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# Why "Privileges or Immunities"? An Explanation of the Framers' Intent

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## WHY “PRIVILEGES OR IMMUNITIES”? AN EXPLANATION OF THE FRAMERS’ INTENT

*William J. Rich\**

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### I. INTRODUCTION

In the *Slaughter-House Cases*,<sup>1</sup> Justice Field accused the majority of turning the Fourteenth Amendment’s Privileges or Immunities Clause<sup>2</sup> into a “vain and idle enactment which accomplished nothing,”<sup>3</sup> and Justice Swayne argued that the majority “turn[ed] . . . what was meant for bread into a stone.”<sup>4</sup> Most contemporary commentators appear to agree.<sup>5</sup> Robert Bork went so far as to compare that clause to a provision “written in Sanskrit” or “obliterated past deciphering by an ink

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1. 83 U.S. 36 (1873).

2. 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 . . .”).

3. *Slaughter-House Cases*, 83 U.S. at 96 (Field, J., dissenting).

4. *Id.* at 129 (Swayne, J., dissenting).

5. See, e.g., Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) (noting that “‘everyone’ agrees the Court incorrectly interpreted the Privileges or Immunities Clause . . .”).

blot.”<sup>6</sup> Did the framers of the Fourteenth Amendment make a colossal mistake? Or were Justices Field and Swayne correct when they blamed Justice Miller’s majority opinion in *Slaughter-House* for leading the nation astray? Answers to these questions, in the pages that follow, are “no” to the first, and a qualified “no” to the second. The phrase “privileges or immunities” made sense at the time when Congressman Bingham and his colleagues inserted it into the Fourteenth Amendment. Contemporary misunderstanding of that clause reflects continuing failure to appreciate positive aspects of the framework offered by Justice Miller in 1873.

## II. FEDERALISM (NOT JUST THE BILL OF RIGHTS)

In the hundred and forty years following ratification of the Fourteenth Amendment, much of the debate has focused upon incorporation of the Bill of Rights. Many commentators argue that the framers of the Amendment intended to incorporate the Bill of Rights when they drafted the Privileges or Immunities Clause.<sup>7</sup> Detractors who argue against incorporation ask, among other things, why the framers did not simply use that language if their intent was to make states subject to the Bill of Rights.<sup>8</sup> The Supreme Court muddled these issues, rejecting the Privileges or Immunities Clause as a basis for incorporation in the *Slaughter-House Cases*<sup>9</sup> and then using the Due Process Clause to accomplish virtually all of the same goals. Because the Supreme Court used the “wrong clause,” however, academic debate continues unabated.<sup>10</sup>

The central thesis of the following discussion is that this debate has been too narrow; the phrase “privileges or immunities” was chosen because the framers had more than the Bill of Rights in mind when they promulgated the Fourteenth Amendment, and incorporation of the Bill of

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6. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990).

7. See, e.g., Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1098-1124 (2000).

8. See, e.g., D.O. McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219, 233 (1918).

9. 83 U.S. 36, 77-79 (1873).

10. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 181-230 (1998) (proposing a “refined model of incorporation” of the Bill of Rights into the Fourteenth Amendment); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) (citing historical evidence in support of incorporation of the Bill of Rights); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis’ Response*, 44 OHIO ST. L.J. 1 (1983).

Rights would only accomplish a portion of their objectives. The framers drafted the Fourteenth Amendment to assure state compliance with rights derived from federal law in a broad sense. They chose the phrase "privileges or immunities of citizens of the United States" specifically to meet this objective.

For an illustration of this point, consider the case of Samuel Hoar. In 1844, Massachusetts sent Hoar as an emissary to South Carolina to protest that state's imprisonment of British and American seamen with African ancestry who arrived in the port of Charleston.<sup>11</sup> The South Carolina legislature denounced Hoar, claiming the state's right to exclude "free negroes and persons of color" who could not be United States citizens and therefore were not protected by "the privileges and immunities of citizens in the several States."<sup>12</sup> Hoar hastily retreated, fearing for his life.<sup>13</sup> The Hoar affair became a cause célèbre, with southern states rallying to the support of South Carolina,<sup>14</sup> while the Massachusetts legislature invoked the need for congressional action to protect the citizens of that state.<sup>15</sup> Rather than dying a quiet death, the controversy sparked debate in Congress both before and after the Civil War.<sup>16</sup> In his first speech on the floor of Congress supporting what became the Fourteenth Amendment, Congressman John Bingham decried the lack of safety for a Massachusetts citizen in the streets of Charleston, and denounced South Carolina for "utterly disregard[ing] . . . the privileges and immunities" of Samuel Hoar.<sup>17</sup>

While the reference to Hoar could be characterized as an example of the need to incorporate the Bill of Rights, protecting the right of all Americans to exercise freedom of speech and to petition state governments, that depiction misses a larger point. Hoar traveled to South Carolina to denounce that state's defiance of Commerce Clause and Treaty Clause protection for the right of free navigation.<sup>18</sup> He

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11. Philip M. Hamer, *Great Britain, The United States, and the Negro Seamen Acts, 1822-1845*, 1 J. S. HIST. 3, 22 (1935).

