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Privileges, Immunities, and Affirmative Action in Medical Education

GREGORY CURFMAN, MD*

ABSTRACT. In *Students for Fair Admissions v. President & Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, the Supreme Court ruled that affirmative action in university admissions, in which an applicant of a particular race or ethnicity receives a plus factor, is unconstitutional. This ruling was based on both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. This article argues that a more natural fit as the basis for constitutional analysis would be a different clause in the Fourteenth Amendment, the Privileges or Immunities Clause. In the article, a legal analysis based on the clause is applied to medical school admissions. Depending on whether a fundamental rights reading or an antidiscrimination (equality) reading of the clause is applied, opposite conclusions are reached on the constitutionality of affirmative action in medical school admissions. This analysis demonstrates why affirmative action in admissions—in this case medical school admissions, which directly affect the composition of the Nation's physician workforce—is a complex and difficult constitutional question.

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I. INTRODUCTION

It has been 150 years since the Supreme Court issued its opinion in the *Slaughter-House Cases*. In his opinion for the Court, Justice Stephen Miller concluded that butchers in New Orleans, even though they were US citizens, did not have a "privilege" to freely pursue their occupation.[1] The butchers had argued that they did have this privilege based on the Privileges or Immunities Clause of § 1 the recently ratified Fourteenth Amendment, which states: "No state shall make or enforce any law that abridges the privileges or immunities of citizens of the United States."[2] This important clause is immediately preceded in § 1 by the Citizenship Clause: "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."[2] The definition of citizenship is directly followed by the important stipulation that the privileges or immunities of US citizens are protected from abridgement by the states.

A. The Ruling in *Slaughter-House*

Justice Miller's opinion, which is now infamous, effectively wrote the Privileges or Immunities Clause out of the Constitution, and the clause has never been officially restored by overturning *Slaughter-House*. The justice concluded that the only privileges or immunities that were protected by the clause were a small number of national rights, and in what must be regarded as dicta, the justice gave as an example the right to travel on the Nation's navigable waters. The fact that the Civil War was not fought to secure the right to travel the navigable waters provides the context for concluding that Justice Miller's interpretation of privileges or immunities was, to say the least, unorthodox. It is also noteworthy that although Justice Miller dismissed the notion that the Privileges or Immunities Clause protected unenumerated rights, the right to travel the navigable waters was surely unenumerated (contradicting his contention that unenumerated rights are not protected). The Privileges or Immunities clause has been referred to as "the gem of the Constitution," but issued just five years after the ratification of the Fourteenth Amendment in 1868, Justice Miller's opinion in *Slaughter-House* trivialized this clause, which was, contrary to his view, intended to be central to § 1 of the Fourteenth Amendment, and effectively removed it from constitutional jurisprudence.[3]

B. Was *Slaughter-House* Correctly Decided?

While some legal scholars, such as Kurt Lash,[4] believe that *Slaughter-House* was correctly decided, many other legal scholars, including Randy Barnett,[5] Kermit Roosevelt,[6]

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[1] Slaughter-House Cases, 83 U.S. 36 (1872).
[2] U.S. CONST. AMEND. XIV, § 1.
[3] Constitution Accountability Center, *The Gem of the Constitution*. https://www.theusconstitution.org/wp-content/uploads/2017/12/Gem_of_the_Constitution.pdf.
[4] Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities as an Antebellum Term of Art",* 98 Geo. L. J. 1241 (2010).
[5] Randy E. Barnett, Evan Bernick, *The Privileges or Immunities Clause Abridged: A Critiques of Kurt Lash on the Fourteenth Amendment,* Notre Dame Law Rev. Vol 95, Issue 2, 499.
[6] Kermit Roosevelt, *What if Slaughter-House Had Been Decided Differently?,* 45 Ind. L. Rev. 61 (2011).

and Akhil Ahmar[7] believe that it was wrongly decided. One Supreme Court justice, Justice Thomas, also believes the case was incorrectly decided and is open to reinstituting the Privileges or Immunities Clause into constitutional jurisprudence.[8] While Lash believes that unenumerated rights, such as the right (or privilege) of citizens to pursue an occupation, were not included among the privileges or immunities of the Fourteenth Amendment, Barnett, Roosevelt, and Amar believe that at least some unenumerated rights may be encompassed by the Privileges or Immunities Clause. These scholars are joined by Michael Gerhardt[9] and Jack Balkin,[10] both of whom believe that certain unenumerated rights of citizens of the United States may be protected by the Privileges or Immunities Clause. Jud Campbell proposed the idea that general citizenship rights originally arose from the concept of general law, which pre-dated the Fourteenth Amendment and were later referred to as privileges or immunities; he has developed this interesting line of thought in a recent law review article.[11] If more support is needed for the doctrine of unenumerated rights, it can be found in the Ninth Amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[12]

