvenile delinquency proceeding, the Court held that the Due Process Clause required that the juvenile and his parents be informed of the right to counsel and given counsel to represent the child in the proceedings. Though *Gault* addressed the due process requirements regarding counsel in juvenile proceedings, it left significant questions open about right to counsel in parental-rights termination cases. In 1981, the Supreme Court handed down the landmark decision in *Lassiter v. Department of Social Services.* The issue in *Lassiter* was whether denial of court-appointed counsel for an indigent parent in a parental-rights termination case was a Due Process Clause violation. The Court held that, under due process, the “preeminent generalization” is that an indigent person has a mandatory right to counsel in a suit where he “may lose his physical liberty if he loses the litigation.” Thus, if an indigent person risks going to prison if he loses the suit, even for a small crime, the court must provide counsel. Historically, however, the Court had been very reluctant to extend this mandatory right in cases, even criminal, that may not result in confinement or loss of personal liberty.

Justice Potter Stewart, writing for the majority, “meld[ed] the criminal right-to-counsel cases and the due process cases, and [did] so in a way that add[ed] an enormous obstacle to obtaining appointed counsel in civil cases.” With a presumption that litigants in civil cases do not receive a right to counsel, the Court used the test from *Mathews v. Eldridge* to determine whether due process requires mandatory

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93 387 U.S. 1, 41 (1967).
94 Id. at 34-41.
95 Compare id., with *Lassiter*, 452 U.S. at 31.
96 452 U.S. at 18.
97 Id. at 24.
98 Id. at 25.
99 Id. (citing *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)).
100 Id. at 26 (citing *Scott v. Illinois*, 440 U.S. 367, 373 (1979)).
102 424 U.S. 319, 335 (1976).
appointment of counsel in parental-rights termination suits: balancing "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."103 Although the Court noted that the right to parenthood “undeniably warrants deference,” it concluded that the “complexity of the proceeding and the incapacity of the uncounseled parent” are not always so great as to “make the risk of an erroneous deprivation of the parent's rights insupportably high.”104 Thus, the Court refused to issue a blanket rule that "the Constitution requires the appointment of counsel in every parental termination proceeding."105 The Court left the decision to the trial courts, requiring them to make a case by-case fact determination on the ground level utilizing the Mathews due process balancing test, coupled with the presumption against right to counsel unless there is a risk to physical liberty.106 The Court, however, did not define how to make this case-by-case determination, reasoning that “[it was] neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements.”107

Justice Harry Blackmun dissented in Lassiter, disagreeing with the Court's conclusion that “deprivation [of parental rights] somehow is less serious than threatened losses deemed to require appointed counsel, because in this instance the parent's own 'personal liberty' is not at stake.”108 Justice Blackmun did not accept Court's presumption that “physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel under the Due Process Clause.”109 Further, Blackmun warned that the majority's case-by-case instruction to trial courts would endanger parental

103 Lassiter, 452 U.S. at 27 (citing Mathews, 424 U.S. at 335).
104 Id. at 27, 31 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
105 Id. at 31.
106 Id. at 31-32 (adopting the rule in Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)); see also THORNBURG, supra note 101, at 29-30.
107 Id. at 32 (quoting Gagnon, 411 U.S. at 790).
108 Id. at 40.
109 Id.
rights, because the Court chose to avoid "the obvious conclusion that due process requires the presence of
counsel" for indigent parents.110

C. Disparate Statutory Standards

Federal law requires states receiving federal child abuse prevention and treatment funding to appoint
a representative for children involved in abuse or neglect proceedings.111 Thus virtually all states have
 statutes guaranteeing either the right to an attorney or the right to a guardian ad litem for children in abuse
and neglect cases.112 Many, but not all, states also have a statute guaranteeing the right to counsel for
parents in state-initiated termination-of-parental-rights proceedings, and some have a statute guaranteeing
the right for parents in abuse and neglect proceedings as well.113 Federal law also requires states to
provide counsel for the parent of an Indian child in abuse, neglect, and termination-of-parental-rights
proceedings.114 Several states have incorporated that requirement into their statutes.115

Other categories of family law matters in which statutes guarantee a right to counsel for one or more
parties include domestic violence proceedings;116 divorces and annulments;117 private petitions to

