RESCUING THE FOURTEENTH AMENDMENT PRIVILEGES OR IMMUNITIES CLAUSE: HOW "ATTRITION OF PARLIAMENTARY PROCESSES" BEGAT ACCIDENTAL AMBIGUITY; HOW AMBIGUITY BEGAT *SLAUGHTER-HOUSE*

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This Essay addresses a topic of great academic and practical interest currently facing the Supreme Court: whether the Privileges or Immunities Clause, which has lain dormant since the Court's ill-conceived 1873 *Slaughter-House Cases* decision, should be resurrected in order to apply the Second Amendment to the states.

The Essay makes the novel argument that the textual basis for the *Slaughter-House* Court's holding regarding the clause—i.e., the lack of parallel textual construction in the first two sentences of Section 1 of the Fourteenth Amendment regarding citizenship—was in fact the wholly unintentional product of what we might call "attrition of parliamentary processes." This analysis is not new to the Supreme Court. Borrowed from an oral argument made before the U.S. Supreme Court in 1882 by Roscoe Conkling (a member of the 1866 Joint Committee on Reconstruction), the analysis played a vital role in leading the Court to its 1898 conclusion that the word "person" in Section 1 of the Fourteenth Amendment should be read to include not only freedmen but also white people and artificial persons, including corporations— an interpretation substantially broader than that given previously by the *Slaughter-House* majority.

Just as the Court in the last decades of the nineteenth century corrected the Court's too-narrow interpretation of Section 1 "personhood," so it should now—finally—begin to correct its earlier misreading of the distinction in Section 1 between U.S. and state citizenship in order to restore the Privileges or Immunities Clause to its full intended effect of applying the Bill of Rights (and more) to the states.

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During its 2009–2010 Term, the United States Supreme Court has its best opportunity in generations to rescue the Fourteenth Amendment Privileges or Immunities Clause from its wrongful 1873 banishment from the Constitution.[1] In *McDonald v.*

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[1] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

City of Chicago,[2] in which petitioner is asking the Court to apply the Second Amendment to the states,[3] the Court may examine—for the first time in its history, really[4]—the compelling evidence that the framers and ratifiers of the Fourteenth Amendment intended that the Privileges or Immunities Clause would apply the Bill of Rights, and more, to the states.[5] Once examined, the Court may then correct the *Slaughter-House Cases'* mistakenly narrow initial reading of the provision,[6] and welcome the Privileges or Immunities Clause back, after its 136 year purgatory, into the constitutional fold.[7]

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[2] NRA v. City of Chicago, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. City of Chicago, 78 U.S.L.W. 3137 (U.S. Sept. 30, 2009) (No. 08-1521).

[3] *McDonald* follows naturally from the Court's 2008 *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) decision, which held that the Second Amendment protects an individual right that Congress may not abridge, but which expressly did not address the question of whether the Second Amendment applies to the states.

[4] As Justice Hugo Black commented in his 1947 *Adamson v. California* dissent:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. *This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.*

332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (emphasis added) (internal citation omitted). Sixty-two years later, nothing has changed—the Court still has not addressed the issue.

[5] Elsewhere I have suggested that the Second Amendment offers a useful mechanism to address the Privileges or Immunities Clause issue. *See* Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007).

[6] *Slaughter-House*, 83 U.S. (16 Wall.) at 72–82.

[7] It should be noted that a proper reading of the Privileges or Immunities Clause does not moot a century-plus worth of due process jurisprudence. Indeed, the Constitution allows for overlapping protections by the Due Process and Privileges or Immunities Clauses, providing another form of the "double security" envisioned by James Madison. *See* THE FEDERALIST NO. 51 (James Madison).

Moreover, to the objection that giving full effect to the Privileges or Immunities Clause (i.e., incorporation of the entire Bill of Rights, and more, to the states) would be too disruptive to the states, especially relating to the Fifth Amendment grand jury and Seventh Amendment right to jury in civil cases provisions, the Constitution itself provides a tried and true mechanism to allay this concern: the Article V amendment process. If the people decide that they wish to retain the Supreme Court's current doctrine of not applying certain parts of the Bill of Rights to the states, it is within their power to do so. The amendment process would be the proper approach to achieve this goal—by contrast, it is *not* proper to continue holding the Privileges or Immunities Clause hostage.

This Essay is intended to supplement the impressive body of scholarship arguing for a reconsideration of *Slaughter-House* that, when considered *in toto*, makes a powerful case for a resurrected Privileges or Immunities Clause.[8] Part I briefly discusses the *Slaughter-House* opinion and its aftermath, summarizing both contemporaneous and modern day criticisms of the case. Part II then engages the Essay's main task of discussing a mostly unexplored discrete aspect of Section 1 of the Fourteenth Amendment: specifically, why the first sentence (the Citizenship Clause) speaks of United States *and* state citizenship, while the second sentence (the Privileges or Immunities Clause) speaks only of United States citizenship.

The Essay suggests, based on the history of the congressional debates, that the lack of a precisely parallel textual construction between Section 1's first two sentences may well have been the inadvertent product of a legislative process involving numerous "different proposals, independent of each other, originating in different minds, and at different times, not in the order in which they now stand . . . [but which] came to be collected in one formulated proposal of [the] amendment."[9] We might describe this somewhat haphazard accretion as the product of "the attrition of parliamentary processes."[10] This analysis (including the phrase itself) is borrowed from an oral argument made before the U.S. Supreme Court in 1882 by Roscoe Conkling[11] (himself a member of the 1866 Joint Committee on Reconstruction), which played a vital role in leading the Court to its 1898 conclusion that the word "person" in Section 1 of the Fourteenth Amendment should be read to include not only freedmen but also white people and artificial persons, including corporations[12]—an

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While it is true that amending the Constitution is difficult to accomplish (it has only been done eighteen times in the nation's history—first with the Bill of Rights and then seventeen times since), it is not impossible. Indeed, when the people put their minds to it, it can be done very quickly. Witness the very first amendment to follow the Bill of Rights, the Eleventh Amendment; it took Congress less than three weeks in 1793 to approve the amendment after a Supreme Court ruling not to its liking, and it took the states less than a year to ratify. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 222 (2d ed. 2005).

[8] *See, e.g.*, *infra* note 57.

[9] BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, 31 (1914).

[10] *Id.*

[11] *See* Transcript of Oral Argument, San Mateo County v. S. Pac. R.R., 116 U.S. 138 (1885) (No. 1063).

[12] Smyth v. Ames, 169 U.S. 466 (1898); *see, e.g.*, Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371, 371–72 (1938) ("Coming from [Conkling,] a man who had twice declined a seat on the Supreme Bench, who spoke from first hand knowledge, and who submitted a manuscript record in support of his stand, so dramatic an argument could not fail to make a profound impression. Within the next few years the Supreme Court began broadening its interpretation of the Fourteenth Amendment, and early in 1886 it unanimously affirmed Conkling's proposition, namely that corporations were 'persons' within the meaning of the equal protection clause. It is literally true therefore that Roscoe Conkling's argument sounded the death knell of the narrow 'Negro-race theory' of

interpretation substantially broader than that given previously by the *Slaughter-House* majority.[13]

Just as the Court in the last decades of the nineteenth century began to correct Justice Miller's too-narrow interpretation of Section 1 "personhood,"[14] it should now—finally—begin to correct his misreading of the distinction between U.S. and state citizenship in order to restore the Privileges or Immunities Clause to its full intended effect of applying the Bill of Rights (and more) to the states.