C. A Counterfactual Analysis in *Students for Fair Admissions*

This article will provide an alternative legal analysis of the affirmative action cases recently decided by the Supreme Court, *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*,[13] based on a consideration of the Privileges or Immunities Clause (in this article the cases will be referred to together as *Students for Fair Admissions*). This counterfactual analysis will be conducted as if the clause were still part of the Court's jurisprudence and will address the question, "How would the affirmative action cases be argued and decided, based on the Privileges or Immunities Clause, if the opinion in *Slaughter-House* had come out differently or was later overturned?" Although this analysis based on the Privileges or Immunities Clause can be applied to affirmative action in any educational setting in university admissions, this article will focus specifically on medical education. The article contends that the Privileges or Immunities Clause is a more logical fit for deciding the affirmative action cases, which were argued and decided instead on the basis of the Equal Protection of the Laws Clause and Title VI of the Civil Rights Act of 1964.[13] Since Title VI is generally considered to be

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[7] Akhil Reed Amar & John C. Harrison, *The Privilege or Immunities Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/704#the-privileges-or-immunities-clause-by-akhil-amar-and-john-harrison.

[8] Timbs v. Indiana. 139 S. Ct. at 691 (Thomas, J. concurring in judgment). See also McDonald v. City of Chicago. 130 S. Ct. at 3062 (2010) (Thomas, J. concurring).

[9] Michael J. Gernhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 Vanderbilt Law Review 409 (1990).

[10] Jack M. Balkin, *Original Meaning and Constitutional Redemption*, CONSTITUTIONAL COMMENTARY VOL. 433. (2007) https://scholarship.law.umn.edu/concomm/433.

[11] Jud Campbell, *General Citizenship Rights,* 132 Yale Law J. No. 3. 611 (2023).

[12] U.S. CONST. AMEND. IX.

[13] Students for Fair Admissions v. President, 600 U.S. 181 (2023).

coextensive with the Fourteenth Amendment,[14] this article will not treat Title VI independently of the Fourteenth Amendment.

The article will proceed in four parts. Part I presents an analysis of the affirmative action cases based on a "fundamental rights" interpretation of the Privileges or Immunities Clause, which was developed in an important dissent in *Slaughter-House* written by Justice Joseph Bradley.[15] Part II presents a counterpoint analysis of the affirmative action cases based on an "anti-discrimination" interpretation of the Privileges or Immunities Clause, which was developed in a second dissent in *Slaughter-House* written by Justice Stephen Field.[16] Part III will summarize and contrast the two analyses, and suggest how the Supreme Court might decide the affirmative action cases if presented with these two opposing analyses in a subsequent case. Part IV will look to what is up next for affirmative action in education, with an examination of *Coalition for TJ v. Fairfax County School Board*, a case focused on race-neutral approaches to achieving racial and ethnic diversity.

II. PART I: PRIVILEGES OR IMMUNITIES AND FUNDAMENTAL RIGHTS

The "fundamental rights" interpretation of the Privileges or Immunities Clause was developed in Justice Joseph Bradley's dissent in *Slaughter-House*,[17] and it has been endorsed by legal scholars on the political right and the political left. Justice Bradley wrote:

> Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the State where he resides, what, in general, are the privileges and immunities of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them?
>
> And he continued:
>
> And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not.

If we accept Justice Bradley's contention that the right to pursue an occupation is one of the privileges or immunities of U.S. citizenship, we may then question whether the ability of Black individuals to pursue an occupation as a physician has been and is being abridged by barriers for them to gain admission to U.S. medical schools. Even with affirmative action programs in place, Black students, particularly Black male students, are significantly underrepresented in our Nation's medical schools and in the physician

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[14] The United States Department of Justice Archives. Note on Fisher v. University of Texas at Austin. https://www.justice.gov/archives/crt/fcs/newsletters/summer2016/Fisher.
[15] *Supra* note 1 at 111.
[16] *Supra* note 1 at 83.
[17] *Supra* note 1 at 113-114.

workforce.[18] [19] A recent study has confirmed that among states that instituted affirmative action bans, the enrollment of underrepresented racial and ethnic groups in public medical schools declined significantly.[20] During the year before the bans, underrepresented racial and ethnic groups comprised 14.8% of students in public medical schools, while this figure declined by 4.8 absolute percentage points after the ban, but increased by 0.7 absolute percentage points in control schools in states without bans.[20] Thus, following the Supreme Court's ruling in *Students for Fair Admissions*, it can be expected that the numbers of underrepresented racial and ethnic groups in our Nation's medical schools will decline significantly, perhaps even more than following affirmative action bans in individual states.