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110 Id. at 35, 50-51.
112 See National Council of Juvenile and Family Court Judges, Child Abuse and Neglect Cases: Representation as a
Critical Component of Effective Practice, 2–3 (1998) (reporting that thirty states appoint an attorney who represents
“both the best interests and the wishes of the child,” ten appoint a guardian ad litem and a separate attorney for the
child, and ten appoint only a non-attorney guardian ad litem).
113 Id. at 21, (reporting that six states require that counsel be appointed for indigent parents in all dependency
proceedings, thirty-nine require that counsel be provided for indigent parents in at least some dependency
proceedings, three require that counsel be provided for indigent parents in termination-of-parental-rights cases only,
and three do not have statutes “explicitly” providing for the appointment of counsel for parents in any dependency
or termination-of-parental-rights cases).
115 See, e.g., MONT. CODE ANN. § 41-3-425(2); NEV. REV. STAT. § 128.100
116 New York has the only statute guaranteeing a right to counsel for petitioners and respondents in domestic
violence proceedings. N.Y. FAM. CT. ACT § 262(a). But a few statutes give courts the discretion to appoint counsel for
the petitioner in such cases. See, e.g., ALASKA STAT. § 18.66.100 (permitting court to appoint counsel for minor who
is the subject of a petition for a domestic violence protective order); CAL. FAM. CODE § 6386 (permitting court to
appoint counsel for minor or adult who is the subject of a petition for a domestic violence protective order).
117 See, e.g., OR. REV. STAT. § 107.425(6) (guaranteeing right to counsel for children who request it in a divorce
proceeding); VT. STAT. ANN. TIT. 15, § 594 (guaranteeing right to counsel for children called as a witness in a divorce
or annulment proceeding)
terminate parental rights or for adoption;\textsuperscript{118} paternity proceedings,\textsuperscript{119} child custody, support, and visitation proceedings;\textsuperscript{120} and proceedings regarding visitation or permanency for children in foster care.\textsuperscript{121} Also worth noting is a category of statutes denying the appointment of counsel to specific categories of people in several types of family law matters.\textsuperscript{122} Courts have ruled at least some of these statutes unconstitutional either as an infringement of the court’s inherent powers or as an infringement of the rights of the individual denied counsel.\textsuperscript{123}

Clearly, there is a broad range of individual rights provided to indigent parents from state to state. Additionally, America has certainly become a more transient and mobile society since the days of \textit{Pennoyer v. Neff}, which established the traditional bases of personal jurisdiction.\textsuperscript{124} This mobility across multiple jurisdictions can subject parents to substantially unequal treatment depending on where they choose to enjoy their fundamental right to parenthood and raising children. Thus, the privileges and

\textsuperscript{118} See, \textit{e.g.}, \textsc{alaska stat.} \textsection 25.23.180(h) (requiring appointment of counsel for respondent to a private petition for termination of parental rights); 750 ill. \textsc{comp. stat. ann.} \textsection 50/13b (guaranteeing right to counsel for respondent in an adoption petition where the petition alleges the respondent to be unfit); \textsc{mass. gen. laws ann. ch.} 119, \textsection 29 (guaranteeing right to counsel for child in contested proceeding to dispense with need for consent to adoption); \textsc{n.y. fam. ct. act} \textsection 262(a) (guaranteeing right to counsel for a parent opposing adoption).

\textsuperscript{119} See, \textit{e.g.}, \textsc{conn. super. ct. fam. matters p.} \textsection 25-68(a) (guaranteeing right to counsel for putative father in a state-initiated paternity action); \textsc{kan. stat. ann.} \textsection 38-1125 (authorizing petitioner in a paternity proceeding to seek representation from county trustee, the county social services department, or the county attorney); \textsc{n.y. fam. ct. act} \textsection 262(a) (guaranteeing right to counsel for respondent in paternity proceeding).

\textsuperscript{120} See, \textit{e.g.}, \textsc{la. rev. stat. ann.} \textsection 9:345 (guaranteeing right to counsel for child in child custody or visitation proceeding if any party presents a prima facie case that the child has been sexually, physically, or emotionally abused); \textsc{mass. gen. laws ann. ch.} 209c, \textsection 7 (west) (requiring appointment of counsel for either party in contested custody or visitation proceeding “whenever the interests of justice require”); \textsc{n.y. fam. ct. act} \textsection 262(a) (guaranteeing right to counsel for child in a child custody proceeding); \textsc{or. rev. stat.} \textsection 107.425(6) (guaranteeing right to counsel for children who request it in a custody proceeding or a proceeding regarding support of an out-of-wedlock child).

