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## INK BLOT OR NOT: THE MEANING OF PRIVILEGES AND/OR IMMUNITIES

*Richard L. Aynes\**

“I admit, you have a clear right to show it is wrong if you can; but you have no right to pretend you can not see it at all.”<sup>1</sup> Abraham Lincoln

Section 1 of the Fourteenth Amendment provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>2</sup> An examination of the Journal of the Joint Committee on Reconstruction reveals that the addition of the terms “privileges or immunities” was the work of Pennsylvania native and Ohio Congressman John A. Bingham, whom Justice Black called the “Madison of the first section of the Fourteenth Amendment.”<sup>3</sup> Benjamin Kendrick, the editor of the published Journal, wrote that “had it not been for [Bingham’s] untiring efforts the provision for nationalizing civil rights would have not found a place in the fourteenth amendment.”<sup>4</sup>

This Article will explore the following topics: (1) the use of the terms privileges and immunities in America; (2) evidence that privileges and immunities were intended to protect the *rights* of citizens;

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1 Abraham Lincoln, Speech in the U.S. House of Representatives on the Presidential Question (July 27, 1848), in ABRAHAM LINCOLN, LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 205, 207 (Don E. Fehrenbacher, ed., 1989) [hereinafter LINCOLN].

2 U.S. CONST. amend. XIV, § 1.

3 *Adams v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting). For biographical information on Congressman Bingham, see Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003); Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881 (1988). See also Richard L. Aynes, *John A. Bingham*, in 2 AMERICAN NATIONAL BIOGRAPHY 792–93 (John A. Garraty & Mark C. Carnes eds., 1999).

4 BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 184 (1914).

(3) the breadth of the rights protected under the privileges or immunities clause; (4) the consensus on the enforcement of the Bill of Rights against the States; and (5) how the task of determining the privileges and/or immunities of U.S. citizens should be executed. Though a comprehensive discussion of all of the privileges or immunities is beyond the scope of this work, consideration will be given to how these principles would apply to two matters protected by the Bill of Rights, the Establishment Clause, and the Second Amendment, to illustrate the application of the principles involved. Further illustrations will be provided by consideration of a right noted in the Constitution, but not contained in the Bill of Rights: the writ of habeas corpus, and the potential application to a right of family life, which now seems to be at least partially protected by the concept of substantive due process.

#### I. THE HISTORY OF THE USE OF THE WORDS "PRIVILEGES OR IMMUNITIES"

The phrase "privilege or immunities" used in the Fourteenth Amendment was not created by Bingham. Rather, the terminology had a long and respected independent history in America.<sup>5</sup> For example, the first Charter of Virginia (April 10, 1606) used similar terminology by indicating that the colonists "shall HAVE and enjoy all Liberties, Franchises, and *Immunities*" that they would have if they were born in and were residing in England.<sup>6</sup> By 1612, when Virginia's Third Charter was issued, the language had evolved to include both terms: "Liberties, Franchises, *Privileges*, *Immunities*, Benefits, Profits,

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<sup>5</sup> For purposes of this article the use of these terms in America is all that is necessary. However, it is clear the origin of these terms can be traced to earlier times in England. See generally Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1094-96 (2000) (discussing English and colonial history, including an analysis of Blackstone).

<sup>6</sup> The First Charter of Virginia (1606), *reprinted in* SOURCES OF OUR LIBERTIES 39, 44 (Richard L. Perry ed., 1978) (emphasis added) [hereinafter SOURCES]. See also The Charter of Maryland, art. XVI (1632), *reprinted in* SOURCES *supra*, at 105, 111 ("Rights, Jurisdictions, Liberties, and Privileges . . ."); Massachusetts Body of Liberties, pmbl. (1641) ("[L]iberties Immunities and priveledges [sic] . . ."), *reprinted in* SOURCES *supra*, at 148; The Charter of Massachusetts Bay (1629), *reprinted in* SOURCES *supra*, at 82, 93 ("[L]iberties and Immunities . . ."); Pennsylvania Charter of Privileges (1701) ("Liberties, Franchises and Privileges . . ."), *reprinted in* SOURCES *supra*, at 255-56; Concessions and Agreements of West New Jersey (1677) ("[T]he common law or fundamental rights and privileges . . ."), *reprinted in* SOURCES *supra*, at 184. For further discussion of early examples from Virginia, Massachusetts and Georgia, see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64-65 (1986).

and Commodities whatsoever” of the prior colonists were guaranteed to new colonists.<sup>7</sup> Thus, these terms were part of the usage and culture of people in America for at least 250 years prior to their use in the proposed Fourteenth Amendment. Further, these terms were used in the Declaration and Resolves of the First Continental Congress in 1774, almost a century before they were proposed as part of Section 1. The Continental Congress maintained that Americans were “entitled to all the immunities and privileges granted” in royal charters or provincial laws.<sup>8</sup>

These same words were, of course, used in the Article IV of the Articles of Confederation and Perpetual Union.<sup>9</sup> They also were included in the original Constitution in Article IV, Section 2, which provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>10</sup>

These words did not disappear after the adoption of the Constitution. Rather, they were preserved in the general lexicon, as evidenced by the state constitution of Ohio, where Bingham was admitted to the bar. The Ohio Constitution of 1851 used both terms: “no special *privileges or immunities* shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.”<sup>11</sup>

As Professor William J. Rich has documented, these terms were also used in contracts, corporate charters, and other legal documents throughout the nineteenth century.<sup>12</sup> Privileges and immunities were

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7 SOURCES, *supra* note 6, at 44 n.26 (emphasis added).

8 *Id.* at 288. See also *id.* at 287 (noting that “our ancestors . . . were . . . entitled to all the rights, liberties, and immunities of free and natural-born subjects”).

9 See ARTICLES OF CONFEDERATION AND PERPETUAL UNION, art. IV, § 1 (“The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, *the free inhabitants of each of these States*, paupers, vagabonds, and fugitives from justice excepted, *shall be entitled to all privileges and immunities of free citizens in the several States*; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.” (emphasis added)).

10 U.S. CONST. art. IV, § 2.

11 OHIO CONST. of 1851, art. I, §2 (emphasis added).

12 See William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235, 246–47 (2001) (noting that the terms appeared in contracts as boiler-plate and in incorporation certificates as well).

common terms that were used in a variety of U.S. treaties not only in the nineteenth century but up to the present day.<sup>13</sup>

Moreover, these were not simply lawyers' terms. In an era in which people subscribed to the *Congressional Globe* and read the debates, where individuals attended trial proceedings, when court opinions were published—often in full—in the newspapers, these terms were part of the public understanding of the era.<sup>14</sup> As Michael Kent Curtis has noted: “The words *rights, liberties, privileges* and *immunities*, seem to have *been used interchangeably*.”<sup>15</sup>

Indeed, one has to look no further than the *Slaughter-House Cases*<sup>16</sup> to see that Professor Curtis's conclusion is supported by then contemporaneous views. In the majority opinion Justice Miller referred to the privileges or immunities clause as protecting the “right” of U.S. citizens on multiple occasions. For example, after discussion of Justice Washington's opinion in *Corfield v. Coryell*,<sup>17</sup> Justice Miller summarized Washington's view as being that the privilege or immunities are

13 For example, the Burlingame Treaty between the United States and China provided that: “Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the . . . most favored nation.” Additional Articles to the Treaty Between the United States and China, U.S.-P.R.C., art. VI, June 18, 1858, 16 Stat. 739, 740. These words, privileges and immunities, were often qualified by adding the words “the same” or comparisons to “the most favored” nation so that this became an equality provision. But the terms privileges and immunities themselves were not limited to equality. The use of these terms in treaties was common and continues today. See, e.g., Vienna Convention on Consular Relations art. XXXVI, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (using the term “same”). As is true in domestic law, in international treaties “privileges and immunities are nothing but ‘rights,’ in the broader sense of the term.” Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 53 (2003). For other examples of the use of these terms in treaties, see AKHIL R. AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 167 n.\* (1998).

14 For a summary of the importance of reprinting speeches in this era for mass distribution, see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 69 n.66 (1993).

15 CURTIS, *supra* note 6 at 64–65 (second emphasis added). *Black's Law Dictionary* does distinguish between privilege and immunity, indicating that an immunity is an “[e]xemption” while a privilege is a “particular and peculiar benefit or advantage.” BLACK'S LAW DICTIONARY 885, 1359 (4th ed. 1968). Yet, that same source demonstrates the overlap between the two terms in its definitions of privilege which includes: “A right, power, franchise, or *immunity* held by a person or class” and “[a]n *exemption* from some burden or attendance.” *Id.* at 1359 (emphasis added). Likewise, THE NEW ROGET'S THESAURUS 376–77 (1964) lists among the synonyms for “privilege” the words “right” and “immune.” This is not to deny that earlier in history the various terms may have had very distinct meaning. But just as the probate words “devise, bequeath, and bequest” no longer convey the distinction they once had, by 1866 the words privileges, immunities, and rights were no longer used in distinct ways.

16 83 U.S. (16 Wall.) 36 (1873).

17 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

“those *rights* which are fundamental.”<sup>18</sup> In suggesting some privileges and immunities which “owe their existence to the Federal government,” Justice Miller included the “right” of travel found in *Crandall v. Nevada*;<sup>19</sup> “the *right* of free access to its seaports”;<sup>20</sup> the *right* to demand care and protections of one’s life, liberty and property on the high seas or in a foreign jurisdiction;<sup>21</sup> the privilege of the writ of habeas corpus as one of the “*rights* of the citizen guaranteed by the Federal Constitution”;<sup>22</sup> the “*right* to use the navigable waters of the United States”;<sup>23</sup> “all *rights* secured to our citizens by treaties”;<sup>24</sup> the opportunity to become a citizen of a state with “the same *rights* as other citizens of that State”;<sup>25</sup> and the “*rights* secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth.”<sup>26</sup> No other Justice questioned Justice Miller’s language in equating “rights” with “privileges or immunities.”

