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Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity

BY WILLIAM J. RICH*

When Congress acts pursuant to its legitimate authority to establish rights, privileges or immunities for United States citizens, no state should be allowed to abridge those rights. The Fourteenth Amendment not only established protection for fundamental rights, it also changed federal and state relationships in order to protect future generations from state interference with privileges or immunities established by either the Constitution or laws of the national government. Whenever it was asked the question, the Supreme Court ruled that the Privileges or Immunities Clause protects rights established by federal law. In recent years, however, lawyers have forgotten to repeat that question. In decisions protecting state sovereign immunity under the Eleventh Amendment, Supreme Court Justices appear to have forgotten the answer.¹

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1. See *Board of Trustees of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Critics have harshly attacked the Court's recent extensions of the Eleventh Amendment. See, e.g., John P. LaVelle, *Sactioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe*, 31 ARIZ. ST. L.J. 786 (1999) (attacking anti-tribal judicial activism); Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1351 (2000) (finding that the Supreme Court's conception of state sovereignty fails to adequately assure the supremacy of federal law); James G. Wilson, *The Eleventh Amendment Cases: Going "Too Far" with Judicial Neofederalism*, 33 LOY. L.A. REV. 1687 (labeling the Supreme Court's recent Eleventh Amendment decisions as "some

The Supreme Court's assault on federal power began with its decision in *Seminole Tribe of Florida v. Florida*² holding that the Supremacy Clause of the Constitution did not empower Congress to abrogate the Eleventh Amendment. In 1999 and 2000, that holding was broadened to limit enforcement of federal laws protecting patent rights,³ the Fair Labor Standards Act,⁴ the Age Discrimination in Employment Act,⁵ and the Americans with Disabilities Act.⁶ The three most recent cases involve individual claims for what could be characterized as "privileges or immunities of citizens of the United States."⁷ In these cases, however, the clause of the Fourteenth Amendment on which such claims should be based was ignored; judges, litigants and scholars no longer recognize its most obvious meaning.

Throughout the Twentieth Century, the Fourteenth Amendment's Privileges or Immunities Clause stood as a monument to all that it seemed to promise and failed to deliver. Within the Supreme Court, arguments that privileges or immunities included a broad range of fundamental rights, including but not limited to those identified by the Bill of Rights, ended almost as soon as they began. As frequently noted by commentators, the *Slaughter-House Cases*⁸

of its worst in decades" for improperly "diluting the constitutional and federal statutory rights of millions of people"); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999) (arguing against expanded federalism and demonstrating that courts are using federalism doctrine for political or ideological reasons); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000) (explaining that the Supreme Court's Eleventh Amendment decisions cause harm while failing to promote any coherent conception of state autonomy). Most of these critics have focused upon the Eleventh Amendment itself, noting the harm caused by the Court's doctrine that lacks either textual support or internal coherence. This article shifts the focus away from the direct assault on Eleventh Amendment doctrine to a reexamination of the Fourteenth Amendment. Virtually all participants in the debate agree that the Fourteenth Amendment overrides the Eleventh Amendment. This article builds upon that agreement to demonstrate that, at least as to those federal laws that establish "privileges or immunities," the Court's Eleventh Amendment decisions are demonstrably wrong.

2. 517 U.S. 44, 76 (1996).

3. See *Florida Prepaid*, 527 U.S. at 627.

4. See *Alden*, 527 U.S. at 706.

5. See *Kimel*, 528 U.S. at 62.

6. See *Garrett*, 121 S. Ct. at 955.

7. U.S. CONST. amend. XIV, § 1.

8. 83 U.S. 36 (1873) (denying claim that the Privileges or Immunities Clause protected inherent business rights of butchers in New Orleans who objected to law requiring them to move their operations to a single slaughter-house).

had the effect of making the Clause “practically a dead letter.”⁹

Most discussions about the Privileges or Immunities Clause that have taken place since 1872 have focused either directly or indirectly on questions about which, if any, inherent fundamental rights should receive protection.¹⁰ Blinded by this debate, most writers have ignored alternative roles for the Privileges or Immunities Clause. In particular, they have generally failed to consider implications of the majority decision in the *Slaughter-House Cases* for debates about the role of Congress in protecting individuals from the action of states. A typical dismissive reference was to the effect that, “[u]nder *Slaughter-House*, the Privileges or Immunities Clause has no independent

9. Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 144 (1949). See also THE CONSTITUTION OF THE UNITED STATES 965 (E. Corwin, ed. 1964) (explaining that the Privileges or Immunities Clause “enjoys the distinction of having been rendered a ‘practical nullity’ by a single decision of the Supreme Court rendered within five years after its ratification”); Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L. & PUB. POL’Y 71, 73 (1989) (noting that the *Slaughter-House Cases* “ruthlessly eviscerated the Clause of practically all operative meaning”); Aviam Soifer, *Protecting Posterity*, 7 NOVA L. REV. 553, 557 (1982) (finding that the Supreme Court “narrowed this protection . . . to redundancy and oblivion”). The only time prior to 1999 when a Supreme Court majority relied on the Privileges or Immunities Clause of the Fourteenth Amendment to invalidate a state law was in *Colgate v. Harvey*, 296 U.S. 404 (1935) (striking down a state tax provision). The interpretation of the Clause adopted in that case was subsequently rejected in *Madden v. Kentucky*, 309 U.S. 83, 93 (1940).

Scholars continue to debate whether the *Slaughter-House Cases* accurately reflected framers’ intent. Compare Philip B. Kurland, *The Privileges or Immunities Clause: ‘Its Hour Come Round At Last?’* 1972 WASH.U.L.Q. 405; JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* (1980); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193 (1992); and MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* (1986); with scholars who defend a more restrictive interpretation including Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989). Robert Bork found the meaning of the Clause so uncertain that he would dismiss it entirely. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990). For the view that intent of framers of the Privileges or Immunities Clause is inherently indeterminate, see Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U. L. REV. 142 (1984).

10. In a recent and comprehensive discussion of the incorporation debate, Akhil Amar argues that various references to “privileges” or “immunities” made in the years leading up to promulgation of the Fourteenth Amendment “all were understood to encompass, among other things, the protections of the federal Bill of Rights.” AKHIL AMAR, *THE BILL OF RIGHTS* 167-68 (1998). But see Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause: Michael Perry’s Justification for Judicial Activism or Robert Bork’s Constitutional Inkblot*, 10 SETON HALL CONST. L. J. 321 (2000) (arguing that a constitution-amending majority would not have subscribed to a broad theory of incorporation).

function, except as an alternative to using the Supremacy Clause.”¹¹ In the contemporary context, however, this statement assumes new dimensions; with the Court’s rulings that the Eleventh Amendment constricted the Supremacy Clause, the value of an alternative to that Clause now seems clear.

The thesis developed in the following pages is that the Privileges or Immunities Clause authorizes Congress to abrogate states’ sovereign immunity under the Eleventh Amendment when acting to enforce individual rights that Congress has been otherwise authorized to protect.¹² This proposition will be developed by tracing the meaning of the phrase “privileges or immunities” through debates, judicial opinions, and legislative action. It will begin by describing references to this language made throughout the antebellum era. Whether appearing as an element of constitutional analysis or in contracts or treaties, all of those references are consistent with the argument that generally applicable statutes are a likely source of privileges or immunities. The context in which the Fourteenth Amendment was promulgated and the statutes adopted to enforce that Amendment underscore this conclusion.

The most direct and authoritative evidence that federal statutory rights were protected by the Fourteenth Amendment’s Privileges or Immunities Clause comes from the Supreme Court, both in its earliest interpretations of the clause and in its contemporary interpretation of statutes that use these terms. The second major section of this article will review those opinions. For all of the weaknesses of the *Slaughter-House Cases*, Justice Miller’s opinion for the Court in that case did establish that privileges or immunities could be derived from federal statutes. Subsequent Supreme Court decisions reinforced this conclusion; in some contexts, federal statutes were essential to proving that individual rights owed their existence to the federal government.¹³ In other cases the Court has explicitly ruled that the

11. 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) (citing EDWARD CORWIN, *THE CONSTITUTION OF THE UNITED STATES* 965 (1953); David Currie, *The Constitution in the Supreme Court: Limitations on State Power 1865-1873*, 51 U. CHI. L. REV. 329, 348 (1983)).

12. The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

13. *Compare* United States v. Cruikshank, 92 U.S. 542 (1875) (concluding that a general right of assembly was not a right, privilege, or immunity of national citizenship) with *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939) (finding that assembly to

statute originally designed to enforce the Privileges or Immunities Clause protects federal statutory rights.¹⁴

As demonstrated in the final section of this article, recent Supreme Court decisions that bar congressional abrogation of the Eleventh Amendment clash with the change in federalism that accompanied ratification of the Civil War Amendments to the Constitution. Serious application of the *Slaughter-House Cases*' majority opinion and the cases that followed supports a conclusion that Supreme Court decisions blocking enforcement of federal patent rights,¹⁵ the Fair Labor Standards Act,¹⁶ or the Age Discrimination in Employment Act¹⁷ should be reversed. Furthermore, the Supreme Court should not have rejected claims for monetary damages by disabled citizens of the United States who seek equal access to state government services and employment relationships.¹⁸ The Americans with Disabilities Act established the privileges or immunities of those citizens.

I. Background to a Search for the Meaning of Privileges or Immunities

To understand the meaning that had been given to the phrase "privileges or immunities" during the period preceding ratification of the Fourteenth Amendment, it is helpful to examine two broad questions. First, where had that language appeared in prior legal texts and how was it being used? Second, what does the context in which the Fourteenth Amendment was framed reveal about the meaning of those terms? The discussion that follows offers answers to these questions.

A review of these issues shows that, although frequent references were made to rights, privileges, and immunities, precise meaning of such terms was rarely discussed. The context in which the words were used, however, adds substantially to the focused commentary on the

protect rights established by the National Labor Relations Act was a protected privilege or immunity). For discussion, see *infra* text accompanying notes 173-182.

14. See, e.g., *Main v. Thiboutot*, 488 U.S. 1 (1980) (construing 42 U.S.C. § 1983 to protect federal statutory rights). See generally *infra* text accompanying notes 205-227.

15. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

16. See *Alden v. Maine*, 527 U.S. 706 (1999).

17. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

18. See *Board of Trustees of Univ. of Ala. v. Garrett*, 121 S.Ct. 955 (2001).

case of *Corfield v. Coryell*,¹⁹ which is so often used as a solitary guide. The context in which the Civil War Amendments were framed also helps to explain why the phrase "privileges or immunities" was used in the Fourteenth Amendment. Both of these discussions add to the evidence that federal statutes should be recognized as a source for such rights.

A. Early History

Several purposes will be served by reviewing references to "privileges" and "immunities" that preceded ratification of the Fourteenth Amendment. This review will illustrate the frequency of these references; by 1869 the concept was neither new nor exotic. It will also illustrate, both directly and by implication, that privileges or immunities included a broad range of legal interests at least some of which were based upon statutes. Finally, it will illustrate an underlying theme of nondiscrimination: an assurance that those entitled to the privileges and immunities of citizens will have equal opportunities to claim the protection of the law.

Lawyers and lawmakers commonly referred to privileges and immunities long before the framing of the Fourteenth Amendment. American colonists sought the "essential Rights, Liberties, Privileges and Immunities of the People of Great Britain" in the years leading up to the Revolutionary War.²⁰ The various terms were used interchangeably with no apparent concern for separate identification or definition. Claims to the "rights, liberties and immunities of free" English subjects were made by the First Continental Congress.²¹ Article IV of the Articles of Confederation protected "all privileges and immunities of free citizens of the several states" including "free ingress and regress" as well as "all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."²²

Participants in the Constitutional Convention drew from these sources when they chose the language used for Article IV, Section 2, Clause 1 of the Constitution: "The Citizens of each State shall be

19. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) (finding that collecting oysters was not a privilege or immunity protected by Article IV, Section 2 of the United States Constitution).

20. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 64 (1986) (quoting the Massachusetts assembly).

21. *Id.* at 65.

22. *Id.*

entitled to all Privileges and Immunities of Citizens in the several States.” Despite the frequent references, however, its difficult to add much insight into the meaning ascribed to these terms. Madison’s *Notes from the Constitutional Convention* record agreement to the Clause without discussion.²³ In the only reference to privileges and immunities contained in the *Federalist Papers*, Alexander Hamilton addressed issues of equality, referring to the Clause as what may be “esteemed the basis of the Union.” He then explained:

[I]f it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority* it will follow that in order to [assure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.²⁴

The only recorded federal case in the first half of the Nineteenth Century that devoted a full page to discussing the meaning of privileges and immunities was *Corfield v. Coryell*.²⁵ Given the paucity of alternative resources, *Corfield* became the most common measure of those terms. In that case, Justice Washington, acting as circuit judge, ruled that New Jersey magistrates and constables could lawfully seize a boat without becoming liable for trespass when that boat was owned by a person from another state and was being used to illegally gather oysters within New Jersey waters.²⁶

Corfield is commonly thought to stand for the proposition that New Jersey was entitled to limit gathering of oysters to its own citizens because oysters were part of the common property of the state, therefore effectively owned by state citizens and subject to their exclusive use. After asking whether citizens from other states had a right to gather New Jersey oysters, Justice Washington concluded that “it would . . . be going quite too far to construe the grant of privileges

23. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 545(ed. 1966).

24. THE FEDERALIST NO. 80 (Alexander Hamilton).

25. 6 F. Cas. at 551-52.

26. It should be noted that the privileges and immunities issue in the case had little to do with Justice Washington’s final judgment. In the concluding section of his opinion, Washington found that the owner of the boat in such circumstances had no right to bring a trespass action when the boat had been leased to another individual who was using it at the time of seizure. *See id.* at 555. The person who was actually using the boat at the time had “escaped under an apprehension of being sued by a person living at Leesburg, to whom he was indebted.” *Id.* at 547. The case was therefore dismissed on jurisdictional grounds, which had nothing to do with privileges and immunities; Justice Washington’s discussion of that issue was nothing more than dictum.

and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the state, to the citizens of all the other states."²⁷

Actually, however, the New Jersey laws were not nearly as discriminatory as Justice Washington's opinion implied. At the time *Corfield's* boat was seized, everyone was barred from raking for oysters whether or not they were New Jersey residents. The key distinction between residents and non-residents was that the boats of the latter could be seized and sold; this distinction could be easily understood in the context in which maintaining jurisdiction over non-residents for purposes of exacting fines or penalties other than seizure would have been difficult. The holding in *Corfield* merely upheld this statutory scheme.

Justice Washington made clear in his opinion that the Privileges and Immunities Clause of Article IV did not require absolute equality of citizens and non-citizens. A state could have ownership interests that inured to the benefit of its residents, and only when state regulations addressed interests "which [were], in their nature, fundamental" did the Privileges and Immunities Clause attach.²⁸ But Justice Washington's account of such interests was far from illuminating. It included "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,"²⁹ but subjected these rights to "such restraints as the government may justly prescribe for the general good of the whole."³⁰ Washington also identified the right to pursue a trade or profession, to be protected by habeas corpus, and to be exempt "from higher taxes or impositions than are paid by the other citizens of the state."³¹ In reaching these conclusions, he rejected the proposition that "citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens."³²

Much of the difficulty in construing Justice Washington's opinion results from subsequent attempts to apply references made in a common law era and at a time when principles of natural law were

27. *Id.* at 552.

28. *Id.* at 551.

29. *Id.* at 551-52.

30. *Id.* at 552.

31. *Id.*

32. *Id.*

more readily accepted. In contemporary parlance, Washington's opinion left room for two alternative conceptions of the rights that he embraced. By denoting his approach as a search for "fundamental" rights, distinct from rights which are exclusively those of state citizens and presumably less fundamental, his opinion can be cited as an argument for a "natural rights" view of privileges and immunities.³³ This natural rights element of the case became a lightning rod for subsequent arguments over the scope of the concept of privileges and immunities, and was subsequently rejected by the courts.³⁴

A second element of Justice Washington's opinion, based upon a principle of equal treatment, has been less controversial and has received correspondingly less attention. Washington's opinion can be understood as a search for those rights that should be shared equally, without additional reference to their nature or importance. Building from this premise, the term "fundamental" can be understood as a reference to rights that are basic and held by all, as distinguished from rights enjoyed by a select segment of the society or reserved only to those with unique citizenship status. Although the oblique reference to natural rights called for speculation regarding the inherent substantive rights that all states must protect regardless of legislative action, the emphasis on equality allowed for more concrete application and less speculative judicial decision-making. In a world in which statutes and constitutions have generally replaced common law and natural rights, it is easier to understand that judges have the role of deciding which of the rights and privileges extended to state citizens must also be extended to citizens of other states. In this context, judges need not decide whether state citizens have inherent rights regardless of state recognition. Based upon this generally prevailing interpretation, the role of the judge is not to conjure "fundamental rights," but rather to assure equal application of recognized privileges and immunities to outsiders. For example, courts are not asked to determine whether or not states should be allowed to tax. Instead, the central question is whether state taxes and regulations apply in a fair and non-discriminatory manner to citizens both inside and outside of the forum state. State government may prescribe restraints "for the general good of the whole",³⁵ by

33. See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 24 (1988).

34. See *Slaughter-House Cases*, 83 U.S. at 78; *Downham v. Alexandria*, 77 U.S. 173 (1869); *Paul v. Virginia*, 75 U.S. 168 (1869).

35. *Corfield*, 6 Fed. Cas. at 552.

implication, they are barred only when those restraints discriminate unfairly against non-residents.

