Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon

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Taking "Privileges or Immunities" Seriously: 
A Call to Expand the Constitutional Canon

William J. Rich†

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INTRODUCTION

[N]o one in the legal academy thinks it very important to explain [the Privileges or Immunities Clause] . . .

— J.M. Balkin & Sanford Levinson¹

¹Everyone’ agrees the Court incorrectly interpreted the Privileges or Immunities Clause . . .

— Richard L. Aynes²

Could everyone be wrong?

We rely upon traditional canons of constitutional law to distinguish significant clauses of the Constitution from the insignificant ones. Today, almost everyone agrees that the Privileges or Immunities Clause in the Fourteenth Amendment, as authoritatively construed, belongs on the insignificant list. Beginning with the first Supreme Court interpretation of the Clause in 1873,³ dissenting Justices and critical scholars have ridiculed the Court’s majority for rendering the Clause “superfluous and redundant”⁴ and merely

4. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 430 (13th ed. 1997). Treatment of the issue changed slightly after the
reinforcing a Supremacy Clause that had no need for additional support. In often cited dissents, Justice Field accused the Court of turning the Clause into a "vain and idle enactment, which accomplished nothing,"
 and Justice Swayne argued that the majority had "turn[ed] . . . what was meant for bread into a stone." William Crosskey agreed, labeling judicial interpretation of the clause "completely nugatory and useless." Charles Black blamed the Supreme Court for "annihilat[ing]" the Clause and transforming it into a "cost-free blown kiss." Robert Bork compared the Clause to a provision "written in Sanskrit" or "obliterated past deciphering by an ink blot."

The Fourteenth Amendment guarantees that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Periodically, scholars argue for revival of this clause.

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5. Slaughter-House, 83 U.S. at 96 (Field, J., dissenting).
6. Id. at 129 (Swayne, J., dissenting).
11. See, e.g., AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 181-230 (1998) (proposing and defending a "refined model of incorporation" of the Bill of Rights into the Fourteenth Amendment); BLACK, supra note 8, at 146-48 (explaining that the meaning of the phrase, "privileges or immunities," has not changed with time); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (justifying the incorporation of the Bill of Rights into the Fourteenth Amendment based on historical and judicial evidence); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 28-30 (1980) (observing that the Privileges or Immunities Clause was best interpreted as protecting rights that the Constitution "neither lists . . . nor . . . gives directions for finding"); DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 199-232 (1993) (discussing the potential importance of the role of the Fourteenth Amendment Privileges or Immunities Clause in protecting human rights, and justifying interpretation of the Clause to encompass such a role); Philip B. Kurland, The Privileges or Immunities Clause: "Its Hour Come Round at Last?, 1972 WASH. U. L.Q. 405, 418-20 (exploring the possibility of an increased role for the Fourteenth Amendment Privileges or Immunities
Starting with the premise that the Supreme Court erred, these scholars attempt to reverse the course of history, either to affect a recognition that protecting privileges or immunities means enforcing the Bill of Rights against state governments, or to advocate broad protection for economic liberties, participatory rights, self governance, or fundamental rights more broadly defined. I agree with those who read the historical record of the Privileges or Immunities Clause to include incorporation of the Bill of Rights, but I offer a different perspective. Rather than calling for a change of privileges or immunities doctrine, I advocate taking the existing doctrine seriously.


14. See Daniel J. Levin, Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce, 35 HARV. C.R.-C.L. L. REV. 569, 571-74, 615 (2000) (arguing that the Privileges or Immunities Clause should be relied upon to protect "structural privileges of citizenship" and to "reunite political access doctrine").


17. This Article builds upon prior work. See 3 CHESTER JAMES ANTEIAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 44.85 (2d ed. 1997) (noting that we should not lose sight of "the understanding that the Fourteenth Amendment empowered Congress to pass remedial legislation intended to enforce rights established not only by the Constitution directly, but also by federal statutes enacted pursuant to congressional powers defined more generally"); 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, 284-92 (2001) (explaining that federal law establishes privileges or immunities of United States citizens that override state Eleventh Amendment immunity); see also Vicki C. Jackson, Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution,
Two Supreme Court decisions bracket my assessment of the doctrine. In the *Slaughter-House Cases*, the Supreme Court construed the Fourteenth Amendment for the first time, and Justice Miller's opinion for the Court directed future generations to look to federal law to identify privileges or immunities. That admonition, however, had been all but forgotten when, in 1999, the current Supreme Court used the case of *Saenz v. Roe* to redirect attention to the Privileges or Immunities Clause. In rejecting welfare laws that discriminated against new residents, the Justices found a home for the "right to travel" in the Privileges or Immunities Clause, emphasizing "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." That decision, joined by seven Justices, recognized state legislation as a source of "privileges" enjoyed by bona fide state residents. Both *Slaughter-House* and *Saenz* link positive law with constitutional references to "privileges" or "immunities," and together they set the stage for reconsidering that relationship.

Looming in the background of this analysis is a series of Supreme Court decisions imposing new constraints on federal power. Current Supreme Court Justices have ruled that the Eleventh Amendment, or the principle of state sovereignty on which it was based, bars Congress from using Article I powers to authorize individual actions for monetary damages against state agencies that violate federal law. As a result, thousands of state employees have lost substantial protection from state violation of the Fair Labor Standards Act, the Age Discrimination in Employment Act, and the Americans with

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53 STAN. L. REV. 1259, 1304-06 (2001) (advancing the same proposition "tentatively").
18. 83 U.S. 36 (1873).
19. Id. at 79.
21. Id. at 503.
22. Id. at 502.
23. Id. at 507.
24. The first case in this series of Supreme Court decisions was *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), which found the state immune from enforcement of the Indian Gaming Regulatory Act. Id. at 47.
27. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000), cert. granted,
Disabilities Act. States have also been given a free pass to violate the intellectual property rights of United States citizens.

One feature of these cases stands out: The litigants failed to ask, and the Justices therefore did not address, the question of whether the federal laws at issue constituted privileges or immunities of United States citizens, protected by a Fourteenth Amendment that supersedes Eleventh Amendment state immunity. That question will be raised in the following pages. After reviewing the history of privileges or immunities, this Article will examine the implications of the Privileges or Immunities Clause for three other, more fundamental constitutional issues.

First, valuing the Privileges or Immunities Clause clarifies the relationship between state and federal governments. Federalism helps to preserve a political environment in which citizens maintain access to government and make meaningful choices about how they are governed. The Constitution of 1787 embraced this concept of federalism, leaving room for states to claim independent sovereign rights. In 1868, however, the federal balance changed as the Fourteenth Amendment strengthened values of nationhood, equality, and democracy. When federalism is at issue, the values of 1868 should be predominant. Judges should respect the central importance of national citizenship and democratic control, and legitimate congressional action should override state sovereign immunity.

Second, the Privileges or Immunities Clause provides a basis for resolving the perceived conflict between positive and negative rights. The former are viewed as necessary to protect human dignity, but the Bill of Rights as traditionally

30. See infra Part I.
31. See infra Part II.A.
34. See infra Part II.B.
construed only protects the latter. A constitution “worthy of respect” should find room for both, and the Privileges or Immunities Clause, properly understood, makes that possible.