Individuals may select their personal physicians on the basis of various criteria, and choosing a physician of a person's own race may be an important preference for some, perhaps many, individuals. Given that the Nation has suboptimal numbers of Black physicians, especially Black male physicians, Black patients who prefer a Black physician may simply not be able to find one.

To meet the health care needs of all citizens of the United States, the Nation needs more Black physicians, and the Nation's medical schools must have the authority to admit Black students and educate them as physicians. This is what the Privileges or Immunities Clause requires. In the oral arguments in *McDonald v. City of Chicago*, Justice Scalia alleged that the Privileges or Immunities Clause is not needed because its function in assuring fundamental rights has been superseded by the Due Process of Law Clause (i.e., substantive due process).[21] Yet, the counterargument is that the Privileges or Immunities Clause is a more natural fit for supporting the need for affirmative action in medical education and provides more compelling legal reasoning.

Viewed from this perspective, the Privileges or Immunities Clause abrogates the abridgment of a critical privilege of national citizenship, the right to pursue an occupation as a physician. Our Nation's medical schools must be able to respond to the necessity of a diverse physician workforce and admit students whom they believe will best fulfill the health care needs of our increasingly diverse society. The Privileges or Immunities Clause, were it still a meaningful part of constitutional jurisprudence today, would demand nothing less and would provide a compelling argument in favor of the preservation of affirmative action in medical school admissions. This analysis applies cogently to public medical schools, since they are financed and operated by the state in which they reside, but also to private medical schools given the substantial public financing and tax credits they receive. A ruling by the Supreme Court eliminating affirmative action in university admissions will inevitably require the states to abridge the privilege of Black individuals to pursue an

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[18] Association of American Medical Colleges, *2021 Fall Applicant, Matriculant, and Enrollment Data Tables,* https://www.aamc.org/media/57761/download?attachment (last visited June 18, 2023).
[19] Association of American Medical Colleges, *2022 Physician Specialty Data Report Highlights*, https://www.aamc.org/data-reports/workforce/data/2022-physician-specialty-report-data-highlights (last visited June 18, 2023).
[20] Dan P. Ly, Utibe R. Essien, Andrew R. Olenski, Anupam B. Jena, *Affirmative Action Bans and Enrollment of Students from Underrepresented Racial and Ethnic Groups in U.S. Public Medical Schools.* Ann. Int. Med. 175 (Issue 6), 873-878 (2022).
[21] Transcript of Oral Argument at 6, McDonald v. City of Chicago, 561 U.S. 742 (2010).

occupation as a physician, in violation of the Privileges or Immunities Clause. Simply put, fewer Black students will be admitted to our Nation's medical schools.

III. PART II: PRIVILEGES OR IMMUNITIES AND ANTI-DISCRIMINATION

In addition to the fundamental rights interpretation of the Privileges or Immunities Clause, a second accepted interpretation is based on an anti-discrimination reading of the clause. This reading is derived from the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This clause was intended to prevent one state from discriminating against the citizens of other states, while the Privileges or Immunities Clause of the Fourteenth Amendment has been interpreted as proscribing discrimination among the citizens of an individual state. The anti-discrimination, or equality, interpretation of the Privileges or Immunities Clause was framed well in Justice Field's dissent in *Slaughter-House*, where he wrote:

> In all these cases, there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.[22]

Here Justice Field not only agrees with Justice Bradley that "the pursuit of the ordinary avocations of life" is a privilege or immunity of U.S. citizens, but he goes further in emphasizing that this right applies equally among citizens. Although in today's law the Equal Protection Clause of the Fourteenth Amendment serves the purpose of promoting equality among persons, John Harrison has argued that the text of this clause actually addresses "the protection of the laws," and that it is the Privileges or Immunities Clause that better fits with an equality mandate and "ensures that all the citizens of every state shall be entitled to the privileges and immunities of state citizenship, thereby mandating equality of rights."[23] The most natural reading of the equality interpretation of the Privileges or Immunities Clause is an individual rights reading. Such a reading would dictate equal rights for each individual citizen, as contrasted with rights protected for particular groups of citizens.