The link between the Article IV Privileges and Immunities Clause and the Fourteenth Amendment Privileges or Immunities clause is not accidental. As early as 1856, Congressman and Section 1 author John A. Bingham stated on the floor of the House of Representatives that Article IV, Section 2 contained an ellipsis that made it clear the clause should read: “The citizens of each State shall be entitled to all privileges and immunities of citizens [of the United States] in the several States.”<sup>27</sup> An examination of the text lends reasonable support to this view, because the first reference to citizens is clearly limited to state citizenship, but the second reference contains no such limitation.<sup>28</sup>

Bingham, consistent with long-standing anti-slavery theory, contrasted Congress’s enforcement power under the Full Faith and Credit Clause<sup>29</sup> with the lack of explicit enforcement power under the

18 *The Slaughter-House Cases*, 83 U.S. at 76 (emphasis added).

19 *Id.* at 79.

20 *Id.* (emphasis added).

21 *Id.*

22 *Id.* (emphasis added).

23 *Id.* (emphasis added).

24 *Id.* (emphasis added).

25 *Id.* at 80 (emphasis added).

26 *Id.* at 80 (emphasis added). Further, though he did not refer specifically to the First Amendment, Miller wrote: “The *right* to peaceably assemble and petition for redress of grievances . . . are *rights* of the citizen guaranteed by the Federal Constitution.” *Id.* at 79 (emphasis added).

27 CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

28 The text supports Bingham’s view. At the same time, there is some ambiguity and it is not the only possible reading.

29 U.S. CONST. art. IV, § 1 (“And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

remaining portions of Article IV and reasoned that the Fugitive Slave Act (and the other clauses)<sup>30</sup> could not be enforced by the federal government.<sup>31</sup> With this context, it is understandable that the Congress thought it was clarifying Article IV when it adopted the Fourteenth Amendment by spelling out the rights of U.S. citizens, including their privileges or immunities.<sup>32</sup> Further, this explains statements on the floor of Congress that the Amendment was designed to provide enforcement power.<sup>33</sup>

It is true that some individuals have an idiosyncratic view of the Fourteenth Amendment. Most famously, Judge Robert Bork of the U.S. Court of Appeals for the D.C. Circuit, who, having aided President Richard Nixon in the “Saturday night massacre” by discharging Special Prosecutor Archibald Cox, attempted to “nullify” the Fourteenth Amendment by characterizing the provision as an “ink blot.”<sup>34</sup> Of course, if this were true, then over 250 years of English and American legal history would be an “ink blot.” It is more likely that Judge Bork is wrong<sup>35</sup> than it is that thousands of lawyers and laymen had

30 See U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State . . . shall, in Consequence of any Law . . . be discharged from such Service . . .”).

31 See Aynes, *supra* note 14, at 62 (explaining the anti-slavery textual analysis led to the argument that Article IV, except for the Full Faith and Credit Clause, was unenforceable).

32 U.S. CONST. amend. XIV, § 1.

33 See U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”).

34 ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990). Judge Bork apparently did not work very hard in his attempt to discover its meaning. It took me one book and about fifteen minutes to trace the meaning and history back to 1606 and even less time to document the link between “rights” and “privileges or immunities” in Justice Miller’s opinion. Of course, even Justice Miller, Justice Jackson, and the Court in *Saenz v. Roe*, 526 U.S. 489 (1999) were able to see more than Judge Bork’s “ink blot.”

35 There are two other observations that apply as well. There is no indication in any of Judge Bork’s work that he canvassed the relative debates of the framing or ratification in a serious way as did Justice Black or the many scholars who come to an opposite conclusion. Further, it appears that Judge Bork committed the first “sin” against legal scholarship: he did not take the people who proposed and adopted the Amendment seriously. See Richard L. Aynes, *The Bill of Rights, the Fourteenth Amendment, and the Seven Deadly Sins of Legal Scholarship*, 8 WM. & MARY BILL RTS. J. 407, 409–18 (2000) (articulating the importance of taking previous scholars’ work seriously). Though recognizing this as an “all too human trait,” it appears that Judge Bork assumed, when he could not make sense of Section 1, that the problem was with the way the section was written and not with himself. *Id.* at 410. This is consistent with the view that we “tend to see and hear only those messages that are congruent with our interests and attitudes.” *Id.* (internal quotation marks omitted) (quoting B. EUGENE GRIESSMAN, *THE ACHIEVEMENT FACTORS, CANDID INTERVIEWS WITH SOME OF THE MOST SUCCESSFUL PEOPLE OF OUR TIME* 191 (1993)).

Like Charles Fairman, who was one of the great scholars of his era, Judge Bork’s experience and views may have colored his perceptions so that, like someone who is tone deaf or has an impaired sense of taste, he was simply unable to accurately analyze this sit-

used these terms for almost 250 years without giving them any meaning.<sup>36</sup> Indeed, Judge Bork's comment reminds one of then future

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uation. For a general discussion of how the lens through which one views a problem can affect legal conclusions, see PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999).

<sup>36</sup> It is clear that attempts were made by the Democratic minority to obscure the meaning of these words and it is common to cite, for example, speeches of Senator Reverdy Johnson (D-Md.) for claims about defects in the proposed amendment. *E.g.*, George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1633, 1646 (2007).

Of course, it must be noted that Johnson was in a decided minority in the Senate. He was listed as a member of the "Opposition" even when Abraham Lincoln was President. *Domestic Intelligence*, HARPER'S WEEKLY, Jan. 16, 1864, at 35. At the time he was one of only eighteen Senate members in the opposition, *id.*, who were easily out-voted by the thirty-two members supporting President Lincoln. He ultimately was one of only three members—all Democrats—of the Joint Committee of Fifteen voting in opposition to submitting the Fourteenth Amendment to the Congress. KENDRICK, *supra* note 4, at 115. In the vote upon the Fourteenth Amendment he was one of only eleven of the forty-nine members of the Senate who voted against the Amendment's adoption. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866). It is noteworthy that while five Republicans voted against the Amendment, not a single Democratic vote in the Senate was given in favor of its adoption.

Most lawyers do not have the luxury of choosing their clients or choosing their causes, but Johnson did. If we look at his choices, we will see that there are reasons to be skeptical about anything that Johnson argued on the floor of the Senate with respect to the Fourteenth Amendment, which he opposed. Johnson was counsel in the *Dred Scott* case, not only arguing for slavery, but arguing that liberty could continue only if slavery was perpetual. Of course, because of his role in that case, he knew that Chief Justice Taney had defined Article IV privileges and immunities to include many of the Bill of Rights protections, including the right to bear arms. In a pre-Fourteenth Amendment case, Johnson argued that while the First Amendment's requirement that there be "no interference with religion" was not binding on Missouri, that the Amendment "announce[d] a great principle of American liberty," that its violation was "tyrannical," and it was "almost inconceivable" that the state constitution come to a contrary result. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 313 (1866). After the adoption of the Amendment, Johnson and his co-counsel admitted that it enforced the Second Amendment against the states. ROBERT KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 122-32 (1985). The cases were *United States v. Avery*, 80 U.S. (13 Wall.) 251 (1871), and *United States v. Mitchell*, 26 F. Cas. 1283 (C.C.D.S.C. 1871) (No. 15,790).

Johnson was recruited in the Colfax Massacre case by former Confederate General Wade Hampton and helped create the Supreme Court's unjust decision in *United States v. Cruikshank*, 92 U.S. 542 (1875). See CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 116-17 (2008) (explaining the history behind Johnson and Hampton's relationship). For more on the Colfax Massacre, see NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 12-30, 163 (2006). Johnson merits further study to determine whether or not he ever used his talents on the side of liberty or freedom.

But if, as is often claimed, Johnson was one of the best lawyers of his era, he was certainly not one of the best men. Though the application of the principle to Johnson is my responsibility, I am indebted to the analysis in Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. (forthcoming 2009), for this concept. The record of



President Lincoln's points of analysis: "I admit, you have a clear right to show it is wrong if you can; but you have no right to pretend you do not see it at all."<sup>37</sup>

Recognizing that the Privileges and Immunities Clause was designed to protect the rights of U.S. citizens, Judge Bork's statement amounts to a claim that he does not know of any rights that belong to U.S. citizens. One might credibly say that the full scope of the rights of U.S. citizens is unclear or even contested. But to deny that one knows of any right that one has by virtue of being a U.S. citizen is beyond credulity.

## II. THE CLAUSE WAS INTENDED TO PROTECT THE RIGHTS OF U.S. CITIZENS

It is appropriate to recognize that the Privileges or Immunities Clause of the Fourteenth Amendment was thought by the framers and the ratifiers to provide substantial and, in some cases, substantive protections against the States and to give the federal government the power to enforce those provisions.<sup>38</sup> This is reasonably apparent from the plain reading of the text.<sup>39</sup> Further, this conclusion is supported by a thorough and systematic review of the debates over the Amendment in Congress. For those who do not have the time to devote to looking at the voluminous records on the proposal and the ratifica-

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Senator Johnson places him on the wrong side of history and, more importantly, among the worst people of his generation. We know that talent, like bravery, has no inevitable moral content. It can be used for evil as well as good purposes, and Johnson made choices reflecting that his values were inconsistent with the national goals of the Fourteenth Amendment.

<sup>37</sup> Abraham Lincoln, Speech in the U.S. House of Representatives on the Presidential Question (July 27, 1848), in LINCOLN, *supra* note 1, at 207.

<sup>38</sup> Some scholars have suggested that this clause is simply a non-discrimination provision. For an article along these lines, see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). Of course, there is no question that equality is one of the privileges or immunities. However, if it were the only privilege or immunity, then the use of both "privilege" and "immunity" would not have been necessary and those terms would have been inserted into the Amendment in the singular form not the plural. Further, as Professor Curtis has noted, "this reading . . . does not refer to national constitutional rights at all; it refers to rights under state law. . . . The denial of rights of speech and press and other basic liberties in the South before the Civil war was racially neutral; neither whites nor blacks, Southerners or Northerners, could engage in anti-slavery or pro-Republican speech." Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2009).