Third, recognizing privileges or immunities also enables us to appreciate the separate roles of Congress and the courts. Congress should be given wide authority to develop the social and economic environment of a flourishing society. Courts, on the other hand, must ensure that the legislative and executive branches do not overstep their bounds. In other words, the legislative branch should be the primary source of positive rights, leaving courts with the responsibility to impose constitutional constraints. The Fourteenth Amendment embodies this balance of legislative and judicial responsibility.

In the pages that follow, this Article develops the thesis that the Constitution empowers Congress to establish privileges or immunities of United States citizens. History and tradition support this thesis, but lawyers and scholars have forgotten or ignored its basic thrust. Commentators have been collectively blinded by assumptions that only those rights generated and protected by the courts deserve to be taken seriously, and therefore they have been unduly preoccupied by debates about whether the Privileges or Immunities Clause incorporated inherent rights that were enforceable through direct judicial action. The text of the Constitution, as currently construed, offers a simple and compelling alternative vision that is worthy of inclusion in the canons of constitutional law.

I. INTRODUCING PRIVILEGES OR IMMUNITIES

Several important background features of privileges or immunities merit explanation. First, prior to ratification of the Fourteenth Amendment, legislatures and courts often referred to “privileges or immunities” but rarely defined the substance of those terms. Framers of the Fourteenth Amendment articulated a range of views regarding the Privileges or Immunities Clause, including references to fundamental rights and to solidification of federal supremacy. When first asked to construe that clause, the Supreme Court majority did not

36. See infra Part II.C.
37. See infra notes 38-57 and accompanying text.
38. See infra notes 60-82, 109-23 and accompanying text.
address the issue of incorporating the Bill of Rights.\textsuperscript{39} The Justices did, however, recognize federal supremacy by concluding that the privileges or immunities protected by the Fourteenth Amendment were those owing "their existence to the Federal government, its National character, its Constitution, or its laws."\textsuperscript{40} Subsequent cases, statutes, and commentary have reinforced this doctrine, whether or not they accorded it respect.

A. REVIEWING THE BACKGROUND

References to "privileges" and "immunities" became well ingrained in American law long before the introduction of the Fourteenth Amendment. Colonial charters commonly protected some equivalent of the "liberties and immunities of free and natural subjects."\textsuperscript{41} The Articles of Confederation protected "all privileges and immunities of free citizens in the several states" including "free ingress and regress" as well as "all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."\textsuperscript{42} Minor amendments were made to that language before it appeared in Article IV of the United States Constitution, promising that "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."\textsuperscript{43} In subsequent years, courts dealt with the same general phrase in contexts as diverse as protecting copyright claims\textsuperscript{44} and determining the contractual rights of a quartermaster who sought pay for unusual services.\textsuperscript{45} Africans aboard a Spanish ship, \textit{The Amistad}, gained "the privileges, and immunities, and rights belonging to bona fide subjects of

\begin{footnotes}
\item 39. See \textit{infra} notes 139-46 and accompanying text.
\item 40. The Slaughter-House Cases, 83 U.S. 36, 79 (1873).
\item 42. \textit{ART. OF CONFED.,} art. IV, cl. 1 (1781).
\item 43. \textit{U.S. CONST.} art. IV, § 2, cl. 1.
\item 44. See \textit{Wheaton v. Peters}, 33 U.S. (8 Pet.) 591, 606 (1834) (describing the argument of counsel addressing copyright claims of the official reporter of federal cases).
\item 45. See \textit{United States v. Webster}, 28 F. Cas. 509, 516 (D. Me. 1840) (No. 16,658) (denying repayment for services that were not payable pursuant to either statute or usages and custom). In almost all cases, it could be fairly implied that the phrase "privileges and immunities" was used as a reference to existing common law or statutory rights. See \textit{Rich, supra} note 17, at 244.
\end{footnotes}
Spain, under our treaties or laws, but virtually no other cases used "privileges and immunities" language to protect individuals who lacked European ancestry. More typically, slaveholders found refuge in the privileges and immunities doctrine whereas courts rejected claims for parity made by African-Americans. This trend culminated in the Supreme Court's infamous decision in Dred Scott v. Sandford that African-Americans, "whose ancestors were imported into this country, and sold as slaves," were not entitled to the rights, privileges, and immunities guaranteed by the United States Constitution.

Most early nineteenth-century courts addressing questions about the privileges and immunities doctrine reduced the issue to whether the parties involved belonged to a protected category. The only case giving significant attention to the term's substantive content was Corfield v. Coryell, in which Justice Bushrod Washington devoted a page of dictum to a vague, and admittedly incomplete, account of privileges and immunities. Before concluding that the party who challenged the statute had no right even to bring his cause of action, Justice Washington expressed his approval of a statutory scheme allowing seizure of boats of nonresidents who unlawfully gathered oysters along the New Jersey coast. Justice Washington's list of privileges and immunities included "enjoyment of life and liberty, with the right to acquire and

46. United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 595 (1841) (freeing slaves who had revolted while being transported to Cuba).
47. See, e.g., Johnson v. Tompkins, 13 F. Cas. 840, 855 (C.C.E.D. Pa. 1833) (No. 17,416) (upholding use of force by slave owners to seize their human "property" in non-slave states because of their entitlement to "all the privileges and immunities of citizens of any other states").
48. See, e.g., Costin v. Washington, 6 F. Cas. 612, 614 (C.C.D.C. 1821) (No. 3266) (concluding that laws imposing constraints and penalties on all "persons of color" would not violate the Constitution).
49. 60 U.S. (19 How.) 393 (1856).
50. Id. at 403.
51. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (finding that collection of oysters was not a privilege or immunity protected by Article IV, Section 2 of the United States Constitution).
52. See id. at 552.
53. See id. at 555 (explaining that the owner of the boat could not bring a trespass action to contest its seizure at a time when the boat had been leased to another individual). For additional discussion of the fundamental rights and equal treatment elements of Justice Washington's opinion, see Rich, supra note 17, at 241-44.
54. See Corfield, 6 F. Cas. at 552.
possess property of every kind, and to pursue and obtain happiness and safety, subject...to such restraints as the government may justly prescribe for the general good of the whole.\textsuperscript{55} The list, however, did not extend to the "grant of a co-tenancy in the common property of the state, to the citizens of all the other states."\textsuperscript{56} In keeping with the era in which he wrote, Justice Washington's general language straddled the worlds of natural law and positive law, failing to resolve subsequent questions about the scope and nature of privileges and immunities.\textsuperscript{57}

By the time members of Congress met to promulgate the Fourteenth Amendment, debate had developed over whether the Privileges and Immunities Clause of Article IV, Section 2 should be construed as a source of inherent, fundamental rights or instead as a right to comity that guaranteed the equal application of rights to citizens and sojourners alike.\textsuperscript{58} Depending upon how one interpreted Justice Washington's reference to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments,"\textsuperscript{59} advocates of either argument could have cited the text of Corfield for support. In 1868, the same year in which the Fourteenth Amendment was ratified, however, the Supreme Court ruled the state of sojourn could, in effect, dictate the scope of Article IV privileges and immunities.\textsuperscript{60} References to "common rights of free citizens" or "fundamental" rights were therefore qualified; a state could deny all rights if the denial extended equally to its citizens and citizens from other states.\textsuperscript{61} In other words, by 1868 the Supreme Court had determined that positive law would control.