In short, if, as appears quite possible, the lack of parallel textual construction in Section 1's first two sentences regarding citizenship was in fact wholly unintentional, the disparity should be disregarded when considering the proper scope of the Privileges or Immunities Clause. Then, once the textual discrepancy between the Citizenship Clause and the Privileges or Immunities Clause is removed as a viable rationale, *Slaughter-House* simply fails.

I. *SLAUGHTER-HOUSE*

In 1873 the United States Supreme Court held 5-4 in *Butchers' Benevolent Association of New Orleans v. Crescent City Livestock Landing and Slaughter-House Co.* (*Slaughter-House Cases*)[15] that the Privileges or Immunities Clause of the Fourteenth Amendment applied only to the few privileges or immunities associated with national citizenship, thereby leaving the states free to continue regulating (or, more likely, not regulating) those many residual privileges and immunities said to be associated with state citizenship.[16] Ever since the *Slaughter-House* decision, the

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the Fourteenth Amendment expounded by Justice Miller in the *Slaughter House* cases. By doing this it cleared the way for the modern development of due process of law and the corresponding expansion of the Court's discretionary powers over social and economic legislation. Viewed in perspective, the argument is one of the landmarks in American constitutional history, an important turning point in our social and economic development.") (internal citations omitted). Having identified the importance of Conkling's oral argument, Graham is largely critical throughout the remainder of the article. *See, e.g.*, *id.* at 379. Also see Graham's later work, including, e.g., HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 4–10 (1968), which explores antislavery bases for the Fourteenth Amendment.

[13] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72–82 (1873).

[14] *See Smyth*, 169 U.S. at 522 (citing Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 154 (1897); Charlotte, Columbia & Augusta R.R. v. Gibbes, 142 U.S. 386, 391 (1892); Santa Clara County v. S. Pac. R.R., 118 U.S. 394, 396 (1886)) (explaining that it is settled that a corporation is a person within the meaning of the Fourteenth Amendment). This Essay suggests that the Court, if anything, was incorrect in extending 'personhood' status to corporations, however. *See generally* Graham, *supra* note 12.

[15] 83 U.S. (16 Wall.) 36.

[16] *See id.* at 72–82. The Court's removal of the Bill of Rights from the Fourteenth Amendment was made explicit in *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). *See infra* note 54 and accompanying text.

Privileges or Immunities Clause has been a virtual nullity, offering very little protection to individuals of the several states. Once released of the Privileges or Immunities Clause's constraints, states were free, for example, to perpetuate unjust discriminatory Jim Crow laws for another ninety years,[17] and to infringe, to this day, upon the individual right to bear arms.

This outcome is directly contrary to what Section 1's framers in Congress intended for the clause. The framers were determined, in light of the Court's *Barron v. Baltimore*[18] decision holding that the Bill of Rights applies not to states but only to Congress, to amend the Constitution to make clear that the Bill of Rights and protections of other basic civil rights *do* apply to the states.[19]

The rest of the members of Congress in 1866 understood perfectly well that Section 1 was intended to repudiate *Barron*: "Over and over [John Bingham] described the privileges-or-immunities clause as encompassing 'the bill of rights'—a phrase he used more than a dozen times in a key speech on February 28."[20] In short, regarding the effect of the Privileges or Immunities Clause on the states, there was no question[21]—and

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[17] The Court held in 1954 that "separate but equal" laws violate the Fourteenth Amendment's Equal Protection Clause, thus reversing its infamous 1896 *Plessy v. Ferguson*, 163 U.S. 537 (1896) decision. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[18] 32 U.S. (7 Pet.) 243 (1833).

[19] To this end, in drafting Section 1 of the Fourteenth Amendment for the Joint Committee on Reconstruction, Representative John Bingham looked to *Barron* itself for guidance. Within Chief Justice John Marshall's words he found clear instructions: "Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention," Marshall explained in *Barron*. *Id.* at 250. In drafting Section 1, Bingham drew a parallel from Article I, Section 10 of the Constitution, which provides explicitly that "No State shall . . . emit Bills of Credit; . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts," leaving no doubt of what is prohibited of the states. U.S. CONST. art. 1, § 10, cl.1. Bingham thus noted: "Acting upon this suggestion [from *Barron*] I did imitate the framers of the original Constitution. . . . [I]mitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution . . . ." CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871).

As Professor Akhil Amar has noted, "[t]he Supreme Court Justices in *Barron* asked for 'Simon Says' language, and that's exactly what the Fourteenth Amendment gave them." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 164 (1998).

[20] *See* AMAR, *supra* note 19, at 182.

[21] *See id.* at 181–83. Professor Amar states that

> [Bingham] explained why a constitutional amendment was necessary, citing . . . *Barron* and one of its progeny, *Livingston v. Moore*. The day before, a colleague of Bingham's, Robert Hale, had suggested that states were already bound by the Bill, but Bingham set Hale and others straight with the following quotation from *Livingston*: "As to the amendments of the Constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the States . . . ." Six weeks later Bingham . . . invok[ed] "the bill of rights"

in response to Bingham's strong statements in the House, nobody spoke up to disagree with him.[22]

Similarly, in the Senate, Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction, commented on May 23, 1866:

> I can only promise to present to the Senate, in a very succinct way, *the views and the motives which influenced that committee* . . . in presenting the report which is now before us for consideration, and *the ends it aims to accomplish*. . . .
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> [Section 1 is intended to impose a] general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. . . .
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> . . . .
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> It is not, perhaps, very easy to define with accuracy what is meant by the expression, "citizen of the United States". . . .
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> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—*to these should be added the personal rights guarantied* [sic] *and secured by the first eight amendments of the Constitution; such as the freedom of speech* . . . *[and] the right to keep and to bear arms* . . . .
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> . . . .
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> [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied [sic] by the Constitution or recognized by it . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them . . . .
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> [Presently,] they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from

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six times in a single speech and again remind[ed] his colleagues that it "has been solemnly ruled by the Supreme Court of the United States" that "the bill of rights . . . does not limit the powers of States." In . . . January 1867, while the amendment was pending in the states, Bingham again reminded his audience that his amendment would overrule *Barron*.

Id. at 182–83 (internal citations omitted).

[22] *Id.* at 187 ("[S]urely, if the words of section I meant something different, this was the time to stand up and say so.").

> violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. *The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. . . .*
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> . . . .
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> I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, *forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.*[23]

As Professor Michael Curtis reports:

> There was no extended discussion of section 1 in the Senate after Howard spoke. Senator John Brooks Henderson's remarks on section 1 were brief but consistent . . . . He discussed the first section "only so far as citizenship is involved in it. . . . It makes plain only what has been rendered doubtful by the past action of the Government." The remaining provisions of section 1, Henderson said, "merely secure the rights that attach to citizenship in all free Governments."[24]

The following week, after a private Republican caucus to decide upon final adjustments to the proposal (*including* adding the Citizenship Clause at the eleventh hour), the amendment was passed by a vote of 33-11.[25]

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That the *Slaughter-House* Court's narrow interpretation still controls, after lo these many years, begs the question: *Why* has it survived? The most obvious

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[23] CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (emphasis added). Senator Howard's comments were widely reported in the local and national press. His comment that "to these [privileges and immunities] should be *added* the personal rights guarantied [sic] and secured by the first eight amendments" would explain why the Fourteenth Amendment's proponents did not simply say: No State shall make or enforce any law which shall abridge the Bill of Rights' protections of citizens of the United States. *Id.* at 2765 (emphasis added). Additionally, Howard cited *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3203), to identify some of the privileges and immunities of Article IV, Section 2. *Id.*

[24] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 89 (1986).

[25] *See infra* note 96 and accompanying text.

answer—one that generations of beginning law students have been taught—is that, in strictly textual terms, Justice Samuel Miller's opinion makes sense. Specifically, while Section 1's first sentence provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States and of the State* wherein they reside," its second sentence provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States* . . . ."[26] Seizing upon this language, Justice Miller wrote for the 5-4 *Slaughter-House* majority:

> It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.[27]

In strictly textual terms, this is a plausible interpretation. But then, in strictly textual terms an interpretation under Article II, Section 1, Clause 5 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President")[28] that no person born by Caesarian-section delivery is eligible to be President is also plausible. We understand the ludicrousness of such an interpretation, though, relative to the surrounding context. Likewise, once we move beyond Section 1's bare text to the context of the post-Civil War years of 1866–68, we understand that *Slaughter-House*'s strictly textual interpretation is also nonsense. According to the absurdity doctrine, textual readings leading to absurd results should not control.[29]

The stretched interpretation did not bother Justice Miller, however—indeed, disturbingly, it appears that neither he nor the other majority Justices nor counsel bothered even to look at the amendment's history;[30] or, if they did, they completely

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[26] U.S. CONST. amend. XIV, § 1.

[27] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873).

[28] U.S. CONST. art. II, § 1, cl.5.

[29] *See, e.g.*, *generally* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006).

[30] In an 1879 law review article, William Royall notes:

> It is a little remarkable that, so far as the reports disclose, no one of the distinguished counsel who argued this great case (the Slaughter-House Cases), nor any one of the judges who sat in it, appears to have thought it worth while to consult the proceedings of the Congress which proposed this amendment, to ascertain what it was that they were seeking to accomplish. Nothing is more common than this. There is hardly a question raised as to the true meaning of a provision of the old, original Constitution that resort is not had to Elliott's Debates, to ascertain what the framers of the instrument declared at the time that they intended to accomplish.

William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S. L. REV. 558, 563 (1879).

ignored it (evidence suggests Miller actually knew Congress's true intent).[31] In any event, despite the telling lack of evidence that the Republicans or Democrats in the Thirty-ninth Congress or the conventions in the ratifying states considered the distinction between state and national citizenship to be especially relevant, in a neat bit of textual sophistry, Justice Miller gave meaning to the distinction—thereby turning, in the words of dissenting Justice Noah Swayne, "what was meant [to be] bread into a stone."[32]

Reaction at the time of the opinion was withering. The four dissenting Justices were unsparing in their criticism. "No searching analysis is necessary to eliminate [the Privileges or Immunities Clause's] meaning," Justice Swayne explained.[33] Further,

> [i]ts language is intelligible and direct. . . . Every word employed has an established signification. . . . There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out.
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> . . . .
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> A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country. . . .
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> . . . .
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> The language employed is unqualified in its scope. . . . By the language "citizens of the United States" was meant *all* such citizens; and by "any person" was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color. . . . [The majority] defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted.[34]

Regarding the Justices' responsibility in interpreting the Constitution, Swayne continued, "[t]his court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it."[35] Finally, to

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[31] Indeed, Justice Miller knew very well Congress's intent for Section 1, yet chose to ignore it. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 660–62 (1994) (explaining that Miller followed the debates in Congress closely; was familiar with Judge George W. Paschal's treatise stating that "'general principles which had been construed to apply only to the national government, are thus imposed upon the States,'" and traveled in 1871 with a group including Bingham on a trip to the Pacific Coast where Bingham spoke several times on the expansive meaning of the amendment).

[32] *Slaughter-House*, 83 U.S. (16 Wall.) at 129 (Swayne, J., dissenting).

[33] *Id.* at 126.

[34] *Id.* at 126–29.

[35] *Id.* at 129.

those objecting to a broad reading of Section 1, Swayne answered that the restrictions imposed upon states are indeed "novel and large [but] the novelty was known and the measure deliberately adopted."[36]

Justices Bradley, Field, and Chase also dissented.[37] "[C]itizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance," Justice Joseph Bradley argued.[38]

> [F]ormerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens . . . , [but] that cannot be said now . . . . [I]t was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.[39]

Elaborating upon the point that fundamental rights were found in Magna Carta, Blackstone's Commentaries, and Justice Washington's enumeration in *Corfield v. Coryell*,[40] Bradley explained: "But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself."[41]

Justice Stephen Field agreed, lamenting that if the majority's assertion that most rights remained under state control was indeed accurate, then the Fourteenth Amendment "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[42]

The *Slaughter-House* dissenters' strong comments highlight that the bare 5-4[43] majority's approach was not, contrary to long held revisionist wisdom,[44] a foregone

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[36] *Id.*

[37] *See id.* at 83, 111 (majority opinion).

[38] *Id.* at 116 (Bradley, J., dissenting).

[39] *Id.* at 121–22.

[40] *See id.* at 115–17.

[41] *Id.* at 118.

[42] *Id.* at 96 (Field, J., dissenting).

[43] For discussion of the dynamics of this 5-4 split, see Aynes, *supra* note 31, at 686–87.

[44] The perpetuation of the myth of *Slaughter-House*'s inevitability throughout much of the twentieth century can be traced to a few influential works. *See* RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 750 (1965); *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, 342–51 (1985); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 114–18 (1988); H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR HOW THE SECOND AMENDMENT FELL SILENT 313

conclusion in 1873. Indeed, if anything, the foregone conclusion at the time was that the Fourteenth Amendment applied all rights, privileges, liberties, and immunities—those enumerated within the Bill of Rights and elsewhere, as well as those unenumerated—to the states.

The few scholars who continue to support the *Slaughter-House/Cruikshank* interpretation point to the relative paucity of contemporaneous newspaper accounts during the state ratification debates from 1866–68 as evidence for their position. "If the amendment was truly intended to apply the Bill of Rights to the States," they might say, "we would see evidence of that interpretation in the news of the day."[45]

This argument is fallacious. The fact that available news accounts fail to explain that the amendment would apply the Bill of Rights to the states does not mean that the public failed to understand this intent, just as the absence of a smoking gun in a criminal case does not mean that a shot was not taken. Juries draw conclusions based on strong circumstantial evidence all the time. In the absence of the gun, we look to other evidence—and here we find it, in the congressional debates and elsewhere.