This is not to say that courts could apply the Privileges and Immunities Clause of Article IV, Section 2, without making substantive judgments. As with all procedural issues, there continues to be an underlying need to identify those cases to which equal treatment of non-residents should apply. That inquiry, however, need not be seen as an open-ended search for substantive rights.³⁶

At the time when the Fourteenth Amendment was promulgated, the judicial record supporting the view that the Privileges and Immunities Clause of Article IV protected inherent fundamental rights did not extend far beyond the limited references described above. More extensive support existed for the alternative, albeit complementary view that, at a minimum, protection of privileges or immunities implied a right to invoke a substantial range of existing statutory or common law protections in order to assure equality of treatment. In case after case, whether the phrase "privileges and immunities" appeared in Article IV of the Constitution or in treaties, statutes or contracts, its meaning included some measure of equal application of existing law. For example, the clause in Article I, Section 8, of the Constitution declaring that "all duties, imposts, and excises, shall be uniform throughout the United States" had been interpreted by the Supreme Court as:

a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one State over those of another. . . . [T]hese privileges and immunities, whatever they may be in the judgment of congress, shall be common and equal in all the ports of the several States.³⁷

In other words, privileges or immunities of United States citizens were to be established by national legislation.

A handful of cases illustrate how the Privileges and Immunities Clause of Article IV was commonly used to equalize statutory rights. In *Wheaton v. Peters*,³⁸ counsel argued:

The constitution, by this provision, designed to make, and does in fact make us one nation, living under the same laws. It is

36. The experience of the Supreme Court when it rejected privileges or immunities protection in the *Slaughter-House Cases* illustrates this distinction. See *infra* at text accompanying notes 115-143.

37. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 435 (1855) (concluding that Congress had power to authorize continued use of a bridge that courts previously found to have impeded navigation).

38. 33 U.S. 591 (1834) (addressing copyright claims of publishers of the U.S. Reports).

designed to give to all the citizens of the United States . . . the benefit of all the laws of all the states, and the privileges conferred by them. Under this provision, a citizen of New York has all the privileges of the laws of Pennsylvania whatever they may be.³⁹

In an 1858 circuit court decision, the court rejected the proposition that a river could be “made a highway only for citizens of Pennsylvania.”⁴⁰ The circuit court explained that, pursuant to Article IV, Section 2 of the Constitution:

The complainants have a right to hold land in Pennsylvania, to erect mills and use the public highways by land or water, as freely as citizens of Pennsylvania, and have, moreover, a right to sue a citizen of Pennsylvania, or a corporation, the members of which are presumed to be citizens of Pennsylvania, in this court.⁴¹

In a Supreme Court decision interpreting the Privileges and Immunities Clause of Article IV during the same time period as Fourteenth Amendment ratification debates, the Court emphasized “the object of the clause . . . to place the citizens of each State upon the same footing with citizens of other States.”⁴² The Court concluded that corporations were not included within the term citizens, and that out-of-state insurance companies were therefore not entitled to protection from Article IV.⁴³ Justice Field’s rationale was that the advantages of corporate status achieved in one state should not be automatically recognized and protected in all other states. As he explained: “The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created.”⁴⁴ As a result, Justice Field concluded that special privileges flowing from corporate status were not transferrable from one state to another. In the same opinion the Court concluded that insurance contracts were not “articles of commerce” and that discrimination against foreign insurance companies did not interfere with congressional authority under the Commerce Clause. Language in Justice Field’s opinion was generally viewed as having limited the scope of privileges and immunities to those legal and constitutional

39. *Id.* at 606.

40. *Mason v. Boom Co.*, 16 F. Cas. 1012, 1013 (W.D. Penn. 1858) (No. 9,232).

41. *Id.*

42. *Paul v. Virginia*, 75 U.S. 168, 180 (1868).

43. *Id.* at 183.

44. *Id.* at 181.

rights accorded by the state of sojourn.⁴⁵

Other contexts further illustrate how the concept of privileges and immunities was understood. In 1828, the Supreme Court was asked to review salvage claims that had been litigated in the territorial courts of Florida. To reach that issue, Chief Justice Marshall construed the 1819 treaty by which Spain ceded the territory of Florida to the United States, assuring Florida residents "the enjoyment of the privileges, rights and immunities of the citizens of the United States."⁴⁶ But, that clause did not give the Florida inhabitants any rights to participate in political institutions or activities. As a result, Chief Justice Marshall concluded that admiralty claims involving those Florida residents could be resolved by courts which lacked Article III stature. Political rights were thus distinguished from other rights that arose under the Constitution and laws of the United States. Chief Justice Marshall's opinion did not specifically address the issue, but allowed for the implication that the phrase privileges and immunities referred to assurances of non-discrimination as to general statutory provisions enacted by Congress. It distinguished generally applicable legislation from that which only pertained to members of the political community of the state.

In *United States v. Webster*,⁴⁷ the district court considered whether a quartermaster should be paid for unusual services rendered. In concluding that repayment would not be ordered when the services at issue were not payable pursuant to either statute or usages and custom, the Court referred to the latter as a source for definition of privileges and immunities.⁴⁸

In numerous other cases, the phrase "privileges and immunities" appeared as virtual boiler-plate. In most instances, the message appeared clear: parties to a contract or agreement would be protected by the same laws or rules that protect the general population. For example, the phrase often appeared in admiralty cases. In one such case, the relationship between a ship's officer and a seaman was contrasted with that of parent and child or master and apprentice on grounds that seamen were "entitled to the privileges and immunities of citizens in all respects other than in their qualified subjection to the

45. See CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW § 9.18 (1st ed. 1969).

46. *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 542 (1828).

47. 28 F. Cas. 509 (D. Me. 1840) (No. 16,657).

48. See *id.* at 516.

discipline on ship-board.”⁴⁹ Based on that distinction, the district court concluded that a ship’s master was liable for damages when he ordered flogging without hearing the seaman’s reason for disobeying an order.

In *Smith v. Hunter*,⁵⁰ the Supreme Court discussed the tax status of land granted by Congress for formation of Miami University of Ohio. Although the Court concluded that it lacked jurisdiction to hear the case, it noted that terms of incorporation for the University protected “all the privileges and immunities granted to the lessees of the university by the several acts and laws of the State.” This phrase was typical of the routine language used at the time to assure the entity whose rights were protected that it would not be discriminated against by the state. Significantly, the phrase “privileges and immunities” was consistently used as a reference to statutes having general application.

Yet, the most striking feature of the pre-Civil War record is the extent to which references to privileges and immunities chronicled the sordid history of slavery. Most notorious was the case in which the Supreme Court asked whether Dred Scott,

whose ancestors were imported into this country, and sold as slaves, [c]ould become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen.⁵¹

The Court concluded that Scott was not entitled to those rights and therefore could not be made free as a matter of federal law. The extremes to which the sinister meaning of *Dred Scott* could be carried were illustrated in subsequent decisions by the Mississippi Supreme Court, holding that all African-Americans, whether slave or free, were “infidels” and “articles of merchandise,” therefore incapable of becoming residents of the state or inheriting property.⁵²

In the case of *The Amistad*, the Court examined “the privileges,

49. *Sheridan v. Furbur*, 21 F. Cas. 1266, 1268 (S.D.N.Y. 1834) (No. 12,761).

50. 48 U.S. 738, 741 (1849).

51. *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1856).

52. *Heirn v. Bridault*, 37 Miss. 209, 224-26 (1859). See also *Mitchell v. Wells*, 37 Miss. 235 (1859). Such racist attitudes were not confined to the southern states. A Connecticut statute barred out-of-state African-Americans from attending unincorporated Connecticut schools. The Connecticut Supreme Court avoided questions about whether that statute violated the Privileges and Immunities Clause of Article IV by narrowly construing the statute so that it did not apply to the defendants who had been charged with violating the law. See *Crandall v. Connecticut*, 10 Conn. 339 (1834).

and immunities, and rights belonging to bona fide subjects of Spain, under our treaties or laws"⁵³ The Court concluded that free Africans aboard the ship were entitled to as much respect as Spanish subjects. In *Dred Scott*, privileges and immunities were synonymous with those fundamental liberty interests protected by the Constitution and federal law establishing freedom from slavery. In *The Amistad*, the context of the reference makes it clear that privileges and immunities had been created by the treaties and laws enacted by Congress.

State law also became the point of reference for determining the legal status of former slaves or their captors. In one example, slavery was reduced to claims of a contract for service. "The presumption of freedom attaches to every resident of a free state, without regard to color; and, on the same principle in a slave state, every colored man is presumed to be a slave."⁵⁴ The Privileges and Immunities Clause of Article IV was cited as a basis for federal authority to enforce this presumption.⁵⁵ In *United States v. Scott*, the district court noted that when the Constitution was ratified, Massachusetts forced all African-Americans from other states who lacked a certificate of citizenship to be imprisoned by hard labor, punished by whipping and ordered out of the state.⁵⁶ The exception for those who had a certificate of citizenship was explained by reference to the Privileges and Immunities Clause of Article IV.⁵⁷

In yet another case, a circuit court cited the Second Amendment right to bear arms, in combination with the Privileges or Immunities Clause, to provide justification for a New Jersey slave owner who entered Pennsylvania and used force to claim an alleged fugitive slave.⁵⁸ The court described the slave owner "[a]s the owner of property, which he had a perfect right to possess, protect, and take away; as a citizen of a sister state, entitled to all the privileges and immunities of citizens of any other states"⁵⁹ In *Costin v.*

53. 40 U.S. 518, 595 (1841) (freeing slaves who had revolted while being transported to Cuba).

54. *Miller v. McQuerry*, 17 F. Cas. 335, 340 (D. Ohio 1853) (No. 9,583).

55. *See id.* at 338.

56. 27 F. Cas. 990, 995 (D. Mass. 1851) (No. 16,240). Note, the *Scott* case also upheld a congressional act which "commandeered" state officials by ordering them to assist in the seizure of fugitive slaves. *Id. Cf. Printz v. United States*, 521 U.S. 898 (1997).

57. *See Scott*, 27 F. Cas. at 995.

58. *See Johnson v. Tompkins*, 13 F. Cas. 840, 850 (E.D. Pa. 1833) (No. 17,416).

59. *Id.* at 855.

Washington,⁶⁰ the D.C. Circuit Court found that the Constitution did not guarantee "equal rights to all citizens of the United States, in the several states." The Court emphasized the limited scope of Article IV, noting that "[a] citizen of one state coming into another state, can claim only those privileges and immunities which belong to citizens of the latter state."⁶¹ Based on this distinction, the Court leapt to the conclusion that laws imposing constraints and penalties on all "persons of color" would not violate the Constitution.⁶² This case and others like it from the antebellum period demonstrate that slavery and racism had been frequently intertwined with the concept of privileges and immunities; it was the instrument by which the authority of slave owners was enforced and the rights of slaves were denied.

Prior to 1869, references to privileges and immunities fell short of establishing a single, coherent meaning for that phrase. The early cases do not disprove the theory that references to privileges or immunities were meant to embody fundamental and inherent constitutional rights. When viewed as a whole, however, they demonstrate that privileges or immunities could be based upon statutory claims, and that one primary reason for protecting those interests was to assure equal treatment. Not all statutory interests warranted this treatment. The line distinguishing rights of state citizens from rights of those who lacked state citizenship but whose privileges and immunities were protected was rarely discussed and remained amorphous.

B. Development of the Fourteenth Amendment

One of the enduring mysteries surrounding the Fourteenth Amendment, which tends to be attached in particular to debates about whether it incorporated the Bill of Rights, is why the Amendment's text did not contain a more clearly defined statement of its scope. Advocates of incorporation are asked, if fundamental principles of the Bill of Rights were to be applied to the states, why

60. 6 F. Cas. 612 (D. D.C. 1821)(No. 3,266).

61. *Id.* at 613-14. *But see* *The Cynosure*, 6 F. Cas. 1102, 1103 (D. Mass. 1844) (No. 3,529). The *Cynosure* Court found that the Commerce Clause was violated by a prohibition against persons of color who were seamen on vessels using the ports of Louisiana, noting that "if one color may be excluded, any other may . . ." *Id.* The Court did not reach the question of whether the Privileges or Immunities Clause also protected the seaman because there was no proof that he was a citizen of any state. *See id.*

62. *Costin*, 6 F. Cas. at 614

didn't framers of the Amendment say so in no uncertain terms?⁶³ The following analysis suggests that, at a minimum, the Fourteenth Amendment erased doubts regarding enforcement of federal statutes to assure protection of the privileges and immunities of all United States citizens.

If, in 1867, one looked to the Privileges and Immunities Clause of Article IV as a point for comparison, it would have been obvious that the practical scope of privileges or immunities depended, at least in part, on the context of the litigation and the underlying law that pertained. When Justice Washington wrote his opinion in *Corfield v. Coryell*, he could not reasonably have anticipated all of the state laws governing individual status or behavior that necessitated equal treatment of citizens from other states. He preferred to speak in generalities, and he explicitly refused to identify a comprehensive list of privileges or immunities that might qualify for protection.⁶⁴ Decisions about whether courts should mandate equality of treatment must be made on a case-by-case basis as government regulations addressed new situations, rather than by reference to a rigid list or a limited conception of its application. When the claim is perceived in these terms, the reasons for leaving "privileges and immunities" indefinite seem obvious, especially when their meaning depended in part upon the legitimate scope of future legislative acts.

Furthermore, whereas certain privileges or immunities may be inherent and therefore enforceable whether or not states have enacted relevant and related legislation, other privileges or immunities came into existence only as a result of legislation. For example, rights to due process preceding a criminal conviction may be fundamental privileges or immunities that presumably existed for all state citizens and that extended to visiting citizens from other states by reason of the Privileges and Immunities Clause of Article IV. On the other hand, there may not have been an inherent right to engage in commercial fishing; but if state legislation licensed state residents to engage in that vocation, that state had to extend the same right to citizens of other states, again by reason of Article IV. Because of this two-tiered structure, including more than just inherent rights (or rights derived from natural law), the substance of "privileges or immunities" remained open-ended.

This interpretation, recognizing that existence of some privileges or immunities depended upon legislative action, explains why

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

64. *Corfield*, 6 F. Cas. at 552.

participants in the Fourteenth Amendment ratification debate could claim that no "new" rights were being created.⁶⁵ The federal government did not gain broad authority to enact new legislation. Enforcement powers of Congress authorized by Section 5 of the Fourteenth Amendment only extended to legislation authorized by the enumerated powers of Congress, legislation to enforce inherent rights of state and/or United States citizens, and legislation to enforce principles of due process and equality in the post-slavery context. If this was the conception of the Fourteenth Amendment existing in the late 1860's, then it is understandable that further enumeration or references to incorporation would not have been made. The context within which the Fourteenth Amendment was promulgated illustrates the legitimacy of this framework.

Much of the debate regarding the scope of the Fourteenth Amendment Privileges or Immunities Clause has focused on meaning that can be derived from the ratification debates, but arguments taken from the debates fail to provide a complete or adequate context for understanding the amendments. The inherent difficulty in attempting to draw interpretations from statements made during a debate is easily illustrated. Individual scholars have found substantial evidence to support diametrically opposing views. Compare, for example, Raoul Berger's view of the framers' "vastly preponderant view that they were *merely* incorporating the limited provisions of the Civil Rights Act"⁶⁶ with the argument of Henry Commager that "the rights, privileges and immunities to be protected . . . were the whole spectrum of rights embraced in such phrases as 'natural rights,' 'fundamental rights,' 'the rights of man,' 'God-given rights' and so forth"⁶⁷

A persuasive argument can be made that there was no majority view, let alone a consensus, regarding the meaning of privileges or immunities at the time the clause was inserted into the Constitution.⁶⁸ At the very least, a narrow focus on the ratification debates is

65. See, e.g. ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS DEBATES* 230 (1967) (quoting Senator Poland).

66. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 146 (1977).

67. HENRY COMMAGER, *Historical Background of the Fourteenth Amendment*, in *THE FOURTEENTH AMENDMENT* 23-24 (B. Schwarz ed. 1970).

68. This conclusion is consistent with the diversity of views that continues to be reflected in debates regarding this issue. See Bishop, *supra* note 9, at 190. Robert Bork concludes that meaning of the Privileges of Immunities Clause cannot be ascertained, and therefore the Clause should have no more meaning than an "ink blot." BORK *supra* note 9, at 166.

unlikely to yield clear or coherent answers to questions about the intended scope of the Fourteenth Amendment.⁶⁹

Conflicting comments made in the heat of debate may in isolation seem inscrutable and have given rise to competing theories about legislative intent. A clearer picture emerges from the broader social and political context within which promulgation and ratification took place. From that context one can demonstrate three underlying concerns which inspired and motivated advocates of the amendments. One of those can be expressed in terms of emphasis on fundamental rights; framers understood the need to assure that all citizens would be free to express themselves without government interference and to seek refuge in the law when threatened by government persecution. A second concern was for the elimination of invidious discrimination, not only in the form of slavery (a concern that had been addressed in narrower terms by the Thirteenth Amendment), but in broader manifestations as well. A third concern had to do with changing the relationship between state and federal governments to assure that Congress would be empowered to protect the rights of United States citizens. All three of these concerns were reflected in the language of the Privileges or Immunities Clause.