<sup>39</sup> See Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 AM. U. L. REV. 536, 540 (1891) ("If the language of the fourteenth amendment is to have its natural and obvious meaning . . . it would seem to prohibit the States from making or enforcing any law which shall abridge the rights secured [by] . . . the constitution.").

tion of the Amendment, an examination of the historical appendix that Justice Black attached to his dissent in *Adamson v. California*<sup>40</sup> should give a quick overview of many of the salient points of the debate and demonstrate the predominance of the Privileges or Immunities Clause in the thinking of the framers.<sup>41</sup>

Moreover, the fact that the Clause was designed to give important protections was recognized by two of the most prominent skeptics of giving full content to the Clause. Justice Robert Jackson recognized that “the hope of imparting to American citizenship some of this vitality was the purpose” of the Privileges or Immunities Clause.<sup>42</sup> But he also admitted that the Supreme Court had failed to allow that hope to be realized: “the hope proclaimed in such generality soon shriveled in the process of judicial interpretation. For nearly three-quarters of a century this Court rejected every plea to the privileges and immunities clause.”<sup>43</sup>

Charles Fairman suggested that “Congress, no doubt, meant . . . to establish some substantial rights even though the State might not itself have established them for its own citizens. These were the ‘privileges and immunities of citizens of the United States.’”<sup>44</sup> Writing almost ten years later about the *Slaughter-House Cases*, Fairman acknowledged, without regret, that the Court “virtually scratched [the Privileges and Immunities Clause] from the Constitution.”<sup>45</sup>

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40 322 U.S. 46 app. at 92–123 (1947) (Black, J., dissenting).

41 One should be careful to note, however, that Justice Black did not base his dissent upon the Privileges or Immunities Clause or the Due Process Clause but made it clear that he was relying upon all of Section 1 of the Amendment. This would include Privileges and Immunities, Due Process, and the Citizenship Clause. *Id.* at 68, 71–74.

42 *Edwards v. California*, 314 U.S. 160, 182 (1941) (Jackson, J., concurring).

43 *Id.*

44 Charles Fairman, *What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870-1892*, 30 B.U. L. REV. 49, 77 (1950). Fairman argued that Congress did not make “clear what their content should be. It left that to the Justices when actual cases required answers.” *Id.*

In contrast, Justice Swayne indicated that with respect to Section 1: “No searching analysis is necessary . . . Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established significance. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out.” *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 126 (1873) (Swayne, J., dissenting).

45 Fairman, *supra* note 44, at 78. For accounts of the flaws in Fairman’s analysis, see Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 3 (1968); Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995); William W. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); BRANDWEIN, *supra* note 35; Aynes, *supra* note 14.

In 1941 Fairman's friend, Justice Robert Jackson,<sup>46</sup> wrote in *Edwards v. California*, that the Court "always hesitated to give any real meaning to the privileges and immunities clause lest it improvidently give too much."<sup>47</sup> Fairman justified the Court's action in words that parallel those of Justice Jackson: "The words meant too much, or almost nothing. The majority chose the latter alternative."<sup>48</sup> In taking this approach, Fairman, Justice Jackson, and the Court ignored well-known principles of Constitutional interpretation. As Chief Justice Marshall wrote in *Marbury v. Madison*: "It cannot be presumed that any clause in the constitution is intended to be without effect."<sup>49</sup> Furthermore, in interpreting the Constitution, "real effect should be given to all the words it uses."<sup>50</sup>

It is not without irony that these two prominent and loyal New Dealers took a stand against the judicial activism of *Lochner*<sup>51</sup> and later cases striking down New Deal legislation, and yet with respect to the Fourteenth Amendment, they took the very same approach they had

As Professor Amar has suggested, Professor Fairman's "unfair substance and tone put almost an entire generation of lawyers, judges, and law professors off track" from an accurate interpretation of the Fourteenth Amendment. AMAR, *supra* note 13, at 188 n.\*.

Though Fairman gained prominence as a scholar, during World War II, while he was a political science professor at Stanford, he "defended the constitutionality of the military orders excluding Japanese Americans from the West Coast." John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's Korematsu Dissent*, 68 LAW & CONTEMP. PROBS. 57, 65 (2005). "Although early commentators on *Korematsu* praised Justice Jackson's dissent," Fairman thought Jackson was "'wrong' and urged him to reconsider his narrow view of executive power in wartime emergency." *Id.*

46 Charles Fairman was a Colonel in the Judge Advocate General's Division in Germany after World War II. Fairman was the head of the international law branch at Frankfurt and in some way supervised war criminal prosecutions in that theatre. Though the exact nature of their joint work is unclear, in that position he worked with Justice Robert Jackson during the Nuremberg trials. John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOBAL STUD. L. REV. 511, 522 (2007). Their relationship was close enough that, in 1950, Justice Jackson sent Fairman a long letter asking for his advice on pending cases involving racial segregation in education, and he outlined eight questions for Fairman's consideration. Letter from Robert H. Jackson, Supreme Court Justice, to Charles Fairman, Professor of Law, Stanford University (Mar. 13, 1950) in WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953*, at 713-15 (2006). On the relationship between Justice Frankfurter and Charles Fairman, see Aynes, *supra* note 45. The article also gives accounts of some contacts between Fairman and Justice Jackson.

47 314 U.S. 160, 183 (1941) (Jackson, J., concurring).

48 Fairman, *supra* note 44, at 78. An interpretation could mean "too little" or "too much" only by ignoring the limitations of the text. Fairman was obviously looking at this from a policy standpoint and accepting his choice and the choice of the Court on policy over the choices made by the framers and ratifiers of the Constitutional Amendment.

49 5 U.S. (1 Cranch) 137, 174 (1803).

50 *Myers v. United States*, 272 U.S. 52, 151 (1926).

51 *Lochner v. New York*, 198 U.S. 45 (1905).

condemned. Because they did not like the broad provisions of the Privileges or Immunities Clause, and because they thought they knew better than the Fourteenth Amendment framers and ratifiers, they believed they were justified in supporting or acquiescing in “scratching” the words out of the Constitution.

### III. THE BREADTH OF THE PROTECTION PROVIDED BY THE PRIVILEGE OR IMMUNITIES CLAUSE

As my colleague Elizabeth Reilly noted in opening a conference commemorating the 140th anniversary of the ratification of the Amendment, Section 1 contains “stunning opening phrases” that include “sweeping evocations of individual rights” including the Privileges or Immunities Clause.<sup>52</sup> Justice Strong, writing for a 7-2 majority in *Strauder v. West Virginia* noted that:

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property.<sup>53</sup>

As an example, consider the statement of Section 1 author Bingham, who indicated that after the privilege of worshipping God in one’s own way, the second greatest privilege of a citizen was “to bear true faith and allegiance to the Constitution and Government of his country, and not to be told by a mere act of State secession that he must be dragged into the field and armed to the teeth to strike down the world’s last hope.”<sup>54</sup> This may seem a little “out of the box” compared to traditional thinking about the Clause. But the context for this was Bingham’s thinking about the 1833 Force Act<sup>55</sup> which provided for federal protection for U.S. government employees who might be criminally prosecuted, imprisoned or drafted by rebels, but not for ordinary U.S. citizens who owed allegiance to the national government. This example shows the far-ranging, and yet reasonable, possibilities for the Privileges or Immunities Clause.

Further, one should be aware of the fact that the Framers built in duplicate or redundant protections. As Jacobus tenBroek observed in 1951: “The three clauses of section 1 of the Fourteenth Amendment

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<sup>52</sup> Elizabeth A. Reilly, *Infinite Hope: Introduction to the Fourteenth Amendment: the 140th Anniversary Symposium*, 42 AKRON L. REV. (forthcoming 2009).

<sup>53</sup> 100 U.S. 303, 310 (1879).

<sup>54</sup> *Father in Israel*, CINCINNATI COM. GAZETTE, Oct. 3, 1885, at 3.

<sup>55</sup> Act of March 2, 1833, ch. 57, 4 Stat. 632.

are mostly but not entirely duplicative. . . . All three, however, refer to the protection or abridgement of natural rights. . . . Section 5 thus confirms or effects a revolution in federalism by nationalizing the natural or civil rights of men or citizens.”<sup>56</sup>

This is not surprising. Almost every right can be protected both directly and by equality concepts. Further, the Fourteenth Amendment framers who had been in the anti-slavery struggle had seen many of their heart-felt beliefs rejected. Their view of the Fugitive Slave Act was struck down in *Prigg v. Pennsylvania*.<sup>57</sup> Their view of the Citizenship Clause and Article IV was struck down in the clearly mistaken opinion in *Dred Scott*.<sup>58</sup> They saw the white slaveholding southern conspirators orchestrate a great Civil War simply because they had lost an election. The framers thought the Thirteenth Amendment put the issue of race and citizenship behind them, only to see it did not. They thought the Civil Rights Act of 1866 achieved the rest of what the Thirteenth Amendment did not do, only to discover that resistance continued. By the time they came to draft and ratify the Fourteenth Amendment it was clear that they had good reason to build in multiple, redundant protections.

While judges and law professors often treat each clause of the Amendment as if it were separate and independent,<sup>59</sup> an examination

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<sup>56</sup> JACOBUS TENBROEK, *EQUAL UNDER LAW* 239 (1965). This book was originally published in 1951 under the title *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT*. See also Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 313 (2007) (“The purpose of the Citizenship, Privileges or Immunities, and Equal Protection Clauses, and indeed of the entire Fourteenth Amendment, was to secure equal citizenship, equal civil rights, and civil equality for all citizens of the United States.”).

<sup>57</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>58</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>59</sup> A common argument is to observe that the Fifth Amendment contains a due process clause and that if the privileges and immunities “incorporate” that clause, then the Due Process Clause of the Fourteenth Amendment is “surplusage.” CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 455 (2d ed. 2005). But this claim ignores the fact that, within the Fourteenth Amendment itself, the Privileges and Immunities Clause applies only to citizens and the Due Process Clause applies to all “persons.” Further, it presupposes that the framers had an aversion to redundancy when, in fact, they saw it as providing increased security. Indeed, the Due Process Clause itself was said to be a “summary of the whole” of procedural rights. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 132–33 (Da Capo Press 1970) (1825). Forty-one years later, in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1855), in a unanimous opinion authorized by Justice Benjamin R. Curtis, the Court indicated that all the procedural protections of the Constitution were contained in the Due Process Clause. In 1864, Senator Charles Sumner (R-Mass.) said that the Due Process Clause: “Brief as it is, it is in itself a whole bill of rights.” *CONG. GLOBE*, 38th Cong., 1st Sess. 1480, col. 3 (1864). I thank Michael Kent Curtis for calling this speech to my attention. See also, Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 *DRAKE L. REV.* 911, 930 (2008) (“The Due Process Clause

of the Congressional debates and other statements by the framers indicates the truth of this portion of tenBroek's conclusion. For example, in 1862 Congressman Bingham indicated that "[t]he great privilege and immunity of an American citizen . . . is that they [sic] shall not be deprived of life, liberty, or property without due process of law."<sup>60</sup> Justice Bradley recognized that "[e]quality before the law is undoubtedly one of the privileges and immunities of every citizen."<sup>61</sup>

An appropriate application of this view can be seen in a now abandoned turn of the century case. Judge Thomas G. Jones of the United States District Court for the Northern District of Alabama was a former Confederate soldier who had served under Confederate General Stonewall Jackson and by the time of Lee's surrender at Appomattox was a Major.<sup>62</sup> He served as the Democratic Governor of Alabama (1890–1894).<sup>63</sup> He was appointed to the Court by President Theodore Roosevelt. Yet, his opinion in *Ex parte Riggins*<sup>64</sup> illustrated two important features of the Privileges or Immunities clause: (i) how the concept of multiple protections for rights worked; and (ii) how a generous reading of the Amendment would have provided real protection for all citizens.