12. 5 STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 238 (Herman V. Ames ed., 1900) [hereinafter STATE DOCUMENTS].

13. See Hamer, *supra* note 11, at 23.

14. STATE DOCUMENTS, *supra* note 12, at 237.

15. Hamer, *supra* note 11, at 23.

16. See THE RECONSTRUCTION AMENDMENTS' DEBATES 748 (Alfred Avins ed., 1967) (listing seventeen pages with references to the "Hoar incident in South Carolina" during debates surrounding promulgation of the Civil War Amendments). This account does not include a number of implied references to the same events.

17. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866).

18. See Hamer, *supra* note 11, at 22-23. Supreme Court Justice William Johnson had previously issued a circuit court opinion stating that South Carolina's law violated both Commerce

planned to argue that the South Carolina law conflicted with “the express provisions or fundamental principles of the national compact.”<sup>19</sup> The Fourteenth Amendment Privileges or Immunities Clause was drafted for the broad purpose of assuring that individuals would be able to enforce federal law against state authorities.<sup>20</sup>

An assessment of congressional debates and subsequent treatment of these issues leads to identification of three categories of “rights” that fall within the scope of “privileges or immunities.”<sup>21</sup> The first category includes rights directly defined in the constitutional text and determined to be applicable to the states. The Bill of Rights as currently incorporated into the Due Process Clause fits within this definition, and so do rights found in Article I, sections 9 and 10 of the Constitution as well as the Privileges and Immunities Clause of Article IV section 2. A second category involves rights derived from acts of Congress specifically authorized by the Constitution. This category would include Commerce Clause and Treaty Clause rights such as those that should have protected the seamen who entered Charleston Harbor.<sup>22</sup> It would also include patent rights or bankruptcy rights as subsequently defined by Congress.<sup>23</sup> The third category includes those interstitial rights which may be fairly inferred from the Constitution. The “right to travel,” recognized by the Supreme Court in *Saenz v. Roe*,<sup>24</sup> fits within this definition; the Supreme Court first identified this right in 1867 with its decision striking down a capitation tax in *Crandall v. State of Nevada*.<sup>25</sup>

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and Treaty Clause powers of Congress, but dismissed the case for lack of jurisdiction. *See Elkison v. Deliesseline*, 8 F. Cas. 493, 495-96, 498 (C.C.D.S.C. 1823) (No. 4,366).

19. Hamer, *supra* note 11, at 22. President Andrew Jackson and his Attorney General Roger Taney had refused to take action against South Carolina, with Taney expressing the view that “[t]he African race in the United States even when free . . . were not looked upon as citizens by the contracting parties who formed the Constitution” and were therefore not protected by the Privileges and Immunities Clause of Article IV. DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* 38 (1981).

20. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57, 70-73 (1993) (noting John Bingham’s emphasis on federal authority to enforce, “at a minimum,” the Bill of Rights).

21. *See* William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 *HASTINGS CONST. L.Q.* 235, 249-82 (2001) (providing a more detailed development of this background).

22. *See Elkison*, 8 F. Cas. at 495-96.

23. *See* An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights, ch. 230, 16 Stat. 198 (July 8, 1870); *see* William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 *MINN. L. REV.* 153, 204, 216 (2002).

24. 526 U.S. 489, 498 (1999).

25. 73 U.S. 35, 44 (1867). The right to privacy or personal autonomy arguably may also fit within this definition, although there is no reason to pursue that controversy within this paper.

The framers of the Fourteenth Amendment aptly chose the phrase "privileges or immunities" to reflect this combination of interests. Although the terms were familiar enough to lawmakers, having already appeared in the text of the Constitution with respect to rights of state citizens, their meaning had only been discussed at length in one prior federal court opinion. In *Corfield v. Coryell*,<sup>26</sup> Justice Bushrod Washington devoted a page of text to the meaning of the phrase, but did little to provide clarity beyond holding that it did not prohibit all state laws according different treatment to citizens and non-citizens.<sup>27</sup> He did include "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" subject to "such restraints as the government may justly prescribe for the general good of the whole."<sup>28</sup>

Omitted from the framework described above is the argument made by dissenters in the *Slaughter-House Cases* that the Fourteenth Amendment gave Congress control over substantive rights that fall within the scope of *state* privileges and immunities.<sup>29</sup> Congress had gained authority to enforce the Article IV Privileges and Immunities Clause when non-residents of a state were discriminated against, but not to rewrite the laws encompassed by that clause.<sup>30</sup> As drafted and as defended during the ratification debates, the Fourteenth Amendment Privileges or Immunities Clause only extended federal authority to rights directly linked, either explicitly or implicitly, to the national government.<sup>31</sup>

### III. CONGRESS (NOT THE SUPREME COURT)

During the ratification debates, critics of the phrase "privileges or immunities" voiced concerns that the text swept too broadly and enlarged federal power without providing clear guidance regarding the

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26. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) (concluding that a statutory scheme to seize the boats of non-residents who unlawfully gather oysters was not a violation of the Privileges and Immunities Clause).