In his recent book, Professor Akhil Amar explained that the context in which the Fourteenth Amendment was drafted underscored the importance of protecting fundamental rights.⁷⁰ In years leading up to the Civil War, states had banned "incendiary" publications.⁷¹ Thus, former slaves were not alone in needing protection from state governments. Participants in the abolitionist movement understood from personal experiences why broader protection was needed. Justice Miller apparently did not appreciate this concern when he wrote in 1872 that former slaves were the only intended beneficiaries of the Fourteenth Amendment,⁷² but Republicans in Congress undoubtedly understood the need to protect fundamental liberties such as the freedoms of speech or press from state as well as federal intrusion. It would be difficult to imagine that framers of the Fourteenth Amendment would not have intended to protect these interests from state interference. The context in which the ratification debate took place therefore lends support to the thesis

69. See NELSON, *supra* note 33, at 4 (finding that "[h]istorical scholarship on the adoption of the Fourteenth Amendment is now at an impasse").

70. See AMAR, *supra* note 10, at 137-162.

71. *Id.* at 159.

72. See *Slaughter-House Cases*, 83 U.S. 36, 71 (1872).

that framers of the Fourteenth Amendment intended to incorporate those protections, and the Privileges or Immunities Clause could logically be understood as a source for that incorporation. It makes more sense than relying upon the Due Process Clause,⁷³ and it is not inconsistent with references to privileges and immunities made by prior generations.

Arguments made during the ratification debate, however, also illustrate the point that privileges or immunities included something more than the list of fundamental rights of the first eight amendments. Justice Washington's views expressed in *Corfield v. Coryell* were cited for this proposition by Senator Jacob Howard who offered the most comprehensive analysis of this issue rendered to the Senate. After quoting *Corfield* at length, Senator Howard noted that "[t]o these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments"⁷⁴

A non-discrimination theme can also be easily demonstrated by the context in which the Fourteenth Amendment arose. Opposition to slavery was a starting point for understanding this concern, and those who framed the Fourteenth Amendment did so in part out of fear that the Thirteenth Amendment, which abolished slavery, had not gone far enough to authorize federal legislation that would be needed to secure freedom from invidious discrimination. Denial of privileges and immunities had been a manifestation of slavery, but the Thirteenth Amendment failed to adequately assure that all persons were entitled to those privileges and immunities that states had previously reserved for slave owners and others of their race.

The notion that principles of equality were of central concern to those who framed the Fourteenth Amendment is not debatable. Some would argue, however, that this concern was adequately addressed by the Equal Protection Clause and did not require reinforcement. Historical use of the terms privileges and immunities, however, illustrates that those terms were also intended at least in part to address questions about equal application of the law. Whereas the Equal Protection Clause focused on concerns about discriminatory state law, the Privileges or Immunities Clause of the Fourteenth Amendment assured equality of rights and interests

73. See ELY, *supra* note 9, at 14-30.

74. 39th Cong., 1st Sess., CONG. GLOBE 813, 1064-65 (1866); See AMAR, *supra* note 10, at 185-86.

otherwise established by the Constitution or laws of the federal government.

A third theme derived from understanding the pre-Civil War context dealt with the need to shift the federal balance, giving Congress unquestioned authority to protect individuals from state governments. In its most meaningful sense, the Privileges or Immunities Clause was about federalism.⁷⁵ It was intended to resolve, once and for all, debates that had raged around claims of state and federal sovereignty. This third theme is one that contemporary Supreme Court Justices seem to have forgotten.

John C. Calhoun and other southern leaders had construed state sovereignty to include final authority to nullify federal law when state courts determined that the national government had acted unconstitutionally.⁷⁶ Calhoun's theory was carried beyond mere rhetoric when the South Carolina legislature met in special session to nullify the Tariff of 1832; its action led to a standoff with President Andrew Jackson and eventually to a compromise lowering import duties to levels that were more acceptable to South Carolina.⁷⁷ In addition to this example, there were many instances in which other states, acting through their courts, nullified federal law.⁷⁸ In those cases, Congress generally lacked the power needed to effectively protect individual citizens from state nullification. The Privileges or Immunities Clause redressed that balance of power.⁷⁹

As explained by Professor Robert Kaczorowski, "Because Northern Republicans needed to preserve their Civil War victory over state sovereignty and slavery, they established in law the primacy of United States citizenship and with it the primacy of Congress's authority to secure the rights of American citizens."⁸⁰ Their instrument for achieving this aim was the Privileges or

75. See, e.g., Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 877 (1986).

76. JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT 20-38 (C. Gordon Post ed. 1953). See generally NELSON, *supra* note 33, at 33.

77. See WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836*, p. 260-97 (1965).

78. See NELSON, *supra* note 33, at 27. In addition to the southern efforts to nullify federal law, there were also many instances in which northern judges had used the same concept of state sovereignty to advance their interests. See, e.g., *Abelman v. Booth*, 62 U.S. 506 (1859) (holding that Wisconsin state judges could not block federal enforcement of fugitive slave laws).

79. 39th Cong., 1st Sess., CONG. GLOBE 2542 (1865-66). See also, Fairman, *supra* note 9, at 51-53.

80. Kaczorowski, *supra* note 75.

Immunities Clause. That Clause assured that Congress would be able to protect the basic privileges of all citizens free from state resistance or interference; in other words, privileges or immunities established by Congress would be protected in all states.

Congressman John Bingham, who authored the first clause of the Fourteenth Amendment, had strong opinions about the need to reinforce federal authority. He expressed those views in his 1859 speech in opposition to the admission of Oregon because of provisions in that state's constitution that would have permanently barred African-Americans from holding real estate or making contracts.⁸¹ Bingham explained both his conception of privileges and immunities and the need he felt for additional federal authority to protect those interests.⁸² He equated the privileges and immunities of Article IV with an entitlement to "the privileges and immunities of citizens of the United States in the several States,"⁸³ and he interpreted that phrase as barring any states from allowing "strong citizens [to] deprive the weak citizens of their rights, natural or political."⁸⁴ In Bingham's view, the Supremacy Clause, even without the Fourteenth Amendment, guaranteed that the Constitution and laws of the United States would bar states from violating this concept of privileges and immunities.⁸⁵ Having experienced the debate surrounding Oregon's constitution, however, Bingham understood that his views regarding the Supremacy Clause needed reinforcement.

Congressman Bingham's concern for reinforcing his conception of privileges and immunities served as a motivating force at the time when he led the drive towards ratification. In his final speech to the House of Representatives in favor of adoption, he explained the need for the Privileges or Immunities Clause in terms of "the right to bear true allegiance to the Constitution and laws of the United States."⁸⁶ For further explanation and emphasis, he referred to South Carolina's efforts to nullify the revenue laws of the United States.⁸⁷ The first section of the Fourteenth Amendment protected citizens from future

81. See John Bingham, *The Constitution of the United States and the Proslavery Provisions of the 1857 Oregon Constitution*, 35th CONG., 2nd Sess., Cong. Globe vol. 1, 1858-59, reprinted in JACOBUS TENBROEK, *EQUAL UNDER LAW* 332 (1965).

82. See *id.*

83. *Id.* at 333.

84. *Id.* at 332.

85. See *id.*

86. 39th Cong., 1st Sess. CONG. GLOBE 2542 (1865-66).

87. See *id.*

state efforts to nullify the laws of the United States. All of Congress must have understood this reference, and also understood that the Privileges or Immunities Clause reestablished federal supremacy.

In his remarks on "The Reconstruction Amendment," Representative Jehu Baker of Illinois added: "What business is it of any State to do the things here forbidden? to rob the American citizen of rights thrown around him by the supreme law of the land?"⁸⁸ Understood in context, Baker was reiterating the view that the Privileges or Immunities Clause would reinforce federal supremacy law against competing claims of state sovereignty.

Protection for fundamental rights, non-discrimination principles, and changes in federal power were all themes running through the ratification debates, and the Privileges or Immunities Clause was well suited to address them. The fundamental rights component could be protected directly by the courts through their articulation of inherent principles derived directly from the Constitution. Other interests embodied in the Privileges or Immunities Clause, however, were meaningful only in the context of federal statutes. Much like the antebellum references to privileges or immunities, this implies a two-tiered approach; privileges or immunities were in part inherent and immutable, and also, in part, creations and creatures of Congress.

A two-tiered approach to understanding privileges or immunities is not new. Frequent references to the Privileges or Immunities Clause of Article IV as a model for the language contained in the Fourteenth Amendment make complete sense when understood as embracing common law and statutory rights in addition to those derived from constitutional principles or from the natural law.⁸⁹ The prime difficulty with this argument was that, when seen as giving Congress authority to address common law issues that were the traditional realm of state law, it shifted more power to the central government than politicians of that era would have accepted.⁹⁰ One

88. 39th Cong. 1st Sess., CONG. GLOBE 3683 (1865-66), App. 255. See Fairman, *supra* note 9.

89. Congressman Bingham identified the Privileges or Immunities Clause of Article IV as his model. 39th Cong., 1st Sess., CONG. GLOBE part 2, 1033-34 (1866). Members of Congress repeatedly referred to Justice Washington's opinion in *Corfield*, interpreting that clause. See generally BERNARD H. SIEGAN, SUPREME COURT'S CONSTITUTION 46-56 (1987).

90. See EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 29-42 (1990). Note, however, that at the time when the Fourteenth Amendment was added to the Constitution, federal courts, as distinct from Congress, played a substantial role in developing a federal common law. That role did not change until the Supreme Court decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

solution to this problem was to limit federal protection of state generated common law rights to instances of irrational discrimination in the protection of those rights.⁹¹ Several scholars have argued for recognition of a "two-tiered" interpretation of privileges or immunities, embracing core protection of fundamental rights while also including a non-discrimination principle that would apply to common law or state statutory rights.⁹² The latter concept, however, adds little to what we currently understand to be the meaning of the Equal Protection Clause of the Fourteenth Amendment.

An alternative, two-tiered approach seems more viable and more consistent with traditions and context. In addition to protecting fundamental rights included within the Bill of Rights, the Privileges or Immunities Clause also protects rights established by federal statutory law that are of the same nature as those traditionally recognized as privileges or immunities derived from common law, statutes, or treaties. Whereas the substantive meaning of the former would be enduring, the scope of the latter would be determined by reference to federal law.

This is not to suggest that the Privileges or Immunities Clause could be construed as an empty vessel to be filled at will by a future Congress. As noted above, framers of the Civil War Amendments were too suspicious of government authority to agree that power to enforce the Privileges or Immunities Clause opened a door to Congress to enact legislation creating new privileges or immunities. Their fear of expansive government power, however, did not preclude interpreting privileges or immunities to include future acts of Congress made within its legitimate sphere of authority. When the federal government acts to establish contract rights, property rights, or employment rights, Congress possesses the authority to prevent state interference with those privileges or immunities.⁹³

91. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

92. JACOBUS TENBROECK, *EQUAL UNDER LAW* 189-90 (Collier, 1965) (1951); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 323 (1988). As this approach was explained by Akhil Amar, the decision about whether a given right was truly fundamental at a given time and place could thus be based upon either inscription in an enduring bill of rights or legislation that a present government chose to extend to its most favored citizens. This second category of rights would receive antidiscrimination protection rather than fundamental rights protection. AMAR, *supra* note 10, at 179.

93. For example, when Congress exercised its power to regulate federal property by establishing homestead rights, it also created privileges or immunities for its citizens. See *United States v. Waddell*, 112 U.S. 76 (1884).

This reading of the Privileges or Immunities Clause is also consistent with the textual limit of its application to "citizens" rather than to "all persons." The issue stemming from *Dred Scott* was whether citizens could be denied privileges or immunities.⁹⁴ At that time and for generations thereafter, it was understood that states might restrict property or employment rights of aliens.⁹⁵ Treaties that protected the rights, privileges or immunities of inhabitants of new U.S.⁹⁶ territories meant that those inhabitants were to be treated more like citizens than aliens. Furthermore, privileges or immunities entailed a kind of ownership interest that may not have been appropriate for non-residents. In the example of homestead rights, Congress legitimately limited enjoyment of those rights to citizens of the United States. Thus, the fact that privileges or immunities protections extended only to citizens coincided with the nondiscrimination element of that clause identified in the preceding discussion.

The idea that some federal law would embrace privileges or immunities was firmly rooted at the time when the Fourteenth Amendment was ratified. Prior southern resistance to federal law had also illustrated the need to reinforce federal supremacy. By the late 1860's, Congress had already enacted civil rights statutes intended to protect privileges and immunities, and the Constitution was amended in part to establish federal authority to enforce those laws.

C. Civil Rights Statutes

As illustrated in the preceding discussion, parallel concerns for fundamental rights, equal treatment, and federal authority motivated Congress at the time it promulgated the Fourteenth Amendment. Legislation passed in the years that immediately preceded or followed ratification of that Amendment illustrated the same range of interests and need for statutory as well as constitutional reinforcement. Civil rights legislation from the Reconstruction Era provides primary evidence of the meaning intended for the Privileges or Immunities

94. 60 U.S. at 403.

95. While some state limits on employment opportunities of aliens were invalidated in 1915, *Truax v. Raich*, 239 U.S. 33 (1915), alien status was not identified as a "suspect category" that constrained discriminatory state legislation until 1971. See *Graham v. Richardson*, 403 U.S. 365 (1971).

96. See AMAR, *supra* note 10, at 167-68 (identifying treaties with France, Spain, Mexico and the Stockbridge and Wyandott Tribes protecting the inhabitants of new territories acquired by the United States).

Clause.

In 1866, the initial southern state reaction to the end of slavery was an attempt to replicate it through discriminatory codes that denied African-Americans many of the basic rights accorded to European-Americans. Blacks could not rent or own houses, could not meet after dark without permission of the police, and in some cases could not even pass through a local parish without a permit.⁹⁷ In response, Congress proposed the Freedmen's Bureau Bill, which was a precursor to the Privileges or Immunities Clause.⁹⁸ Introduced on January 5, 1866, the bill provided that "whenever any state formerly in rebellion denied on account of color the civil rights and immunities belonging to white persons, including the rights to contract, sue, give evidence, take, hold and convey property, and enjoy the equal benefit of laws for the security of person and estate, the President has a duty to extend military protection to the persons affected by such discrimination."⁹⁹ Although the Freedman's Bureau Act was vetoed by President Johnson, comparable language, protecting the same litany of rights, became the Civil Rights Act of April 9, 1866, which was passed over Johnson's veto.¹⁰⁰ That act demonstrated a commitment to the nondiscrimination principles motivating legislators during that era.¹⁰¹ It emphasized the right of all citizens "in every State and Territory in the United States" to make contracts "and to full and equal benefit of all laws and proceedings for the security of person and property."¹⁰²

The jurisdictional provisions of the 1866 Act made clear that a major congressional concern at the time was to provide a federal forum for victims of discriminatory action within the southern states. Section 3 of the Civil Rights Act provided concurrent district and circuit court jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights

97. See I. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279-81 (1960).

98. See MALTZ, *supra* note 90, at 48-49.

99. See 39th Cong., 1st Sess., CONG. GLOBE 6 (1865-66).

100. See 14 Stat. 27 (1866).

101. Raoul Berger mistakenly argues that Section 1 of the Fourteenth Amendment mirrors the language of the Civil Rights Act of 1866, and that the scope of that act was limited to outlawing race discrimination. BERGER, *supra* note 9, at 22. Akhil Amar demonstrates the fallacy of Berger's argument, but does not dispute existence of a nondiscrimination principle that is embraced by both the Civil Rights Act and the Fourteenth Amendment. AMAR *supra* note 10, at 193-97.

102. See AMAR *supra* note 10, at 178.

secured to them" by the first section of the Act.¹⁰³

The 1866 Acts were meant to enforce the Thirteenth Amendment, but concerns were expressed about whether the Thirteenth Amendment offered adequate authority for those laws. As a result, after ratification of the Fourteenth Amendment, Congress enacted the Enforcement Act of 1870, which substantially restated the first two sections of the Civil Rights Act of 1866, maintained provisions for concurrent district and circuit court jurisdiction, and also made it a crime to conspire to deny any person of "any right or privilege granted or secured . . . by the Constitution or laws of the United States."

In a continuing effort to define and extend protection derived from the Civil War Amendments, Congress added the Civil Rights Act of 1871. Section one of that act provided redress for deprivations of rights under color of state law.¹⁰⁴ The new civil remedy of the 1871 Act encompassed deprivations of "any rights, privileges or immunities secured by the Constitution of the United States."¹⁰⁵ Much has been made of the fact that this language only protected privileges or immunities derived from the Constitution, rather than the broader inclusion of statutory rights that had been explicitly recognized under the conspiracy statute of 1870.¹⁰⁶ It is possible, however, that the change in language created a distinction without a difference. When viewed in terms of the Supremacy Clause, all federal statutory rights could be properly understood as having been secured by the Constitution; state laws that conflict with or are preempted by federal law are commonly deemed unconstitutional.¹⁰⁷

103. 14 Stat. 27 (1866).

104. 16 Stat. 433 (1871).

105. *Id.*

106. See, e.g., *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979) (ruling that federal court jurisdiction did not encompass claims that state welfare regulations conflicted with the Social Security Act).

107. Similar analysis, that rights "secured by the Constitution" included those protected by the Supremacy Clause, was rejected by the Supreme Court in *Chapman*. *Id.* at 613-15; see also *Swift & Co. v. Wickham*, 382 U.S. 111, 126-27 (1965). The reasoning employed by the Court in those cases, however, points towards the opposite conclusion when applied to the Civil Rights Act of 1871. In *Chapman*, the Court noted that the jurisdictional grant codified in 28 U.S.C. § 1343 distinguished between constitutional claims and rights secured by an Act of Congress. Justice Stevens reasoned that these separate provisions would not have been made if constitutional claims were meant to have included those derived from the Supremacy Clause. The Civil Rights Act of 1871, however, did not make any separate provision for rights protected by federal law, and in that context it makes more sense to interpret the reference to rights, privileges and immunities secured by the Constitution broadly. For a broad interpretation, see *Maine v.*

Framers of the Civil Rights Act of 1871 may well have seen reference to "laws of the United States" as redundant to secure Constitutional rights.