The case involved an application for a writ of habeas corpus for one Riggins who had been convicted for conspiracy to violate civil rights because he participated in seizing a criminal defendant, Horace Maples, from state authorities and hanging him before he could be tried pursuant to state law that comported with due process.

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should also be read to protect the criminal procedure guarantees of the Bill of Rights for all persons."). In the *Slaughter-House Cases*, Justice Bradley's dissent indicates that the Due Process Clause included many rights beyond those enumerated in the Bill of Rights: "above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law.*" 83 U.S. (16 Wall.) 36, 118 (1872) (Bradley, J., dissenting). Professor Bogen indicates that since Justice Miller and the majority made no comment upon this analysis, it left future courts to pursue and adopt this approach. David Bogen, *Rebuilding the Slaughter-House: The Cases' Support for Civil Rights*, 42 AKRON L. REV. (forthcoming 2009).

60 CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862). Bingham also articulated the view that due process insured equality. See AMAR, *supra* note 13, at 283 (explaining that Bingham believed equal protection related to the rights of life, liberty and property).

61 *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting) (speaking of Article IV privileges and immunities).

62 CONCISE DICTIONARY OF AMERICAN BIOGRAPHY 510 (Joseph G. E. Hopkins ed., 1964).

63 *Id.*

64 134 F. 404 (C.C.N.D. Al. 1904). At the time, *Ex Parte Riggins* appeared to have been overruled *sub silentio* by the Supreme Court in *Hodges v. United States*, 203 U.S. 1 (1906). Nevertheless, *Ex parte Riggins* was cited by the Supreme Court in *Screws v. United States*, 325 U.S. 91, 125 n.22 (1945), and *Powell v. Alabama*, 287 U.S. 45, 70 (1932) (for the proposition that denying counsel was a denial of due process), and then explicitly overruled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442–43 n.78 (1968).

Though it was argued that there was no Fourteenth Amendment violation because the state actors were doing all they could to provide due process and the murder was the result of the intervention of private actors, Judge Jones rejected that analysis. Judge Jones held that when private actors interfere with the State's attempt to provide due process, the private actors can be reached under the federal criminal law passed pursuant to the Fourteenth Amendment.<sup>65</sup>

The syllabus written by Judge Jones indicated that the Thirteenth Amendment "prescribe[d], as the standard of the freedom the amendment gave" the "perfect equality of civil rights with the white race."<sup>66</sup> Further, and importantly for purposes of this article, Judge Jones held that "civil equality" was "a right, privilege, or immunity" under the Constitution and laws of the United States.<sup>67</sup>

The Court held that when private individuals seize a prisoner from state custody and murder him in order to prevent the State from giving him due process of law, the result is "in the strictest constitutional sense [to] prevent and destroy the citizen's enjoyment of the right, privilege, or immunity to have the state afford him due process of law."<sup>68</sup>

In his opinion, Jones specifically stated: "No one can deny that the fourteenth amendment conferred upon the citizen the right, privilege, or immunity to have his state afford him due process of law on accusation of crime against him."<sup>69</sup>

Both Bingham's Congressional statements and Judge Jones's opinion in *Ex parte Riggins* illustrate how the Amendment could be fairly interpreted if it had active enforcement by sympathetic judges who were supported by the Supreme Court.

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65 134 F. at 423.

66 *Id.* at 404, syll. 1.

67 *Id.*; *see also id.*, syll. 2 (noting that if assailed by white men because of his race and denied any civil rights that white men enjoy, then "it is an interference with the [N]egro's enjoyment of equality of civil rights" and is an "attack upon [his] right, privilege, or immunity" of freedom given by the Thirteenth Amendment).

68 *Id.* at 404-05, syll. 5. Jones then distinguished federal authority under equal protection and due process. He found that under equal protection, the federal government could exercise only a corrective power to wrongs by the state or her officers. *Id.* at 405, syll. 6. But as to meeting its duty of providing due process, Jones held that the national government had the "power and duty to legislate for the protection of the right, privilege, or immunity of the citizen, which the amendment creates, to have the state afford him due process." *Id.*

69 *Id.* at 412. But because this right cannot be vindicated if "lawless outsiders" prevent state officers from doing their duty, due process "necessarily carries with it and includes in it the right, privilege, or immunity to enjoy freedom, exemption, from lawless assault, which supervenes between the state and the performance of its duty." *Id.* at 413.

#### IV. THE CONSENSUS ON THE NATIONALIZATION OF THE BILL OF RIGHTS

Though the full extent of the contours of the Clause is subject to interpretation, there should be no controversy that, at the core, these provisions included the Bill of Rights.<sup>70</sup> As summarized by Randy Barnett: “There is now a scholarly consensus that the original meaning of ‘privileges or immunities’ included the Bill of Rights.”<sup>71</sup>

There is, of course, some doctrinal confusion. The Supreme Court took an incorrect turn someplace.<sup>72</sup> There is debate among

<sup>70</sup> United States v. Mall, 26 F. Cas. 1147, 1147 (C.C.S.D. Al. 1871) (No. 15,712) (holding that “the words ‘any right or privilege granted or assured to’ any citizen . . . include the rights of peaceably assembling and of free speech”); United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Al. 1871) (No. 15,282) (including the right of freedom of speech and the right to peaceably assemble in the privileges and immunities). There is some question about whether these are two cases or a misspelling in Mall. See Aynes, *supra* note 14, at 98 n.262 (discussing the two points of view regarding *Mall* and *Hall*).

In his decision upon the Circuit in the *Slaughter-House Cases*, Justice Joseph Bradley indicated that police regulations cannot interfere with liberty of conscience, or with the entire equality of all creeds and religions before the law. *Live-Stock Dealers’ & Butchers’ Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8,408). Nor can they “abridge the privileges or immunities of citizens of the United States.” *Id.* Further, in his dissent in the Supreme Court, Bradley specifically listed trial by jury, free exercise of religious worship, free speech, free press, the right of assembly, the prohibition against unreasonable searches and seizures, and due process as privileges and immunities. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 118 (1873) (Bradley, J., dissenting). This was also the view of the U.S. Attorneys office and the lower federal courts. KACZOROWSKI, *supra* note 36, at 13–17 (discussing judicial interpretation of the Privileges and Immunities Clause in the wake of the passage of the Civil Rights Act). Others have read the scope of the privileges and immunities to go beyond the Bill of Rights. See Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 966–67 (1984) (“No one [of the framers], however, believed that the Bill of Rights was the *only* source of privileges and immunities.”).

<sup>71</sup> RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* 292 (2008). See also MASSEY, *supra* note 59, at 446–47 (“[M]ost of the substantive guarantees of the Bill of Rights have been . . . made applicable to the states,” and “this debate is now over for all practical purposes.”).

<sup>72</sup> A majority of scholars who have looked at this issue carefully seem to be of the opinion that the incorrect turn took place in the *Slaughter-House Cases*. However, there are prominent scholars who say the incorrect turn took place in *United States v. Cruikshank*, 92 U.S. 542 (1875). For articulations of this view, see Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739.

One problem with this view is that neither Palmer nor anyone else has given any satisfactory account of Justice Miller’s silence in *Cruikshank*. It may be that the *Cruikshank* silence is consistent with the traditional reading of the *Slaughter-House Cases*. Or it may be that like Justice Bradley and thousands of others, Justice Miller abandoned his original understanding of the Amendment as arguably expressed in the *Slaughter-House Cases*.



scholars between the predominant view that this wrong turn took place in the *Slaughter House Cases*<sup>73</sup> in 1873, a minority view that this occurred in *United States v. Cruikshank*<sup>74</sup> in 1876, and even those who believe that two cases left the issues open and it took place in some later case.<sup>75</sup> But virtually everyone agrees that the wrong turn took place.<sup>76</sup>

Between 1873–1949, while some people praised it and other people condemned it, virtually everyone writing in the area thought Miller’s dicta in the *Slaughter-House Cases* was incorrect.<sup>77</sup> It was Stanford and Harvard Professor Charles Fairman—with Justice Frankfurter and Justice Jackson later citing Fairman as conclusive authority without revealing their personal relationships—who changed all of this, and ushered in a new era of Fourteenth Amendment scholarship that lasted until the early-mid 1980s.<sup>78</sup> After “[b]rooding” over the problem, Fairman was “slowly brought [to] the conclusion that Justice Cardozo’s gloss on the due process clause—what is ‘implicit in the concept of ordered liberty’—comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause.”<sup>79</sup>

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<sup>73</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>74</sup> 92 U.S. 542 (1875). For a discussion of this case and the underlying historical context, see LANE, *supra* note 36, at 255–57.

<sup>75</sup> Other candidates might include *Hurtado v. California*, 110 U.S. 516 (1884), and *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>76</sup> By the “wrong turn” I am referring not to the decision of the Court that the regulatory scheme set up in Louisiana was constitutional. Again, the overwhelming majority of scholars seem to agree that it was. If anyone has doubt, two recent books powerfully support that view: RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* (2003), and MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* (2003). Rather, it was Miller’s dicta upon other portions of the Fourteenth Amendment that was incorrect. 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, 627 n.4, 628 n.7 (1994) (explaining what the Court’s error was in the *Slaughter-House Cases*).

<sup>77</sup> Aynes, *supra* note 76, at 678–86 (collecting examples of both praise and condemnation).