27. *Id.* at 551-52.

28. *Id.*

29. *See Slaughter-House Cases*, 83 U.S. 36, 96 (1873) (Field, J., dissenting).

30. *See id.* at 77 ("[W]hatever those rights, as you grant or establish them to your own citizens, . . . the same . . . shall be the measure of the rights of citizens of other States within your jurisdiction.").

31. *See Rich, supra* note 23, at 167-73.

boundaries of that power.<sup>32</sup> Reassurance by advocates of the Fourteenth Amendment consisted in significant part of expressions that the Privileges or Immunities Clause did not expand the substantive scope of existing protection.<sup>33</sup> Some have taken such statements as implied rejections of incorporation,<sup>34</sup> in spite of repeated favorable references to the Bill of Rights.<sup>35</sup> While rejecting those assessments, a more substantial contemporary concern is that focus upon the Bill of Rights debate has side-tracked scholars from a primary reason for choosing the phrase “privileges or immunities.” The framers were more likely to have been concerned about the role of Congress in defining those rights that would be enforceable against the states.<sup>36</sup>

Origins of the Fourteenth Amendment began with fears that the Thirteenth Amendment failed to give Congress adequate authority to enact early civil rights legislation.<sup>37</sup> The framers therefore focused on expanding that power, and it is reasonable to believe that they foresaw a predominant role for Congress in defining the scope of the Amendment. The Privileges or Immunities Clause corresponds to that focus, especially when judged in light of the broad definition of that phrase extant at the time. Given that the framers of the Fourteenth Amendment

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32. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. App. 133 (1866) (Congressman Rogers challenging the broad extension of federal power represented by the Privileges or Immunities Clause).

33. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (Congressman Bingham, assuring that “the proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution”).

34. See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 36 (1949) (asking “if Bingham’s object was to make the provisions of the first eight Amendments applicable to the states, why did he not say so?”).

35. See AMAR, *supra* note 10, at 167-68 (arguing that references to “privileges” or “immunities” in years prior to promulgation of the Fourteenth Amendment “all were understood to encompass, among other things, the protections of the federal Bill of Rights”).

36. Contemplation of an active congressional role in defining “privileges or immunities,” rather than direct judicial enforcement, could also explain the lack of concern about possible discontinuity between the Bill of Rights and existing state constitutions with respect to issues such as grand jury indictment. Thus, congressional enforcement power could be seen as a vehicle for achieving “selective incorporation.” *But see* Louis Henkin, “*Selective Incorporation*” in *the Fourteenth Amendment*, 73 YALE L.J. 74, 77-78 (1963) (finding “no evidence . . . that anyone thought or intended that the amendment should impose on the states a selective incorporation”).

37. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 30 (2d ed. 1997) (arguing that the purpose of the Fourteenth Amendment was to “embody and protect” the Civil Rights Act of 1866); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 346-49 (1985) (noting an intent to provide constitutional authority for enacting the Civil Rights Act of 1866).

were focusing on federalism issues,<sup>38</sup> there are good reasons to believe that members of Congress were chiefly concerned about their own legislative authority as distinct from the authority of the courts.

Admittedly, the framers were aware of problems associated with judicial interpretation of constitutional text, especially as visited upon the nation in the case of *Dred Scott v. Sandford*.<sup>39</sup> They crafted the Fourteenth Amendment in part to overrule the racist assumptions upon which that case was based,<sup>40</sup> thereby sending a message to the Supreme Court to avoid such debacles in the future. “*All persons born or naturalized in the United States*” were given citizenship status and protected from discriminatory treatment.<sup>41</sup> But it was emphatically Congress that was given the “power to enforce” the provisions of the Fourteenth Amendment.<sup>42</sup>

Congress accepted that challenge with enactment of the Ku Klux Klan Act of 1871 (also known as The Civil Rights Act of 1871), which imposed liability on persons who “under color of any law . . . cause . . . the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States.”<sup>43</sup> The purpose of this law was explained by Congressman Bingham, primary sponsor of the Fourteenth Amendment, who sought to “provide by law for the better enforcement of the Constitution and laws of the United States.”<sup>44</sup> In 1874, a Committee on Revision of the Laws, charged with the responsibility to “amend the imperfections of the original text” without altering meaning,<sup>45</sup> revised language from the Ku Klux Klan Act to develop what we now find in 42 U.S.C. § 1983, protecting “any rights, privileges, or immunities secured by the Constitution *and laws*” of the federal government.<sup>46</sup> With this language, Congress communicated the broadly accepted understanding that the Privileges or Immunities Clause was to be co-extensive with rights found within the text of the Constitution as well as rights defined by Congress exercising its authority as defined by Article I of the Constitution. Today, federal statutory rights may be

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38. See *supra* notes 7-31 and accompanying text.