With such a limited and confusing background, it may seem strange that the framers of the Fourteenth Amendment chose to place such emphasis on the phrase "privileges or

\textsuperscript{55} Id. at 551-52.
\textsuperscript{56} Id. at 552.
\textsuperscript{58} See infra note 75.
\textsuperscript{59} See Corfield, 6 F. Cas. at 551.
\textsuperscript{60} See Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180-81 (1868).
\textsuperscript{61} See id. at 180.
immunities.” Close attention to the context of that debate, however, helps to explain the choice of language.

B. UNDERSTANDING THE FRAMERS’ PERSPECTIVE

The isolated group of delegates to the original constitution enjoyed sustained conversation in their deliberations; the framers of the Fourteenth Amendment had no such luxury. Instead, the bitter divisions of the Civil War and its aftermath influenced the open debates on the floor of Congress. These debates shed light on how the participants understood the proposed text. Scholars who have studied the debates focus on whether members of Congress intended to incorporate the Bill of Rights or to enforce the Privileges and Immunities Clause of Article IV. Without denigrating the importance of those discussions, I will focus primarily on a third issue—an explication of how the Fourteenth Amendment Privileges or Immunities Clause reinforces federal supremacy.

1. Incorporation of the Bill of Rights

For more than one hundred years, scholars have asked whether protection of privileges and immunities meant that provisions of the Bill of Rights had been made enforceable against the states. The most compelling answer to that question favors incorporation. Akhil Amar chronicles evidence of such incorporation at length—as “a lover of mercy” resisting the temptation to detail every supporting piece of information—and concludes that the congressional debate “clinches the case for some sort of incorporation.” After repeated examinations of this issue, Michael Kent Curtis reaches the same result.

A familiar challenge to the incorporation argument asks: If Congress meant to incorporate the Bill of Rights, why did the Fourteenth Amendment not include clear language to that

62. See Curtis, supra note 12, at 34-35.
63. See supra notes 12 and 14.
64. See AMAR, supra note 11, at 186.
65. See CURTIS, supra note 11, at 215-20; Curtis, supra note 12, at 1147. But see Raoul Berger, Incorporation of the Bill of Rights: A Reply to Michael Curtis’ Response, 44 OHIO ST. L.J. 1 (1983); Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5, 132 (1949) (concluding that the Privileges or Immunities Clause was not intended to incorporate the Bill of Rights).
effect? The most obvious answer to that question, consistent with the analysis of both Amar and Curtis, is that the framers of the Amendment had in mind a more inclusive conception of privileges or immunities. Whether or not one accepts an incorporationist view of the Privileges or Immunities Clause, it is clear that those who promulgated the Fourteenth Amendment viewed the Privileges or Immunities Clause as an important protection of national authority with respect to issues and concerns beyond those that the first eight amendments controlled.

2. Enforcement of Article IV

A second debate regarding the intended scope of privileges or immunities protection focuses on the relationship between the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section 2. The congressional debates made numerous references to Article IV, implying that the Fourteenth Amendment would give Congress authority to enforce the privileges and immunities that the Clause conferred. In particular, members of Congress referred to Justice Washington's opinion in Corfield v. Coryell as they attempted to explain the substantive scope of privileges or immunities. Those references, however, do little to quell debate about what such enforcement might entail. As

66. See, e.g., D.O. McGovney, Privileges or Immunities Clause, Fourteenth Amendment, 4 IOWA L. BULL. 219, 233 (1918).
68. The initial draft of the Fourteenth Amendment Privileges or Immunities Clause duplicated the language of Article IV. See CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). In a subsequent draft, the text was modified to refer to "privileges or immunities of citizens of the United States." Id. at 2286.
69. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).
70. At least eighteen separate references to Corfield can be found in debates involving the Fourteenth Amendment and related enforcement acts. See THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 121-122, 128, 152, 181, 207, 219, 248, 466, 468, 494, 528, 540, 557, 626, 659, 664, 674, 679 (Alfred Avins ed., 1967) [hereinafter DEBATES].
previously noted, the *Corfield* opinion fails to resolve arguments about whether the Privileges and Immunities Clause of Article IV provided inherent protection of fundamental rights or merely extended comity to citizens from one state traveling to another. The Fourteenth Amendment debates reflected both perspectives.

Courts have consistently rejected claims that the Privileges or Immunities Clause of the Fourteenth Amendment gave the federal government—either Congress or the courts—the authority to determine the substantive scope of all privileges and immunities included in Justice Washington's litany. In spite of some historical ambiguity on the issue, ratification of the Fourteenth Amendment did not give the federal government general supervisory authority over areas such as contract law or property law. The *Slaughter-House Cases* put this matter to rest.

Questions about the interpretation or enforcement of Article IV affected the development of the Fourteenth Amendment in other significant ways. Congressional debates reveal that some members of Congress were less concerned about the power to establish the substance of privileges or immunities than with ensuring that the federal government had the authority to enforce the equality component of Article IV. In the years leading up to the Civil War, courts had seized upon the Article IV Privileges and Immunities Clause as a tool for the enforcement of slavery. White slaveholders were generally entitled to the protection of the Privileges and Immunities Clause; blacks were not. Despite notable

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71. *See supra* text accompanying notes 55-57.
72. *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard that the Privileges or Immunities Clause, including rights identified in *Corfield*, would “put the citizens of the several States on an equality with each other as to all fundamental rights”), *with* CONG. GLOBE, 42d Cong., 1st Sess. app. at 189 (1871) (statement of Rep. Willard that the rights Justice Washington identified as belonging to a citizen were understood to be “in subordination to the laws of the State in which he may happen to be”).
73. *See* The Civil Rights Cases, 109 U.S. 3, 23 (1883) (finding that Congress lacked Fourteenth Amendment authority to address private acts of discrimination).
74. 83 U.S. (16 Wall.) 36, 78-79 (1873).
76. *See* Johnson v. Tompkins, 13 F. Cas. 840, 850 (C.C.E.D. Pa. 1833) (No. 7416) (upholding the use of force by slave owners to seize their “property” in
exceptions, the dominant question in these cases was not “substantive,” but rather whether blacks were entitled to the same privileges or immunities as whites.