Whatever limit in the scope of civil rights protection may have been implied from the omission of reference to federal laws was removed three years later when Congress accepted a general consolidation of the federal laws in which language from the 1871 Civil Rights Act was broadened to include any "rights, privileges, or immunities, secured or protected by the Constitution *and laws* of the United States."¹⁰⁸ This change was made in the context of federal code revisions that were not intended to have been substantive. Drafters of the revision, however, were undoubtedly aware of the difference in language that had emerged in the 1870 and 1871 acts, and chose language in 1874 that extended the more inclusive 1870 language to both the conspiracy statute and the civil remedy provision.

Alteration in the language of the Civil Rights laws was consistent with contemporaneous judicial explanations that privileges or immunities could be established either by the text of the Constitution or by statute.¹⁰⁹ In other words, the commonly accepted and, therefore, unremarkable view of the time was privileges or immunities could be established through federal statutes. If civil rights laws were to offer protection paralleling that expectation, then remedies should be available for deprivation of either Constitutional or statutory rights.¹¹⁰

Additional evidence that members of Congress who participated in framing the Fourteenth Amendment understood that privileges or immunities could be established by federal law can be found in the debate that accompanied the passage of the Civil Rights Act of 1875. That Act, which prohibited discrimination in inns, theaters, common carriers, and other forms of public accommodations, began its course in 1870. Nearly half of the senators and a significant number of the representatives who voted for the Fourteenth Amendment also participated in the debate leading up to passage of the Act.¹¹¹ During

Thiboutot, 448 U.S. 1 (1980) (interpreting 42 U.S.C. § 1983 to include rights secured by federal statutes). For additional discussion, see *infra* text accompanying notes 114-227.

108. § 5510 of the 1874 Revised Statutes (emphasis added).

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

110. References to privileges or immunities established by federal statutory law, found in both the Enforcement Act of 1870 and the Revised Statutes of 1874, have survived to the present day in the form of 42 U.S.C. §§ 1985 and 1983.

111. Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the*

initial years of the debate, several of the bill's sponsors made it clear that they relied upon the Privileges or Immunities Clause of the Fourteenth Amendment as their authority for taking such action.¹¹² Debate on that bill, however, illustrated the uncertain and inconsistent views regarding the scope of federal protection for privileges or immunities that existed during that era. The Supreme Court intervened when it narrowed the scope of privileges or immunities with its 1872 decision in the *Slaughter-House Cases*.¹¹³

II. Supreme Court Elaboration on the Meaning of Privileges or Immunities

Prior history, the context in which the Fourteenth Amendment was promulgated, and legislation intended to enforce that Amendment, all demonstrated that privileges or immunities of United States citizens should include statutory claims. Confirmation of that theory came quickly and consistently from the United States Supreme Court.

Initially, the Court took dramatic actions narrowing the scope of the Fourteenth Amendment from that which many of its proponents advocated. The following sections will first look at the most visible of those decisions, the *Slaughter-House Cases* and the *Civil Rights Cases*.¹¹⁴ Critics have focused upon the limitations derived from those decisions. In contrast, this analysis will emphasize aspects of those cases that have often been ignored and that support a view of federal statutes as a primary source for privileges or immunities. Subsequent sections will also develop the same theme, focusing on cases construing "privileges or immunities" with regard to the Fourteenth Amendment, Article IV, and modern interpretations of section 1983, title 42 of the United States Code.

A. The *Slaughter-House Cases*

The preceding paragraphs provide groundwork for arguments that framers of the Fourteenth Amendment understood boundaries of the Privileges or Immunities Clause to include protection of fundamental rights along with rights established through federal

Fourteenth Amendment and Public Accommodations, 66 COLUM. L. REV. 873, 875 (1966).

112. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1426-30 (1992).

113. 83 U.S. 36 (1872).

114. 109 U.S. 3 (1883) (finding that the Fourteenth Amendment only empowered Congress to remedy state action).

legislation. One decision of the United States Supreme Court, however, dramatically altered future debates regarding this issue. Although many have argued that the *Slaughter-House Cases* eliminated arguments for the potential dual meaning of privileges or immunities described above, that conclusion does not necessarily follow from the text of the opinion or from a consideration of the concerns that were faced by participants in that debate.

The *Slaughter-House Cases* were brought by butchers of New Orleans outraged by a Louisiana law forcing them to move all slaughtering activities to the confines of a single livestock landing area controlled by a state-established corporation.¹¹⁵ The dispute arose in 1869, and records were filed with the Supreme Court in 1870. The case was first argued in January of 1872 and then reargued in February of that year because of the perceived gravity of the issues, division within the Court, and concern that one of the Justices had not been present for the first arguments.¹¹⁶ Participants recognized this as the Court's first significant opportunity to interpret the Fourteenth Amendment. The key question was whether operation of a slaughtering house was a "privilege or immunity" that, therefore, could not be taken away from butchers throughout the city and confined to a state monopoly. The Court determined that the butchers' claimed rights did not fall within the scope of privileges or immunities.

The experience of living down wind from a mid-western meat processing plant makes it easy for this author to understand that the Supreme Court majority reached the correct conclusion in the *Slaughter-House Cases*. It is also easy to understand why the people of New Orleans supported the law in spite of its economic impact on local butchers. Health and safety concerns as well as odor undoubtedly motivated the state's decision to confine such activities to a single small section of the city.

Whether the Privileges or Immunities Clause incorporated the Bill of Rights was not at issue before the Court. The specter faced by Justice Miller as he wrote the opinion of the Court was not that federal courts would be asked to protect individual freedom of speech, free exercise of religion, or freedom from unreasonable searches and seizures. Instead, the question was whether the Privileges or Immunities Clause implied a constitutional right to

115. *Slaughter-House*, 83 U.S. at 58.

116. *See id.*

freedom of contract.¹¹⁷ Justice Miller's opinion anticipated cases like *Lochner v. New York*,¹¹⁸ in which the Supreme Court acted in the name of freedom for economic rights to bar states from protecting the health and safety of their citizens. *Lochner* was wrongly decided for the same reason that the holding in the *Slaughter-House Cases* was correct.

Much of the argument that has taken place since the *Slaughter-House* decision has amounted to claims that the reasoning of the Court was flawed when it suggested that framers of the Fourteenth Amendment did not intend to "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."¹¹⁹ But that statement should be understood within the unique context of the *Slaughter-House Cases* and concern about congressional authority and judicial review over all cases in which state exercise of the police power interfered in any way with the economic or property interests of state residents. The Court majority ruled, in essence, that the Fourteenth Amendment did not on its face prohibit states from establishing monopolies in order to protect the health and safety of their residents.¹²⁰ As understood within that context, the conclusion of the Supreme Court can be justified.¹²¹ The expansion of federal power that would have resulted from such a broad vision of civil rights as that sought by the plaintiffs was beyond acceptable bounds as contemplated by the Court's majority in 1872.

When Justice Miller expressed the majority's opinion that the Fourteenth Amendment was focused upon the "one pervading purpose" of securing "freedom of the slave race,"¹²² and eschewed

117. Note that the Privileges or Immunities Clause originated as an enforcement mechanism for the Civil Rights Act of 1866, which in turn guaranteed that "citizens of the United States . . . of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . ." Act of Apr. 9, 1866, Sess. I, ch. 31, § 1, 14 Stat. 27 (1866). Justice Miller was, in effect, arguing that such language should not be construed to give the federal government general authority over all questions about contract rights, property rights and related concerns.

118. 198 U.S. 45 (1905).

119. *Slaughter-House Cases*, 83 U.S. at 77.

120. See *id.* at 66-78.

121. Compare the recent decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997) in which the Supreme Court announced the principle that Congress lacked authority to expand its power under Section 5 of the Fourteenth Amendment by construing provisions of the Bill of Rights to extend substantially beyond the definition of those rights enunciated by the Court.

122. *Slaughter-House Cases*, 83 U.S. at 71.

transferring a broad expanse of traditional state responsibility to Congress, he did not seriously address questions about whether the first eight amendments were to be incorporated by the Privileges or Immunities Clause and applied to the states.¹²³ Furthermore, none of the dissenters explicitly argued for incorporation.¹²⁴ The only provision in the Bill of Rights that could, through incorporation, have brought success to the plaintiffs would have been the Due Process Clause of the Fifth Amendment. In telling passages, none of the Justices gave significant weight to the argument that creation of a slaughter-house monopoly represented a "taking" or violated the Due Process Clause of the Fourteenth Amendment.¹²⁵

The real focus of the plaintiffs and the dissenters was on a view of fundamental rights that embraced unfettered marketplace competition. Their arguments bear close resemblance to the Supreme Court majority opinion in *Lochner*. For example, plaintiffs' counsel argued that "free competition in business, free enterprise, the absence of all exactions by petty tyranny, of all spoliation of private

123. An argument that Justice Miller did not necessarily have the narrow vision of Fourteenth Amendment rights generally associated with the *Slaughter-Houses Cases* is illustrated by his subsequent comments which gave birth to modern concepts of substantive due process:

[W]hen, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'No State shall deprive any person of life, liberty, or property without due process of law,' can a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation.

Davidson v. New Orleans, 96 U.S. 97, 102 (1877). John Hart Ely has suggested that Justice Miller's inclusion of the right to assemble and petition the Government among the privileges of national citizenship may indicate that the Court would have actually embraced incorporation if asked to do so. ELY, *supra* note 9, at 196-197.

124. The closest to such an argument was made by Justice Bradley who referred to the enumerated protections of the Bill of Rights, emphasizing the Due Process Clause, and indicating that those provisions were "among the privileges and immunities of citizens of the United States . . ." *Slaughter-House Cases*, 83 U.S. at 118-19 (Bradley, J., dissenting). Justice Swayne's dissent could be construed to have similar import when he argued that "By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by [the Fourteenth Amendment]." *Id.* at 129 (Swayne, J., dissenting).

125. Justice Miller noted for the majority that "[t]he argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law." Referring to interpretations of the Fifth Amendment and to Due Process Clauses in existing state constitutions, he concluded that "under no construction of that provision that we have ever seen . . . can the restraint imposed . . . be held to be a deprivation of property within the meaning of that provision." *Id.* at 80-81.

right by public authority . . . were exactly what the colonists sought for and obtained by their settlement here"¹²⁶ In his dissent, Justice Field relied upon the British common law which, in his view, secured "the natural right of every Englishman" to be free of "interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment."¹²⁷ He cited at length the views of Adam Smith:

The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him.¹²⁸

Instead of incorporating any provision of the Bill of Rights to support their arguments, both Justice Field and Justice Bradley relied instead upon language from the Declaration of Independence.¹²⁹ Justice Swayne's dissent, although less extensive and less eloquent, relied just as squarely upon the theory that

[l]iberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property 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.¹³⁰

One case cited by plaintiffs to support their argument against state established monopolies was *Gibbons v. Ogden*.¹³¹ Closer examination of *Gibbons*, however, illustrates the fundamental flaw in the plaintiffs' case, and the fundamental reason why the *Slaughter-House Cases* never seriously addressed issues of incorporation. *Gibbons* was a case about regulation of interstate commerce and federal supremacy within that context.¹³² The case could not be stretched, as plaintiffs in *Slaughter-House* would have liked, to encompass the principle that government-created monopolies violated the Bill of Rights; Chief Justice Marshall would not have questioned the authority of Congress to establish monopolies in the

126. *Id.* at 48 (argument by plaintiffs' counsel).

127. *Id.* at 104 (Field, J., dissenting).

128. *Id.* at 110 n.39 (citing ADAM SMITH, WEALTH OF NATIONS, b. 1, ch. 10, part 2.)

129. See *id.* at 105; *id.* at 115-16 (Bradley, J., dissenting).

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

131. 22 U.S. 1 (1824).

132. *Id.* at 186-222.

steamboat trade if Congress deemed such laws appropriate for the regulation of interstate commerce. If the Constitution did not bar Congress from establishing monopolies, then incorporation of the Bill of Rights would not have led to the conclusion that states were barred from establishing monopolies in the slaughter-house trade.

The point of this elaboration is not to argue either for or against the incorporation doctrine. It is rather to establish the basic reasonableness of the majority's decision to avoid wholly open-ended interpretations of the Privileges or Immunities Clause that would have invited unbounded federal interference with traditional state police powers. For all of the reasons described above, the *Slaughter-House Cases* did not present a viable forum within which to seriously consider and resolve the issue of incorporation. Unfortunately, the debate about incorporation has been blocked in large part because of an opinion in which the issue was neither argued nor resolved. It is also unfortunate that lingering preoccupation with that debate has obscured the focus on privileges or immunities that were explicitly embraced within the text of Justice Miller's opinion.

In key language, the Court supported protection for those privileges and immunities "which owe their existence to the Federal government, its national character, its Constitution, *or its laws*."¹³³ Based upon this language, the laws of Congress should be a focal point for measuring privileges or immunities. To the extent that Congress acts within legitimate bounds, adopting generally applicable legislation to protect individual rights or interests, states should not be allowed to abridge those rights.

The dissenting opinion by Justice Field raised a challenge to this analysis, which warranted a more careful response than that offered by the majority. Justice Field noted that with the majority's designation of privileges and immunities, "no new constitutional provision was required" because "supremacy of the Constitution and laws of the United States always controlled any state legislation of that character."¹³⁴ Justice Field drew the conclusion that the Privileges or Immunities Clause was not needed to reinforce the Supremacy Clause.

The Supreme Court majority, however, understood the disingenuous element of Justice Field's argument. One year earlier, Field had faced the problem of a Wisconsin court that asserted

133. *Slaughter-House Cases*, 83 U.S. at 79 (emphasis added).

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

authority over federal officials.¹³⁵ He wrote an opinion declaring that, under the Supremacy Clause, state sovereignty must yield to the sovereignty of the federal government. Field noted that the "experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void."¹³⁶ While Justice Field apparently read this recent history to support his conclusion that reinforcement of the Supremacy Clause was not needed, others reading the same history reached the opposite conclusion.¹³⁷ The fact that cases supporting theories of state nullification were still being litigated at the time when the Fourteenth Amendment was promulgated proved the continuing need to reinforce federal supremacy.

Justice Field's preferred answer to his question whether the Privileges or Immunities Clause had broadened federal power was based upon congressional enactment of the Civil Rights Act, which protected contract and property rights and assured the "full and equal benefit of all laws and proceedings for the security of person and property."¹³⁸ Field saw in this language an intent to expand federal power to superintend all state contract and property law. With his language carried to its extreme, Field would have relied upon the Privileges or Immunities Clause to enforce Adam Smith's vision of an unregulated marketplace.

Although mistaken in the application of his concepts, Justice Field may have been more in tune than his brethren with the spirit of the generation that promulgated the Fourteenth Amendment as to the need for federal protection of civil rights,¹³⁹ even though the majority gave a better answer to the actual question pending before the Court.¹⁴⁰ In retrospect, Justice Field's analysis was wrong in one

135. See *Tarble's Case*, 80 U.S. 397 (1871) (holding that Wisconsin state judge could not interfere with federal military enlistment).

136. *Id.* at 408.

137. See comments by Congressman John Bingham, *supra*, text accompanying notes 81-87.

138. *Slaughter-House Cases*, 83 U.S. at 96 (Field, J., dissenting) (*internal quotes omitted*).

139. See NELSON, *supra* note 33, at 156-58.

140. As previously noted, neither Field nor the majority really addressed the issue of incorporation which may have provided a better answer to the question that Field was raising. See AMAR, *supra* note 10, at 163-230 (developing the case for a "refined" theory of incorporation).

respect but right in another.

First, although the Civil Rights Act “place[d] the common rights of American citizens under the protection of the National Government,”¹⁴¹ that Act did not prohibit Louisiana from establishing a slaughter-house monopoly. Thus, the fact that the Fourteenth Amendment created new authority for Congress to enact laws protecting privileges and immunities did not mean that Congress had done so in a manner that protected the butchers of New Orleans. Furthermore, when viewed from the perspective of contemporary constitutional doctrine, Justice Field was wrong when he suggested that the Privileges or Immunities Clause broadly expanded the power of Congress to establish federal rights significantly beyond those otherwise established by the Constitution.¹⁴²

At the time of his decision, however, many members of Congress agreed with Justice Field. Their position was documented by the Civil Rights Act of 1866, and even more clearly through passage of the Civil Rights Act of 1875, which was already under consideration at the time when the *Slaughter-House Cases* were decided. Congress anticipated the need to assure that states would not interfere with those privileges or immunities that were protected by federal law. With hindsight, we know that Congress was right to assert its authority to protect individuals from private invidious discrimination even if the constitutional basis for doing so was the Commerce Clause rather than the Fourteenth Amendment. The critical point is that, although the Privileges or Immunities Clause of the Fourteenth Amendment did not expand the power of Congress to enact such laws, it did reestablish federal supremacy so that once such laws were passed, states were obligated to accept their authority.

Regardless of whether or to what extent Justice Miller’s majority opinion in the *Slaughter-House Cases* appeared redundant to the Supremacy Clause, both the majority and the dissenters agreed on several essential points that support a current interpretation of congressional authority derived from the Privileges or Immunities Clause. Thus, all of the Justices cited with some level of approval Judge Washington’s decision in *Corfield v. Coryell*.¹⁴³ All of the Justices would appear, therefore, to have agreed that, when Congress acted within its power to protect “the right to pursue and obtain happiness and safety,” it would be acting to protect privileges or

141. *Slaughter-House Cases*, 83 U.S. at 93 (Field, J., dissenting).