39. 60 U.S. 393 (1856).

40. Both sides of the *Slaughter-House* debate appear to agree on this point. See *Slaughter-House Cases*, 83 U.S. 36, 71 (1873) (noting the purpose of providing “freedom of the slave race”); *id.* at 95 (Field, J., dissenting) (noting reversal from *Dred Scott*).

41. U.S. CONST. amend. XIV, § 1.

42. U.S. CONST. amend. XIV, § 5.

43. Act of April 20, 1871, ch. 22, 17 Stat. 13, 13.

44. CONG. GLOBE, 42d Cong., 1st Sess. App. 81 (1871).

45. Act of June 27, 1866, ch. 140, § 2, 14 Stat. 74, 75.

46. 42 U.S.C. § 1983 (emphasis added).



enforced by invoking § 1983,<sup>47</sup> but few appear to remember that authority for doing so may be traced to the Privileges or Immunities Clause.

#### IV. JUSTICE MILLER WAS NOT THE ENEMY

Few Supreme Court justices have been more savagely attacked than Justice Samuel Miller,<sup>48</sup> and few opinions have been subject to such prolonged criticism as Justice Miller's opinion in the *Slaughter-House Cases*.<sup>49</sup> The criticism looks good in hindsight; subsequent Supreme Court decisions rejected incorporation of the Bill of Rights into the Privileges or Immunities Clause, and *Slaughter-House* opened the door for those decisions. Casting blame in that manner, however, distracts from a more charitable view of the *Slaughter-House* framework which retains contemporary significance.<sup>50</sup>

Misunderstanding of *Slaughter-House* begins with a failure to appreciate the competing ideologies of the litigants in that case. John A. Campbell, who represented the plaintiffs, was a former U.S. Supreme Court Justice who shared responsibility for the *Dred Scott* decision as a member of that Court, and who resigned from that office to join the Confederacy.<sup>51</sup> He was also a disciple of John C. Calhoun.<sup>52</sup> Attorneys on the other side of the argument were followers of Daniel Webster, who had opposed secession and organized an army to support President Jackson's battle against nullification.<sup>53</sup> After reviewing this alignment of counsel, some may argue that the plaintiffs' attorneys were abandoning their historical ideological commitments by challenging state authority to regulate the butchers of New Orleans and advocating

47. See *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980) (explaining that § 1983 "was intended to provide a remedy to be broadly construed, against all forms of official violation of federally protected rights").

48. See, e.g., CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 55 (1997) (characterizing Justice Miller's opinion in *Slaughter-House* as "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court").

49. 83 U.S. 36 (1873).

50. For a more favorable view of Justice Miller's perspective in *Slaughter-House*, see MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* 201-10 (2003) (describing Justice Miller's background as a physician, his support for public health measures, and his support for the biracial government in Louisiana that enacted the *Slaughter-House* regulations).

51. See *id.* at 200; Michael Franklin, *The Foundations and Meaning of the Slaughter-House Cases*, 18 TUL. L. REV. 1, 88 (1943).

52. Franklin, *supra* note 51, at 88.

53. *Id.* at 52.

national oversight.<sup>54</sup> An alternative perspective suggests that Chief Justice Miller and others in the majority understood that the plaintiffs were attempting to promote individual property rights, and in that sense the plaintiffs' arguments remained in line with their prior commitment to the owners of slaves.<sup>55</sup> Calhoun's arguments for states' rights were based upon an assumption that South Carolina would retain the institution of slavery, and his conservative ideology had as much to do with preserving individual property rights as with restraining the national government.<sup>56</sup>

Ironically, one of the few cases subjected to as many academic attacks as *Slaughter-House* is *Lochner v. New York*.<sup>57</sup> The losing argument in *Slaughter-House* eventually prevailed in *Lochner*.<sup>58</sup> Justice Field's dissenting opinion in *Slaughter-House* cited at length to the views of Adam Smith.<sup>59</sup> Justices Bradley and Swayne were equally devoted to protecting property rights in their broadest form, with Justice Swayne arguing that "[p]roperty is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner."<sup>60</sup> The opinions of Justices Field, Bradley, and Swayne coincide with those of the Court majority in 1905, which concluded that freedom of contract principles should prevail over protective labor legislation.<sup>61</sup>

In contrast, Justice Miller's opinion in *Slaughter-House* took a decidedly cautious approach toward striking down state measures designed to protect public health. While there are phrases in his opinion which, with the benefit of hindsight, suggest an unduly limited scope for the Fourteenth Amendment,<sup>62</sup> the basic framework that he described for

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54. See, e.g., Aynes, *supra* note 5, at 657.