\textsuperscript{121} See, \textit{e.g.}, \textsc{n.y. fam. ct. act} \textsection 262(a) (guaranteeing right to counsel for petitioner in proceeding regarding visitation of child in foster care and for respondent in permanency proceeding).

\textsuperscript{122} See, \textit{e.g.}, \textsc{n.h. rev. stat. ann.} \textsection 169-c:10.ii(a) (barring appointment of counsel for any party other than the child or the parent in a neglect and abuse case); \textsc{w. va. code} \textsection 48-24-105 (barring appointment of counsel at the state’s expense for parents in a paternity proceeding); \textsc{wis. stat. ann.} \textsection 48.23(3) (barring appointment of counsel for any party other than the child in a children-in-need-of-protection proceeding).

\textsuperscript{123} See, \textit{e.g.}, \textsc{in re shelby r.}, 804 a.2d 435, 439–40 (n.h. 2002) (holding that \textsc{n.h. rev. stat. ann.} \textsection 169-c:10.ii(a), barring appointment of counsel for stepparent in neglect and abuse cases, was unconstitutional because due process provision of state constitution required appointment of counsel in such cases); \textsc{joni b. v. wisconsin}, 549 n.w.2d 411, 414 (wis. 1996) (holding that \textsc{wis. stat. ann.} \textsection 48.23(3), barring appointment of counsel for any party other than the child in children-in-need-of-protection proceedings, was an unconstitutional intrusion onto powers of the judiciary).

\textsuperscript{124} \textit{Pennoyer v. Neff}, 95 u.s. 714 (1878), a cornerstone of civil procedure establishing the groundwork for personal jurisdiction and the traditional bases: (1) presence, (2) domicile, (3) Agency, (4) consent (express or implied).
Immunities Clause guidance from Justice Thomas in *Saenz* becomes all the timelier, and the original interpretation from Justice Field seems increasingly on point.

### III. PRIVILEGES OR IMMUNITIES: ORIGINALIST SAGA, OR FAMILY LAW SHORT STORY?

#### A. From “And” to “Or,” and IV to XIV

Article IV of the Articles of Confederation attempted to set forth a basis for the conferred rights of citizenship to the newly created states following the revolutionary war. A streamlined version of this provision became Article IV of the Federal Constitution: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." At the time of its enactment, there was little in the way of substantive discussion regarding the meaning and potential application of Article IV, Section 2. James Madison indicated that it clarified the language of the older Article IV. Alexander Hamilton confusingly explained that it formed "the basis of the Union" and that federal courts should be available to ensure an "equality of privileges and immunities to which citizens of the Union [would] be entitled." Nevertheless, at the time of authorship and adoption, Article IV spawned little controversy.

A frequent question among students of Constitutional Law often turns on the actual difference one letter can make, when considering the interchanging of “and” with “or” between the two Constitutional references to the words “privileges,” and “immunities.” While the origins of each phrase have been often studied and debated, the most basic definition rests on whether the reference is intended to effect federal or state powers. The scope of conferred federal power was a matter of continual debate in the early years of the Constitution as Congress debated matters such as the establishment of a national bank.

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125 See *supra* note 68.
126 U.S. CONST., ART. IV, § 2, cl. 1.
127 See THE FEDERALIST No. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961) (“In the fourth article of the Confederation, it is declared 'that the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall, in every other, enjoy all the privileges of trade and commerce,' etc. There is a confusion of language here which is remarkable.”).
128 THE FEDERALIST No. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton mis-quotes the provision as "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." *Id.*
authority to criminalize seditious speech. Nevertheless, even the most aggressive proponents of federal power accepted the basic concept of enumerated federal authority.131 Although the states faced certain restrictions under Article I, Section 10 according to Chief Justice John Marshall in *Barron v. Baltimore*,133 the provisions of the Bill of Rights bound only the federal government.134 This left the subject matter of the Bill of Rights, and personal rights in general, under the care and protection of state majorities.