<sup>78</sup> There were other views, most importantly those of William Crosskey. For these views, see 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953), and Crosskey, *supra* note 45. Alfred Avins provided a balanced assessment of the debate; he ultimately came down on the side of Crosskey on this issue. See Avins, *supra* note 45, at 3. Yet Avins’s work seems to have been widely ignored. But maybe this was because Black was winning the “selective incorporation” battle in the Court, and it was not all that important. For more modern critiques of Fairman’s failure, see BRANDWEIN, *supra* note 35 and Aynes, *supra* note 45.

<sup>79</sup> Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

For Fairman, this had three virtues. First, selective incorporation accommodated the overwhelming evidence that Fairman encountered indicating that the Amendment was to protect First Amendment freedoms.<sup>80</sup> Second, it allowed the rejection of “federal requirements as to juries” for which Fairman had disdain.<sup>81</sup> Third, it allowed him to assail Justice Black for having “rebelled” against *Palko* and implicitly defend his mentor, Justice Frankfurter.<sup>82</sup>

Ironically, as the Fairman/Frankfurter view of the Fourteenth Amendment and the Bill of Rights gained a tighter and tighter grip in the academic world, it lost more and more ground in the world of courts and lawyers. In fact, *Adamson* is generally considered the last victory for Frankfurter,<sup>83</sup> even though he remained on the Court for another fifteen years.<sup>84</sup> Less than two months after Justice Frankfurter’s death, Justice Black announced the unanimous decision of the Court in *Pointer v. Texas*,<sup>85</sup> enforcing the confrontation clause of the Sixth Amendment against the States. Elizabeth Black declared victory, writing in her diary that the result of *Pointer* was to make her husband’s *Adamson* dissent “the law.”<sup>86</sup>

Raoul Berger published his controversial *Government by Judiciary: The Transformation of the Fourteenth Amendment* in 1977, twelve years after *Pointer*. Berger was both a student of Felix Frankfurter’s and a classmate of Fairman’s.<sup>87</sup> Berger took a harsher view than Fairman, claiming that the Court’s decisions on selective incorporation, desegregation, and one person, one vote were all contrary to the original intent of the framers of the Fourteenth Amendment.<sup>88</sup> Though one person, one vote, and desegregation were more difficult cases to make, Berger seemed to be making progress in convincing people of the correctness of his views on the Bill of Rights until Michael Kent

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80 Recalcitrant to the end, Fairman only indicated that “freedom of speech was mentioned in the discussion of 1866.” *Id.* Of course if freedom of speech had only been “mentioned” Fairman would have ignored it and would have not thought it important enough to accommodate through selective incorporation.

81 *Id.*

82 *Id.*

83 Melvin I. Urfosky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 105 (1988) (“Frankfurter won his last major battle in *Adamson v. California* . . .”).

84 Aynes, *supra* note 45, at 1266.

85 380 U.S. 400 (1965).

86 HUGO L. BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 109 (1986).

87 Aynes, *supra* note 45; Fairman, *supra* note 79.

88 RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 1–10, 69–98, 117–33, 351–72 (1977) (discussing slavery, reapportionment, segregated schools, and judicial review, respectively).

Curtis began to critique Berger's claims.<sup>89</sup> We all owe a tremendous debt to Professor Curtis not just for his research, but also for his persistence and professional responses to Berger's prolific efforts, many of which contained ad hominem attacks.<sup>90</sup>

The overwhelming number of scholars who have systematically reviewed the *Congressional Globe* and the ratification debates agree that, at some point after 1873, the Supreme Court abandoned the public understanding as well as the intent of the framers and the ratifiers. Both Congressman Bingham and Senator Howard made it clear that there were other rights that were considered privileges and immunities.

In the Senate, Howard quoted long portions from Justice Washington's Circuit opinion in *Corfield v. Coryell*<sup>91</sup> and then stated:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined *in their entire extent and precise nature*—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution.<sup>92</sup>

In 1871 during the debate on legislation to protect people against the Ku Klux Klan, Bingham said that “the privileges and immunities of citizens of the United States . . . are *chiefly* defined in the first eight amendments to the Constitution of the United States.”<sup>93</sup>

The Privileges or Immunities Clause provides a solid textual basis for many rights already recognized and some that have never been recognized.

#### V. APPLICATION OF PRINCIPLES FOR PRIVILEGES OR IMMUNITIES

Professor Barnett has noted that while there has been much work on the Bill of Rights: “Much less work has been done on whether the Clause also embraced other unenumerated rights retained by the

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89 The series of critiques by Professor Curtis, replies by Mr. Berger, and more critiques by Professor Curtis appears to have begun in 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).

90 Professor Curtis's works are too numerous to cite, but his books include CURTIS, *supra* note 6, MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); and MICHAEL KENT CURTIS ET AL., *CONSTITUTIONAL LAW IN CONTEXT* (2d ed. 2006).

91 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

92 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (emphasis added).

93 CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (emphasis added).

people.”<sup>94</sup> Obviously, some of these tasks are more difficult than others.

In spite of his crabbed view of the amendment, Justice Jackson provided some sage advice in *Edwards*: “I do not ignore or belittle the difficulties of what has been characterized by this Court as an ‘almost forgotten’ clause. But *the difficulty of the task* does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear . . . .”<sup>95</sup>

It would appear that all the Justices who have written about this question have suggested taking a step-by-step or common law approach to identifying rights protected under the Privileges and/or Immunities Clauses.

Justice Curtis, one of the most thoughtful members of the Court during his service, wrote the Court’s opinion in *Conner v. Elliott*<sup>96</sup> indicating that he would interpret the Privileges and Immunities Clause of Article IV, Section 2, using a case-by-case approach.<sup>97</sup> This same approach seems to be endorsed with respect to the Fourteenth Amendment’s Privileges or Immunities Clause by the majority opinion of Justice Miller in *Slaughter-House* who, notwithstanding the dicta to follow, wrote: “we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.”<sup>98</sup>

The same view was adopted by Justice Robert Jackson, who, in *Edwards*, advocated

[G]iving these general and abstract words [privileges or immunities] whatever of specific content and concreteness they will bear as we mark out their application, case by case. That is the method of the common

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94 BARNETT, *supra* note 71, at 292.

95 *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring) (emphasis added). *See also* *Taylor v. Taylor*, 440 N.E.2d 823, 823 syll. 1 (Ohio Ct. App. 1981) (“It is an abuse of discretion for a court to dispose of issues by concluding that they are too difficult to resolve, then leaving the issues undecided.”)

96 59 U.S. (18 How.) 591 (1855).

97 *See id.* at 593 (“It is safer . . . to leave [the meaning of the word privileges in the clause] to be determined, in each case . . . .”). On Curtis’s role in the Court’s work on due process and Article IV, see STUART STREICHLER, *JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM* 98–118 (2005).

98 83 U.S. (16 Wall.) 36, 78–79. Further, in discussing whether the Equal Protection Clause could be used for any others than African Americans in instances of oppression or denial of equal justice by the state courts, Miller expressed skepticism but then stated, “We find no such case in the one before us, and do not deem it necessary to go over the argument again.” *Id.* at 81.

law, and it has been the method of this Court with other no less general statements in our fundamental law.<sup>99</sup>

In attempting to identify reference points from which it could be determined what the privileges and immunities of U.S. citizens were, Justice Bradley began with very general principles and then, as outlined below, also made more specific suggestions. Justice Bradley's dissent in *Slaughter-House* implies that one way of determining the privileges or immunities of U.S. citizens would be to look to the English common law: "In this free country, the people of which inherited certain traditional rights and privileges from their ancestors, citizenship means something."<sup>100</sup> Bradley noted that the "people of this country brought with them to its shores the rights of Englishmen."<sup>101</sup>

But Bradley went further and wrote that "even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are."<sup>102</sup> In Bradley's view, these privileges were conferred upon people by "[t]heir very citizenship . . . if they did not possess them before," and they included buying, selling, and enjoying property, engaging in any lawful employment and restoring to court for redress of injuries "and the like."<sup>103</sup>

#### A. *Looking to the Constitution: Its Amendments, Treaties and Statutes*

In his *Slaughter-House* dissent, Justice Bradley indicated that the privileges and immunities of U.S. citizens were "specified in the original Constitution, or in the early amendments of it."<sup>104</sup> Justice Miller said nothing about the "early" amendments—save for a reference to words used in the First Amendment about the right of assembly and

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<sup>99</sup> 314 U.S. at 183 (Jackson, J., concurring). To his credit, Justice Jackson noted that there were other no less general statements in the Constitution: "[t]his Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases as 'due process,' 'general welfare,' 'equal protection,' or even 'commerce among the several States.'" *Id.*

<sup>100</sup> 83 U.S. at 114 (Bradley, J., dissenting). In addition, the first Justice Harlan, whose many dissents often eventually became the law, indicated that "[t]he privileges and immunities mentioned in the original Amendments, and *universally regarded as our heritage of liberty from the common law*, were thus secured to every citizen of the United States and placed beyond assault by any government, Federal or state." *Twining v. New Jersey*, 211 U.S. 78, 122 (1908) (Harlan, J., dissenting) (emphasis added).

<sup>101</sup> 83 U.S. at 114 (Bradley, J., dissenting).

<sup>102</sup> *Id.* at 119.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 118.

petition<sup>105</sup>—but he did state in dicta that the rights guaranteed by the Thirteenth Amendment, Fifteenth Amendment, and “other clause[s] of the fourteenth” were privileges or immunities.<sup>106</sup> Justice Miller’s and Justice Bradley’s views that privileges and immunities could be drawn from the Amendments to the Constitution also demonstrate that the privileges and immunities of U.S. citizens can be changed by new amendments.

The view that additions can be made to the privileges and immunities of citizens seems to have been held by Justice Miller, the author of the majority opinion. In dicta, Miller wrote that they include “all rights secured to our citizens by treaties with foreign nations.”<sup>107</sup> Since new treaties are adopted and old treaties are amended or terminated, this supports the idea that some of the privileges and immunities of U.S. citizens will change over time.

This idea that the amendments and treaties could specify privileges or immunities reinforces Rebecca Zietlow’s<sup>108</sup> and William J. Rich’s<sup>109</sup> analyses indicating that Congress has the ability to create and change such rights by statute. One’s rights as a U.S. citizen should include one’s statutory rights, as can be seen by reference to the various Enforcement Acts passed by the Reconstruction Congress.