Even assuming the absence of contemporaneous news stories,[46] who really knows what this might mean? Maybe, after the horrific bloodshed of the recent war, the

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n.120 (2002). For early opposing views, see, e.g., Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954) (effectively rebutting the claims of Charles Fairman's enormously influential—though deeply flawed—1949 article arguing against incorporation of the Bill of Rights, *see* Fairman, *supra*); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982); Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982); Robert J. Kaczorowski, *Searching for the Intent of the Framers of Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979). Later critical work includes AMAR, *supra* note 19, at 188 ("Though his work has drawn much praise, in my view Professor Fairman was unfair to Justice Black, and his unfair substance and tone put almost an entire generation of lawyers, judges, and law professors off track."), and 197 ("Berger's misstatements, distortions, and non sequiturs are legion. . . ."); Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1258 (1994) (revealing something of an unholy alliance between Justice Felix Frankfurter, primary Court opponent of Justice Black's total-incorporation-through-the-Privileges-or-Immunities-Clause approach, and Charles Fairman, the primary scholarly opponent of this approach, in a series of letters over the course of eight years between the two men).

[45] *See, e.g.*, Brief for Constitutional Law Professors as Amici Curiae in Support of Petitioners at 6–8, McDonald v. City of Chicago, 78 U.S.L.W. 3137 (U.S. Sept. 30, 2009) (No. 08-1521); *see also* George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section I*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2009), *available at* http://ssrn.com/abstract=1392961.

[46] Two recent works persuasively dispute this assumption, arguing instead that media accounts did in fact place the public on notice. *See, e.g.*, David T. Hardy, *Original Popular*

public was so fed up that it quietly and resolutely went along with the idea that states would henceforth be bound by the Bill of Rights—in other words, because it was so obvious to the people that states would no longer have discretion to abridge individual rights and liberties (i.e., "privileges and immunities"), there was simply no need to discuss the matter. This interpretation is at *least* as plausible as saying, as opponents do, that the public expressly believed the amendment would not apply the Bill of Rights to the states.[47] In short, in the final analysis, absent a strong body of contemporaneous statements favoring either alternative, the default conclusion must favor the understanding as expressed by the amendment's framers and contemporaneous commentators.

On the issue of contemporaneous understandings, an 1879 law review article by William Royall is instructive:

> It must be admitted that the construction put upon the language of the first section of this amendment by the majority of the [*Slaughter-House* C]ourt is not its primary and most obvious signification. Ninety-nine out of every hundred educated men, upon reading this section over, would at first say that it forbade a state to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States; and it is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear.[48]

Those ninety-nine educated men would have based their natural conclusions upon the many statements of numerous members of Congress and others, as well as upon the teachings of a number of leading legal treatises of the day. As Professor Amar explains,

> John Norton Pomeroy viewed section I as "a remedy" for *Barron*'s rule concerning "the immunities and privileges guarded by the Bill of Rights"; similarly, Timothy Farrar carefully elaborated the declaratory theory of the federal Bill—indeed, in a later, 1872 edition of his treatise, Farrar noted that the amendment had

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Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868, 30 WHITTIER L. REV. 695 (2009); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1590 (2007) (explaining that "[t]he newspaper coverage of the Bingham and Howard speeches [during the debates in Congress] provides substantial evidence that the national body politic, during 1866–68, was placed on fair notice about the incorporationist design of the Amendment").

[47] *See, e.g.*, Thomas, *supra* note 45 (discussing possible interpretations of the lack of public attention to Section 1).

[48] Royall, *supra* note 30, at 563.

> "swept away" *Barron* and its progeny. Finally, in an 1868 treatise, George Paschal noted in passing—as if the issue were obvious—that "the general principles which had been construed to apply only to the national government, are thus imposed [by the Fourteenth] upon the States. Most of the States, in general terms, had adopted the same bill of rights in their own constitutions."[49]

One Senator involved in the framing of the amendment, Senator George Franklin Edmunds, said that the *Slaughter-House* opinion "'radically differed'" from what the framers had intended for Section 1.[50] Political scientist John W. Burgess reflected in 1890 that *Slaughter-House* eviscerated "the great gain in the domain of civil liberty won by the terrible exertions of the nation in the appeal to arms. I have perfect confidence that the day will come when it will be seen to be intensely reactionary and will be overturned."[51]

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Well over a hundred years have passed since Burgess's prediction, yet we still await *Slaughter-House*'s day of reckoning. For the rest of the nineteenth and twentieth centuries, the Supreme Court's treatment of the Privileges or Immunities Clause has been "impoverished."[52] From a very early date, the Court simply considered the

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[49] AMAR, *supra* note 19, at 210 (alteration in original) (citations omitted). An 1871 circuit court opinion, *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282), validated the accuracy of these viewpoints. Writing for the Fifth Circuit, then-future Supreme Court Justice William Burnham Woods stated that the "rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States . . . ." *Hall*, 26 F. Cas. at 82. Further, he argued that

> the privileges and immunities of citizens of the United States here referred to [in Section 1] . . . are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union. . . . Among these we are safe in including those which in the constitution are expressly secured to the people [i.e., in the Bill of Rights], either as against the action of the federal or state governments.

Id. at 81.

[50] CURTIS, *supra* note 24, at 177.

[51] 1 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 228 (1893).

[52] AMAR, *supra* note 19, at 213–14 (commenting that Justices throughout the years knew they were giving the amendment short shrift); *see also, e.g.*, Aynes, *supra* note 31, at 681–86 ("Justice Moody, who refused to follow the intent of the Amendment, admitted that '[u]ndoubtedly, [the *Slaughter-House Cases*] gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended.'") (quoting Twining v. New Jersey, 211 U.S. 78, 96 (1908)). Aynes also quoted Charles Warren, pointing out that in his classic, *The*

issue settled—commenting, for example, in *United States v. Cruikshank*[53] in 1876, a mere eight years after the Fourteenth Amendment's ratification: "It is now too late to question the correctness of this construction. . . . or their protection in [the] enjoyment [of rights guaranteed in the Bill of Rights], therefore, the people must look to the States."[54] Only once has the Court struck down a statute on grounds that it violated the Privileges or Immunities Clause, and even then the Court reversed itself just five years later.[55]

Scholarly commentary, however, has been a different matter. After many quiet decades, scholars began turning over rocks in the second half of the twentieth century (no doubt encouraged by Justice Black's comments in *Adamson v. California*[56] and elsewhere) in order to better understand the Privileges or Immunities Clause, to the point where today most scholars who have investigated the issue, while they may differ on the scope of the clause's reach, now agree that *Slaughter-House* was wrongly decided.[57] As Justice Thomas observed in *Saenz v. Roe* in 1999, "[l]egal scholars

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Supreme Court in United States History, 1836–1919, "Warren noted that Miller's opinion was 'directly contrary' to the intent of the framers of the Amendment and that in its history the Court had, with 'very little variation' acted to 'controvert the purpose of the Amendment [and] to belittle its effect.'" *See id.* at 685 (quoting 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 541 (1928)).

[53] 92 U.S. 542 (1876).