The terms “privileges” and “immunities” evolved alongside terms such as “rights” and “liberties,” and were put to the same varied use. Throughout the late eighteenth and early nineteenth centuries, one finds countless examples of the terms “rights,” “advantages,” “liberties,” “privileges,” and “immunities” used interchangeably, and often at the same time.135 According to legal sources in the early years of the Republic, the words “privileges” and “immunities” often meant the same thing.136 According to the Maryland General Court in 1797, the terms “[p]rivilege and immunity are synonymous, or nearly so.”137

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132 U.S. CONST. ART I, §10, “No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”
134 Id. at 247-48.
136 See Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1133 (2009) (“It appears that ‘immunity’ and ‘privilege’ were reciprocal words for the same legal concept.”).
137 *Campbell v. Morris*, 3 H. & McH. 535, 553 (Md. 1797); see also Douglass’ Adm’r v. Stevens, 2 Del. Cas. 489, 501 (1819) (“By the second section of the fourth article of the Constitution of the United States the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states. The words ‘privileges’ and ‘immunities’ are nearly synonymous. Privilege signifies a peculiar advantage, exemption, immunity. Immunity signifies exemption, privilege.”).
Dictionaries of the time also equated the terms.\textsuperscript{138} While synonymous in one sense, the use was also clearly referring to different rights in another. For example, in one section of his Commentaries, Blackstone uses the individual terms "privileges" and "immunities" in reference to individual natural rights,\textsuperscript{139} while in a different section of the same book he uses the combined phrase "privileges and immunities" to refer to the government conferred collective rights of corporations.\textsuperscript{140}

Historical accounts of the Privileges or Immunities Clause of the Fourteenth Amendment generally assume that the author of the text, John Bingham, based the Clause on Article IV of the Constitution.\textsuperscript{141} Article IV speaks of "privileges" and "immunities" and, during the debates over the Fourteenth Amendment, members of the Thirty-ninth Congress often referred to Article IV cases like \textit{Corfield v. Coryell}.\textsuperscript{142} These applicable references to \textit{Corfield} have advanced the notion that Bingham and the other Republican members of the Thirty-ninth Congress embraced Justice Washington's opinion in \textit{Corfield} as a uniquely authoritative statement on the meaning of Article IV.\textsuperscript{143}

The consistency between Article Four and the Fourteenth Amendment is regardless of verbiage or linguistic interpretation, the original intent indicates the vesting of rights that the modern Court would deem “fundamental.” Perhaps no better illumination of this concept is required beyond the speech of Fourteenth Amendment sponsor Senator Jacob Howard’s address to the 39th Congress. According to


\textsuperscript{139} \textsc{1 William Blackstone Commentaries}, *129 (describing personal rights as “private immunities” and “civil privileges”).

\textsuperscript{140} \textit{Id.} at *468

\textsuperscript{141} Daniel A. Farber, Constitutional Cadenzas, 56 \textsc{Drake L. Rev.} 833, 842-43, (2008) (“The debates confirm that, by referring to privileges or immunities, the supporters of the Fourteenth Amendment were drawing a link to the ‘P & I’ Clause of the original Constitution .... In the House, Bingham explained that the effect of the Amendment was ‘to protect by national law...the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.’”).

\textsuperscript{142} 6 F Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,320), discussed \textit{supra}, Note 71-73.

\textsuperscript{143} \textsc{Randy E. Barnett}, \textsc{Restoring the Lost Constitution: The Presumption of Liberty} 61-62 (2004) ("It is not seriously disputed, however, that sometime after ratification it came to be widely insisted by some judges, scholars, and opponents of slavery that Article IV was indeed a reference to natural rights. Nor is it disputed that, whenever it first developed, the members of the Thirty-ninth Congress meant to import this meaning into the text of the Constitution by using the language of 'privileges' and 'immunities' in the Fourteenth Amendment.").
Senator Howard, the “privileges or immunities” of U.S. citizens consisted of two categories of “fundamental guarantees.”144 In the first category were “the privileges and immunities spoken of in the second section of the fourth article of the Constitution.”145 After reading from Justice Washington’s Corfield opinion, Senator Howard identified a second category of fundamental rights: “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 and secured by the first eight amendments of the Constitution.”146

B. Back to the “Once and Future”—Modern Implications147

While Corfield provided an enumerated listing of those privileges and immunities covered under Article IV, many wonder what exactly are those privileges or immunities of citizens of the United States”? The opportunities to arrive at an answer have been few and far between. The equality function of the clause, much altered in character, was assumed by the Equal Protection Clause, and the substantive functions, again altered, were assumed by the Due Process Clause. Both of these clauses of the Fourteenth Amendment apply to “persons,” whereas the Privileges or Immunities Clause is limited to “citizens.” Indeed, except for Colgate v. Harvey,148 over-ruled five years later in Madden v. Commonwealth of Kentucky,149 the Supreme Court did not rely on that clause as the basis for any decision until 1999, when it decided Saenz v. Roe.150