142. See *City of Boerne*, 521 U.S. 507.

143. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

immunities. Although the majority and the dissenters may have disagreed about the existing scope of congressional authority to enact such legislation, they would not have disagreed about the supremacy of federal law when derived from legitimate sources of federal power. Valid federal laws protecting interests comparable to those identified by Judge Washington in *Corfield* would be construed as privileges or immunities of United States citizens, and conflicting state law should yield accordingly. The conclusion that follows is that when one combines the Privileges or Immunities Clause as understood at the time of the *Slaughter-House Cases* with the Commerce Clause as understood today, Congress has power to enforce such laws against the states themselves, free from Eleventh Amendment constraints.

B. The *Civil Rights Cases*

In the *Civil Rights Cases*,¹⁴⁴ the Supreme Court considered the constitutionality of challenges to private acts of race discrimination based upon the Civil Rights Act of 1875. This was the second, and some would say the last, "big" case in which the Court focused upon the scope of the Privileges or Immunities Clause. The majority concluded that Congress lacked power to enforce the Fourteenth Amendment in the absence of government action.¹⁴⁵

Although remembered primarily for their disagreements about the need for "state action," both the majority opinion by Justice Bradley and the dissenting opinion of Justice Harlan help to illuminate our understanding of privileges or immunities. The reason given by Justice Bradley for striking down the act was not that the issues embraced were outside of the scope of privileges or immunities. His opinion for the Court worked from an assumption that the subject matter of the act involved "rights, privileges and immunities of citizens which cannot rightfully be abridged by state laws under the Fourteenth Amendment."¹⁴⁶ He noted that: "Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the Fourteenth, no less than to the Thirteenth Amendment . . ."¹⁴⁷ From the Court's perspective, the problem with the legislation was that it was "primary and direct" rather than "corrective" of state laws or actions.¹⁴⁸ In a remarkable

144. 109 U.S. 3 (1883).

145. *See id.* at 13.

146. *Id.* at 21.

147. *Id.*

148. *Id.* at 19.

anticipation of future events, Justice Bradley also observed that different conclusions could follow if Congress had authority to address such issues directly, for example, through the exercise of its power to regulate commerce.¹⁴⁹

The state action doctrine that emerged from Justice Bradley's opinion narrowed the scope of the Fourteenth Amendment from that contemplated by the framers of the Civil Rights Act of 1875; it is an open question as to whether this narrower vision was consistent with the views of those who framed and ratified the Fourteenth Amendment. In his dissent, Justice Harlan argued that the majority's analysis was inconsistent with the sentiments of the time. He explained that "[i]t is not the words of the law but the internal sense of it that makes the law; the letter of law is the body; the sense and reason of the law is the soul."¹⁵⁰ In his view, the Civil War Amendments guaranteed to all, those "rights, privileges, or immunities . . . belonging to citizens of the white race in the same State."¹⁵¹

The gap between the opinions of Justice Bradley and Justice Harlan may not have been as wide as it initially appears. Both Justices recognized that, following enactment of the Fourteenth Amendment, all citizens were to be afforded equal rights of admission to an inn, a public conveyance, or a place of public amusement. Justice Bradley reasoned that states continued to have primary responsibility for enforcing those rights, which were "presumably subject to redress by [state] laws until the contrary appears."¹⁵² Justice Harlan believed that the national government could provide direct protection without reference to the failings of state law.¹⁵³ Both Justices thus entertained comparable visions of equality and both also recognized that the Fourteenth Amendment had directly or indirectly secured these visions.

Current constitutional law can be faithful to core views expressed by both Justice Bradley and Justice Harlan. Congress has the authority to address private acts of discrimination when those acts have a substantial cumulative effect on interstate commerce.¹⁵⁴ The

149. *See id.*

150. *Id.* at 26 (Harlan, J., dissenting) (*internal quotations omitted*).

151. *Id.* at 48 (Harlan, J., dissenting).

152. *Id.* at 24 (noting that if state laws fail to provide protection, Congress may adopt "corrective legislation" to counteract the effect of state laws or state action).

153. *See id.* at 57 (Harlan, J., dissenting).

154. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964);

Commerce Clause limitation is consistent with concerns about unlimited federal power that motivated Justice Bradley; the breadth of authority currently derived from that clause is consistent with the "sense and reason of the law,"¹⁵⁵ embracing some measure of the contract and property rights that were understood at the time when Justice Harlan wrote. In other words, expansive interpretation of the Commerce Clause has established the conditions that Justice Bradley anticipated; it also allows Congress to embrace the spirit of the law described by Justice Harlan.

C. Applications of the Fourteenth Amendment

The *Slaughter-House Cases* set the stage for subsequent interpretations of the Privileges or Immunities Clause. The framework of Justice Miller's decision has been routinely accepted by subsequent courts that focus their attention on the question of whether given rights "owe their existence to the Federal government, its national character, its Constitution or its laws."¹⁵⁶ Claims often rose or fell based upon whether federal statutes provided underlying support for the claimants.

Thus, Justice Miller's opinion in the *Slaughter-House Cases* narrowed, but did not eviscerate the Privileges or Immunities Clause. Justice Miller illustrated the use of the Clause when he wrote *United States v. Waddell*¹⁵⁷ in 1884. The issue was whether the United States had authority to prosecute individuals for conspiring against "any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution and laws of the United States."¹⁵⁸ The case involved defendants' interference with an individual's efforts to establish a homestead on federal land. The question came down to whether "the right to remain on the land in order to perform the requirements of the act of congress" was within the purview of the federal statute.¹⁵⁹ Power to create the homestead law was derived from Article IV, Section 3 of the Constitution, which authorized Congress to regulate property of the United States. Having acted within that authority, Congress established a privilege or immunity for individual citizens. As explained by the Court, "No such right

Katzenbach v. McClung, 379 U.S. 294 (1964).

155. *Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

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

157. 112 U.S. 76 (1884).

158. Rev. St. U.S. § 5508, 18 U.S.C. § 51, currently codified at 42 U.S.C. § 1981.

159. *See Waddell*, 112 U.S. at 80.

exists or can exist outside of an act of congress.”¹⁶⁰ The Privileges or Immunities Clause of the Fourteenth Amendment secured congressional authority to protect individuals from interference with that right. It may be that Congress had authority to enact anti-conspiracy laws like the one at issue in *Waddell* prior to the Fourteenth Amendment, but ratification of the Amendment eliminated any doubt.

The *Waddell* case illustrates the basic point underlying this article’s thesis. Privileges or immunities of United States citizenship can be created by Congress, acting pursuant to its enumerated powers. Given that premise, it follows that the Fourteenth Amendment reinforced the Supremacy Clause and reestablished congressional authority to enforce federal rights, thereby eliminating any reasonable doubts about whether claims to state sovereignty qualified or constrained those rights.

Other cases also serve to illustrate the relationship between “privileges or immunities” and federal statutes. For example, the Court ruled in 1875 that the Privileges or Immunities Clause did not mean that women had a right to vote.¹⁶¹ The case was one of several in which the Court declared that the Fourteenth Amendment “did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.”¹⁶² The Court reasoned that Congress had not enacted any law granting such a right.¹⁶³ Voting rights for women could not have been privileges or immunities as a matter of state law because that law had not been construed as such historically¹⁶⁴ and because the privileges and immunities of state citizens, embraced by Article IV, could not have conferred voting rights on citizens from other states.¹⁶⁵

The Court’s decision regarding women’s voting rights, however, reflects little more than the deeply rooted sexism of the era in which the Court acted.¹⁶⁶ The right to vote eventually came to be recognized as a privilege or immunity of United States citizenship. Later decisions were explained by noting that when state law had

160. *Id.* at 79.

161. *See Minor v. Happersett*, 88 U.S. 162 (1875).

162. *Id.* at 171.

163. *See id.*

164. *See id.* at 172-73.

165. *See id.* at 174.

166. *See Bradwell v. Illinois*, 83 U.S. 130 (1873) (upholding rule that precluded women from practicing law based upon “the civil law, as well as nature herself”).

determined an individual was part of a class of persons on whom the right to vote had been conferred, federal protection of that right could be inferred from the Constitution.¹⁶⁷

Another illustration of the rights and privileges of national citizenship was provided by an 1895 decision upholding federal prosecution of individuals who interfered with efforts by citizens to report violations of internal revenue laws.¹⁶⁸ Interpreting federal law punishing conspiracies "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States,"¹⁶⁹ the Court explained that barring the federal government from enacting laws of this sort "would tend to defeat the independence and the supremacy of the national government."¹⁷⁰ In reaching this conclusion, the Court also explained:

Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.¹⁷¹

In a series of other cases, the Supreme Court ruled that the Privileges or Immunities Clause did not apply because the rights in question did not "owe their existence to the Federal government."¹⁷² In *United States v. Cruikshank*, defendants had been charged with conspiring to prevent two African-Americans from exercising their right of peaceable assembly.¹⁷³ The Court rejected that indictment, finding that the Privileges or Immunities Clause only protected the right of assembly if it was in some manner linked to powers or duties

167. *Ex parte Yarbrough*, "The Ku-Klux Klan Cases," 110 U.S. 651 (1884). *See also* *United States v. Mosley*, 238 U.S. 383 (1915) (finding that right to vote was a right or privilege secured by the Constitution or law of the United States for all citizens, even in the absence of allegations of race discrimination); *United States v. Classic*, 313 U.S. 299 (1941) (holding that voting in primary elections was a privilege or immunity secured by the Constitution).

168. *See In re Quarles*, 158 U.S. 532 (1895).

169. *Id.* at 535.

170. *Id.* at 537.

171. *Id.* at 535 (*citing* *Logan v. United States*, 144 U.S. 263, 293 (1892)).

172. *See Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 539 (1922) (upholding state employee discharge laws); *Owmbey v. Morgan*, 256 U.S. 94, 113 (1921) (upholding foreign attachment rules); *Maxwell v. Bugbee*, 250 U.S. 525, 553 (1919) (upholding state inheritance laws).

173. 92 U.S. 542 (1876).

of the national government.¹⁷⁴ In the same year, the Court used similar reasoning to conclude that the right to a jury trial was not a privilege or immunity of national citizenship applicable to state courts.¹⁷⁵ The Court reasoned that state law allowing judges to rule in cases of a hung civil jury did not violate “the Constitution, or any law or treaty of the United States.”¹⁷⁶ The right to bear arms was not deemed a privilege or immunity of citizens of the United States in *Presser v. Illinois*.¹⁷⁷ The Court stressed that an individual who was not a member of an organized militia had no right under the Fourteenth Amendment to organize with others as a military unit; to establish such a right “he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred.”¹⁷⁸

In 1939, a Supreme Court plurality relied upon the Privileges or Immunities Clause as the basis for concluding that Jersey City could not prohibit the assembly of labor organizers.¹⁷⁹ Although the holding derived from that case is generally cited purely in terms of the right of assembly, it is worth looking more closely at the Court’s presentation of the issue:

174. See *id.* at 552-53. It should be noted that the primary problem in this case was the “vague and general” nature of the indictment. *Id.* at 559. The ruling left broad scope for the federal government to act, and implied that defendants could have been charged for a violation of federally protected privileges or immunities if the indictment had specified that the victims were assembling “for consultation in respect to public affairs and to petition for a redress of grievances.” *Id.* at 552. Defects in the indictment might also have been cured if Defendants had been charged with attacking the victims “on account of their race,” and therefore with violating provisions of the Civil Rights Act of 1866. See *id.* at 555. The absence of such specific terms in the indictment led to the discharge of the defendants.

175. See *Walker v. Sauvinet*, 92 U.S. 90 (1876).

176. *Id.* at 93. See also, *Maxwell v. Dow*, 176 U.S. 581 (1900); *U.S. v. Waddell*, 112 U.S. 76 (1884) (upholding state use of an eight person jury in a criminal case and rejecting general theories of incorporation). In discussing the meaning of federal privileges or immunities, the Court identified the issue of uniformity; where diversity within and among states is acceptable, then the Privileges or Immunities Clause of the Fourteenth Amendment would not apply. *Id.* at 599-600.

177. 116 U.S. 252, 266-67 (1886).

178. *Id.* at 266.

179. *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939). Only seven Justices participated in the decision. Justice Roberts, with Justice Black concurring, relied upon the Privileges or Immunities Clause as the basis for his decision. See *id.* at 514. Justices Stone, Reed and Butler did not reject the reasoning that Congress created privileges or immunities of United States citizens when it enacted the National Labor Relations Act, but they did not agree that the record of the case adequately supported that conclusion. See *id.* at 522 (Stone, J., dissenting).

The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment.¹⁸⁰

It was the focus on the National Labor Relations Act that distinguished this case from *Cruikshank*. Justice Roberts' opinion noted the "confusion and debate" regarding federal and state relationships prior to the Civil War.¹⁸¹ He concluded that the Fourteenth Amendment resolved the debate: "Thence forward citizenship of the United States became primary and citizenship of a State secondary."¹⁸² Justice Roberts' reasoning supports a conclusion that the range of rights included in the National Labor Relations Act constituted privileges or immunities established by federal law. Action by Congress, rather than an inherent right of assembly, transformed the claim into one which owed its existence to the federal government.

After 1939, the Supreme Court rarely made direct reference to the Fourteenth Amendment Privileges or Immunities Clause. An exception was the recent case of *Saenz v. Roe*.¹⁸³ Writing for the majority, Justice Stevens reaffirmed the doctrine that states could not discriminate when distributing welfare benefits to new residents.¹⁸⁴ Instead of once again failing "to ascribe the source of this right to travel interstate to a particular constitutional privilege,"¹⁸⁵ Justice Stevens found that "[d]espite fundamentally differing views concerning [its] coverage . . . it has always been common ground" that the Privileges or Immunities Clause protects this "component of the right to travel."¹⁸⁶ Although Chief Justice Rehnquist and Justice Thomas dissented, all other members of the Court joined in this opinion.

The relatively unique aspect of the Court's decision in *Saenz* was its use of the Privileges or Immunities Clause as a source of inherent rights derived from the Constitution without a separate basis in federal statutes. As noted by Justice Stevens, the Court's decision

180. *Id.* at 512.

181. *Id.* at 509.

182. *Id.* at 510.

183. 526 U.S. 489 (1999).

184. *See id.* at 507.

185. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

186. *Saenz*, 526 U.S. at 503 (citing *The Slaughter-House Cases*, 83 U.S. 36 (1873)).

remained consistent with the *Slaughter-House* framework, protecting claims owing their existence to the “national character, Constitution or laws” of the federal government.¹⁸⁷ Beyond that right to travel ruling, however, few efforts have been made to protect meaningful substantive rights derived directly from the Privileges or Immunities Clause.¹⁸⁸ Although few scholars have asked about the congressional role in defining the privileges or immunities protected by the Fourteenth Amendment, the Supreme Court has explored the meaning of that phrase in other contexts in ways that strengthen the thesis of this article.

D. Interpretations of Article IV

In addition to the limited number of interpretations of the Fourteenth Amendment Privileges or Immunities Clause described above, the Supreme Court also interpreted the Article IV counterpart to that Clause in ways that further illustrate the meaning of both.

Courts have historically recognized the overlapping scope of the Commerce Clause and the Privileges and Immunities Clause of Article IV. In 1870, the Supreme Court invalidated a Maryland law that forced nonresidents to purchase a license to sell non-agricultural goods within the state. Relying upon both the Commerce Clause and the Article IV Privileges and Immunities Clause, the Court emphasized the “comprehensive meaning” as well as the commercial scope of the latter: “[T]he clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation”¹⁸⁹ The link between privileges and immunities and the Commerce Clause was illustrated when the Court reasoned that if states had power to impose discriminatory taxes against citizens from another state, then “the power conferred upon Congress to regulate interstate commerce [would be] of no value”¹⁹⁰ Justice Harlan expressed similar thoughts when he wrote in 1879 that the Privileges and Immunities Clause of Article IV secures “the equality of commercial privileges . . . to citizens of the several States” and forbids material

187. See *supra* text accompanying note 156.

188. But see *Dennis v. Higgins*, 498 U.S. 439 (1991) (ruling that 42 U.S.C. § 1983, which protected “rights, privileges or immunities,” derived from the Constitution or laws of the United States could be relied upon for enforcement of the dormant Commerce Clause).

189. *Ward v. Maryland*, 79 U.S. 418, 430 (1870).

190. *Id.*

impairment of such privileges.¹⁹¹

In the Twentieth Century, the Court erected a temporary roadblock to development of the non-discrimination principle embodied in Article IV. In 1919, the Court drew a line between "residence" and "citizenship," holding that Article IV, Section 2, only applied to the latter.¹⁹² States were free to discriminate against nonresidents as long as they were not discriminating on the basis of state citizenship.¹⁹³ As a result, a state statute which mandated that insurance brokers reside within the state was sustained, as citizens of the enacting state who resided elsewhere were included in the class discriminated against.¹⁹⁴ For decades following this decision, state commercial regulations that discriminated against nonresidents tended to be challenged under the Commerce Clause rather than the Privileges and Immunities Clause.

In 1975, the Supreme Court effectively eliminated the distinction between citizens and residents,¹⁹⁵ and in 1984 the Court noted that, in some instances, the Privileges and Immunities Clause will reach conduct that may not be implicitly barred by the Commerce Clause.¹⁹⁶ For these reasons, cases relying upon the Privileges and Immunities Clause of Article IV have once again become more common.