[54] *Id.* at 552. The Court cited eight cases in support of the same conclusion reached by Chief Justice Marshall in *Barron* forty-odd years earlier. Notably, all but two of the cases cited in *Cruikshank* were decided *before* the Fourteenth Amendment's proposal and ratification, and the two that were not, *Twitchell v. Commonwealth*, 74 U.S. (7 Wall.) 321 (1868), and *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874), themselves simply cited back to the earlier six cases without acknowledging the Fourteenth Amendment. In other words, the *Cruikshank* Court, with two feet firmly planted in the past, utterly ignored the possibility that the Fourteenth Amendment might have affected a change from that which existed before the amendment's ratification.

[55] *See* Colgate v. Harvey, 296 U.S. 404 (1935), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940). The *Madden* court cited *Slaughter-House* and progeny with approval, stating that "[i]n view of our conclusions, we look upon the decision in [*Colgate*] as repugnant to the line of reasoning adopted here." *Madden*, 309 U.S. at 93; *see also* Saenz v. Roe, 526 U.S. 489 (1999) (holding that the right to travel is an attribute of *national* citizenship and that, according to *Slaughter-House*, states are thus barred by the Privileges or Immunities Clause from infringing the right to travel).

[56] 332 U.S. 46, 71–72 (1947); *see also supra* note 4.

[57] Historian Eric Foner succinctly states the unavoidable conclusion one is forced to draw upon examining the evidence: "[The *Slaughter-House* majority's] studied distinction between the privileges deriving from state and national citizenship, should have been seriously doubted by anyone who read the Congressional debates of the 1860s." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 530 (1988). See *supra* note 44 for a list of early scholars calling for the Court to revisit *Slaughter-House*. For later treatments, see, e.g., DAVID A. J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 216 (1993); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1321–24, 1331 (3d ed. 2000); Aynes, *supra* note 31, at

agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873."[58] Many *do* agree, however, that the Privileges or Immunities Clause includes, at a minimum, the individual civil rights secured by the first eight amendments.[59]

Some federal courts are beginning to pay attention to the Privileges or Immunities Clause. The U.S. Supreme Court's holding in *Saenz*, though unremarkable, was an important step in the sense that the Court as much as acknowledged the Privileges or Immunities Clause's existence.[60] The clause has been so deeply buried for so long that even the mere recognition from the Court was positive. Dissenting in *Saenz*, Justice Thomas went further: "Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of [the Supreme Court's] Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case."[61]

A few lower courts are beginning to pay some attention to the clause as well. Holding in *Nordyke v. King* that the Second Amendment is selectively incorporated

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687; Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 105 (1996); Lawrence, *supra* note 5; Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 648–49 (2000). *See generally* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION 11–12, 38, 61–62 (1999) (discussing *Slaughter-House* as vindicating northern Democratic perspectives on slavery); MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS 199–210 (2003) (justifying Justice Miller's *Slaughter-House* opinion). One work characterizes the *Slaughter-House Cases* as being unfairly scapegoated. *See* RONALD M. LABBÈ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003). Labbè and Lurie conclude that

> expressions of anguish over [the Privileges or Immunities Clause of the Fourteenth Amendment's] supposed demise are premature. Like its sister the contracts clause, . . . [it] remains part of the living Constitution, readily available whenever the Court wishes to employ it. . . . More than a century later, blaming Miller for current judicial disinclination to apply the clause is unwarranted. When the Court desires to utilize it, the clause is there.

Id. at 251. Fair enough. It is now time, 2009, for the Supreme Court to do the right thing, and resurrect the Privileges or Immunities Clause.

[58] Saenz v. Roe, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting).

[59] *See, e.g.*, AMAR, *supra* note 19; CURTIS, *supra* note 24, at 222 n.19 (citing sources prior to 1986); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 83–94 (1993); Lawrence, *supra* note 5; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007). *But see* George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007) (casting doubt on this idea).

[60] *See Saenz*, 526 U.S. at 501. The case merely identified the right to travel as one of those few attributes of national citizenship described by *Slaughter-House*. *See id.* at 503–04.

[61] *Id.* at 527–28 (Thomas, J., dissenting).

to apply to the states through the Due Process Clause,[62] the Ninth Circuit Court of Appeals noted in 2009 that it was barred by precedent from considering the Privileges or Immunities Clause, commenting: "We are aware that judges and academics have criticized *Slaughter-House*'s reading of the Privileges or Immunities Clause."[63]

While the Seventh Circuit's more recent opinion in *NRA v. City of Chicago*[64] perfunctorily decided on procedural grounds not to consider the incorporation issue under *any* theory, Chief Judge Frank Easterbrook expressed sympathy for reviewing *Slaughter-House*, commenting during oral argument:

> Indeed, I entirely appreciate your argument that the *Slaughter-House Cases* are wrongly decided. . . . But as is often said in the bureaucracy, that's above our grade level. . . .[65]
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> . . . .
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> . . . [T]here's a lot of rumbling about the *Slaughter-House Cases* even amongst the Justices . . . .[66]
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> . . . .
>
> One potential consequence . . . is that the Supreme Court will overrule *Slaughter-House* and incorporate everything.[67]

What is most striking about this sequence is that multiple federal courts, after having swept the Privileges or Immunities Clause under the rug for over 135 years, are now talking in serious terms about the provision. This is a major positive step.

Summing up, as explained by Professor Michael Curtis for *amicus curiae* in the 2009 Ninth Circuit case, *Nordyke v. King*:

> The *Slaughter-House* majority provided a radically incomplete historical background for the Fourteenth Amendment. It ignored Southern state suppression of civil liberty—including speech, press, assembly, arms, and free exercise of religion—in the interest of protecting slavery. It ignored the denial of these basic liberties

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[62] 563 F.3d 439, 457 (9th Cir. 2009), *reh'g granted en banc*, 575 F.3d 890 (9th Cir. 2009).

[63] *Id.* at 446 n.5 (citing *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting); AMAR, *supra* note 19, at 163–230; Lawrence, *supra* note 5, at 12–35).

[64] 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. Chicago, 78 U.S.L.W. 3137 (U.S. Sept. 30, 2009) (No. 08-1521).

[65] Recording of oral argument at 3:55, *NRA*, 567 F.3d 856 (No. 08-4241), *available at* www.ca7.uscourts.gov/fdocs/docs.fwx [hereinafter *NRA* oral argument]. In a nod to one of the early pioneers advocating a re-examination of the Fourteenth Amendment's history, Judge Easterbrook also commented: "One can only imagine William Winslow Crosskey coming back to debate this issue." *See id.* at 18:43; *see also* Crosskey, *supra* note 44.

[66] *NRA* oral argument, *supra* note 65, at 17:40.

[67] *Id.* at 26:43.

> including the right to bear arms that characterized the quasi-slavery of the Black Codes. *Slaughter-House* did discuss the Black Codes, but failed to mention how they limited the rights of blacks to free speech, assembly, exercise of religion, and the right to bear arms. It totally ignored statements of leading supporters of the Amendment. It failed to note that the words "privileges" and "immunities" had a long history as description of liberties such as those in the Bill of Rights. The Court suggested, incorrectly, that the Fourteenth Amendment was motivated simply by the need to protect blacks.[68]

While nothing can remedy the many decades of liberty already lost due to the Supreme Court's mistaken reading of Section 1 in *Slaughter-House* and *Cruikshank*,[69] the 2009–2010 Roberts Court can forever distinguish itself as the group of Justices that finally gave effect to the People's will as expressed in the Fourteenth Amendment Privileges or Immunities Clause.