This issue could be restated in terms of racial comity: When blacks traveled away from their home state, were they entitled to be treated with the same respect as all other citizens? In the course of the congressional debates, framers of the Fourteenth Amendment denounced the Supreme Court ruling in Dred Scott and made frequent references to other incidents in which African-Americans had been denied equal treatment by state authorities. The Citizenship Clause, making “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof . . . citizens of the United States and of the State wherein they reside,” effectively overturned the Dred Scott ruling, but did not eliminate questions about race discrimination. For example, in another infamous judicial ruling, a federal court concluded that as long as all persons of color were similarly discriminated against, regardless of their state of origin, they could not claim to have been denied the protection of Article IV. An equality rationale would undermine that ruling. Such a rationale would

77. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403 (1857).
78. A shift from comity to substance took place, however, when courts elevated the “property interest” in slaves to a privilege protected by Article IV. See Johnson, 13 F. Cas. at 855 (ruling that the Privileges and Immunities Clause protected the property rights of a New Jersey slaveowner who claimed possession of an allegedly fugitive slave).
79. See, e.g., Costin v. Washington, 6 F. Cas. 612, 614 (C.C.D.C. 1821) (No. 3266). For additional discussion, see Rich, supra note 17, at 247-49.
81. Members of Congress repeatedly referred to this case during congressional debates. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1116 (1866) (Rep. Wilson of Iowa noting the “monstrosities of that decision”); id. at 1263 (Rep. Broomall denouncing the holding that a “negro has no rights which a white man is bound to respect”).
82. See, e.g., infra text accompanying notes 101-10 (referring to the arrest of a black seaman in the harbor of Charleston, South Carolina); infra text accompanying notes 108-12 (discussing the debate regarding the admission of Oregon to the Union with a constitutional provision barring entry by African-Africans).
83. U.S. CONST. amend. XIV, § 1, cl. 1.
84. See Costin, 6 F. Cas. at 614.
also be consistent with the goal of securing congressional authority to enact the Civil Rights Act of 1866, which extended citizenship to blacks and guaranteed them full and equal benefit of all provisions for the security of person and property.85

I do not challenge that interpretation, nor do I question the importance of principles of equality to those who framed the Fourteenth Amendment. These arguments do not, however, complete our review of how the framers understood the phrase “privileges or immunities.” Another significant, but generally neglected, relationship between Article IV and the Fourteenth Amendment involves an inquiry into whether the Constitution empowered Congress to enforce Article IV constraints independent of any control over its substance. Nothing in the text of the Constitution gives Congress the authority to impose the Constitution’s textual constraints on states. Without that authority, Congress could not provide relief for those whose rights to privileges and immunities had been violated, nor could it impose liability on those who interfered with such rights. The importance of this issue of federal power to those who framed the Fourteenth Amendment merits elaboration, including a review of events that transpired in the years leading up to the Civil War.

3. Federal Supremacy

In the first half of the nineteenth century, few constitutional issues overshadowed the efforts of advocates of states’ rights to nullify federal law. Use of the term “nullification” could be traced to Thomas Jefferson’s original draft of the Kentucky Resolution,86 written to rally opposition to Federalists in the election of 1800.87 John C. Calhoun, however, led a South Carolina contingent to a much more

85. See, e.g., RAOUl BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 30 (2d ed. 1997) (arguing that “all are agreed” that the purpose of the Fourteenth Amendment was to “embody and protect” the Civil Rights Act of 1866); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 346-49 (1985) (noting intentions of providing a constitutional basis for the Civil Rights Act of 1866).

86. See RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS 9 (1987) (noting that, in 1832, states’ rights advocates discovered and published Jefferson’s original draft of the Kentucky Resolution, which used the term “nullification”).

87. See id. at 4 (explaining that states’ rights advocates cast their position as a “legal procedure” for nullification).
extreme conception of state nullification than the one Jefferson briefly espoused. Rather than arguing for dual sovereignty, "nullifiers" advocated an ultimate state sovereignty susceptible only to constitutional amendment.88 Their arguments stemmed in part from a significant gap in the text of the Constitution that, while providing for federal supremacy, did not explicitly allocate power to either Congress or the Supreme Court to determine whether the federal government had exceeded its authority. On the floor of the United States Senate, South Carolina Senator Robert Hayne challenged Daniel Webster to identify where the Constitution gave the federal government "power of deciding ultimately and conclusively upon the extent of its own authority."89 Webster responded by noting "that the laws of Congress are made supreme; and that the judicial power extends, by express words, to the interpretation of these laws."90 But Webster's oration failed to convince supporters of nullification.

Arguments for the power to nullify federal law were coupled with claims to a right of secession, provoking what historians have called "the most serious constitutional crisis to take place in the United States in the period between the adoption of the Constitution and the Civil War."91 The nullification crisis pitted President Andrew Jackson against his first term vice-president, Calhoun of South Carolina, who supported nullification. The South Carolina Ordinance of Nullification barred compliance with the Federal Tariff Acts of 1828 and 1832, prohibited appeals to the United States Supreme Court, and declared that federal coercion would provoke secession.92 When the South Carolina Governor called for raising an army of 12,000, President Jackson countered by threatening to hang the leading nullifiers as traitors, and reinforced the military stationed in and around Charleston as evidence of his resolve.93 Congress defused the crisis by engineering a compromise that gave South Carolina much of the tariff reform it had sought.94 Although the congressional compromise resolved the immediate crisis, it merely postponed

88. Id. at 8.
89. 6 REG. DEB. 86 (1830).
90. Id. at 93.
91. ELLIS, supra note 86, at 12.
92. Id. at 75-76.
93. Id. at 76-79.
94. Id. at 168-69.
the Civil War, while fueling resentments leading up to that conflict.

A second issue of states’ rights coincided with the confrontation between Jackson and Calhoun. In 1832, the Supreme Court ruled that the laws of Georgia had no effect on the Cherokee Nation, and that the United States government had the sole right to regulate relations with the Indian nations. Georgia reacted defiantly, insisting upon its authority over Cherokee lands, and its defiance underscored the point that many states’ rights advocates questioned Supreme Court authority over federal-state relations. As in South Carolina, compromise averted a constitutional crisis. In this case, two missionaries who were being prosecuted by the state for living on Cherokee land accepted a pardon from the Georgia governor rather than continuing to pursue their claims. Supreme Court authority emerged technically unscathed, in spite of the substantial doubts that had been raised regarding the Court’s enforcement powers. For the Cherokee Nation, a Trail of Tears signaled retreat from Georgia, and mocked Chief Justice Marshall’s description of the relationship between the Indians and the federal government as that of “a ward to his guardian.”