The Court has continued to draw a line between "those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity" and those deemed less fundamental.¹⁹⁷ The Court thus drew a line between recreational big-game hunting licenses¹⁹⁸ and commercial fishing licenses, the former deemed less than fundamental.¹⁹⁹ State laws favoring employment of "qualified" residents violate the Article IV Clause,²⁰⁰ as do those insisting upon

191. *Guy v. City of Baltimore*, 100 U.S. 434, 439-40 (1879) (striking down discriminatory fees on the use of public wharves).

192. *La Tourette v. McMaster*, 248 U.S. 465, 470 (1919) (upholding a two year residency requirement for licensed insurance brokers).

193. *See id.*

194. *See id.*

195. *See Austin v. New Hampshire*, 420 U.S. 656, 662 (1975). *See also Hicklin v. Orbeck*, 437 U.S. 518 (1978).

196. *See United Bldg. and Constr. Trades Council v. City of Camden*, 465 U.S. 208 (1984) (distinguishing *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983)).

197. *Baldwin v. Fish and Game Comm'n of Mon.*, 436 U.S. 371, 383 (1978).

198. *See id.*

199. *See id.* at 386 (citing *Toomer v. Witsell*, 334 U.S. 385 (1948)).

200. *See Hicklin*, 437 U.S. 518.

residency as a condition for practicing law.²⁰¹ Discrimination against nonresidents with respect to payment of taxes,²⁰² access to medical facilities,²⁰³ and access to natural resources²⁰⁴ have all been deemed unconstitutional.

A commercial nexus appears in virtually all cases in which state regulations have been found to violate the Privileges and Immunities Clause of Article IV. That element is significant, since in such cases Congress could presumably regulate the same behavior based upon its Commerce Clause authority. For example, Congress undoubtedly has the power to regulate commercial fishing licenses or purchases of hydroelectric power. Congress would also have the authority to establish rules governing access to employment and to medical care. What makes this observation noteworthy is that, in exercising such powers, Congress would be acting pursuant to its Commerce Clause authority while also acting to protect "privileges or immunities of citizens of the United States." This dual authority, derived from both Article I of the Constitution and the Fourteenth Amendment, is the key to understanding why the Privileges or Immunities opens a door for abrogating Eleventh Amendment immunity, even if the Commerce Clause did not independently have that effect.

E. Interpretations of 42 U.S.C. § 1983

One more piece to the puzzle completes the picture that privileges or immunities can be derived from federal law. In recent years the Supreme Court has been called upon repeatedly to interpret the scope of the federal statutes protecting the "rights, privileges or immunities" of United States citizens. They have done so without any debate pertaining to the original text of the Fourteenth Amendment on which those statutes were based. Nevertheless, the Court's conclusions unmistakably point towards recognizing federal statutes as a basis for those rights.

As previously noted, the Civil Rights Act of 1871 became law for the express purpose of carrying out the mandate that Congress

201. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

202. See *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 289 (1998).

203. See *Doe v. Bolton*, 410 U.S. 179 (1973).

204. See *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979). In reaching these decisions, the Court abandoned the "legal fiction" of state ownership of natural resources that originally motivated Justice Washington in his path breaking decision in *Corfield*.

received from Section 5 of the Fourteenth Amendment.²⁰⁵ As revised in 1874, the remedial section of that Act provided:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²⁰⁶

The only subsequent changes made to that remedial language extended its protection to residents of the District of Columbia.²⁰⁷ The jurisdictional provisions that were part of the original Civil Rights Act of 1871 were eventually divided and narrowed in scope so as only to encompass "any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."²⁰⁸

The Supreme Court has distinguished between these remedial and jurisdictional statutes. In an opinion filled with debate regarding the origin and history of these provisions, the Court concluded in *Chapman v. Houston Welfare Rights Organization*²⁰⁹ that the jurisdictional statute did not include claims that state welfare regulations violated the Social Security Act.²¹⁰ One year later, in *Maine v. Thiboutot*,²¹¹ the Court rejected arguments for a narrow interpretation of the remedial statute. The Court concluded that state deprivation of welfare benefits protected by the Social Security Act violated the protection of 42 U.S.C. § 1983 for "rights, privileges or immunities" secured by federal law.²¹²

In reaching this conclusion, the Court recounted its prior decisions in which it had found that "no doubt that § 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly

205. See *supra* at text accompanying notes 99-113.

206. Rev. Stat. § 1979 (1874).

207. See 42 U.S.C. § 1983 (1994). Revisions pertaining to the District of Columbia were made in 1979.

208. 28 U.S.C. § 1343(a)(3) (1994).

209. 441 U.S. 600 (1979).

210. *Id.* at 623.

211. 448 U.S. 1 (1980).

212. *Id.* at 5 (quoting *Mitchum v. Foster*, 407 U.S. 225, 240 n. 30 (1972); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 n. 7 (1972)).

construed, against all forms of official violation of federally protected rights.”²¹³ It noted numerous other decisions of the Court in which section 1983 had been “necessarily the exclusive statutory cause of action.”²¹⁴ In his opinion for the Court, Justice Brennan also observed that when Congress added the words “and laws” to the Civil Rights Act, it was “aware of what it was doing”²¹⁵ and did not object to codification, which protected rights derived from the Constitution and laws of the United States. Instead of revisiting the deep divisions regarding statutory history that had surfaced a year earlier in the *Chapman* case, the majority in *Thiboutot* concluded that federal statutory rights were protected by a plain reading of section 1983.²¹⁶ The argument that Justice Brennan did not make, but that should by now be obvious, is that the 1874 Congress did not object to including a reference to federal law in the revised text of the Civil Rights Act because that language was entirely consistent with the meaning of “privileges or immunities” as understood on that date.

In subsequent decisions, the Supreme Court reaffirmed and clarified this conclusion. Not every federal statute establishes a “right, privilege or immunity,” and not every violation of federal law establishes a basis for claiming protection under section 1983. Two cases were decided in 1981 that limited relief under section 1983. In the first, the Court concluded that a federal financial aid program for treatment of the developmentally disabled, although characterized as a “bill of rights,” did not evidence clear congressional intent to establish a personal cause of action.²¹⁷ Plaintiffs had failed to convince the Court that they had a “right secured” by federal law, especially where the law itself provided for an alternative, exclusive remedy.²¹⁸ In the second case, the Court rejected claims for violations of the Federal Water Pollution Control Act independently of the procedures provided for by that Act.²¹⁹ Although rejecting a theory of implied private actions, the Court did not determine that victims of water pollution lacked “privileges or immunities” that had been

213. *Id.* at 5 (quoting *Monell v. New York City Dep’t. of Soc. Servs.*, 436 U.S. 658, 700-01 (1978) (concluding that municipalities are persons under § 1983)).

214. *Id.* at 6.

215. *Id.* at 8.

216. *Id.*

217. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981).

218. *Id.* at 28.

219. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n.*, 453 U.S. 1 (1981).

violated by state or local governments.²²⁰ The conclusion was simply that Congress provided alternative remedies for those victims and by doing so precluded relief under section 1983.²²¹

In *Golden State Transit Corp. v. City of Los Angeles*,²²² the Court found that the "interest in being free of government regulation of the 'peaceful methods of putting economic pressure upon one another'" was a right conferred on employers and employees by the National Labor Relations Act.²²³ In other words, state and local governments could not interfere with the rights, privileges or immunities protected by section 1983. Prior to reaching this conclusion, the Justices identified a three part test to determine whether Congress established a claim that falls within the parameters of section 1983. First, the law must establish binding obligations.²²⁴ Second, the interest cannot be too "vague and amorphous" for judicial enforcement.²²⁵ Finally, the person claiming the right must be an intended beneficiary of the federal law.²²⁶ These requirements mark the Supreme Court's contemporary definition of rights, privileges or immunities.²²⁷

This review of Supreme Court decisions leads finally to the issue of whether it is possible that individuals can establish "rights, privileges or immunities" under federal law, as defined by the federal statute that was enacted to enforce the Fourteenth Amendment, without Congress having authority under the Fourteenth Amendment to enforce such actions against states. The current Supreme Court Justices may be able to resolve the paradox suggested by this question. At the very least, they need to be asked to do so.

220. *Id.* at 19.

221. *See id.* at 21.

222. 493 U.S. 103 (1989) (holding that plaintiffs were entitled to a section 1983 remedy for violations of the National Labor Relations Act).

223. *Id.* at 112 (quoting *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 154 (1976)).

224. *See id.* at 106 (citing *Pennhurst*, 451 U.S. at 19).

225. *See id.* (citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32 (1987)).

226. *See id.* (citing *Wright*, 479 U.S. at 430).

227. The Court also eliminated any doubt about links between the Commerce Clause and section 1983 when it ruled in 1991 "that the Commerce Clause confers 'rights, privileges, or immunities'" within the meaning of that law. *Dennis v. Higgins*, 498 U.S. 439, 446 (1991) (concluding that § 1983 could be relied upon to enforce dormant commerce clause claims). *See generally* Henry Paul Monaghan, *Federal Statutory Review under Section 1983 and the APA*, 91 COLUM. L. REV. 233 (1991).

III. Federalism, Immunity, and Enforcement of the Privileges or Immunities Clause

The relationship between federal law and the Privileges or Immunities Clause described above can be easily traced to Nineteenth Century origins. The Fourteenth Amendment eliminated the nullification doctrine and reestablished a conception of state sovereignty subordinate to legitimate actions of Congress taken to protect individual rights. Justice Miller explained this at the time of the *Slaughter-House Cases*, and Justice Roberts still understood this lesson when he was writing in 1939.²²⁸ In the late Twentieth Century, however, courts and commentators rarely examined the scope of the Privileges or Immunities Clause. At least two factors contributed to this lack of discussion. The first, discussed in detail in prior sections, is that most of the focus on privileges or immunities dealt with problems of defining those inherent rights that could be incorporated or inferred from the Constitution.²²⁹ That debate overshadowed the more mundane acceptance of, and at times even insistence upon, a federal statutory basis for privileges or immunities.

Even more important, however, was that no significant need arose to find within the Fourteenth Amendment's Privileges or Immunities Clause a source of authority to protect individuals from state law. No one sought to reinforce the Supremacy Clause. At least until the Court's recent decisions, Nineteenth Century claims that state sovereignty included power to ignore or nullify federal law all but disappeared.

A primary issue for much of the Twentieth Century was whether Congress had power to enact laws regulating the national economy. There was little need to question whether congressional actions based upon that power established privileges or immunities for United States citizens. One context in which that issue could logically have arisen developed when the Court was asked to decide whether Congress had authority to expand federal law so as to protect state employees. The Court moved back and forth on that issue, first finding that some state employees were protected by the Fair Labor Standards Act,²³⁰ then concluding that the Act could not be enforced against states when doing so interfered with integral governmental

228. See *Hague v. Committee for Indust. Org.*, 307 U.S. 496 (1939), and text accompanying notes 179-181.

229. See text accompanying notes 9, 66 and 72-74.

230. See *Maryland v. Wirtz*, 392 U.S. 183 (1968).

functions,²³¹ and then reversing course again when five Justices concluded that the traditional or integral functions test was unworkable.²³² The Court's analysis turned on the breadth of the Commerce Clause and its interaction with the Tenth Amendment. Although it may have been logical to discuss the Privileges or Immunities Clause in that context, there was no substantial reason to do so because the outcome of the Court's analysis would be the same whether the source of congressional power was attributed to the Commerce Clause or to the Privileges or Immunities Clause.

That crucial fact changed in 1996 when five Supreme Court Justices decided that the Commerce Clause did not empower Congress to abrogate Eleventh Amendment immunity.²³³ With that decision, the Court found for the first time that the Eleventh Amendment blocked the operation of the Supremacy Clause when private parties had been explicitly authorized by Congress to enforce their federal rights against the states; only a source of congressional power that modified Eleventh Amendment immunity could therefore be used to protect individual rights from state interference. As a result, the time has now arrived to decide what was meant when Justice Miller determined that the Fourteenth Amendment protected the privileges or immunities derived from the Constitution or laws of the federal government. Before reaching that question, however, it is necessary to review the Supreme Court's treatment of the Eleventh Amendment, and the interaction of those rulings with its views regarding the scope of congressional authority to enforce the Fourteenth Amendment.

A. Eleventh Amendment Immunity

On its face, the Eleventh Amendment appears both simple and relatively benign: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This language emerged as a direct response to the Supreme Court decision in *Chisholm v. Georgia*²³⁴ which held that diversity jurisdiction of federal courts could be used by citizens of one state to enforce debts against

231. See *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

232. See *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 531 (1985).

233. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

234. 2 U.S. 419 (1793).

another state.²³⁵ Creation of federal common law liability of states clashed with traditional conceptions of state sovereignty; the reaction to the Court's decision was immediate and dramatic.²³⁶ Within five years the Constitution had been amended to preclude such actions.²³⁷

In subsequent years, the Supreme Court added complexity to the Eleventh Amendment as it addressed questions about state liability for violations of federal law. Initially, the Court, led by Chief Justice Marshall, found that the Eleventh Amendment had not barred federal question jurisdiction in cases brought against state officials.²³⁸ Marshall saw this holding as essential to preserving the role of federal courts in enforcing the Supremacy Clause and assuring uniformity of federal law throughout the states.²³⁹ By the 1890's, however, the spirit of the Court had changed and protection of state sovereignty gained strength. In *Hans v. Louisiana*, Supreme Court Justices found that "suability of a State without its consent was a thing unknown to the law."²⁴⁰ It therefore ruled that a citizen could not sue its own state in federal court even though the Eleventh Amendment did not address that issue.²⁴¹ The Court made clear that interpretation of the Amendment should not be determined by reference to the letter of the law, but rather by reference to broad traditional conceptions of state sovereignty.²⁴² As expressed in more recent cases, the Justices "have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."²⁴³

The broad holding in *Hans*, however, was not the last word in construing the scope of the doctrine of state sovereign immunity. In the same year that the Court limited Eleventh Amendment immunity to preclude suits by a state's own citizens, the Justices also determined that the Amendment did not protect independent agencies or political subdivisions within a state.²⁴⁴ Cities, counties,

235. *Id.* at 479 (writing for the Court was Chief Justice Jay).

236. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1054-63 (1983) (detailing the response to *Chisholm*).

237. U.S. CONST. amend. XI.

238. See *Osborn v. Bank of the United States*, 22 U.S. 738 (1824).

239. See *id.* at 846-59.

240. 134 U.S. 1, 16 (1890).

241. See *id.* at 15.

242. See *id.*

243. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53 (1996).

244. See *Lincoln County v. Luning*, 133 U.S. 529, 530-31 (1890) (finding that counties

school boards or other agencies independent of direct state control could be sued in federal court²⁴⁵ even when state statutes attempted to limit actions against them to state courts.²⁴⁶

Other exceptions to Eleventh Amendment immunity go even more directly to the heart of state liability. The Court recognized that the Eleventh Amendment did not preclude suits against states brought by the federal government.²⁴⁷ Current statutory law authorizes bringing such actions in federal district courts.²⁴⁸ Based on Supreme Court decisions that predate the recent spate of restrictive holdings,²⁴⁹ suits by the federal government may be brought against states even when the purpose for doing so is to protect the rights of private citizens who would be barred from filing personal actions.²⁵⁰

It has also been understood that the Eleventh Amendment does not preclude suits against state officials for prospective injunctive relief. This principle, identified with *Ex parte Young*,²⁵¹ had been referred to as "settled doctrine" as early as 1898.²⁵² In *Ex parte Young*, the majority concluded that state action that violated federal law was invalid; therefore, "[i]t is simply an illegal act upon the part of a state official in attempting by the use of the name of the state, to enforce a legislative enactment which is void, because unconstitutional."²⁵³ In more recent applications of this doctrine, the Court recognized that claims for prospective injunctive relief may have a fiscal impact upon the state without crossing the line precluding monetary damages. Thus, although barring retrospective

are municipal corporations and not protected by the Eleventh Amendment).

245. See *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (holding that interstate compact agency was not immune from suit in federal court).

246. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (holding that school boards were not entitled to Eleventh Amendment immunity).

247. See *Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279, 286 (1973).

248. 28 U.S.C.A. §§ 1251(b)(2), 1345 (1997).

249. See cases cited, *supra* note 1.

250. See *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983) (enforcing Age Discrimination in Employment Act); *Employees of Dept. of Public Health, 411 U.S. 279* (allowing suit by Secretary of Labor to enforce the Fair Labor Standards Act).

251. 209 U.S. 123 (1908).

252. See *Smyth v. Ames*, 169 U.S. 466, 518 (1898) (blocking enforcement of unconstitutional law by state officials). For prior examples, see *Poindexter v. Greenhow*, 114 U.S. 270 (1885) (blocking seizure of property by state tax collector); *Pennoyer v. McConaughy*, 140 U.S. 1 (1891) (restraining land commissioners from violating contract based upon unconstitutional state law).

253. *Ex parte Young*, 209 U.S. at 159.

monetary damages, the Justices upheld a prospective order to disburse state funds in conformity with federal law.²⁵⁴ In reaching these judgments, the Court has repeatedly stressed the necessity of *Ex parte Young* to preserve the supremacy of federal law.²⁵⁵

It should be noted that the *Ex parte Young* exception from Eleventh Amendment immunity only applies to claims of state violation of federal law, not to claims that the state violated its own law. The Supreme Court explained that the exception was needed to protect the uniformity and supreme authority of the federal law and that those concerns "disappear" when parties seek to enforce pendent state claims against state officials.²⁵⁶

The long standing and seemingly settled exceptions to Eleventh Amendment immunity described above also appeared consistent with a more general rule that allowed Congress to abrogate Eleventh Amendment immunity. The Court illustrated this general rule when it upheld awards based upon the Civil Rights Attorney's Fees Awards Act of 1976.²⁵⁷ Congressional abrogation in that case could be attributed to a power of Congress derived from the Fourteenth Amendment.²⁵⁸ In a 1989 plurality opinion, the Court extended that ruling to apply also when Congress expressly abrogated Eleventh Amendment immunity based upon its Commerce Clause power.²⁵⁹ Seven years later, in a five-to-four decision, the Supreme Court overruled that holding.²⁶⁰ The majority explained that it did not question congressional authority to use its power under the Fourteenth Amendment to expressly abrogate Eleventh Amendment immunity.²⁶¹ Chief Justice Rehnquist's opinion for the Court also

254. See *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). See also *Quern v. Jordan*, 440 U.S. 332 (1979) (upholding district court order that members of the class be notified that they may be eligible for past welfare benefits pursuant to state administrative procedure).