55. See Rich, *supra* note 23, at 179. In contemporary terms, it would be the same as an expectation that Justice Thomas, who grew up in South Carolina and appears to follow the ideology of Calhoun and his compatriots, would promote states' rights over those of the federal government and would also champion the rights of private property owners over regulatory authority of the states.

56. *Id.*

57. 198 U.S. 45 (1905).

58. See Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996).

59. *Slaughter-House Cases*, 83 U.S. 36, 110 n. 39 (1873) (Field, J., dissenting) (citing 1 ADAM SMITH, WEALTH OF NATIONS, ch. 10, part 2.).

60. *Id.* at 127 (Swayne, J., dissenting).

61. See *Lochner*, 198 U.S. at 64.

62. E.g., after describing the "pervading purpose" of the Civil War amendments to the Constitution, Justice Miller described discrimination against emancipated slaves as the "evil to be

interpreting the Privileges or Immunities Clause parallels major components of the approach described in this article.<sup>63</sup> Miller explicitly refers to both the navigation rights and the interstitial right to freedom of travel as examples of privileges or immunities.<sup>64</sup> He rejected a meaning that would have incorporated the writings of Adam Smith (or Herbert Spencer) into the Constitution, and history demonstrates the wisdom of that response.<sup>65</sup> Presumably, for those who pillory Justice Miller's opinion while also condemning the Supreme Court decision in *Lochner*,<sup>66</sup> the *Slaughter-House* dissenters surely do not offer much in the way of a positive alternative.<sup>67</sup>

A primary focus of Justice Miller's interpretation of the Privileges or Immunities Clause was his effort to dispel belief that *new* substantive rights were to be identified and defined by the courts, without having an independent basis in the Constitution or laws of the United States government.<sup>68</sup> Instead, the Clause protected those rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws."<sup>69</sup> The first example he gave was the case of *Crandall v. Nevada*,<sup>70</sup> a case from 1867 in which Justice Miller had established the right of United States citizens to travel freely from one state to another.<sup>71</sup> The right to travel falls within a more general category of rights derived from the "national character" of the government.<sup>72</sup>

Justice Miller illustrated a second category of protections embodied by the Privileges or Immunities Clause by reference to the "right to peaceably assemble and petition for redress of grievances" and the "privilege of the writ of *habeas corpus*," both of which were identified

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remedied" by the Equal Protection Clause, doubting whether other actions would "come within the purview" of that provision. *Slaughter-House Cases*, 83 U.S. at 81.

63. See *supra* notes 21-25 and accompanying text.

64. *Slaughter-House Cases*, 83 U.S. at 79.

65. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage law for women, and signaling the demise of *Lochner*).

66. See, e.g., CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, 140, 162 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (with chapters describing *Slaughter-House* as "disastrous" and *Lochner* as a "tragedy").

67. A more entrenched version of *Lochner* may have been even more difficult to reverse than the opinion that Justices Holmes and Harlan so effectively dissented from in 1905.

68. *Slaughter-House Cases*, 83 U.S. at 78 (noting that the Fourteenth Amendment did not transform the Supreme Court into a "perpetual censor upon all legislation of the States").

69. *Id.* at 79.

70. 73 U.S. 35 (1867).

71. *Id.* at 44.

72. *Slaughter-House Cases*, 83 U.S. at 79.

as "rights of the citizen guaranteed by the Federal Constitution."<sup>73</sup> With this language, Justice Miller incorporated individual rights which the text of the Constitution identified only in relation to Congress.<sup>74</sup> One may argue that he referred to the right of petition, rather than to other provisions embodied in the Bill of Rights, because of the drama associated with Samuel Hoar, which remained on the minds of those who understood the purpose of the Fourteenth Amendment.<sup>75</sup> Several authors have noted that Miller's reference to the right of petition is consistent with broader arguments for incorporation.<sup>76</sup> On balance, Professor David Bogen makes a stronger argument that Miller's reference to a "right to petition," although ambiguous, was intended only to limit state interference with the right to petition the national government;<sup>77</sup> that interpretation became manifest two years later with Chief Justice Waite's decision in *United States v. Cruikshank*.<sup>78</sup>

A final category of protections identified by Justice Miller was derived from federal *law*, and illustrated by reference to both navigation and treaty rights.<sup>79</sup> Again, the use of illustrations that were of central concern to Samuel Hoar seems more than merely coincidental.<sup>80</sup> More important than the specific context, however, was the embrace of laws derived from the powers assigned to Congress and the national government as a source of privileges or immunities.