In yet another challenge to federal authority, South Carolina officials seized and imprisoned black seamen who entered Charleston harbor. On behalf of the seamen, Judge Samuel Hoar traveled as an emissary from Massachusetts to Charleston to argue that the Privileges and Immunities Clause of Article IV protected all Massachusetts citizens, regardless of race. Shortly after his arrival, state officials informed Hoar

96. ELLIS, supra note 86, at 115.
97. Id.
98. Id. at 118-19.
99. The apocryphal comment attributed to President Jackson was: “John Marshall made his decision, now let him enforce it.” Id. at 31.
102. See Philip M. Hamer, Great Britain, the United States, and the Negro Seamen Acts, 1822-1845, 1 J. S. HIST. 3, 22 (1935); see also WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 132-40 (1977) (describing a series of confrontations over the Negro Seamen Acts, including an opinion by then Attorney General Roger Taney that a state’s police powers overrode the federal government’s treaty
that his life could not be protected, and the South Carolina legislature ordered his expulsion.\textsuperscript{103} In response to this affair, other southern states, including Georgia and Louisiana, rose to defend South Carolina's efforts to protect "the exercise of their sovereign rights."\textsuperscript{104}

The confrontation in Charleston fueled congressional debates. In an 1849 discussion about slavery in Washington, D.C., Congressman Ashmun took up Judge Hoar's argument that the Privileges and Immunities Clause of Article IV protected both black and white citizens from the north when they ventured into southern ports: "[Every Massachusetts citizen] was as much entitled to protection, if he was black, as any white man on this floor could be."\textsuperscript{105} Congressman Hudson added that he was angered not only by the fact that South Carolina had imprisoned a Massachusetts citizen, but also because the State of South Carolina had blocked appeal of that decision to the United States Supreme Court.\textsuperscript{106} From the beginning, references to the Hoar affair implicated not only the substantive rights of a black seaman and the Massachusetts judge who traveled to defend him, but also the underlying issue of national government authority to protect those rights.\textsuperscript{107} As Congressman Broomall explained,

\begin{quote}
[s]trange as it may seem, while the Government of the United States has been held competent to protect the lowest menial of the minister of the most obscure prince in Europe, anywhere between the two oceans, and from the Lakes to the Gulf, it had no power to protect the personal liberty of the agent of the State of Massachusetts in the city of Charleston, or enable him to sue in the State courts.\textsuperscript{108}
\end{quote}

Members of Congress who supported the Fourteenth Amendment began their political careers immersed in the series of state sovereignty claims that had provoked constitutional crises in the years leading up to the Civil War.

\begin{thebibliography}{10}
\bibitem{103} Hamer, \textit{supra} note 102, at 22-23.
\bibitem{105} \textit{CONG. GLOBE}, 30th Cong., 2d Sess. 419 (1849).
\bibitem{106} \textit{Id.}
\bibitem{107} \textit{See} \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 1263 (1866) (discussing enactment of the Civil Rights Bill). Akhil Amar cites the Hoar affair as evidence that the framers of the Privileges or Immunities Clause intended to protect the right to free speech. \textit{AMAR}, \textit{supra} note 11, at 236. References to the Hoar affair also implied that members of Congress were seeking to establish federal supremacy.
\bibitem{108} \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 1263 (1866).
\end{thebibliography}
Congressman John Bingham, the person most responsible for framing the Fourteenth Amendment and guiding it through the House of Representatives, cared deeply about these issues. In 1857, he tried in vain to convince the House of Representatives to deny Oregon admission to the United States because of a clause in its proposed state constitution excluding entry by African-Americans, stating: "I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory... or from the enjoyment therein of the 'privileges and immunities' of a citizen of the United States."\textsuperscript{109} Despite Bingham's efforts, he lost his argument that the Supremacy Clause of the Constitution precluded such state laws.\textsuperscript{110}

The Civil War itself overshadowed all of these events as brothers battled over questions about national authority to regulate slavery. Again, this time in the midst of a debate about funding the Union Army, Congressman Bingham stressed the importance of federal supremacy: "The Republic can no more live without its supreme law duly obeyed or duly enforced than can its citizens who compose it live without air."\textsuperscript{111}

In a debate that took place on February 26, 1866, Congressman Bingham argued that the Privileges or Immunities Clause of the proposed Fourteenth Amendment that he had authored protected the same rights found in the text of Article IV, other existing constitutional provisions, and the Supremacy Clause.\textsuperscript{112} The only new ingredient was congressional power to enforce those provisions.\textsuperscript{113} Two days later, as part of the same debate, Bingham again emphasized the defiance of federal law that had taken place in Oregon and throughout the southern states.\textsuperscript{114} Congressman Rogers, an opponent of the Amendment, agreed that "guarantees, privileges, and immunities are not powers, and when the Constitution authorized Congress to make all laws necessary and proper to carry into execution the powers vested in the Government, it meant powers strictly."\textsuperscript{115} Congressman Hale,

\textsuperscript{109} CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).
\textsuperscript{110} Id. at 1010-11 (rejecting Bingham's substitute motion and voting to approve admission of Oregon).
\textsuperscript{111} CONG. GLOBE, 37th Cong., 2d Sess. 345 (1862).
\textsuperscript{112} CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 1090.
\textsuperscript{115} CONG. GLOBE, 39th Cong., 1st Sess. app. at 135 (1866).
a New York moderate and former judge, added to the broad consensus on this point, explaining that the constitutional text "limited [congressional authority] directly to these [Article I, Section 8] powers; it is not a general power to enact all laws for carrying out the provisions of the Constitution." In other words, nothing in the body of the Constitution authorized Congress to order state compliance with constitutional obligations. Debate participants understood that the Fourteenth Amendment would secure congressional authority to enforce all elements of federal law.

Members of Congress made additional references to this concern for federal supremacy during the course of debates over the Fourteenth Amendment. For example, in addressing questions about enforcement of the Privileges or Immunities Clause, Congressman Baker quoted the text of that provision and asked:

What business is it of any State to do things here forbidden? To rob the American citizen of rights thrown around him by the supreme law of the land? When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future.

In historical context, Baker's reference would have been understood as an appeal to reinforce federal supremacy. That element of the debate was rarely extended because it was never seriously challenged. The nullifiers had been vanquished, and no one questioned whether, after the Civil War, state sovereignty could independently override enforcement of federal law.

116. DEBATES, supra note 70, at viii.
117. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866).
118. The Supreme Court, however, found implied congressional authority to enforce the Privileges and Immunities Clause of Article IV with its controversial decision in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), where it upheld congressional authorization of southern slave owners to enforce fugitive slave laws in northern states. Id. at 625. Abolitionists had argued against the Supreme Court opinion in Prigg, and committed themselves to the position that Congress lacked implied enforcement power extending beyond Article I of the Constitution. See Jacobus TenBroek, The Antislavery Origins of the Fourteenth Amendment 37 (1951). As a result, opponents of slavery could have understood a particular need to reinforce federal supremacy.
119. CONG. GLOBE, 39th Cong., 1st Sess. app. at 256 (1866).
120. In the words of Kenyon Bunch, "a constitution-amending majority" readily accepted this proposition. Kenyon D. Bunch, The Original Understanding of the Privileges and Immunities Clause: Michael Perry's Justification for Judicial Activism or Robert Bork's Constitutional Inkblot?, 10
The issue remained important enough, however, for Congressman Bingham to emphasize it in his final speech before the House of Representatives supporting promulgation of the Fourteenth Amendment.\textsuperscript{121} Bingham again referred to South Carolina's interference with enforcement of national law.\textsuperscript{122} When that event took place, a "body of great and patriotic men looked in vain for any grant of power in the Constitution" that would protect South Carolina residents who sought to "bear true allegiance to the Constitution and laws of the United States."\textsuperscript{123} He argued that states should never again be allowed to "abjure their allegiance" to the United States by attempting to "nullify" federal law.\textsuperscript{124} In Bingham's view, adopting the Privileges or Immunities Clause meant, at a minimum, that questions about federal supremacy had been put to rest.