#### B. *Civil Rights Act of 1866*

The 1866 Civil Rights Act, and its re-enactment after the adoption of the Fourteenth Amendment, are two prominent examples of the creation and protection of privileges and immunities of U.S. citizens through statutes. The rights (privileges or immunities) of persons and citizens as set forth in the 1866 Civil Rights Act are that all citizens shall:

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105 *Id.* at 79 (majority opinion) (“The right to peaceably assemble and petition for redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution.”). The meaning and significance of this statement are matters of interpretation.

106 *Id.* at 80.

107 *Id.* at 79. This also indicates that Miller viewed the privileges and immunities as rights. For an analysis of international and treaty rights that may be protected through the Privileges or Immunities Clause, see David S. Bogen, *Mr. Justice Miller’s Clause: The Privileges or Immunities of Citizens of the United States Internationally*, 56 *DRAKE L. REV.* 1051 (2008).

108 See Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 *DRAKE L. REV.* 1015, 1016 (2008) (noting that it was necessary and appropriate for Congress to resort to the Privileges or Immunities Clause to enforce equality rights).

109 William J. Rich, *supra* note 12, at 238 (arguing that the “Privileges or Immunities Clause authorizes Congress to abrogate states’ sovereign immunity under the Eleventh Amendment when acting to enforce individual rights that Congress has been . . . authorized to protect”).

[H]ave the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property. . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other.<sup>110</sup>

This statute was re-enacted after the passage of the Fourteenth Amendment.<sup>111</sup> Similar provisions were made under various enforcement statutes which protected “any right or privilege granted or secured to him by the Constitution or laws of the United States”<sup>112</sup> and “any rights, privileges, or immunities secured by the Constitution of the United States.”<sup>113</sup>

#### VI. THE NON-ESTABLISHMENT CLAUSE RIGHT IS PROTECTED BY PRIVILEGES OR IMMUNITIES

Although there is consensus that the Bill of Rights should be enforced, some express concern that invigorating the Privilege or Immunities Clause will supply a pretext for refusing to enforce the Establishment Clause. Justice Thomas has expressed discontent with the Privileges or Immunities Clause<sup>114</sup> and one of our leading scholars has suggested that it may be an aspect of federalism, and not an individual right.<sup>115</sup> But such action would not be supported by a proper interpretation of the Clause.

Many national churches broke apart over the slavery issue when prior to the Civil War, Southern slaveholders “seceded” from the

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110 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified at 42 U.S.C. 21 §§ 1981, 1981A). An analogous provision was enacted in the Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 200, § 14, 14 Stat. 173, 176 (1866) (“[R]ight to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms . . .”).

111 Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140.

112 *Id.* at § 6.

113 Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

114 *See, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639, 677 (2002) (Thomas, J., concurring) (“I agree with the Court that Ohio’s program easily passes muster under our stringent test, but, as a matter of first principles, I question whether this test should be applied to the States.”); *see also* *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (“I have previously suggested that the Clause’s text and history ‘resis[t] incorporation’ against the States. . . . If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.”) (alteration in original) (citations omitted).

115 AMAR, *supra* note 13, at 246–54.

churches that preached that slavery was evil.<sup>116</sup> They “established” churches that were based upon slavery as a divinely imposed institution.<sup>117</sup> The restrictions upon African American ministers both before and after the Thirteenth Amendment were designed to control (establish) the content of religious doctrine presented to parishioners. Though there are many references to what might be thought to be “intolerance” and suppression of free exercise (freedom of speech from the pulpit) in the white slaveholding south, most of these were really part of the enforcement of the establishment of the white slaveholders’ pro-slavery religion. There is substantial evidence that the establishment of religion of the slaveholding south was one of the evils the Amendment was designed to address.

In describing the evolution of nineteenth century views on the Establishment Clause, Professor Lash notes that there was a marked departure from its Federalist roots “so the principle of nonestablishment was understood to prohibit any government from either supporting *or* suppressing religion as religion.”<sup>118</sup> Further, Lash presents strong support for the view that

Nascent principles of nonestablishment were trampled upon by the southern establishment of pro-slavery Christianity and the suppression of “dangerous” religious ideas. Preventing such suppression of religious be-

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- 116 For an account, within the Methodist Church, of Methodist Reconstruction and efforts to reclaim Southern Churches and staff them with loyal ministers, see GEORGE R. CROOKS, *THE LIFE OF BISHOP MATTHEW SIMPSON OF THE METHODIST EPISCOPAL CHURCH* 253–57, 262–63 (1891).
- 117 Even before the secession of the churches, authorities in Georgia had tried to “establish” religion by using their criminal statutes to limit what missionaries among the Cherokee Indians could and could not do. For an overview along these lines, see GERALD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* (2007). Though challenges are expressed in free exercise and freedom of speech language, the Establishment Clause’s relevance is obvious. In an August 10, 1866 speech in Bowerston, Ohio, Bingham indicated that: “Hereafter the American people can not have peace, if as in the past, States are permitted to take away freedom of speech, and to condemn men, as felons, to the penitentiary for teaching their fellow men that there is a hereafter, and a reward for those who learn to do well.” John A. Bingham, *Speech at Bowerston* (Aug. 24, 1866), in *CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA, AND KENTUCKY* 19 (1866).
- 118 Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *ARIZ. ST. L.J.* 1085, 1089 (1995) [hereinafter Lash, *The Rise of the Nonestablishment Principle*]. Lash was careful to qualify his work by only arguing that the Establishment Clause was as worthy as any other portion of the Bill of Rights to be enforced against the states. *Id.* at 1088. In 1999 Lash suggested that the “fact that southern establishment of proslavery religion was one of the problems meant to be remedied by the Privileges or Immunities Clause, at the very least, seems to raise a presumption in favor of establishment incorporation.” Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar’s The Bill of Rights*, 33 *U. RICH. L. REV.* 485, 495 (1999) [hereinafter Lash, *Two Movements*] (footnote omitted).



lief and practice—the hallmark of religious establishments—was cited by the architects of Reconstruction as one of the purposes behind the adoption of the Fourteenth Amendment.<sup>119</sup>

Lash's work makes it noteworthy that, in the 1866 Congressional election, Bingham stated: "Freedom of conscience is one of the privileges of the citizens of the United States."<sup>120</sup> But Bingham, in that same speech, recognized that "[w]e do not ally the church and the State."<sup>121</sup>

Thus, properly interpreted, utilization of the Privileges or Immunities Clause to enforce the principles of establishment as they ex-

119 Lash, *The Rise of the Nonestablishment Principle*, *supra* note 118, at 1089. *Id.* at 1138 ("All black religious assemblies were carefully monitored to assure the promulgation of only pro-slavery Christianity."). One technique was to require that ministers to black churches be licensed; *see also id.* at 1137 ("By 1860, the South had erected the most comprehensive religious establishment to exist on American soil since Massachusetts Bay."). *See, e.g., id.* at 1137 n.234 (quoting an 1833 Alabama statute requiring the license be by "some regular body of professing Christians immediately in the neighborhood"). This license requirement was continued in many of the post-emancipation Black Codes. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994). Though, as the title suggests, Professor Lash's article is clearly focused upon the Free Exercise Clause, the evidence he marshals also demonstrates that the generation that adopted the Fourteenth Amendment had establishment concerns as well. For example, Lash quoted Baptist evangelist Elias Smith, active during the "Second Great Awakening" for the proposition that the people were "wholly free to examine for ourselves what [was true] . . . without being bound to a catechism, creed, confession of faith, discipline or any rule excepting the scriptures." *Id.* at 1130 (internal quotation marks and footnote omitted). At the same time, he notes the well-known fact that, at least by the 1830s, people held in slavery were prohibited from learning to read and from reading the scriptures, *id.* at 1135, thereby making it impossible for them to examine for themselves what was true. Rather, Lash notes that the slaveholders used "oral instruction," which was designed to provide those held in slavery only what the slaveholder wanted to be known about religion, e.g. "true Christianity." *Id.* at 1136 (internal quotation marks omitted).

Lash notes that after Nat Turner's revolt in 1831, there emerged "a complex and highly regulated system of religious exercise—a system so abhorrent to members of the Thirty-ninth Congress that its abolition was explicitly cited as one of the purposes behind the Fourteenth Amendment." *Id.* at 1133–34.

As Lash explains it: "[b]lack religious assemblies were heavily regulated with severe punishments authorized for improper religious gatherings. Slaves were not permitted to have their own ministers or to worship without the presence of a white man. Even when a religious gathering received the state's imprimatur, the content of the sermon was dictated by proslavery Christian ideology with the message invariably focused on the biblical admonition that slaves 'obey their masters.'" *Id.* at 1134–35 (internal quotation marks and footnotes omitted). *See also id.* at 1136 n.140 (noting examples of the control of content of what was preached).

120 *Eloquent Speech of Hon. John A. Bingham*, THE CADIZ REPUBLICAN, August 15, 1866, at 2 (reported for Cincinnati Gazette) (reporting Bingham's speech on his renomination to Congress).

121 *Id.*

isted in 1866 would not alter Establishment Clause jurisprudence to any significant degree.

## VII. SECOND AMENDMENT

The same principles that enforce the other provisions of the Bill of Rights against the States apply to the Second Amendment as well. One of the important open issues today is whether the Supreme Court's decision in *District of Columbia v. Heller*,<sup>122</sup> recognizing an individual's right to bear arms, should be enforced against the States. The advent of *Heller* brings hope to some and concern to others. But we must follow the evidence where it takes us. Relying upon Justice Scalia's stated limitations in *Heller*, I have suggested that the case does not really change very much and simply reflects the national consensus on both gun ownership and gun regulation.<sup>123</sup>

There are, however, many sources contemporary to the ratification of the Fourteenth Amendment that indicate the framers and ratifiers thought the Amendment supported an individual right to bear arms.<sup>124</sup> As Professor Amar points out, ironically both abolitionists Joel Tiffany and pro-slavery activist Roger Taney reached the same conclusion: "if free blacks were citizens, it would necessarily follow that they had a right of *private* arms bearing."<sup>125</sup> Judge Timothy Farrar specifically included the right to "keep and bear arms," as one of the rights protected under Article IV that could not be "infringed by individuals or States, or even by the government itself."<sup>126</sup>

In his 1868 treatise, in the section where he explained the need for the adoption of the Fourteenth Amendment, Dean John N. Pomeroy posited a situation in which a right protected by the state constitution was not enforced by the state courts. One example he gives

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122 128 S. Ct. 2783 (2008).