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73. *Id.*

74. See David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 342 (2003).

75. See William J. Rich, *Lessons of Charleston Harbor: The Rise, Fall and Revival of Pro-Slavery Federalism*, 36 MCGEORGE L. REV. 569, 586 (2005).

76. See Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 683 (2000); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 750-51; Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1111-15 (2000). See also Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 183-84 (1999) ("It was only a series of later decisions that oddly attributed to Justice Miller's majority opinion in the *Slaughter-House Cases* the expulsion of the Bill of Rights from the privileges or immunities cathedral, an expulsion nowhere to be found on the face of the Miller opinion and indeed inconsistent with much of its language and logic.").

77. See Bogen, *supra* note 74, at 376-77 (concluding, after noting the ambiguity in the *Slaughter-House* text, that "Miller fully intended to repudiate any theory of incorporation").

78. 92 U.S. 542, 549 (1875) (citing *Slaughter-House* for a distinction between rights of state and national citizenship).

79. *Slaughter-House Cases*, 83 U.S. 36, 79-80 (1873).

80. See Rich, *supra* note 75, at 606-07.

Some have questioned the importance of this implied restatement of federal supremacy.<sup>81</sup> Justice Miller downplays the significance of this third category through his broad description of state police powers, which he viewed as outside of the ambit of federal privileges or immunities.<sup>82</sup> His relatively limited conception of federal power was consistent with the understanding of congressional authority in the late nineteenth century. Since that time, however, dimensions of federal power have expanded dramatically, as illustrated by contemporary interpretations of the Commerce Clause.<sup>83</sup>

Subsequent generations accepted the link that Justice Miller drew between the Privileges or Immunities Clause and the Supremacy Clause, beginning with congressional enactment of what we now know as 42 U.S.C. § 1983.<sup>84</sup> Thomas Cooley's 1880 treatise explained that the Privileges or Immunities Clause protected rights to participate in foreign or domestic commerce, benefits of postal laws, and navigation and travel rights because "over all of these subjects the jurisdiction of the United States extends, and they are covered by its laws."<sup>85</sup> A widely recognized article from 1918 by Professor D. O. McGovney explained that, to understand the Privileges or Immunities Clause, counsel must simply ask "what provision or text of Federal law creates or grants this alleged privilege or immunity."<sup>86</sup> More contemporary commentators reinforced this understanding, although doing so in disparaging terms, expressing the lack of any "independent function [of the Privileges or Immunities

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81. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1675 (Johnny H. Killian, George A. Costello & Kenneth R. Thomas eds., 2004) (stating that the *Slaughter-House Cases* reduced the Privileges or Immunities Clause to "a superfluous reiteration of a prohibition already operative against the states").

82. See *Slaughter-House Cases*, 83 U.S. at 77-78.

83. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the congressional power to regulate interstate commerce includes prohibiting local cultivation and use of marijuana); *Perez v. United States*, 402 U.S. 146 (1971) (holding that the portion of the Consumer Credit Protection Act prohibiting "loan sharking" activities is within Congress's power to control activities affecting interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress had ample basis upon which to find that racial discrimination at restaurants, which received from out of state a substantial portion of food served, had a direct and adverse effect on interstate commerce).

84. See *supra* notes 36-40 and accompanying text.

85. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 245 (1880).

86. McGovney, *supra* note 8, at 225. Prof. McGovney's article was recognized by the Association of American Law Schools in 1938 as part of a collection of essays considered to have "permanent value." SELECTED ESSAYS ON CONSTITUTIONAL LAW at v (Ass'n of Am. Law Schools ed. 1938).

Clause], except as an alternative to using the Supremacy Clause.”<sup>87</sup> Both the history leading up to the Civil War<sup>88</sup> and contemporary experience,<sup>89</sup> however, demonstrate the importance of this element of the framework described by Justice Miller.

#### IV. CONTEMPORARY IMPLICATIONS

The Supreme Court got it right when the justices decided in 1999 that the right of new state residents to enjoy the same privileges as those accorded to long term residents is derived from the Fourteenth Amendment Privileges or Immunities Clause.<sup>90</sup> Justice Stevens’ opinion for the Court cites Justice Miller’s *Slaughter-House* opinion as authority for that conclusion,<sup>91</sup> and by doing so revives the first component of the constitutional framework derived from that text.