4. Summarizing the Framers' Views

Congressional debates suggest that the framers chose broad language because they anticipated multiple, related applications of the Privileges or Immunities Clause. First, as both Michael Kent Curtis and Akhil Amar have documented at length,\textsuperscript{125} arguments could be made for incorporating the Bill of Rights. Arguments could also be made that the Privileges or Immunities Clause transferred substantive protection for traditional common law "privileges and immunities" from states to the federal government, or that the purpose of the Clause was to assure that all persons, regardless of race, enjoyed equal protection of their privileges and immunities.\textsuperscript{126} Finally, without necessarily rejecting any of these arguments, protection of privileges or immunities of United States citizens reinforced national supremacy of rights derived from the Constitution or from federal law.\textsuperscript{127} A review of the historical context and congressional debates confirms this understanding.

\textsuperscript{121} CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 2542-43.
\textsuperscript{124} Id. at 2542.
\textsuperscript{125} See AMAR, supra note 11, at 183-85; CURTIS, supra note 11, at 57-130.
\textsuperscript{126} See supra notes 67-85 and accompanying text.
\textsuperscript{127} See supra text accompanying notes 86-123.
As explained in the following section, the Supreme Court explicitly accepted this final argument in the *Slaughter-House Cases*. 128

C. AFFIRMING *SLAUGHTER-HOUSE*

If scholars have agreed that the Privileges or Immunities Clause failed to significantly enlarge the scope of federal protection of individual rights, they normally blame *Slaughter-House* for that failure. 129 By a vote of five-to-four, the Court rejected arguments that the Fourteenth Amendment protected property rights of a group of butchers in New Orleans to continue their trade without having to relocate to a prescribed location owned and managed by a state-created corporation. 130 The majority ruled that the Privileges or Immunities Clause only protected rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws.” 131 Amazing twists of constitutional fate distorted this language so that *Slaughter-House* came to be known as one of the Supreme Court’s historic blunders.

Liberal scholars decry the Court’s failure to protect individual rights, 132 as if oblivious of the fact that, by contemporary liberal standards, the Court reached the correct decision. Simultaneously, conservative authors advocate overruling *Slaughter-House* to resurrect theories of economic liberty. 133 This joint chorus of liberals and conservatives

128. 83 U.S. (16 Wall.) 36 (1873).
129. Charles Black characterized the Supreme Court holding in *Slaughter-House* as “probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court.” BLACK, supra note 8, at 55.
131. Id. at 79.
132. See, e.g., James E. Fleming, *Constitutional Tragedy in Dying: Or Whose Tragedy Is It, Anyway?* in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 162, 162 (William N. Eskridge, Jr., & Sanford Levinson eds., 1998) (labeling *Slaughter-House* as a “decision that has disastrous consequences for interpretive method”); Aynes, supra note 2, at 627 (asserting that “everyone agrees the Court incorrectly interpreted the Privileges or Immunities Clause”).
contributes to the impression that “everyone” rejects the ruling of the *Slaughter-House* majority.\(^\text{134}\) Unfortunately, scholars have tended to ignore an important exception to this seeming consensus: Since 1873, the Supreme Court has never seriously questioned its historical judgment.\(^\text{135}\)

1. Context of the Decision

To understand the *Slaughter-House Cases*, it is important to clarify the context in which the cases arose. Existing doctrinal constraints helped to limit the scope of the Court’s opinion. The political background and ideological vision of the litigants may also have had a significant impact on the opinions of the justices and on subsequent reactions to their decision.

The 1868 Supreme Court decision in *Paul v. Virginia*\(^\text{136}\) established doctrinal boundaries for the *Slaughter-House Cases*.\(^\text{137}\) Writing on behalf of the Court, Justice Field explained that the Privileges and Immunities Clause of Article IV, Section 2 did not create substantive rights, but only protected those rights bestowed by a state upon its own people.\(^\text{138}\) Justice Miller, who authored the fateful majority opinion in *Slaughter-House*, sought an interpretation of the Fourteenth Amendment parallel to the interpretation bestowed upon Article IV. He argued that the rights of United States

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\(^{134}\) See, e.g., Saenz v. Roe, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) (noting that “scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873”). *But cf. supra* note 4.

\(^{135}\) This reaffirmation appeared most recently in *Saenz*. See *Saenz*, 526 U.S. at 503 (referring to *Slaughter-House* for the proposition that the Privileges or Immunities Clause protects the right of interstate travel). For one brief interlude, the Supreme Court arguably deviated from a strict adherence to the *Slaughter-House* framework. See *Colgate v. Harvey*, 296 U.S. 404, 432 (1935) (relying upon the Privileges or Immunities Clause to invalidate a Vermont tax that discriminated against out-of-state investments). That decision was quickly overruled, and the court again limited privileges or immunities to those which “grow out of the relationship of United States citizens to the national government.” *Madden v. Kentucky*, 309 U.S. 83, 91 n.4, 93 (1940).

\(^{136}\) *75 U.S. 168* (1868).

\(^{137}\) See *supra* notes 60-61 and accompanying text.

\(^{138}\) *Paul*, 75 U.S. at 180 (concluding that a grant of corporate privileges need not be extended to citizens from other states); *see also* Downham v. Alexandria Council, 77 U.S. 173, 175 (1870) (noting “[i]t is only equality of privileges and immunities between citizens of different States that the Constitution guarantees”).
cations protected by the Fourteenth Amendment Privileges or Immunities Clause derive from federal law in the same way that the privileges and immunities protected by Article IV arise out of positive state law. Proceeding from this analogy, Miller concluded that the substantive scope of privileges or immunities of United States citizens should be determined by reference to federal sources of law rather than by judicial enforcement of new inherent rights. 139

The federal sources of law to which Justice Miller referred could have included the Bill of Rights, but Miller did not need to face that issue in order to resolve the claims that were before him. The plaintiffs did not present a substantial argument that Louisiana had violated any of the first eight amendments to the Constitution when the state required the New Orleans butchers to relocate and to do business within a state-created location. The Due Process Clause was mentioned only in passing, 140 and counsel for the butchers did not seriously argue that the Louisiana law violated the Bill of Rights.