II. "ATTRITION OF THE PARLIAMENTARY PROCESSES" DURING THE CONGRESSIONAL DEBATES ON THE FOURTEENTH AMENDMENT

The *Slaughter-House* majority's ultimately dispositive strict textual reasoning leaves us with an important lingering question: *why* did the Fourteenth Amendment's framers mention "United States" and "State" citizenship in Section 1's first sentence, but only "United States" citizenship in the second?

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[68] Amicus Curiae Brief of Professors of Law in Support of the Appellants and in Support of Reversal at 26–27, Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) (No. 07-15763) (citations omitted). Amici continue:

> *Slaughter-House* . . . suggested that almost all civil liberties were privileges of state citizenship. Lest it should be said that there were no privileges or immunities of national citizenship, the *Slaughter-House* court suggested some: the right to visit the sub-treasuries, to travel back and forth to Washington, D.C., to use the navigable waters, to petition the [national as it turned out] government, and to protection on the high seas and in foreign lands. By this extraordinary view, the privileges or immunities clause protected the newly freed slaves both on their trans-Atlantic cruises and once they arrived in Paris. The crucial problem from the 1830s through the Civil War had not been the need to protect American citizens in Paris. The problem had been to protect their fundamental rights, particularly, but by no means exclusively, in the slave states.

Id. at 27.

[69] *See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 55 (1997) (commenting that *Slaughter-House* "is probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court").

This Essay suggests that there is a convincing case to be made that the disparity was simply inadvertent[70]—the result of what may be termed the "attrition of parliamentary processes."[71] This is not a new argument to the Supreme Court. Indeed, the argument appears to have played a key role in influencing the Court to depart from its earlier narrow reading of Section 1 of the Fourteenth Amendment in *Slaughter-House* (yes, the same Section 1 and *Slaughter-House* at issue in this Essay) in favor of a broader reading, to include not only freedmen but also white people and artificial persons, including corporations, under the Due Process Clause's definition of "person."[72]

Like the Due Process Clause, arguably the Privileges or Immunities Clause was also a victim of the "attrition of parliamentary processes" that occurred during the Fourteenth Amendment's creation.[73] Just as the intended and understood broad meaning of "personhood" was not initially recognized in *Slaughter-House*, neither was the intended and understood broad meaning of "privileges or immunities" recognized. And just as the Court restored the Due Process Clause to its intended scope in the late nineteenth century,[74] it should now do the same for the Privileges or Immunities Clause.

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The story of how the "attrition of parliamentary processes" argument factored prominently into the Court's broadening of Section 1 begins in 1883 when Roscoe Conkling, a former member of the Joint Committee of Fifteen on Reconstruction, which had drafted the Fourteenth Amendment for the Thirty-ninth Congress, argued before the Supreme Court in *San Mateo County v. Southern Pacific Railroad Co.*[75] on behalf of his railroad client. Benjamin Kendrick[76] describes the scene:

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[70] The suggestion that the lack of parallel construction between Section 1's first and second sentences was wholly unintentional is based on the weight of the available evidence. To be sure, the conclusion likely would not satisfy the most rigorous "beyond a reasonable doubt," or perhaps not even the intermediate "clear and convincing," evidentiary standard. That said, preponderance of the evidence is enough for the Supreme Court to justify reconsidering *Slaughter-House*.

[71] *See* KENDRICK, *supra* note 9, at 31.

[72] *See supra* note 12 and accompanying text.

[73] *See* KENDRICK, *supra* note 9, at 30–31.

[74] *See supra* note 14 and accompanying text.

[75] 116 U.S. 138 (1885); *see* Transcript of Oral Argument, *supra* note 11. The Court's consideration of the question of due process personhood encompassed a series of cases stretched over a period of about fifteen years, culminating in *Smyth v. Ames* in 1898 when it definitively held that "corporations are persons within the meaning of [the Fourteenth Amendment]." 169 U.S. 466, 522 (1898); *see supra* note 14.

[76] Kendrick (presumably a Columbia Ph.D student at the time) unearthed and published, in what was surely one of the more noteworthy Ph.D dissertations in several years, the previously unavailable *Journal of the Joint Committee of Fifteen on Reconstruction*. His description of the *Journal's* journey and how he found it is quite interesting. *See* KENDRICK, *supra* note 9, at 18–22.

> [Conkling] produced in the court room a copy of the journal of [the Joint] committee and revealed for the first time what purported to be the real intention of those who framed the fourteenth amendment. . . .
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> . . . .
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> . . . [Upon which Conkling had] devolved the onerous task of convincing a majority of the members of the Supreme Court that the opinion of Justice Miller in the Slaughter-House cases was based upon a misconception of the intent of the framers of section I of the fourteenth amendment. . . .
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> . . . .
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> Though the points argued by Conkling were not decided by the Court in the San Mateo case, yet his speech in that case marks distinctly the point at which the Supreme Court ceased to interpret section I of the fourteenth amendment as having reference almost wholly to negroes, and began to regard it as having a much broader application.[77]

Arguing before the Court in *San Mateo*, Conkling first laid some groundwork:

> "The idea prevails—it is found in the opinion of the Court in the Slaughter-House cases; it has found broad lodgment in the public

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[77] KENDRICK, *supra* note 9, at 28–29, 34; *see also* Graham, *supra* note 12, at 371–72 (describing Conkling's influence). Kendrick relates three incidents demonstrating how Conkling's arguments influenced the Court: (a) Justice Miller's own acceptance, during the *San Mateo* oral argument, of Conkling's arguments (Miller, after listening to Conkling's argument, cut off Conkling's co-counsel, saying, "'I have never heard it said in this Court or by any judge of it that these articles [i. e., the fourteenth amendment] were supposed to be limited to the negro race.'"), KENDRICK, *supra,* at 34–35 (alteration in original); (b) the 1883 *Santa Clara v. Southern Pacific Railroad* case, 18 F. 385 (C.C.D. Cal. 1883), in which Justice Field, on circuit,

> adopted the same attitude toward the purport of the civil rights section of the fourteenth amendment which Conkling had enunciated in his San Mateo speech. In fact the justice quoted several passages from that speech, a notable one being the concluding paragraph of it in which Conkling laid down what he considered the true method of interpretation,

id. at 35; and (c) the Supreme Court's issuing dicta in *Santa Clara v. Southern Pacific Railroad,* 118 U.S. 594 (1886), in 1886 that "followed Conkling's view." *Id.* at 36. Chief Justice Waite commented, as the Court was ready to receive oral argument that, "[t]he Court does not wish to hear arguments on the question whether the provision in the fourteenth 'amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does.'" *Id.* at 27. Kendrick concludes, "the door was [thus] opened for organized capital to contest, often-times successfully, before the highest Court in the land, whatever laws of the states it considered disadvantageous to its own interests." *Id.* at 36. Again, for a more critical view of Conkling's performance, see, e.g., Graham, *supra* note 12.