Although the second segment of Justice Miller’s framework could have been expanded to incorporate provisions of the Bill of Rights,<sup>92</sup> conceptions of sovereignty accepted by Miller, and at least some of his colleagues,<sup>93</sup> constrained that development. The significance of that loss, however, should not be overstated.<sup>94</sup> The Incorporation Doctrine should now be treated as settled law; contemporary battles over that issue sustain interesting academic squabbles, but have little likelihood of changing judicial treatment of the rights of American citizens. Thus, although the second component of Justice Miller’s framework may not be linked to the Privileges or Immunities Clause, analogous protection extends from contemporary due process analysis. While perhaps unsatisfactory to constitutional purists, this solution meets the needs of those victimized by state abuse.

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87. Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 VAL. U. L. REV. 893, 917 (1997).

88. See Rich, *supra* note 75, at 578-99 (describing actions against black seamen, the Hoar affair, the nullification crisis, and secession, all representing challenges to national sovereignty).

89. See Rich, *supra* note 21, at 284-92 (describing Supreme Court decisions barring individual monetary relief from state violations of federal law).

90. See *Saenz v. Roe*, 526 U.S. 489, 502-03 (1999) (striking down limits on welfare assistance granted to new residents based upon their state of origin).

91. *Id.* at 503.

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

93. See *United States v. Cruikshank*, 92 U.S. 542, 549-50 (1875) (citing *Slaughter-House* for the proposition that national and state governments remained “distinct,” and noting that “[t]he powers which one possesses, the other does not”). Only Justice Clifford dissented from this opinion. *Id.* at 559-69.

94. See Bogen, *supra* note 74, at 392-93 (concluding that the recognition of substantive due process and incorporation of the Bill of Rights through the Due Process Clause protects fundamental rights and remains consistent with the framers’ intent).

It is the third component of the *Slaughter-House* framework which appears to have been lost in the shadow of recent ideological battles within the Supreme Court. In a series of opinions, five Supreme Court justices decided that rights derived from federal law stemming from congressional exercise of its power pursuant to Article I, Section 8 of the Constitution are constrained by the Eleventh Amendment.<sup>95</sup> Those justices substitute their own conventional wisdom for the actual text and history of the Eleventh Amendment and for the conceptions of sovereignty existing at the time the Eleventh Amendment was promulgated.<sup>96</sup> They concede the fact that the Due Process and Equal Protection provisions of the Fourteenth Amendment override the Eleventh Amendment,<sup>97</sup> but then circumscribe congressional authority to interpret those clauses. To date, they have totally ignored the Privileges or Immunities Clause.<sup>98</sup>

The result of recent Supreme Court decisions limiting congressional authority to abrogate the Eleventh Amendment is a fundamentally incoherent conception of federalism generally, and of the Privileges or Immunities Clause in particular. The Supreme Court interpretation of the Eleventh Amendment is at odds with conceptions of sovereignty that gave rise to the language in that text.<sup>99</sup> In more particular terms, the justices acknowledge that language in 42 U.S.C. §

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95. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (barring private parties from bringing complaints against state agencies to the Federal Maritime Commission); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (finding that the Eleventh Amendment barred private enforcement of the Americans With Disabilities Act against states); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (finding Congress could not abrogate the Eleventh Amendment when it authorized private enforcement of the Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that states are immune from enforcement of the Fair Labor Standards Act in state court); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (holding that patent rights could not be enforced against states); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (finding that the Commerce Clause did not give Congress authority to abrogate the Eleventh Amendment).

96. See Rich, *supra* note 75, at 575-77 (noting that the Eleventh Amendment incorporated a conception of separate state and federal sovereignty, and that contemporary conceptions of state sovereign immunity in the context of legitimate federal power may be traced to nineteenth century states' rights advocacy aimed at preserving slavery).

97. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

98. See *id.* at 374 (concluding that the scope of the Equal Protection Clause did not encompass rights protected by the Americans with Disabilities Act).

99. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 24 (1989) (Stevens, J., concurring) (noting that "numerous scholars have exhaustively and conclusively refuted the contention that the Eleventh Amendment embodies a general grant of sovereign immunity to the States").

1983 provides for enforcement of federal statutes,<sup>100</sup> but have never addressed the relationship between § 1983's language and the Privileges or Immunities Clause.<sup>101</sup> By ignoring this relationship, the Court is left with untenable conclusions, such as the decision that states may freely violate federal patent law with impunity.<sup>102</sup> Bankruptcy law has become similarly twisted in order to avoid the unworkable implication that states are immune from judgments deriving their authority from federal statutes.<sup>103</sup>

Why is this so important? In a broader context, scholars categorize rights in both "negative" and "positive" terms.<sup>104</sup> Negative rights impose constraints on government, and, to the regret of some,<sup>105</sup> the Bill of Rights, the Due Process Clause and the Equal Protection Clause have all been limited to that category.<sup>106</sup> Those who believe in the importance of positive rights,<sup>107</sup> however, may see the Privileges or Immunities Clause as a repository of such rights.<sup>108</sup> By their nature, positive rights lend themselves to legislative control, and, properly understood, the Privileges or Immunities Clause recognizes such congressional action.<sup>109</sup> Authority to establish positive rights that states must adhere to or face

100. *See, e.g.,* *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 112-13 (1989) (accepting the National Labor Relations Act as an example of "rights, privileges or immunities" protected by § 1983).