123 For this analysis, see Richard L. Aynes, *Self-Defense, the 2nd Amendment, and the U.S. Supreme Court*, AKRON L.: THE ALUMNI PUBLICATION OF THE U. OF AKRON SCH. OF L., Fall 2008, at 2, 3, 7, available at [http://works.bepress.com/richard\\_aynes/40](http://works.bepress.com/richard_aynes/40).

124 See AMAR, *supra* note 13, at 257–66; Maltz, *supra* note 70, at 966 (suggesting that some congressman referred to individual rights, including the right to bear arms, when discussing the Comity Clause). Many of the relevant sources are cited in STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876* (1998). For further support, also see Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007).

125 AMAR, *supra* note 13, at 263. Of course, for Taney this was a "horrible hypothetical" that he thought demonstrated African Americans could never be U.S. citizens.

126 TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 145 (1867) (internal quotation marks omitted).

is state legislation in which African Americans “are required to surrender their arms, and are forbidden to keep and bear them under certain penalties.”<sup>127</sup>

Though one could reinterpret Pomeroy’s example into a claim of discrimination or denial of equality, read in context it is clear that he was addressing the right to bear arms as one of the “first eight amendments” that would be “binding with equal force” upon the States if the Fourteenth Amendment was adopted.<sup>128</sup> As Professor Akhil Amar has noted:

[B]etween 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction a new vision was aborning: when guns were outlawed, only *the Klan would have guns*.<sup>129</sup>

The result was, Professor Amar explained: “Reconstruction Republicans recast arms bearing as a core *civil* right . . . . Arms were needed . . . to protect one’s individual homestead. Everyone—even nonvoting, nonmilitia-serving women—had a right to a gun for self-protection.”<sup>130</sup>

Thus understood, the analysis which supports recognizing the right to have arms for purposes of self-defense is far more compelling under the Fourteenth Privileges and Immunities Clause than under the Second Amendment itself.

### VIII. THE WRIT OF HABEAS CORPUS

If one looks at the Court’s recent opinions on the writ of habeas corpus, its constitutional basis is called into question. The Court and commentators frequently tie its constitutional status to the implications of Article I, Section 9, Clause 2, commonly called the Suspension Clause or the Non-suspension Clause.<sup>131</sup> Indeed, no matter what

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127 JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 150 (1868). This was probably based upon real ordinances and statutes that tried to prevent African Americans from owning weapons. See AMAR, *supra* note 13, at 264–66 (discussing African American protests against such actions by South Carolina and the claim that this violated the Second Amendment in 1865, even before the adoption of the Fourteenth Amendment).

128 POMEROY, *supra* note 127, at 151.

129 AMAR, *supra* note 13, at 266 (emphasis added).

130 *Id.* at 258–59.

131 *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) (“[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in . . . [the] Constitution. . . . In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause.”).

they say, when one looks at the action of Congress and the Supreme Court it often appears that they treat the writ *as if* it had only a statutory basis which Congress (or the Court) can change at will.

But the right and the writ are more fully supported by the Privileges or Immunities Clause. In *Corfield v. Coryell*,<sup>132</sup> Justice Bushrod Washington indicated that that Art. IV privilege and immunities were, in their nature, “*fundamental*” and included the right “to claim the benefit of the writ of *habeas corpus*.”<sup>133</sup> This presents an interpretative problem for those who, anachronistically, view the Article IV Privileges and Immunities Clause as guaranteeing only a rough equal protection or non-discrimination right with respect to State-created rights.<sup>134</sup>

In the *Slaughter-House Cases*, Justice Miller included “the privilege of the writ of *habeas corpus*” as one of the privileges of the Fourteenth Amendment.<sup>135</sup> Justice Bradley, in his dissent, spoke of the “rights of Englishmen” that were brought to the nation’s shores and then stated: “Another of these rights was that of *habeas corpus*, or the right of having any invasion of personal liberty judicially examined into, at once, by a *competent judicial magistrate*.”<sup>136</sup>

Bradley also referred to “the right of *habeas corpus*” as one of the rights that, prior to the Fourteenth Amendment, was “only secured, in express terms, from invasion by the Federal government,”<sup>137</sup> but after the Amendment was secured against the States.

During the election of 1866, a virtual referendum on the Fourteenth Amendment while it was pending, Congressman, former Judge and former Union Army Colonel, William Lawrence (R-Ohio) indicated that one of the privileges or immunities was the ability to claim the benefit of the writ of *habeas corpus*.<sup>138</sup> A leading treatise writer went even further. Judge Timothy Farrar, one-time partner of Daniel Webster, published his *Manual of the Constitution of the United States* in 1867 after the Fourteenth Amendment had been proposed

132 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

133 *Id.* at 552 (emphasis added).

134 The problem is that *if* Article IV, Section 2 is only an equality provision, then any State or all of the States could choose to not have a writ of *habeas corpus* and the “right” under Article IV claimed by Justice Washington would be illusory. In reading his opinion, it seems clear that he was writing about a substantive, actual right and not a right of mere equality or non-discrimination in access to *habeas corpus*.

135 83 U.S. (16 Wall.) 36, 79 (1873) (“[T]he privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution.”).

136 *Id.* at 114–15 (Bradley, J., dissenting) (emphasis added).

137 *Id.* at 118.

138 CURTIS, *supra* note 6, at 144 (“Lawrence mentioned the right to . . . claim the benefit of the writ of *habeas corpus* . . . as [one] . . . of the privileges or immunities of citizens.”).

but not yet adopted. In speaking of the Article IV privileges and immunities Farrar wrote: “The right of every person . . . to the ‘writ of *habeas corpus*’ . . . [is] recognized by, and held under, the Constitution of the United States, and cannot be infringed by individuals or States, or even by the *government itself*.”<sup>139</sup>

This is consistent with the history of the nation and the work of the anti-slavery lawyers and abolitionists. The writ of habeas corpus was viewed as a mechanism for maintaining liberty. Throughout the struggles against pro-slavery forces and Slave Power, the writ of habeas corpus was identified with liberty. It was used to free fugitive slaves who obtained freedom in free states, to contest the kidnapping of free African Americans by slaveholders, and of individuals wrongfully accused of helping slaves to escape. It is not surprising therefore to find that the writ of habeas corpus was deemed available to vindicate the abolition of slavery and involuntary servitude by the Thirteenth Amendment. For example, Chief Justice Chase, sitting as a Circuit Judge, in *In re Turner* struck down Maryland’s use of an apprenticeship program as a violation of the Thirteenth Amendment through a writ of habeas corpus, even though he cited no jurisdictional statute.<sup>140</sup> In the *Slaughter-House Cases*, Justice Miller’s majority opinion cited with approval Chief Justice Chase’s action in *In re Turner*.<sup>141</sup>

This was *prior* to the 1867 Habeas Corpus statute which extended the writ to individuals held in state custody.<sup>142</sup> Thus, we see a multifaceted approach guaranteeing the writ of habeas corpus.<sup>143</sup> The writ of habeas corpus was secured under Article IV, the Thirteenth Amendment, perhaps the Ninth Amendment, and eventually the Privileges or Immunities Clause of the Fourteenth Amendment. Not only is this a more secure and text-based formulation, but it would per-

139 FARRAR, *supra* note 126, at 145 (emphasis added).

140 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247) (concluding that “the thirteenth amendment to the constitution of the United States interdicts . . . involuntary servitude,” and that “[t]he alleged apprenticeship in the present case is involuntary servitude, within the meaning of these words in the amendment”).

141 83 U.S. (16 Wall.) 36, 69 (1873) (pointing to Chief Justice Chase’s opinion as illustrating the observation that “a personal servitude” is encompassed within the meaning of the Thirteenth Amendment).

142 See Act of Feb. 5, 1867, ch. 27, § 1, 14 Stat. 385 (“[When] in any suit or prosecution which has been or may be commenced in any State court, and which the defendant is authorized to have removed from said court to the circuit court of the United States, . . . the defendant in any suit shall be in actual custody on process issued by said State court, it shall be the duty of the clerk of the said circuit court . . . to issue a writ of habeas corpus cum causa . . .”).

143 Some might call this redundant. But redundant protections strengthen each other.

haps cause the courts and the Congress to respect the rights of U.S. citizens in a way that they do not now do because they view the writ as largely a matter of statutes and rules.<sup>144</sup>

#### IX. THE RIGHT TO FAMILY LIFE

One of the key evils sought to be remedied by the Thirteenth and Fourteenth Amendments was the failure of the white, slaveholding south to recognize marriages and the full range of family rights for African-Americans. Consequently, in looking at the evils against which these two Amendments were directed, it would be reasonable for courts to conclude that they were protecting the right to be married, the right procreation, the right to raise one's children, and the right to have some type of right of family life.<sup>145</sup> In many ways, protection of these rights under the Privileges or Immunities Clause would be more textually sound and correct than the use of substantive due process.

An illustration of this can be found in *Moore v. City of East Cleveland*.<sup>146</sup> The Supreme Court plurality ultimately decided that Mrs. Moore could have her two grandsons live with her, even though they were cousins and not brothers and thus violated East Cleveland's definition of a single family.<sup>147</sup> In doing so, it utilized substantive due process.<sup>148</sup> Efforts were made in that case to claim a First Amendment right of association for the family,<sup>149</sup> a right of privacy (family auton-

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144 What appears above is only a sketch of a broader analysis supporting a constitutional basis for the writ of habeas corpus that seems to have been set to one side by the Court and the Congress. Hopefully time will allow for a fuller exposition of this view in a later article.

145 Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337 (2009) (“[I]ndividuals’ right to choose a spouse and to raise and educate their children had to be secured against state and private interference.”).

146 431 U.S. 494 (1977). In the interest of full disclosure, it should be noted that the author, then a Legal Intern acting under the Ohio Supreme Court practice rule and under the supervision of Attorney Frank Murtaugh, wrote the brief filed in the Eighth District Ohio Court of Appeals in 1974.

147 *Id.* at 505–06.

148 *See id.* at 503–06 (“Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society’. . . . [T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. . . . [T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.”) (internal footnotes and citations omitted).