255. See, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) (rejecting application of *Ex parte Young* doctrine when Indian tribe sought relief comparable to a quiet title action).

256. *Pennhurst*, 465 U.S. at 90.

257. See *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978). See also *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989) (holding that "an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment").

258. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976) (concluding that award of monetary damages against state government for violations of individual's rights under Title VII did not violate Eleventh Amendment because authority was derived from Section 5 of the Fourteenth Amendment).

259. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

260. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

261. See *id.* at 59.

restated traditional exceptions to Eleventh Amendment immunity for direct federal enforcement and for suits for injunctive relief.²⁶²

In subsequent years the Court's majority has seized the Eleventh Amendment as a tool for enforcing its vision of federalism. In doing so, the Court has rejected arguments that states constructively waived some aspects of their immunity through their participation in commercial activities.²⁶³ After eliminating the Commerce Clause basis for congressional abrogation of the Eleventh Amendment, the Court subsequently ruled that other sources of Article I authority could also not be used for that purpose.²⁶⁴ These decisions did not modify settled doctrine that Fourteenth Amendment rights would override Eleventh Amendment constraints. As a result, the focus of debate shifted to questions about whether Congress reasonably relied on the Fourteenth Amendment as a basis for abrogation.

Analysis of Fourteenth Amendment abrogation of state sovereign immunity begins with reference to the interpretive role assigned to Congress by Section 5 of that Amendment. In *City of Boerne v. Flores*,²⁶⁵ the Court ruled that enforcement of rights derived from the First Amendment religion clauses, incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment, must be congruent and proportional with Supreme Court interpretations of those amendments.²⁶⁶ Congressional authority was purely remedial, and could not extend to expanding the scope of the First Amendment.²⁶⁷

The majority relied upon this principle when asked in subsequent cases about whether Congress had reasonably relied upon the Fourteenth Amendment to abrogate Eleventh Amendment immunity. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,²⁶⁸ the Court again reasoned that Congress could not act in a manner that was "'so out of proportion to a supposed remedial or preventive object' that [the congressional act]

262. See *id.* at 91 n.14.

263. See *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (concluding that Florida could not be sued for false advertising under the Lanham Act, 15 U.S.C. § 1125(a) (1999)) (overruling *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184 (1964)).

264. See *Florida Prepaid Postsecondary*, 527 U.S. 627 (concluding that the Patent Clause could not be relied upon to abrogate Eleventh Amendment immunity).

265. 521 U.S. 507, 520 (1997).

266. *Id.* at 520.

267. *Id.* at 519.

268. 527 U.S. 627 (1999).

could not be understood 'as responsive to, or designed to prevent, unconstitutional behavior.'"²⁶⁹ Pursuing this line of analysis, the Court recognized that patent rights constituted a form of property and that state infringement of patent rights could be seen as a deprivation of property without due process.²⁷⁰ Mere identification of patent rights as property, however, did not automatically mean that federal remedies for state infringement of patent rights were congruent and proportional to the remedial authority that Congress was given under Section 5 of the Fourteenth Amendment.²⁷¹ According to the majority, that claim would lie only if states were failing to offer their own remedies to patent violations.²⁷² Because Congress acted without evidence of such abuse, and without a careful assessment of existing state remedies, it could not rely upon the Fourteenth Amendment Due Process Clause as a basis for abrogating state immunity from federal patent enforcement actions.²⁷³

In *Kimel v. Florida Board of Regents*,²⁷⁴ the Court reemphasized this doctrine, holding Alabama immune from suit for violation of the Age Discrimination in Employment Act.²⁷⁵ Kimel argued that Congress had power to abrogate Eleventh Amendment immunity from liability for age discrimination based upon the Equal Protection Clause of the Fourteenth Amendment.²⁷⁶ The Court rejected that argument on grounds that, because age discrimination issues were only subject to rational basis review under prevailing equal protection analysis,²⁷⁷ states should easily be able to meet that standard.²⁷⁸ Again using the "congruence and proportionality" test of *City of Boerne*, the majority found that requirements of the ADEA were "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."²⁷⁹ The same Justices followed the same rationale to conclude in *Board of Trustees of the University of*

269. *Id.* at 639 (quoting *City of Boerne v. Flores*, 521 U.S. at 532).

270. *See id.* at 642.

271. *See id.* at 642-43.

272. *See id.* at 643.

273. *See id.* at 647.

274. 528 U.S. 62 (2000).

275. 29 U.S.C. § 629 et. seq. (1994)(Supp. III 1997).

276. *Kimel*, 528 U.S. at 78.

277. *See id.* at 83.

278. *See id.* at 84-85.

279. *Id.* at 82. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

*Alabama v. Garrett*²⁸⁰ that Congress could not abrogate state immunity from monetary damages in suits by private individuals to enforce the Americans with Disabilities Act.²⁸¹

As demonstrated in *Florida Prepaid* and *Kimel*, limits on the scope of Fourteenth Amendment protection have been critical to advancing the state sovereignty theory of the current Supreme Court. Furthermore, Eleventh Amendment sovereign immunity reflects a broader concept of state and federal government relationships subscribed to by at least some members of the Court. To better understand the vision of federalism that appears to be motivating the Court, it is important to review prior opinions of Justices leading that movement. Justice O'Connor and Chief Justice Rehnquist, who joined in the opinion of the Court in *Kimel*, favor an agenda that goes beyond traditional bounds of Eleventh Amendment immunity. They seek to preclude federal power to enact legislation that intrudes upon traditional or integral state functions.²⁸²

Justice O'Connor's opinion in *Kimel* demonstrates that her approach to the Eleventh Amendment is little more than an alternative route towards achieving the limits on federal power that were rejected by the Court fifteen years ago in *Garcia* and to presage more radical challenges to congressional power. She writes as if states are free from any potential liability under the ADEA. It thus appears that the Eleventh Amendment is now being used to vindicate then-Associate Justice Rehnquist's admonition in *Garcia*, that the approach he shared with Justice O'Connor would "in time again command the support of a majority of this Court."²⁸³ At least some members of the Court seem bound to ignore limits otherwise understood in the Eleventh Amendment framework, including both the doctrine of *Ex parte Young* and the established rule that the Eleventh Amendment does not preclude direct federal enforcement as a means of carrying out their vision of federalism.

Significantly, Justice O'Connor's opinion for the Court in *Kimel* omitted any reference to the doctrine of *Ex parte Young*. Introducing the case, O'Connor made clear that some of the plaintiffs sought declaratory and injunctive relief,²⁸⁴ but the parties did not challenge or even discuss the doctrine that plaintiffs could establish an entitlement

280. 121 S. Ct. 955 (2001).

281. *See id.* at 962.

282. *See Garcia*, 469 U.S. at 579-589 (Rehnquist, C.J. & O'Connor, J., dissenting).

283. *Id.* at 580 (Rehnquist, C.J., dissenting).

284. *See Kimel*, 528 U.S. at 69.

to prospective injunctive relief.²⁸⁵ In keeping with her omission of references to *Ex parte Young*, O'Connor's concluding paragraphs note alternatives remaining for victims of age discrimination based upon state law, without any reference to the option of seeking injunctive relief or direct federal enforcement.²⁸⁶

It is not clear to what extent other Justices share the apparent goal of Justice O'Connor to eliminate state liability for federal laws based upon Congress's Article I authority. Justice Kennedy did not join with Justice O'Connor, but instead joined a strained concurring and dissenting opinion by Justice Thomas finding that Congress failed to adequately abrogate state immunity when it enacted amendments to the ADEA.²⁸⁷ Without explicit abrogation, Justices Thomas and Kennedy found no need to address questions of federal power generally, or Eleventh Amendment immunity in particular.²⁸⁸

In prior opinions, Justice Kennedy had referred to the "essential" role of *Ex parte Young* in the Court's sovereign immunity doctrine, noting that "certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land."²⁸⁹ Given Justice Kennedy's focus on the *Ex parte Young* doctrine in other cases,²⁹⁰ it is hard to

285. An amicus brief in support of the respondent submitted by the Coalition for Local Sovereignty advocated repudiation of *Ex parte Young*. The Respondent's Brief, however, noted that they did not challenge "an individual's authority to bring an injunction action against State officials in federal court, see *Ex Parte Young*, 209 U.S. 123 (1908), or the Federal government's authority to bring a claim for injunctive and monetary relief against States in federal court, see *Employees of the Dep't of Public Health and Welfare v. Missouri Public Health Dept.*, 411 U.S. 279, 286 (1973)." Respondent's Brief, available at, 1999 WL 631661 (1999).

286. See *Kimel*, 528 U.S. at 91-92.

287. See *id.* at 99 (Thomas, J., joined by Kennedy, J., concurring in part and dissenting in part).

288. See *id.*

289. *Alden v. Maine*, 527 U.S. 706, 777 (1999).

290. In his opinion for the Court in *Alden*, Justice Kennedy noted doctrines allowing suits by the federal government and suits for injunctive or declaratory relief, and referred to them as components of "the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Id.* at 757 (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)). The division of the Justices regarding the scope of *Ex parte Young* was demonstrated by their debate in the case of *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270-74 (1997). Justice Kennedy, joined only by Chief Justice Rehnquist, advocated drawing lines based upon whether adequate state forums were available. In his opinion, Kennedy emphasized the importance of ensuring "the supremacy of federal statutory and constitutional law." *Id.* at 270. The concurring opinion of Justice O'Connor, joined by Justices Thomas and Scalia, purported to rest on existing *Ex parte Young* doctrine, but refused to "extend" that doctrine to a private action

imagine that he did not have thoughts about application of that doctrine in *Kimel*. The fact that the Justices chose not to engage in discussion of that issue suggests that deep divisions remain within the ranks of the five Justices who have joined the recent crusade to expand Eleventh Amendment immunity.²⁹¹

Justice Steven's dissenting opinion in *Kimel* acknowledged that, in his view, the issue at stake was an issue of federal power to establish employee rights in the broader sense.²⁹² He noted that prior Supreme Court opinions interpreting the Eleventh Amendment left open "a State's liability upon enforcement of federal law by federal agencies,"²⁹³ clearly doubting whether that door remained ajar after *Kimel*. With that note, Justice Stevens signaled his belief that the majority was intent upon imposing limits on federal power that would go beyond those traditionally associated with Eleventh Amendment immunity. States were, in essence, being invited by the majority to nullify federal law.

In their most recent statement on the issue, the majority by Chief Justice Rehnquist reassured those who may have feared the loss of all avenues for enforcement of federal law against the states. In *Garrett*, the Court barred private suits for monetary damages resulting from state violations of the Americans with Disabilities Act. The Chief Justice explained that persons with disabilities retain "federal recourse against discrimination . . . enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*."²⁹⁴ It is too early to know whether this statement represents a final word on the issue.

that sought to divest the state of a property interest or to eliminate state regulatory power over that property. *Id.* at 296-97. The other four Justices expressed the view that the case was one which fell "squarely within the *Young* doctrine." *Id.* at 297 (Souter, J., with whom Stevens, Ginsburg and Bryer, J.J., join dissenting). While the split within the majority demonstrates disagreement regarding application of *Ex parte Young*, neither of the tests offered by those Justices offer significant guidance as to where a future majority might decide to draw those lines.

291. The Court's reluctance to address the *Ex parte Young* doctrine was again illustrated when the Justices granted *certiorari* in *Alsbrook v. Arkansas*, 528 U.S. 1146 (2000), *cert. dismissed* 529 U.S. 1001 (2000), agreeing to review the question of whether Congress had power to abrogate the Eleventh Amendment under the Americans with Disabilities Act, but refusing to review petitioner's second question addressing the district court's authority to issue injunctive relief.

292. See *Kimel*, 528 U.S. at 93 (Stevens, J., dissenting).

293. *Id.* at 98.

294. *Garrett*, 121 S. Ct. at 969 n.9.

B. The Supreme Court and Congressional Roles in Defining Constitutional Norms

The previous section explained that Supreme Court ambitions to expand state sovereignty remain subject to Fourteenth Amendment enforcement powers. It also described ways in which the Supreme Court narrowly construed those enforcement powers to limit congressional authority. As a result, it is important to take a closer look at the scope of those powers in order to clearly define the respective roles of Congress and the Supreme Court.

It has become settled law that the Supreme Court determines the substantive scope of the Fourteenth Amendment, and Congress' role is remedial rather than plenary: "Congress does not enforce a constitutional right by changing what the right is."²⁹⁵ This design of the Fourteenth Amendment maintains traditional separation of powers between Congress and the Judiciary. The Court recently explained, "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"²⁹⁶

Contrary to superficial appearances, this principle does not conflict with a conclusion that privileges or immunities can be derived from federal statutes. To hold that the Fourteenth Amendment prohibits state interference with privileges or immunities created by Congress does nothing to broaden congressional power to establish such rights. It should be assumed throughout this discussion that Congress can only act pursuant to powers otherwise established by the Constitution. This includes both the substantive role identified by Article I, Section 8 of the Constitution (enumerating Congress' power) and the remedial role identified in Section 5 of the Fourteenth Amendment (granting to Congress power to enforce the Fourteenth Amendment provisions).

The inclusion of privileges or immunities derived from Article I powers of Congress reinforced the nondiscrimination principle that Nineteenth Century jurists had recognized and associated with this language.²⁹⁷ In other words, as with all other equality principles lodged in the Constitution, the Supreme Court would not expect to claim a role in defining underlying policy. For example, in the more traditional context of equal protection principles, the Court would not

295. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

296. *Id.* at 529.

297. *See supra* text accompanying notes 36-60.

decide whether to issue federal contracts to build new highways, but it would determine whether rules of competition for those contracts had been equally applied.²⁹⁸ The role of the Court in enforcing the Privileges or Immunities Clause should follow the same pattern. Thus, the Court would not decide whether there should be a federally mandated minimum wage. Once Congress makes that decision, however, courts would enforce a nondiscrimination principle by deciding whether states have interfered with a federally created privilege or immunity.²⁹⁹

Prior cases further illustrate the roles of Congress and the courts in this context. Congress has the authority to regulate use of federal property. The substance of that regulation must be determined in the first instance by Congress, not by the courts. Once Congress determined that citizens of the United States should be allowed to establish homesteads on federal property, the Privileges or Immunities Clause reinforced the Supremacy Clause and assured that state officials would not be allowed to interfere with that use.³⁰⁰ Similarly, once Congress enacted the National Labor Relations Act, states could not interfere with pursuit of rights derived from that Act.³⁰¹ In both cases, states could not decide that some favored citizens within the state enjoyed the benefit of federal law while other, less-favored citizens were denied that benefit. The fact that Congress, rather than the courts, decided in the first instance to establish federal property rights or labor law did not alter the traditional Supreme Court role in assuring access to those rights free from state interference. In both cases, authority to enact the original legislation was derived from Article I of the Constitution and that authority remained subject to Supreme Court review.

This approach to interpretation of privileges or immunities does not entail the interpretive dilemma that arose when Congress asserted a greater independent role in determining the substantive scope of the Equal Protection or Due Process Clauses of the Fourteenth Amendment in *Kimel*, *Florida Prepaid* and *Garrett*. By enacting laws authorized by Article I, Congress does not change the "paramount law" of the Constitution. Congress does not recast the substantive scope of the Bill of Rights when it relies upon the

298. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (using strict scrutiny to review race-based affirmative action in federal contracts).

299. See *Alden v. Maine*, 527 U.S. 706 (1999).

300. See *United States v. Waddell*, 112 U.S. 76 (1884).

301. See *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939).

Commerce Clause to enact civil rights legislation, and the substantive scope of the Commerce Clause remains subject to judicial constraints.³⁰² Concluding that privileges or immunities may be created by Congress through its legitimate exercise of Article I powers does not change the fundamental nature of congressional authority; Congress' Section 5 power continues to be "corrective or preventive, not definitional."³⁰³

This enunciation of a nondiscrimination principle may sound like nothing more than a restatement of the Supremacy Clause. As previously noted, Justice Field asked the majority in the *Slaughter-House Cases* why the Privileges or Immunities Clause should be cited as authority for the principle that federal law is superior to state law, and state law must therefore give way.³⁰⁴ If the answer to that question seemed mysterious in 1872, the Supreme Court has now solved the mystery. In its Eleventh Amendment cases, the Court determined, in effect, that prior to the Fourteenth Amendment, superiority of federal law did not imply a right of individuals to enforce that law against the states.³⁰⁵ Cogent arguments have been made by many others, including four Justices of the Supreme Court, that this interpretation of the Eleventh Amendment lacks textual, historical, or principled support.³⁰⁶ If one makes the assumption, however, that current Supreme Court interpretation of the relationship between the Eleventh Amendment and preceding articles of the Constitution is correct, then the Privileges or Immunities Clause changed that interpretation when individual rights or interests have been established by federal law and federal courts are called upon to protect those rights from state abridgement.