101. *See* Rich, *supra* note 21, at 298. As noted by David Bogen, this argument may not be persuasive to those current justices who refuse to acknowledge that the original grant of federal power in Article I of the Constitution was limited by the principle of state sovereignty. *See* Bogen, *supra* note 74, at 362-63. For those justices who have consistently objected to decisions constraining congressional authority to abrogate the Eleventh Amendment, however, this argument stands as further support for their dissenting opinions.

102. *See* *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (concluding that the Patent Clause could not be relied upon to abrogate the Eleventh Amendment).

103. *See* *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (concluding, by a 5-4 vote, that states are not immune from bankruptcy court orders).

104. *See* Rich, *supra* note 23, at 210-11.

105. *See, e.g.,* ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 105-51 (1994).

106. *See* Rich, *supra* note 23, at 211.

107. *See, e.g.,* MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 111-61 (2000) (arguing that the state in a good society must ensure fundamental human capabilities); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 124-28 (1996) (arguing that states must ensure some minimal level of basic goods); WEST, *supra* note 105.

108. *See* Rich, *supra* note 23, at 210-19.

109. It should be understood that this reference to "positive rights" is limited to rights identified by Congress and consistent with Article I limits on congressional power. Furthermore, the only additional authority flowing from the Privileges or Immunities Clause is the power to stop state abridgement of these rights.



consequential damages should follow from contemporary recognition of the Privileges or Immunities Clause.<sup>110</sup>

In practical terms, this means that Congress should have authority to protect state workers from age discrimination or from discrimination based upon disabilities by abrogating state immunity from such actions.<sup>111</sup> It also means that the door should be reopened for enforcement of fair labor standards against state employers,<sup>112</sup> and calls for elimination of the unworkable proposition that Congress lacks power to provide for enforcement of patent rights against state governments.<sup>113</sup> All responsibilities assigned to Congress under Article I of the Constitution should once again include the power to ensure state compliance with federal law.<sup>114</sup>

## V. CONCLUSION

Returning to the question of what the framers of the Fourteenth Amendment could have been thinking when they chose the phrase “privileges or immunities,”<sup>115</sup> a transparent purpose emerges. They cared about incorporation of the Bill of Rights, but that was only one element of their quest. They cared about rights derived from the national character of the government, and assuring supremacy of statutory rights also had major significance at that point in history.

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110. Ironically, the *Slaughter-House Cases* have been blamed for leading the courts down a path towards exclusive recognition of “negative” (rather than “positive”) rights. See Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 409-13 (1990). Adding to the irony, one element of the critique of negative rights is that it places undue emphasis upon private property rights to the exclusion of rights of personal well being. See Mary E. Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”*: A Bicentennial Perspective, 59 U. CHI. L. REV. 453, 457 (1992). As explained above, Justice Miller’s *Slaughter-House* opinion was most notable at the time it was issued for its rejection of claims to extensive private property rights. See *supra* notes 57-67 and accompanying text.

111. Reversing conclusions reached by the United States Supreme Court include *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (blocking right to recover monetary damages for violation of the Age Discrimination in Employment Act) and *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (barring monetary damages against states for violations of the Americans with Disabilities Act).

112. See *Alden v. Maine*, 527 U.S. 706 (1999) (holding that the principle of state sovereign immunity limited enforcement of the Fair Labor Standards Act in both state and federal courts).

113. See *supra* note 102 and accompanying text.

114. This conclusion restores the plurality conclusion reached by the Supreme Court when it addressed the question of congressional power to abrogate the Eleventh Amendment in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

115. This phrase was used instead of a more easily defined alternative for the Fourteenth Amendment’s source of substantive rights.

"Privileges or immunities of citizens of the United States" embraced all of these sources of law. This conclusion is consistent with Congressman Bingham's assurance at the time that the central purpose of this provision was simply to "bear true allegiance to the Constitution and laws of the United States."<sup>116</sup> It is also consistent with Justice Miller's understanding that "privileges" and "immunities" include "nearly every civil right for the establishment and protection of which organized government is instituted,"<sup>117</sup> but only those aspects that fall within the scope of federal authority are protected by the Fourteenth Amendment.<sup>118</sup>

It is time to breathe new life into the historical narrative that accompanies our understanding of the Fourteenth Amendment. To do so requires reconsideration of Justice Miller's *Slaughter-House* opinion and resuscitation of the missing piece of the framework established by that opinion. Restoration of federal statutory rights will result.

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

117. *Slaughter-House Cases*, 83 U.S. 36, 76 (1873).

118. *Id.* at 78.