Instead of arguing for incorporation, opponents of the slaughter-house monopoly argued, in effect, that the Privileges or Immunities Clause transformed the Supreme Court into a general guardian of the contract and property rights to which Justice Washington had referred in Corfield, protecting not only “equality of privileges,” but other rights as well. 141 Both plaintiffs’ counsel 142 and Justice Field, in his dissent, based their arguments directly upon Adam Smith’s economic theory supporting the “right of free labor.” 143 Quoting the Connecticut Supreme Court, Field wrote, “[A]lthough we have no direct constitutional provision against a monopoly, . . . the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the

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140. See id. at 80 (noting that an argument that plaintiffs had been deprived of their property without due process had “not been much pressed in these cases”); id. at 118-19 (Bradley, J., dissenting) (referring to the Bill of Rights and, in particular, to the Due Process Clause, as “among the privileges and immunities of citizens of the United States”).
141. Id. at 118 (Bradley, J., dissenting).
142. See id. at 45-46 (argument of plaintiffs’ counsel); 21 L.Ed. 394, 396 (citing ADAM SMITH, THE WEALTH OF NATIONS, p. 1, ch. X, part II).
143. See id. at 110 (Field, J., dissenting) (citing ADAM SMITH, THE WEALTH OF NATIONS, p. 1, ch. X, part II, to support arguments that the Constitution protected a general right to engage in free enterprise).
Bill of Rights . . .” 144

Justice Miller recognized that the plaintiffs' arguments would have led to a major shift in state and federal relationships. Congress and the Supreme Court would become, in Miller's terms, the "perpetual censor" of the state legislatures. 145 Miller explained that the framers of the Fourteenth Amendment had not intended such a dramatic change. 146 Consistent with Washington's Corfield opinion, 147 Miller's opinion for the Court protected community rights to remove "noxious slaughter-houses" from city centers and to generally protect the "convenience, health, and comfort of the people." 148 Although less eloquent, Miller's opinion for the majority in Slaughter-House reached the same conclusion that Justice Holmes famously offered a generation later with his dissent in Lochner v. New York. 149

Since the dissenters in Slaughter-House analogized to those grounds eventually accepted by the Supreme Court in Lochner, it seems inconsistent for the prevailing "constitutional canon" to respect the Slaughter-House dissent and revile the Lochner majority. Presumably, the unsavory character of the slaughter-house monopoly holders, who won their status through bribes to a corrupt reconstruction legislature, made their legal victory difficult to swallow. In the deliberations leading up to the Supreme Court decision, the trial judge had referred to "monstrous and degrading" proceedings that had been "so pernicious in their influence on the legislation of the Country." 150 A falling-out among thieves occurred shortly after the Supreme Court’s decision when neglected participants in the slaughter-house scheme sued to recover their share of the

144. Id. at 108-09 (quoting Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19, 38 (1856)).
145. Id. at 78.
146. Id.
147. Remember that Justice Washington explicitly conditioned the rights to which he referred by "such restraints as the government may justly prescribe for the general good of the whole." Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).
148. Slaughter-House, 83 U.S. at 64.
149. 198 U.S. 45, 75 (1905).
expected bounty.\textsuperscript{151} The Supreme Court of Louisiana found evidence of bribery in both houses of the Louisiana legislature, and furthermore determined that the Governor's signature had been "obtained by the same soft powder."\textsuperscript{152}

Another element of the intrigue and confusion surrounding \textit{Slaughter-House} has to do with the lawyers who argued the case to the Supreme Court. John A. Campbell, a former Supreme Court justice who had helped uphold slavery in \textit{Dred Scott},\textsuperscript{153} appeared on behalf of the plaintiffs. Campbell had resigned his judicial appointment out of southern loyalty, and he held a confederate subcabinet position during the Civil War.\textsuperscript{154} He had been a disciple of John C. Calhoun and a strong advocate of states' rights.\textsuperscript{155} In contrast, defending the \textit{Slaughter-House} monopoly was a group of prominent Louisiana lawyers who, earlier in their careers, had gained international attention for their opposition to secession.\textsuperscript{156} One of the lawyers had what has been described as a "passionate personal attachment to Daniel Webster." The group had even organized an armed force to support President Jackson's anti-nullification efforts.\textsuperscript{157}

Campbell attempted to use defeat in the Civil War to his advantage. He argued that the "doctrine of the 'States-Rights party,' led in modern times by Mr. Calhoun, was, that there was no citizenship in the whole United States.... The Fourteenth amendment struck at, and forever destroyed, all such doctrines."\textsuperscript{158} He asked the Court to recognize an

\begin{itemize}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.} at 25 (quoting Supreme Court Transcript at 406, \textit{Durbridge}).
\item \textsuperscript{153} \textit{Dred Scott v. Sandford}, 60 U.S. 393, 493-518 (1857) (Campbell, J., concurring). Campbell stated a theory of state supremacy over "property," \textit{id.} at 515, and denounced congressional claims of "supreme and irresponsible power... over boundless territories," \textit{id.} at 511.
\item \textsuperscript{155} \textit{See} Franklin, \textit{supra} note 144, at 88 (citing RANDELL HUNT, SELECTED ARGUMENTS, LECTURES AND MISCELLANEOUS PAPERS OF RANDELL HUNT, xviii-xix (1876)).
\item \textsuperscript{156} \textit{See} Franklin, \textit{supra} note 150, at 52.
\item \textsuperscript{157} \textit{Id.} The creation of the slaughter-house monopoly can also be explained as an element of grand unionist plans to strengthen the national economy by streamlining commerce along the Mississippi River. \textit{Id.} at 43-45. As Franklin explains, this theory rested on "capitalistic rather than slave production." \textit{Id.} at 45.
\item \textsuperscript{158} \textit{The Slaughter-House Cases}, 83 U.S. 36, 52 (1873) (argument of plaintiffs' counsel).
\end{itemize}
"indefinite enlargement" of resulting federal power.\textsuperscript{159}

Subsequent writers have considered it ironic that a states' rights advocate argued, in this manner, for an expansive interpretation of the Fourteenth Amendment, while devoted unionists took the side of the state of Louisiana.\textsuperscript{160} The alignment of the lawyers makes perfect sense, however, considering the objectives of the \textit{Slaughter-House} plaintiffs and the reason these pro-slavery "nullifiers" saw the Privileges or Immunities Clause as a tool for protecting individual property rights. Support for states' rights has often been little more than a shallow disguise for other underlying values. John C. Calhoun's passion for state authority accompanied a belief in the right of individuals to own slaves;\textsuperscript{161} he would undoubtedly have opposed state interference with his "rights" to human property, just as he opposed any assertion of federal authority over such interests. In other words, John Campbell's leopard had not changed its spots; whether he argued for states' rights or for an expanded version of the Privileges or Immunities Clause, he advocated private property rights and \textit{laissez faire} economics.\textsuperscript{162} In both contexts, he sought nullification of government regulations that he perceived as interfering with those rights.