149 *See* Brief of Appellant at 21, *Moore v. City of East Cleveland*, No. 75-6289 (U.S. July 5, 1976) (“By precluding appellant and her son and grandson from establishing a home together in East Cleveland, this ordinance unconstitutionally invades the family’s rights of privacy and freedom of association.”). Though many cases were cited, the core concept

omy)<sup>150</sup> and, utilizing the Ninth Amendment (but not the Privileges or Immunities Clause), a right of family life.<sup>151</sup> Though the state court rejected these claims, the Supreme Court plurality cited many of the legal, sociological, and historical sources relied upon to support the claimed “right of family life,” but chose to rest its decision upon substantive due process. That case and others could more naturally be based upon the Fourteenth Amendment Privileges or Immunities Clause.

## X. CONCLUSION

This Article follows the path of other scholars in documenting that the privileges or immunities of U.S. citizens are their “rights.” It points out that some redundant protections are built into the Fourteenth Amendment and that this is a positive development. While the full contours of the Clause may not be as clear as some would like, content may be given to the Clause by looking at natural rights, English common law, and rights listed in the Constitution, treaties, and federal statutes.

Examples of the wide-ranging and yet principled possibilities of the Clause were illustrated through the statements of Section 1 framer John Bingham and U.S. District Judge Jones. The Establishment Clause, the Second Amendment, the writ of habeas corpus, and the

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relied upon was that “one of the most basic forms of human association in our society is the family, and the idea of ‘family’ as the most powerful and intimate center of human feeling and trust runs through a long series of familiar constitutional decisions.” Laurence H. Tribe, *The Supreme Court 1972 Term, Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 34 (1973).

150 See Brief of Appellant at 22, *Moore v. City of East Cleveland*, No. 75-6289 (U.S. July 5, 1976) (“The ordinance invades the privacy of family decisions concerning the nurturing of children.”).

151 *Id.* at 26 (noting that the right to privacy, and therefore family life, partially resides within the confines of the Ninth Amendment). See also *id.* at 21 (“The fundamental rights to establish a home, to control the upbringing of children and to family life are established by the confluence of several interrelated constitutional doctrines principally within the concepts of freedom of association and the right to privacy.”). For a historical account which provides facts from which one could argue that such a general right exists, see PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 248 (1997) (“To think of family liberty as a guarantee offered in response to slavery’s denials of natal connection is to understand it, not only as an end in itself, but as a mechanism of democracy.”). For a positive account of Cooper’s book, see William D. Rich, *Review of Davis, Peggy Cooper*, *Neglected Stories: The Constitution and Family Values*, H-NET REVIEWS, Apr. 2000, <http://hnet.org/reviews/showrev.php?id=4032> (praising Davis for succeeding “in amassing an impressive amount of historical evidence concerning the centrality of arguments about . . . family life to the struggle against slavery . . . which gave rise to the Fourteenth Amendment”).

right of family life all provide examples of situations in which the Privileges or Immunities Clause can be applied.

The Supreme Court's decision in *Saenz v. Roe*<sup>152</sup> held forth the opportunity to breathe new life into the Fourteenth Amendment Privileges or Immunities Clause. That obviously has not happened. To some extent this may be because law is by nature a conservative profession and the profession is content with the results of due process and concerned about what the results may be from utilizing the Privileges or Immunities Clause. But it also has to do with Professor Barnett's observation that much work remains to be done on developing a fuller picture of the options under that Clause. This article is but a small step in that direction. Further, as far as one can tell, it appears that very few cases have been filed asserting claims under the Clause and none have been taken to the federal circuit or state appellate courts.

There is some question as to why we should pursue such a path.<sup>153</sup> As I wrote in 1994, even though most results may be the same under privilege or immunities and due process, the Court's current understanding of the Privileges or Immunities Clause "distorts our understanding of the Constitution to reach a 'correct' result through a forced reading of the Due Process Clause. It makes the Court engage in a decision-making process it knows is wrong, and, thereby, teaches everyone disrespect for the Court and the rule of law."<sup>154</sup>

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<sup>152</sup> 526 U.S. 489 (1999). The case involved claims of the existence of the right to travel, which enjoys support in other case law, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 46 (1867) (holding that State taxation of railroad passengers "may totally prevent or seriously burden all transportation of passengers from one part of the country to the other," though not a Fourteenth Amendment case), and in the views of members of Congress as expressed during proposal and ratification of the Fourteenth Amendment. See Maltz, *supra* note 70, at 966–67 ("No one, however, believed that the Bill of Rights was the *only* source of privileges and immunities. Frequent references were made to the right to travel and to the right of access to courts.") (footnotes omitted). See also CONG. GLOBE, 35th Cong., 2d Sess. 975 (1859) (statement of Rep. Dawes) (discussing what the Constitution guarantees "to the citizen of one State when he goes into another"); CONG. GLOBE, 35th Cong., 1st Sess. 1966 (1858) (statement of Sen. Fessenden) (asserting that the Oregon Constitution's provision "that no free colored persons shall be permitted to come into the State of Oregon. . . . is wrong in its operation upon . . . [his] own State").

<sup>153</sup> See Bogen, *supra* note 107, at 1053–54 (suggesting the Court will see no reason to expand its interpretation of the Privileges and Immunities Clause because it has accomplished all it wants to accomplish through the Due Process and Equal Protection Clauses).

<sup>154</sup> Aynes, *supra* note 45, at 687. Similar views were expressed in a concurring opinion by Justice Robert Jackson, in which he noted that the migration of a person was better protected under the Fourteenth Amendment Privileges or Immunities Clause than the Commerce Clause. *Edwards v. California*, 314 U.S. 160, 182 (1941) (Jackson, J., concurring). He thought that someone who had nothing to sell and no money with which to buy anything could not be considered commerce; as he stated: "To hold that the meas-



Further, for those concerned with a textual basis for the Court's decisions, rights are often more appropriately protected under the Privileges or Immunities Clause than under the concept of substantive due process. The challenge for today is to restore hope under the Fourteenth Amendment by restoring the vitality of the Privileges or Immunities Clause. We are more likely to produce correct decisions by properly using the Privileges or Immunities Clause than we are by improperly using the Due Process Clause. As Susan Gellman and Susan Looper-Friedman have noted: "If you have to drive in a Phillips head screw, you can use a flathead screwdriver, if that's the only tool you've got. It may do the job fine. But if you have a perfectly good Phillips head screwdriver in your toolbox, why not use that instead?"<sup>155</sup>

Moreover, as Professor Lash has suggested, even if judges and lawyers were "getting it right" in terms of results, "[t]he problem is one of political legitimacy."<sup>156</sup>

As Denise Morgan and Rebecca Zietlow have documented,<sup>157</sup> great strides can be made through the legislative branch. Furthermore, there are many examples of actions of the executive, particularly President Lincoln, President Franklin Delano Roosevelt, and President Harry Truman, impacting the protection of the rights of U.S. citizens. Yet we have a tripartite government and in order to optimize protections—even redundant protections—of the rights of U.S. citizens, we need the judiciary to fulfill its role as well.

The one bright example of the judiciary living up to its obligations occurred in the era between *Brown v. Board of Education*<sup>158</sup> and *Milliken v. Bradley*.<sup>159</sup> First, the Supreme Court responded to the litigation initiated by lawyers and citizens by chipping away at the edifice of segre-

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ure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights." *Id.*

155 Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 665 (2008).

156 Lash, *Two Movements*, *supra* note 118, at 485.

157 See Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1350 (2005) (arguing that "Congress has a unique and important role to play in providing a nationally uniform baseline of rights of belonging," and "that only Congress can adequately protect those rights"). See also Zietlow, *supra* note 108, at 1015–16 ("[A]t the end of the twentieth century, the Supreme Court greatly limited Congress's autonomy to use its power to enforce the Equal Protection Clause and the Commerce Clause as a means of enforcing equality rights. Therefore, it is necessary for members of Congress to consider a new source of congressional power to enforce those rights.") (footnotes omitted).

158 347 U.S. 483 (1954).

159 418 U.S. 717 (1974).

gation.<sup>160</sup> Afterward the Court itself seemed to use a sledgehammer in knocking down segregation outside of the school context. In the school context, it has been well-documented that the reason the *Brown* decree was able to be implemented was because of courageous U.S. District and Circuit Court judges in the South,<sup>161</sup> who were fully supported by the Supreme Court.

We can contrast that success between 1954 and 1973 with a lack of success in implementing the Privileges or Immunities Clause of the Fourteenth Amendment and its enforcement acts. The difference was not a lack of courageous judges or the actions of prosecutors in the early Fourteenth Amendment cases. In *United States v. Cruikshank*<sup>162</sup> and the Ku Klux Klan trials, we see that there were equally courageous judges on the federal bench in the South. The difference, one of the failings under Reconstruction, was that the courageous prosecutors, lawyers, and district court judges and even juries, had no meaningful support from the Supreme Court of the United States.<sup>163</sup> Until a majority of the Supreme Court is willing to stand behind the clear textual language and public understanding of the Amendment we cannot fully meet our obligations under the Constitution. But the Privileges or Immunities Clause can still be a guiding star which the Congress and the President can follow even without the aid of the Supreme Court.

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<sup>160</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 710–11 (1976) (explaining that, while the Supreme Court's opinion in *Brown* "had truly and at long last granted to the black man . . . simple justice," it "mut[ed] the initial response to its decision in the South," by "declining to proclaim a crash deadline for the end of segregation").

<sup>161</sup> See, e.g., Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 TUL. L. REV. 2207, 2237 (2004) (discussing the pressures on district and circuit court judges implementing segregation and arguing that the Supreme Court "has an obligation to lead or at least point out the logical line of development of the law"); see also Charles M. Elson, *Remembering Judge Elbert P. Tuttle, Sr.*, 82 CORNELL L. REV. 15, 17 (1996) (noting that Judge Tuttle "continuously displayed great intellectual courage in championing various unpopular causes, both political and social").

<sup>162</sup> 92 U.S. 542 (1875).

<sup>163</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 70–71 (2d ed. 1967) ("The cumulative weakening of resistance to racism was expressed also in a succession of decisions by the United States Supreme Court between 1873 and 1898 . . ."). Of course, racism was not the only cause for the Supreme Court joining the shameful retreat from the promise and hope of the Amendment. For further information in this regard, see HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901* (2001). For a more traditional account of factors resulting in the Court's hesitation to use the Privileges and Immunities Clause of the Fourteenth Amendment, see WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION: 1869–1879* (1979).