When the antidiscrimination (or equality) reading of the Privileges or Immunities Clause is applied to affirmative action in medical school admissions, it poses a difficult constitutional question. Assigning plus factors to particular racial and ethnic groups in medical school admissions inevitably disadvantages other racial and ethnic groups, since there are a fixed number of seats in each class (in game theory sometimes referred to as "zero-sum"). On its face, the use of plus factors based on race or ethnicity in admissions would violate the nondiscrimination guarantee of the Privileges or Immunities Clause as specified by Justice Field in his *Slaughter-House* dissent. This application of the Privileges

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[22] *Supra* note 1 at 109.

[23] John Harrison, *Reconstructing the Privileges or Immunities Clause,* 101 Yale Law J. 1385-1474 (1992).

or Immunities Clause to the admissions process would not support a plus factor approach based on race or ethnicity, since plus factors inevitably also introduce minus factors, in violation of the equality requirement of the clause. This line of argument is reinforced by Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race or natural origin in programs receiving federal financial assistance, an argument that was skillfully developed by Gene Hamilton and Jonathan Mitchell in an amicus brief in *Students for Fair Admissions*,[24] and stated clearly by Justice Gorsuch in his concurring opinion in *Students for Fair Admissions.*[25]

IV. PART III: A DIFFICULT CONSTITUTIONAL QUESTION

Although the Supreme Court decided *Students for Fair Admissions* on the basis of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, this article develops the premise that the Privileges or Immunities Clause is a more natural fit than the Equal Protection Clause as a constitutional theory for deciding the cases. Of course, the Court has shown little interest in reviving the Privileges or Immunities Clause (with the exception of Justice Thomas, who did not apply it in his concurring opinion[26] in *Student for Fair Admissions*), but, as Jack Balkin has written, constitutional interpretation tends to ebb and flow, and what today may be "off the wall" may later come back "on the wall:"

> Constitutional revolutions are changes in expectations about what constitutional provisions mean and how they are likely to be applied; changes in what kinds of positions are thought reasonable and unreasonable, "off-the-wall" and "on-the-wall." These changes are prompted by the contemporaneous work of the political branches and by social mobilizations.[27]

Even if the Privileges or Immunities Clause were applied in a subsequent legal case (or a hypothetical case as in this article) involving affirmative action in university admissions—and specifically in the context of medical school admissions—consideration of race and ethnicity in admissions would still be a difficult constitutional question. This article proposes that application of the fundamental rights interpretation of the Privileges or Immunities Clause creates an argument supporting race-based admissions. A ruling by the Supreme Court eliminating affirmative action in medical school admissions would inevitably require the states to abridge the privilege of Black students to pursue an occupation needed by our society. In contrast, application of the antidiscrimination (or equality) interpretation of the Privileges or Immunities Clause gives rise to an argument against race-based admissions. How the Supreme Court would rule in this circumstance is difficult to predict. The novel legal theory developed in this article based on the Privileges or Immunities Clause of the Fourteenth Amendment does not resolve the provocative

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[24] Brief of America First Legal as Amicus Curiae in Support of Neither Party, Students for Fair Admissions v. President & Fellows of Harvard College (No. 20-1199).
[25] *Supra* note 15.
[26] *Id.*
[27] Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NORTHWESTERN UNIV. LAW REV. 549 at 577 (2009).

matter of admissions based on race or ethnicity—and this is why it is a difficult constitutional question.

V. PART IV: NEXT UP FOR AFFIRMATIVE ACTION

Even though the Supreme Court has issued its opinion in *Students for Fair Admissions*, legal action continues on the subject of affirmative action in education. An important ancillary question is whether facially race-neutral admissions procedures will be sanctioned by the courts—or not. This question has already been raised in *Coalition for TJ v. Fairfax County School Board*.

Thomas Jefferson High School for Science and Technology (known colloquially as TJ) is located in Arlington, Virginia, and is a state-chartered Governor's magnet high school operated by Fairfax County Public Schools. It has the reputation of being one of the top ranked public high schools in the Nation. TJ, along with other similar magnet high schools in New York, Boston, and other cities across the country, are significant for the education of students who have special talents in the STEM disciplines (science, technology, engineering, and medicine). One of the magnet schools in New York, the Bronx High School of Science, has nine Nobel Prize winners among its alumni. Students interested in becoming physicians may receive substantial benefit in their career development from the education offered by these schools.