There is a second, more deeply rooted reason for believing that the Privileges or Immunities Clause includes a nondiscrimination element tied to federal legislation. Ample evidence suggests that framers of the Fourteenth Amendment anticipated a more proactive role for Congress than subsequent Supreme Court decisions allowed. The Civil Rights Acts of 1866, 1870, 1871, and 1875 document contemplation of such a role. History of that time period, previously recounted, demonstrates an understanding that, not only would

302. See *United States v. Morrison*, 120 S. Ct. 1740, 1754 (2000).

303. *City of Boerne*, 521 U.S. at 525.

304. See *supra* text accompanying notes 133-36.

305. See *supra* text accompanying note 257-258.

306. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Stevens, J., Souter, J., Ginsburg, J., and Breyer, J., dissenting). See also *supra* articles cited in note 1.

federal law be needed to block imposition of repressive Black Codes, but also that there would be concern about state interference with those federal laws.³⁰⁷ In 1875, members of Congress accurately anticipated that federal law would be needed to bar race discrimination in establishment of contract or property rights. Although the *Civil Rights Cases* ruled that Congress lacked power to address questions about private discriminatory acts, that decision has been overtaken by time and events. Viewed from a contemporary perspective, congressional power derived from the Commerce Clause authorizes legislation that bars racial discrimination in both private and public employment. Only by dramatically reversing course could the Justices now declare that, when applied to the states, civil rights legislation must be limited in scope by the Court's interpretations of the Equal Protection Clause while at the same time broader interpretations of the same acts can be applied to private employers.³⁰⁸

When congressional action has been firmly grounded in the Commerce Clause, and that legislation secures interests consistent with a traditional concept of privileges or immunities, then the courts should not impose additional tests of "proportionality" to determine whether such acts can be enforced against states through private actions in federal court. But this is not because Congress has been given independent authority to interpret the Fourteenth Amendment. In *Boerne v. Flores*, Congress was challenged for having attempted to rewrite the First Amendment. In *Florida Prepaid*, *Kimel*, and *Garrett* the Court limited congressional power to broaden the scope of due process or equal protection. In contrast, when enforcing the Privileges or Immunities Clause, the scope and validity of the congressional act stems from the Commerce Clause or other Article I sources and cannot be seriously questioned.

There should also not be questions about congressional control over enforcement of such legislation against state officials. When rights derived from Commerce Clause legislation are seen as privileges or immunities of citizens, the text of the Fourteenth

307. See *supra* text accompanying notes 75-88.

308. Unlike recent conflict between Congress and the Supreme Court over authority to interpret the Bill of Rights, the Court has not questioned congressional power to exercise its Commerce Clause authority in ways which differ from the Court's analysis of the Equal Protection Clause. See *Ward's Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642 (1989). Note also that the Supreme Court has explicitly deferred to congressional expertise in defining the reach of the Thirteenth Amendment. See *United States v. Kominski*, 487 U.S. 931, 939 (1988) (refusing to find that the phrase "involuntary servitude" could be based on purely psychological coercion absent congressional decisions to that effect).

Amendment provides freedom from state interference. If the question is whether the Eleventh Amendment bars private parties from bringing such actions in federal court, then the Privileges or Immunities Clause also provides an unambiguous answer to that question by explicitly protecting individuals from state abridgement of their rights. Congressional abrogation of Eleventh Amendment immunity is nothing more than an exercise of remedial power, authorized by Section 5 of the Fourteenth Amendment.

The route to making broad civil rights legislation a responsibility of the federal government was more circuitous than that contemplated by framers of the Fourteenth Amendment. Nevertheless, a coherent conception of the Constitution as an organic document supports the conclusion that Congress was empowered by the Commerce Clause to enact such legislation and by the Privileges or Immunities Clause to determine how it should be enforced. Ignoring the latter, the current Supreme Court majority has committed itself to capturing the spirit of the Eleventh Amendment based upon "the importance of sovereign immunity to the founding generation"³⁰⁹ but in doing so, it has ignored the "sense and reason of the law" as modified by the Reconstruction Amendments.³¹⁰ By allowing states to effectively nullify federal law, the Justices have resurrected John C. Calhoun's conception of state sovereignty³¹¹ and ignored that of John Bingham.

C. Reconsidering Privileges or Immunities

The preceding discussion questions whether the matrix of rules that the Court is constructing around the Eleventh Amendment is consistent with the Privileges or Immunities Clause. In developing these rules, the Court has recognized that Congress only lacks power to abrogate state immunity if its enforcement authority is derived from the main body of the Constitution. As recognized by Justice Kennedy: "[I]n adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to

309. *Alden v. Maine*, 527 U.S. 706, 726-727 (1999).

310. *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

311. See David Milton Whalen, *John C. Calhoun Becomes the Tenth Justice: State Sovereignty, Judicial Review and Environmental Law after June 23, 1999*, 27 B. C. ENVTL. AFF. L. REV. 193 (1999) (sharing the view that the Supreme Court's Eleventh Amendment decisions resurrect Calhoun's conception of state nullification).

its § 5 enforcement power.”³¹² The Court rejected claims that state sovereignty could be defeated by federal law that appeared disproportionate to the scope of arguable due process or equal protection violations.³¹³ Throughout those opinions, however, the Court has never seriously entertained questions about the scope of congressional authority derived from the Privileges or Immunities Clause of the Fourteenth Amendment.

The fact that the Supreme Court and constitutional scholars have generally ignored Privileges or Immunities Clause authority for enforcement of congressional actions against the state should not come as a surprise. As previously noted, generally accepted interpretations of the *Slaughter-House Cases* sharply reduced the concept of privileges or immunities as an independent source of substantive law. Justice Miller’s opinion in that case unquestionably recognized federal law as a source of privileges or immunities; subsequent congressional actions and Supreme Court decisions reinforced and never questioned that recognition. Those interpretations, however, did not in any significant way expand congressional law-making authority. The importance of reinforcing the Supremacy Clause, while understandable in light of antebellum conceptions of state sovereignty, seemed meaningless to Twentieth Century judges and scholars.³¹⁴ The Supreme Court’s apparent move towards using the Eleventh Amendment as a broad source for securing state sovereignty creates the need to reconsider ways in which state and federal sovereign relationships were altered by the Privileges or Immunities Clause.

We now know that Congress has the authority to assure that all citizens of the United States enjoy equal rights to enter into contracts and to possess property whenever regulation of those interests has a substantial cumulative effect on interstate commerce. We know that Congress was empowered to protect these rights by the Commerce Clause even if not by the Thirteenth or Fourteenth Amendments. We should also acknowledge that, given the repeated references to

312. *Alden*, 527 U.S. at 756 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

313. See, e.g., *Board of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (rejecting Equal Protection Clause authority for the Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (rejecting due process arguments as basis for state liability for patent infringements).

314. Hence the equation of references to the Privileges or Immunities Clause as restating the Supremacy Clause with statements that the Privileges or Immunities Clause had become a dead letter. See *supra* notes 8, 10.

Justice Washington's definition in *Corfield v. Coryell*,³¹⁵ privileges or immunities include such rights.

If a particular interest would be considered a "privilege" or an "immunity" when regulated by the state, then parallel use of that language in the Fourteenth Amendment should suggest that the same interests would be considered privileges or immunities of United States citizenship when protected by federal law. One may ask, for example, whether states could protect their own citizens from age discrimination in employment while denying that protection to nonresident employees. Similarly, one may ask whether states could provide a minimum wage for resident employees, but deny equal treatment to nonresidents. One reason why states could not discriminate in such a manner is that equal treatment in employment relationships has long been recognized as embedded in the concept of privileges or immunities.

Another way to understand the scope of protection for privileges or immunities is to ask whether the interests affected by a given law would be protected by a common Nineteenth Century treaty clause assuring that citizens from one nation were entitled to the privileges or immunities of citizens when working or doing business within the territory of another nation.³¹⁶ For example, if a treaty with Spain guaranteed privileges or immunities, could a Spanish citizen have relied on that treaty to establish patent rights within the United States? What would be the answer if, in a treaty acquiring Louisiana, the United States guaranteed that all inhabitants of the territory would enjoy "all of the rights, advantages and immunities of citizens of the United States"?³¹⁷ If patent rights were privileges or immunities in a treaty context, then they should also enjoy that status within the United States. No self-respecting Nineteenth Century judge would have failed to recognize that patent rights were privileges or immunities of United States citizens.

Framers of the Fourteenth Amendment may not have conceived of Article I authority in a manner that would have embraced contemporary labor laws or civil rights legislation. That does not mean, however, that the framers failed to recognize employment

315. 6 F.Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

316. For an account of various treaties of territorial accession guaranteeing to territorial inhabitants "all the privileges, rights, and immunities of the citizens of the United States," see AMAR, *supra* note 10, at 167-68.

317. Treaty Between the United States of America and the French Republic, April 30, 1803, 8 Stat. 200, 202.

relationships, contract rights, and property rights as privileges or immunities. The legislative record following ratification of the Fourteenth Amendment adequately demonstrated such a conception. When the Supreme Court ruled in the *Civil Rights Cases* that Congress lacked power to address private acts of discrimination, they did so after acknowledging that rights to employment and public accommodations could appropriately be characterized as privileges or immunities.³¹⁸ Although enforcement of the state action doctrine limited development of that conception in the century which followed, that should not alter the fact that such interests fall within a reasonable definition of privileges or immunities as those terms were being used in 1869.

A remaining objection, voiced in particular by Justice Thomas in his dissenting opinion in *Saenz v. Roe*,³¹⁹ is that only "fundamental" privileges or immunities "rather than every public benefit established by positive law" were meant to have been protected by the Fourteenth Amendment. The basic error Justice Thomas makes results from his focus on the specific content of legislation rather than on the broad principle that was enforced by the majority's interpretation. Thus, Justice Thomas would have ruled that welfare benefits are not fundamental and, therefore, not protected when state law discriminates by reducing welfare assistance to new residents. The majority, however, understood that the fundamental principle involved is the right to travel from one state to another without experiencing such discrimination.³²⁰ In the same sense, the question of whether federal statutes constitute privileges or immunities should not be resolved on the basis of whether Justice Thomas would consider the specific statutory interests fundamental or enduring, but rather on whether the statute is meant to have general application to all United States citizens. Courts should look at the fundamental principle that all federal statutory rights should be enforced equally

318. *Civil Rights Cases*, 109 U.S. at 21.

319. 526 U.S. 489, 527 (1999) (Thomas, J., dissenting).

320. The Supreme Court recognized the right to travel from one state to another free from discrimination when they struck down the capitation tax in *Crandall v. State of Nevada*, 73 U.S. 35 (1867). In 1872, Justice Miller explicitly ruled that discrimination against travelers into a state was a clear example of state action prohibited by the Privileges or Immunities Clause. See *The Slaughter-House Cases*, 83 U.S. 36, 79 (1872). It was not the seriousness of the amount of the tax, but rather the discrimination against new arrivals from other states that gave rise to Justice Miller's conclusion. Reduced welfare benefits in *Saenz v. Roe* have the same tendency to discourage travel by individuals with limited means as the tax that was declared unconstitutional in *Crandall*.

throughout the United States; that federal supremacy binds us together as citizens of a single nation living under the same law.

Congress may use the power it derives from the Commerce Clause, the Property Clause, or any other source of authority found in the Constitution to establish rights of United States citizens. This does not mean that all federal laws suddenly fall within the definition of privileges or immunities that can be enforced by private individuals against the states. Established rules requiring clear and unambiguous abrogation of Eleventh Amendment immunity would presumably apply in the context of determining the scope of Fourteenth Amendment privileges or immunities.³²¹ Rules developed by the Supreme Court to determine whether statutory claims should be considered "rights, privileges or immunities" protected by section 1983 also presumably apply.³²² The only other substantive constraint should be based upon whether the federal statute was intended to have general applicability and to promote the "enjoyment of life and liberty" or "to pursue and obtain happiness and safety."³²³ Employment and property rights fall well within this definition; if asked the right question, the Supreme Court should reverse its finding of state immunity from monetary damages caused by denial of these federal rights.³²⁴

When the Supreme Court rejected arguments that the Americans with Disabilities Act could be based upon congressional power to enforce the Equal Protection Clause,³²⁵ the majority reasoned that discrimination against people with disabilities may be rational even if heartless.³²⁶ The Court should reconsider state immunity from suits to enforce the ADA, however, because the purposes of that legislation,

321. See *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989).

322. See *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). See generally *supra* text accompanying notes 218-225. Note that rules which deny protections under 42 U.S.C. § 1983 because Congress provided alternative remedies, see *Middlesex County Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981), should not be viewed as limiting the scope of the Privileges or Immunities Clause.

323. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

324. See *Alden v. Maine*, 527 U.S. 706 (1999) (blocking state court enforcement of the Fair Labor Standards Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (barring enforcement of federal patent rights against states). A more difficult question is whether Indian gaming rights that were at issue in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or treaty rights at issue in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), would be included within a reasonable definition of privileges or immunities.

325. See *Garret*, 121 S. Ct. 955.

326. See *id.* at 964.

"to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities,³²⁷ demonstrates contemporary congressional concern for privileges or immunities. The Civil Rights Act of 1866 sought to ensure that all citizens would enjoy "full and equal benefit of all laws and proceedings for the security of person and property." The ADA embraces the same spirit. Although congressional power to enact legislation protecting these interests may be derived from the Commerce Clause, the authority to enforce these rights against the states can be found in the Privileges or Immunities Clause of the Fourteenth Amendment.

Conclusion

In *Seminole Tribes* and the cases that followed, the Supreme Court rejected arguments that Congress could exercise its Article I powers to abrogate state immunity. The Justices never indicated, however, whether in doing so they intended to overrule precedent ranging from the *Slaughter-House Cases* to *Hague v. Committee for Industrial Organization*.³²⁸ The Court ignored its own history that demonstrates that the Privileges or Immunities Clause reinforced the Supremacy Clause, and that privileges or immunities could be established through federal legislation derived from Article I authority.

Federal statutes creating homestead rights also created privileges or immunities of United States citizens.³²⁹ No principled distinction can be made between homestead rights and patent rights. When both have been established by federal law, it follows that both constitute privileges or immunities of United States citizens.

States would not be allowed to bar age discrimination against their own residents while permitting state agencies to discriminate against nonresident elderly citizens. Nor could a minimum wage law protect conditions of employment for a state's own citizens, but deny those rights to employees from other states. Terms or conditions of employment constitute privileges or immunities protected by Article IV, Section 2 of the Constitution; states that discriminate against nonresidents in ways that affect basic employment rights violate the

327. 42 U.S.C. § 12101(a)(8)(1995).

328. 307 U.S. 496 (1939).

329. See *United States v. Waddell*, 112 U.S. 76 (1884) (holding that rights established by federal homestead acts were rights or privileges secured by the Constitution and laws of the United States).

privileges and immunities of those nonresidents. If Congress enacts comparable laws, then those laws constitute privileges or immunities of national citizenship.

When the Supreme Court was asked to define the scope of civil rights statutes that protect the rights, privileges or immunities of United States citizens, it ruled that this language incorporated federal statutory rights.³³⁰ Although the Court did not reference the Fourteenth Amendment when it reached this decision, its conclusion was consistent with views expressed at the time of ratification. The Court now faces a heavy, if not impossible task of explaining why the phrase "privileges or immunities" should mean one thing when it appears in the Fourteenth Amendment and something different when it appears in the statute enacted to enforce that Amendment.

These arguments lead to a conclusion that the outcome in at least four recent Supreme Court decisions should be reversed.³³¹ A question that follows is whether these arguments offer too little and come too late. The same question must have been asked in 1984 when the Court was asked to review its holding that city contracts could require employment of city residents.³³² The Court had rejected similar arguments the prior year when asked whether the Commerce Clause prohibited such contracts.³³³ Because Commerce Clause jurisprudence had dominated debates about this issue, attorneys had ignored the Privileges and Immunities Clause of Article IV. The Court changed its answer, without retreating from precedent, because lawyers in the prior case had simply asked the wrong question.³³⁴ A similar reversal should now take place when courts are asked whether Congress has power to abrogate state immunity when doing so to protect privileges or immunities established by federal law.

The current Supreme Court majority's conception of state sovereignty clashes with the new federalism that emerged from the

330. See *Maine v. Thiboutot*, 448 U.S. 1 (1980) (interpreting 42 U.S.C. § 1983).

331. Based upon these arguments, the outcome would change in the Court's decisions in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (finding state immunity from patent claims); *Alden v. Maine*, 527 U.S. 706 (1999) (upholding state immunity in state courts from claims based upon the Fair Labor Standards Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (finding state immunity from claims under the Age Discrimination in Employment Act); *Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955 (2001) (holding states immune from money damages for violations of the ADA).

332. See *United Bldg.*, 465 U.S. 208.

333. *White v. Massachusetts Council of Const. Employees*, 460 U.S. 204, 213 (1983).

334. See CHESTER JAMES ANTIEAU & WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 32.04 (2d ed. 1997).

Civil War. In arguments about this issue, the Privileges or Immunities Clause is the missing link that, when understood, reestablishes federal authority. If Congress has power to prohibit age discrimination and to protect wages and conditions of employment, then it also has authority to enforce those laws against the states. In addition to the Supremacy Clause, this enforcement power can be derived from Section 5 of the Fourteenth Amendment; it therefore overrides the Eleventh Amendment. In recent decisions limiting the authority of Congress to abrogate Eleventh Amendment immunity, counsel never asked the Supreme Court to apply the Privileges or Immunities Clause of the Fourteenth Amendment. That question should now be asked.