More than a decade passed until the Court would reference the Clause once more, with Justice Ruth Bader Ginsburg pressing for a definition in oral argument in the 2010 case McDonald v. City of Chicago,151 as attorney Alan Gura was lobbying to revive the Privileges or Immunities clause to protect

145 Id. at 2765. The Privileges and Immunities Clause appears at U.S. CONST. art. IV, § 2, cl. 1.
147 Referring to the extensive work by Blackman and Shapiro, supra note 69.
148 296 U.S. 404.
149 309 U.S. 83.
150 See supra, note 79.
the right to keep and bear arms. This argument was wholly consistent with the absolute protection for the enumerated rights set forth by Senator Howard in his address to the 39th Congress.

Unfortunately, by the time of McDonald’s oral argument, the Court was already more than ten years removed from the last reference to the resurrection of the Privileges or Immunities Clause. Masquerading as a Substantive Due Process case, the question before the Court in McDonald was whether to incorporate the Second Amendment as a “liberty” interest protected by the Due Process Clause. It was no secret that the originalist-leaning Justices were often in vocal opposition to the mythical substantive due process, but as Professor Blackman describes, “Whatever its merits or ultimate level of acceptance among the Justices, substantive due process incorporation had one unique feature: it was familiar.” Choosing to vote with the defensible devil they knew, only a plurality was willing to use the Due Process Clause as a basis for extending the Second Amendment to the States.

The crucial fifth vote was provided by Justice Thomas’ extensive originalist opinion that rested solely on the Privileges or Immunities Clause, who appeared to have found the appropriate case he requested in Saenz. Neither Justice Alito for the plurality, nor Justices Stevens or Breyer in dissent, even attempted to critique Justice Thomas’ analysis, which now stands uncontradicted in the Supreme Court Reports. Justice Field’s dissenting opinion from The Slaughter-House Cases asserting that the majority’s basis was incorrect was exonerated. Only a barely defended assertion of stare decisis by Justice Alito was left in the way of a complete restoration of the powerful Privileges or Immunities Clause, described as a cornerstone of the Fourteenth Amendment.

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152 See Transcript of Oral Argument at 3–5, McDonald, 561 U.S. 742 (2010) (No. 08-1521). (Justice Ginsburg from the bench, “But I really would like you to answer the question that you didn’t have an opportunity to finish answering, and that is: What other . . . rights? What does the privileges and immunities of United States citizenship embrace?”)
153 See supra Note 141.
154 See supra Note 74.
155 See Blackman and Shapiro, The Once and Future Privileges or Immunities Clause, *7, (2019)
156 McDonald, 561 U.S. at 806.
157 See Blackman and Shapiro, The Once and Future Privileges and Immunities Clause, *2, (2019)
IV. FEDERAL LAWS PROVIDE THE OPPORTUNITY FOR REMEDY

A. The Government’s Position

The federal government is uniquely situated to create a basic level of adequacy in the representation of parents. Since the early 1970s, the federal government has sought to ensure uniformity in the basic practices and procedures of child welfare systems across the states. The government took these steps due to concerns that children were needlessly entering and remaining in foster care, thereby harming their overall wellbeing. Though the government’s authority to directly require states to follow federal mandates in child welfare cases is limited due to federalism concerns, the government circumvented this by tying federal foster care funding to the adoption of specific procedures it deemed essential to a well-functioning child welfare system. Consider Title IV-E of the Social Security Act, for example, which constitutes the largest federal child welfare program. To receive federal foster care funding under Title IV-E, states must submit a plan for their child welfare system that contains numerous elements, such as ensuring that reasonable efforts are made to prevent the removal of a child, developing a case plan that outlines what a parent must do to reunify with her child, and identifying a child’s relatives within thirty days of removal. Other federal child welfare laws, such as the Child Abuse and Prevention Treatment Act (CAPTA), require states to ensure that children in foster care receive the assistance of a guardian ad litem, the creation of a system for reporting child abuse and neglect, and that a registry be established to identify perpetrators of abuse and neglect. These are but a few of the many requirements imposed by the federal government through its child welfare statutes.