Admission to TJ is very competitive and until 2020 was determined principally by performance on an entrance examination along with grade point average in middle school. In 2019, this admission procedure resulted in a class consisting of 74% Asian students but only very small numbers of Black and Hispanic students. In response, the School Board designed a new plan aimed at providing Black and Hispanic students with greater opportunity for admission.[28] The entrance examination was eliminated, and a policy was established that 1.5% of the students from each of the County's 26 middle schools were offered acceptances. By design, this policy reduced the number of Asian students admitted since they often attended one of three middle schools that had advanced academic programs. The new admissions program dispersed the admission offers among all the 26 middle schools, and in the first year (2020), the percentage of Asian students admitted declined from 73% to 54%, while the percentage of Hispanic students increased from 3% to 11% and the percentage of Black students increased from 1% to 7%. Asian students were the only racial-ethnic group that experienced a decrease in number, while all other groups experienced an increase. The 1.5% admissions plan, while racially neutral on its face, nevertheless is a proxy for a racially motivated admissions policy.

The Coalition for TJ, an ad hoc group comprised principally of Asian families concerned about the new admissions program, brought a lawsuit against the School Board alleging that the new program violated the Equal Protection Clause of the Fourteenth Amendment. Although the Coalition's legal theory is based on the Equal Protection Clause,

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[28] *Fighting Race-Based Discrimination at Nation's Top-Ranked High School*, PACIFIC LEGAL FOUNDATION (2024), https://pacificlegal.org/case/coalition_for_tj/.

for the reasons discussed previously in this article and in another recent law review article by Professor Sonya Starr, the case could also have been argued based on the Privileges or Immunities Clause.[29] This Clause would support a claim that the privilege of applying for admission to a school must be available to all citizens on an equal basis.

Representing the Coalition for TJ, the Pacific Legal Foundation claimed that the program had both an immediate disparate impact on the racial and ethnic composition of the school and was also based on a discriminatory purpose (i.e., to increase the number of Black and Hispanic students and decrease the number of Asian students). The School Board agreed that the plan had a racial purpose but disputed that, as a policy decision, it was discriminatory. The US District Court for the Eastern District of Virginia granted summary judgment for the Coalition for TJ,[30] but a three-judge panel of the Fourth Circuit Court of Appeals reversed, ruling that there was neither disparate impact on the racial composition of the school nor a discriminatory purpose.[31] *Village of Arlington Heights v. Metropolitan Housing Development Corporation* served as precedent that both disparate impact and discriminatory purpose must be demonstrated to establish racial discrimination in this circumstance.[32] The majority ruled that since Asian students were still well represented under the new plan, there was no disparate impact. The majority also ruled that the School Board's plan to increase opportunities for Black and Hispanic students to the disadvantage of Asian students did not constitute discrimination.

Judge Allison Jones Rushing issued a dissent on both counts.[33] A central issue is whether the Equal Protection Clause is focused on individuals or groups. The dissent concluded that the fact that Asan students were still well represented under the new admissions plan (53% of the class) does not justify rejecting individually qualified Asian students to open seats for students of other racial-ethnic groups.[34]

The Pacific Legal Foundation, on behalf of the Coalition for TJ, filed a petition for certiorari with the Supreme Court.[35] On February 20, 2024, the Supreme Court denied the petition for a writ of certiorari, while Justice Alito, joined by Justice Thomas, dissented from the Court's denial of certiorari. In his opinion for the Court in *Students for Fair Admissions*, Chief Justice Roberts wrote that, "Nothing in this opinion should be construed as permitting universities from obtaining indirectly what they cannot obtain directly."[36] It is unfortunate that the Court decided not to take this important case. The Court has passed up the opportunity to settle the matter of whether facially race neutral admissions programs, which arguably take an indirect approach to attaining racial diversity, will be held constitutional under the Fourteenth Amendment. Until there is an answer from the Court to this significant question, universities and their medical schools will be in the dark about

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[29] Sonja B. Starr, *The Magnet-School Wars and the Future of Colorblindness*, STANFORD LAW REVIEW, Vol. 76, No. 1 (forthcoming Jan. 2024).
[30] Coalition for TJ v. Fairfax Cty. Sch. Bd., 2022 U.S. Dist. LEXIS 33684 (2022).
[31] *Id.*
[32] Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977).
[33] *Supra* note 31 at 48.
[34] *Supra* note 31 at 68.
[35] Pet. For Writ of Cert., Coalition for TJ v. Fairfax County School Board, 2023 (U.S. 2023).
[36] *Supra* note 13 at 39.

whether the application of race-neutral admissions policies to obtain—by proxy—greater racial and ethnic diversity in their classrooms is acceptable.