> understanding; that the fourteenth amendment—nay I might say all three of the latter amendments were conceived in a single common purpose—that they came out of one and the same crucible, and were struck by the same die; that they gave expression to only one single inspiration. The impression seems to be that the fourteenth amendment especially was brought forth in the form in which it was at last ratified by the states, as one entire whole, beginning and ending as to the first section at least, with the protection to the freedmen of the South."[78]

Conkling then proceeded to demonstrate how the *Slaughter-House* majority's understanding of Section 1 as "one entire whole" was erroneous.[79] First, he described the process under which the Fourteenth Amendment was drafted:

> "It may shed some modifying light on [the *Slaughter-House*] supposition, to trace the different proposals, independent of each other, originating in different minds, and at different times, not in the order in which they now stand, which finally, by what might be called the *attrition of parliamentary processes in the committee and in Congress*, came to be collected in one formulated proposal of amendment."[80]

Referring to the Joint Committee's journal, he explained: "'[Y]our Honors will perceive that different parts of what now stands as a whole . . . were separately and independently conceived, separately acted on, perfected, and reported, not in the order in which they are now collated, and not with a single inspiration or design.'"[81]

For our present Privileges or Immunities Clause purposes, we may resurrect Conkling's argument thus:

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[78] KENDRICK, *supra* note 9, at 30 (quoting Conkling's oral argument).

[79] *See id.* at 30–31.

[80] *Id.* at 30–31 (emphasis added) (quoting Conkling's oral argument).

[81] *Id.* (quoting Conkling's oral argument). Conkling continued:

> "These originally separate, independent propositions, came from a joint committee of the two Houses. The committee sat with closed doors. A journal of its proceedings was kept by an experienced recorder from day to day.
>
> It seems odd that such a journal has never been printed by order of the two Houses. It has never been printed, however, or publicly referred to before, I believe.
>
> Having consulted some of those whose opinions it preserves, and having the record in my possession, I venture to produce some extracts from it . . . ."

Id. at 31.

> "It may shed some modifying light on [the *Slaughter-House*] supposition [that the Privileges or Immunities Clause applies only to a narrow class of attributes associated with United States citizenship], to trace the different proposals, independent of each other, originating in different minds, and at different times, not in the order in which they now stand, which finally, by what might be called the attrition of parliamentary processes in the committee and in Congress, came to be collected in one formulated proposal of [Section 1 of the] amendment. . . .
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> . . . .
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> . . . [y]our Honors will perceive that different parts of *what now stands as a whole [i.e., the Citizenship, Privileges or Immunities, Due Process, and Equal Protection Clauses of Section 1] . . . were separately and independently conceived, separately acted on, perfected, and reported, not in the order in which they are now collated, and not with a single inspiration or design.*"[82]

Applying the Conkling analysis, when we lay the chronological development of the Privileges or Immunities Clause alongside that of the Citizenship Clause, we see two entirely independent, substantively different proposals. One, the former, originated early and was discussed at length in the Joint Committee and proposed first in the House, then in the Senate; the latter, the wholly independent Citizenship Clause, originated in the Senate very late in the process with *no input* from the Joint Committee, and was tacked onto the seemingly least objectionable spot: the very beginning of the entire amendment, at the very top of the first section of the amendment. These two wholly independent proposals nonetheless came to be (erroneously) viewed by the Supreme Court as a seamless matched pair.

A brief timeline helps illustrate the point:

- January 6, 1866: Joint Committee on Reconstruction meets for the first time (House: Stevens (chair), Washburne, Morrill, Conkling, Boutwell, Blow. Senate: Fessenden (chair), Grimes, Harris, Howard, Johnson, Williams).[83]
- January 12: Joint Subcommittee of Five (Fessenden, Howard, Stevens, Bingham, Conkling) appointed to consider possible amendments. Representative John Bingham first proposes equal protection language in Joint Committee for referral to subcommittee.[84]

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[82] *Id.* at 30–31 (emphasis added).

[83] *Id.* at 39.

[84] *Id.* at 43–46. Bingham's proposal, introduced after discussion of now-Section 2, read: "'The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property.'" The motion was passed. *Id.* Stevens proposed adding: "'All laws, state or national, shall

- January 16: Subcommittee of Five first reports recommended language to Joint Committee.[85]
- February 26: Bingham first introduces Joint Committee's proposed language in House.[86]
- April 21: Representative Thaddeus Stevens first proposes full amendment in five parts in Joint Committee.[87]
- April 25: Bingham's Section V from April 21 is stricken in Joint Committee 7-5.[88]
- April 28: Bingham proposes revised Section 1 in Joint Committee, passes 10-3.[89]
- April 30: Stevens reports Joint Committee's new five part amendment in House.[90]

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operate impartially and equally on all persons without regard to race or color.'" The motion was passed. *Id.* (quoting the records of the Joint Committee).

[85] *Id.* at 49–51. The recommended language read: "'Article C. Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property.'" *Id.* at 51 (quoting records of the Joint Committee). The recommended language passed 10-4 in full Joint Committee. *Id.*

[86] CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866). The proposed language was as follows:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Id. Bingham gave a speech on February 28, in which he repeatedly made clear that the Privileges or Immunities Clause will apply the Bill of Rights, and more, to the States. *Id.* at 1088–95; *see supra* notes 19–22 and accompanying text.

[87] KENDRICK, *supra* note 9, at 82–84. Section I of the proposal read: "'No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.'" *Id.* at 83. Bingham moved to insert a new Section V, reading "'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" It passed the Joint Committee by 10-2. *Id.* at 87 (quoting records of the Joint Committee).

[88] *Id.* at 97–98.

[89] *Id.* at 100, 106.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Id. (quoting records of Joint Committee). Bingham's proposed language is identical to that of Section V stricken three days earlier.

[90] CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).

- May 8–10: House debates Joint Committee's new proposal.[91]
- May 23: Senator Jacob Howard (standing in for Chair Fessenden, who is ill) explains to the Senate the Joint Committee's views and intentions for Section 1.[92]
- May 30: After Republican caucus, Howard first proposes Citizenship Clause in Senate, commenting that

  > "[t]his amendment which I have offered is *simply declaratory* of what I regard as the law of the land already, *that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States*. . . . It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States."[93]

- May 30–June 8: Senate debates the effects of the new Citizenship Clause. Discussions chiefly involve (a) whether to include "Indians not Taxed" language, and (b) intent to overturn *Dred Scott*. There is no recorded discussion about how the Citizenship Clause interrelates with the Privileges or Immunities Clause.[94]
- June 6: Joint Committee reports out to Congress on changes to joint resolution (final meeting of Joint Committee on Fourteenth Amendment

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[91] *Id.* at 2438–41. Proponents and opponents alike recognized that the amendment would impose profound new restrictions on states, including applying the Bill of Rights, and more, to the states. As opponent Andrew Rogers (D-NJ) commented,

> [Section 1] provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . . What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. . . . I hold if that ever becomes a part of the fundamental law of the land *it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities*. . . .