B. Building upon the Title IV-E Framework

Title IV-E of the Social Security Act could provide an easily accessible vehicle for ensuring a federally protected statutory right for all parents to receive the assistance of adequate counsel at the outset

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159 § 671(a)(16).
160 § 671(a)(29).
161 § 5106a(b)(2)(B)(xiii).
162 § 5106a(b)(2)(B)(xvi)(VI).
of a termination proceeding. By specifically including a provision within Title IV-E of the Social Security Act that in order to receive funding under the Act, states must provide indigent parents with the assistance of a lawyer at the first court hearing in a child protective case, the federal government could make it clear that funding under Title IV-E was available to support the representation of parents. The question remains, however, whether doing so would serve the federal government’s child welfare policy interests. In August 2019, the Administration for Children and Families answered this question in a widely distributed Information Memorandum in which it implored state child welfare agencies and courts to strengthen the representation of parents. In the memorandum, the Administration “strongly encourage[d] all jurisdictions to provide legal representation to all parents in every aspect of the child welfare system.” The memorandum documented ways in which strong legal representation furthered the system’s goals of increased party engagement, improved case planning, expedited permanency, and cost savings to state government. It concluded that “[t]he absence of legal representation…at any stage of child welfare proceedings is a significant impediment to a well-functioning child welfare system.”

C. Congressional Action, and Surviving Judicial Review

The permanent solution for parents lies in a congressional change to Title IV-E, to both require and fund adequate parent representation. Given the increased spending by the federal government in response to the 2020 Coronavirus Pandemic, it may be unlikely to see the current political climate support any programmatic adjustments that carry an additional cost. If a powerful campaign for change does not occur, robust case law may serve to compel states to provide legal assistance to parents in child welfare proceedings.

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164 Id. at 6.
165 Id. at 7.
166 Id.
convince Congress to implement a permanent solution, history has shown that regardless of how noble the intent, States are sure to challenge when funding is seemingly tethered to compliance.  

Though the issue of family protection and family rights is a "fundamental liberty interest," the aftermath of *Lassiter* has unfortunately left the "door…open to experimentation by the states." It has also left indigent parents wondering what individual states have decided regarding the right to counsel. In Texas, for example, while the state statute has a higher standard than *Lassiter* for state-initiated suits, the same is not true for private suits. This disparity should be changed both to ensure uniformity among the states and to have a clear standard for parents to have notice of whether they have a right to counsel in involuntary termination proceedings. In doing so, the Supreme Court should revisit its "loss of liberty" standard for the right to counsel and expand it to give the right to indigent parents in termination proceedings. Such expansion would not only allow greater equity and clarity in these important proceedings but would also provide for greater efficiency of these suits, benefiting both the state and the child. With the current economic situation and ever-changing state statutes make this issue ever more urgent, the Supreme Court should seize the next available opportunity to recognize the fundamental liberty of parenthood and the importance of representation for those unable to secure it for themselves. In the Court’s analysis, there would no longer be a need for a “saving construction,” as the strongest framework has been part of the Fourteenth Amendment’s foundation since its composition.

**CONCLUSION**

The economic times America faces now have pushed, and predictably will push more, American families into poverty or indigency. Because most termination suits involve indigent families, courts must
take a careful look at the rights guaranteed to those indigent parents. It would be tantamount to invasion of the fundamental right to family if the right to parent and develop a relationship with one's child depended on the state of the economy and one's ability to afford counsel. Judge Joseph A. Devany, in 1987 during another economic downturn, best stated this potential danger in his dissenting opinion in a Texas court of appeals case:

[W]hen we are faced with an economic depression and parents cannot provide adequate food for their children, . . . parental rights will be terminated [due to their inability to provide for their children] .... [This would allow the] state [to] become a "big brother" form of government of such supremacy that it can destroy the very base of freedom and democracy in this country by destroying the family.175

If parents' right to counsel and right to defend themselves in a parental-rights termination suit were dependent upon their finances, it seems the economy would have an unprecedented role in dictating who is fit to be a parent. But the precedent required for protection exists in the immunity from allowing financial standing to impair the privilege of raising a child, and vigorously defending the fundamental liberty of doing so.

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175 In re S.H.A., 728 S.W.2d 73, 102 (Tex. App.-Dallas 1987, writ ref'd n.r.e.).