Id. at 2458, 2537–41 (emphasis added). To which Bingham replied again: "[The purpose of Section 1 is] to *protect by national law the privileges and immunities of all the citizens of the Republic* and the inborn rights of every person within its jurisdiction *whenever the same shall be abridged or denied by the unconstitutional acts of any State.*" *Id.* at 2542 (emphasis added).

[92] *Id.* at 2764–68; *see supra* notes 23–24 and accompanying text for summary of Howard's comments.

[93] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (emphasis added). The proposed amendment, to be added onto the beginning of Section 1, read: "*[A]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.*" *Id.* (emphasis added).

[94] *Id.* at 2890–2939, 2961–64, 3010–42.

issue; it appears that the Joint Committee never discussed the Citizenship Clause proposed the previous week in the Senate).[95]

- June 8: Joint resolution passes Senate 33-11.[96]
- June 13: Joint resolution (as modified by Senate)[97] passes House 120-32. Fourteenth Amendment is sent to states for ratification.[98]

Studying this chronology, it becomes clear that the Citizenship Clause and Privileges or Immunities Clause were indeed *"'separately and independently conceived, separately acted on, perfected, and reported, not in the order in which they are now collated, and not with a single inspiration or design.'"*[99] Hence, it is altogether plausible to conclude that the unfortunate placement of the Citizenship Clause and the Privileges or Immunities Clause immediately next to one another (especially since both spoke of "citizenship," albeit for their own independent purposes) led to what probably was an unintended textual ambiguity—one that the framers failed to detect and correct, to liberty's everlasting detriment. More pointedly, the lack of parallel construction between the first (Citizenship Clause) and the second (Privileges or Immunities Clause) sentences was, in all likelihood, simply a mistake—a most unfortunate oversight. Scriveners' errors and their equivalents do occur (sometimes even in constitutions) despite drafters' best efforts to avoid them. There is no evidence that the framers intended to create a distinction between forms of citizenship in the two clauses; they failed to detect, however, the textual ambiguity that had been introduced at the eleventh hour by the addition of the Citizenship Clause. They were mortal after all.

How could the framers have made such a damaging mistake? Recall that Section 1 was just one part of the whole proposed five part Fourteenth Amendment, and that the Citizenship Clause and the Privileges or Immunities Clause were just two separate independent parts of Section 1.[100] Indeed, Section 1 was not even the most discussed of the Fourteenth Amendment sections in Congress. Rather, Section 2 (governing how representatives would be apportioned among states in the post-Civil War Congress by reducing representation for states denying the franchise to any adult male citizen),[101] Section 3 (disqualifying from federal or state office certain former federal or state

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[95] KENDRICK, *supra* note 9, at 120.

[96] *See* CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

[97] In addition to adding the Citizenship Clause, other modifications in the Senate included the addition of a new Section 3, which "substitut[ed] the ineligibility of certain high offenders" for the earlier version proposed by Representative Stevens which would have disfranchised all rebels until 1870. *Id.* at 3148. Stevens, though unhappy with the Section 3 change, voted for the amendment. *Id.* at 3148–49.

[98] *Id.* at 3149.

[99] KENDRICK, *supra* note 9, at 31 (emphasis added) (quoting Conkling's oral argument); *see supra* note 80 and accompanying text.

[100] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866); *see also* U.S. CONST. amend. XIV, § 1.

[101] U.S. CONST. amend. XIV, § 2.

officeholders who had actively participated in the rebellion),[102] and Section 4 (voiding any federal or state debt incurred in aid of the rebellion)[103] were deemed of more immediate pressing importance, and so correspondingly occupied more of the House's and Senate's time than did Section 1.[104]

Then, when Senator Howard, close to the end of the process, proposed in the Senate that a new sentence—one that the Joint Committee had never seen—be added (in order to "remove [] all doubt"[105] on the question of the people's utter repudiation of *Dred Scott*)[106] onto what was considered to be essentially a finished, already-negotiated and already-debated amendment, the proposal was received without controversy.[107] After all, what self-respecting reformer could argue with a sentence that guaranteed that all persons born or naturalized in the United States would henceforth be citizens of the states and nation in which they lived?

It is possible, moreover, to see how Congress could have missed the ambiguity created by addition of the late-arriving Citizenship Clause, given the historical context of the two week period between May 30 (the date the Citizenship Clause was introduced and passed, without debate, in the Senate),[108] and June 8 & 13, 1866 (the dates the Senate and House, respectively, passed the Fourteenth Amendment in its entirety, with all of its five sections and multiple provisions).[109] The spring of 1866 was, after all, a singularly momentous period in American history, with the nation just one year removed from a war that took 600,000 lives and tore apart the Republic.[110] So it was not as if the Thirty-ninth Congress had nothing else on its plate—during these months, while the House and Senate were considering passing a multifaceted amendment, they were considering other issues of monumental importance as well.[111]

It is not surprising, then, that in the course of those two weeks the nuance of the not-exactly-parallel use in the first two sentences of the term "citizenship"—the nuance so eagerly seized upon by the *Slaughter-House* majority—escaped the drafters. After all, everybody in Congress—supporters and opponents alike—had known for months that the proposed Privileges or Immunities Clause, together with the rest of

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[102] *Id.* at § 3.

[103] *Id.* at § 4.

[104] *See, e.g.*, AMAR, *supra* note 19; CURTIS, *supra* note 24, at ch.3 (discussing the debate and formation of each part of the Fourteenth Amendment).

[105] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

[106] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[107] The only substantive questions senators had were whether Indians would be included in the definition of citizenship. *See supra* note 94 and accompanying text.

[108] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866).

[109] *See id.* at 3025–55, 3122–48.

[110] CIVIL WAR DESK REFERENCE XVII, 738–39 (Margaret E. Wagner, Gary W. Gallagher & Paul Finkelman eds., 2002). *See generally* Richard L. Aynes, *The 39th Congress (1865–1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1019 (2009).

[111] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2887–3150 (1866).

Section 1 and Section 5, would substantially lessen states' ultimate authority over their citizens. That is why the opponents brayed so loudly about the Fourteenth Amendment: they knew that states would no longer be able to deny citizens (indeed, all manner of citizens, as specified in the newly added first sentence) the individual liberty and equal justice the people had claimed in the Declaration of Independence, but had been denied for four score and ten years since. All of this the opponents understood, so they objected—and they lost. The late-arriving Citizenship Clause did nothing to change any of this—it simply stated what had become axiomatic in the late war: citizenship would not depend on skin color.

CONCLUSION

This Essay suggests that, like the Due Process Clause, the Privileges or Immunities Clause too was a victim of the "attrition of parliamentary processes" that occurred during the Fourteenth Amendment's creation. Just as the intended and understood broad meaning of "personhood" was not initially recognized in *Slaughter-House*, neither was the intended and understood broad meaning of "privileges or immunities." In the former case, however, the Court corrected Justice Miller's narrow misinterpretation of Section 1, thus restoring the intended scope of due process "personhood" to include white people and artificial persons such as corporations. The Court now has the opportunity to do the same with the Privileges or Immunities Clause, and likewise restore this majestic provision to its intended scope of applying the Bill of Rights (and more) to the states. It is never too late in the day for the Court to offer more faithful interpretations of the Constitution.