This relationship between states' rights, property rights, and slavery would have been fresh in the minds of those who had been recently embroiled in the Civil War. Lawyers for the slaughter-house monopoly understood, arguing before the Supreme Court of Louisiana that efforts to overturn Louisiana law echoed the "dangerous doctrine" by which "people were urged to nullify the tariff laws of Congress, because it was pretended that those laws tended to create a monopoly."\textsuperscript{163} Justice Miller must have been aware of the powerful emotions

\begin{itemize}
  \item \textsuperscript{159} \textit{Id.} at 52-53.
  \item \textsuperscript{160} See, e.g., Scarborough, \textit{supra} note 154, at 216 n.21 (noting the irony, and also questioning the motives of ex-Justice Campbell).
  \item \textsuperscript{161} Calhoun and Campbell corresponded with each other regarding arguments that could be made in defense of slavery. See Hans W. Baade, "Original Intent" in Historical Perspective: Some Critical Glosses, 69 Tex. L. Rev. 1001, 1045 (1991).
  \item \textsuperscript{162} Compare Dred Scott v. Sanford, 60 U.S. 353, 493-518 (1857) (Campbell, J., concurring) (arguing against federal interference with property rights), with \textit{Slaughter-House}, 83 U.S. at 44-57 (argument of plaintiff's counsel) (arguing against state inference).
  \item \textsuperscript{163} See Franklin, \textit{supra} note 150, at 87 (citing \textit{RANDELL HUNT, SELECTED ARGUMENTS, LECTURES AND MISCELLANEOUS PAPERS OF RANDELL HUNT} 91-92 (1876)).
\end{itemize}
attached to the same word when he characterized plaintiffs’ argument as an effort to give the court “authority to nullify such [legislation] as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.”

In opposing the plaintiffs’ argument for constitutional recognition of a right to free enterprise, Justice Miller ruled that the Privileges or Immunities Clause had not expanded federal authority to control substantive rights derived from the common law. Responsibility for determining the content of state privileges and immunities remained with the states, and Article IV, Section 2 continued to be a comity clause rather than a source for the protection of inherent rights. By reaching this decision, Miller closed the door to a literally defensible but wildly expansive vision of individual rights. At the same time, however, Miller opened the door to federal enforcement of rights based upon the Constitution or laws of the United States.

Recent analysis reveals that Justice Miller’s opinion for the Court is more consistent with incorporation of the Bill of Rights than with the anti-incorporation assumptions that generated such heat among twentieth-century scholars. As explained by Laurence Tribe,

[i]t was only a series of later decisions that oddly attributed to Justice Miller’s majority opinion in the Slaughter-House Cases the expulsion of the Bill of Rights from the privileges or immunities cathedral, an expulsion nowhere to be found on the face of the Miller opinion and indeed inconsistent with much of its language and logic.

165. *Id.* at 77-78
166. *Id.*
167. See McGovney, supra note 66, at 225-26 (noting that “a literal interpretation of the clause... would have resulted in... extreme centralization, leaving to State governments little more than administrative functions”).
170. Tribe, supra note 15, at 183-84. To underscore Tribe’s point, note that
To resurrect an incorporationist view of *Slaughter-House*, however, would require reconstruction of subsequent history. Rather than advocating such reconstruction, this Article prefers to focus on the argument that Miller made—and that even his harshest critics have never substantially questioned.

2. Sources of Federal Privileges or Immunities

To define the scope of federal privileges or immunities, Justice Miller identified four sources of such rights. The first and most obvious source is the package of negative constraints found in the text of the Constitution. Miller's references include "the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts." His list could also have included the power to enforce the Privileges and Immunities Clause of Article IV as another example of such constraints, but with the clear distinction that by doing so he only implied authority to enforce the principle of comity.

Justice Miller derived a second category of rights from the "national character" of the federal government, such as a citizen's "implied guarantee... to come to the seat of government to assert any claim he may have upon that government." Based upon his prior opinion for the Court in *Crandall v. Nevada*, Miller readily identified the right to travel, free from state border taxes, as an example of such rights.

when William Guthrie addressed this issue in 1898, the argument for incorporating the first eight amendments into the Privileges or Immunities Clause had "either not [been] made or was inadequately presented" in all prior Supreme Court cases. WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 63 (1898). For a discussion of the series of Supreme Court opinions leading to rejection of incorporation, see Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000).


172. In a prior paragraph, Miller explained that the Privileges and Immunities Clause of Article IV only assured rights of comity; it "did not create those rights." *Id.* at 79 (quoting *Crandall v. Nevada*, 73 U.S. 35, 36 (1867)).

173. *Id.* at 79 (quoting *Crandall v. Nevada*, 73 U.S. 35, 36 (1867)).

174. 73 U.S. 35, 49 (1867) (barring states from imposing entrance fees). The contemporary Supreme Court recognized and reaffirmed this constitutional right and the Fourteenth Amendment text in which it is enshrined with its recent decision in *Saenz v. Roe*, 526 U.S. 489 (1999). For discussion of *Saenz*, see infra text accompanying notes 228-44.
Justice Miller's third illustration of federal privileges or immunities incorporated the "right to peaceably assemble and petition for redress of grievances." After reviewing the historical record, one can easily imagine that Justice Miller had in mind the events that had taken place in South Carolina and, in particular, the plight of Judge Hoar, who had been driven from the state while advocating the privileges and immunities of African-Americans. In a recent elaboration of this theme, Kevin Newsom explained that Miller's reference to a right of assembly can best be understood as representative of the more general point that the Privileges or Immunities Clause incorporated provisions of the Bill of Rights.

The fourth and final category of illustrations given by Justice Miller has generally eluded critical examination. Miller referred to the "right to use the navigable waters of the United States" and to "all rights secured to our citizens by treaties with foreign nations." In an otherwise enlightening discussion of Slaughter-House, Newsom refers to these rights as "obscure and practically irrelevant." In reality, however, Justice Miller's point was fundamental. What Newsom missed, and virtually all other commentators have ignored, is the simple truth that the right to use navigable waters referred to the Commerce Clause, and to the broad powers of Congress under Article I, Section 8 of the Constitution. In parallel fashion, the treaty rights reflected the text of Article II, Section 2 and gave the President power to make treaties with the Senate's advice and consent.

With this language, and through these illustrations, Miller had covered all of the important bases. Privileges or immunities could be based upon (1) text that specifically limited the states, (2) implied rights, such as the right to travel,

175. Slaughter-House, 83 U.S. at 79.
177. Slaughter-House, 83 U.S. at 79.
178. Newsom, supra note 169, at 687.
179. Note that the right to navigate and treaty rights had both been implicated by South Carolina's seizure of black seamen who entered the port of Charleston. Justice Johnson, on circuit, had emphasized the "right to navigate," and had declared the "utter incompatibility" of South Carolina's law with congressional commerce clause authority and with the laws and treaties of the United States. Elkison v. Deliesseline, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4366) (concluding that the court lacked jurisdiction to provide the remedy sought by the British seamen who had been jailed in Charleston). For a discussion of frustrations with the failure to protect victims of the South Carolina law, see supra text accompanying notes 101-10.
(3) rights found in the first eight amendments to the Constitution, or (4) rights established through exercise of the power of Congress to pass laws or the power of the executive to make treaties. Contemporary critics may ask why Miller failed to explain his point in this explicit language. A fair reading of his text, however, could hardly have more clearly illuminated his language. All of his illustrations were offered in support of the more general proposition that federal privileges or immunities were those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." Lack of appreciation for Miller's explicit text, and the precise parallel structure of his illustrations, says more about defects in our constitutional canon than about Miller's interpretive shortcomings.

Justice Field's dissenting opinion questioned this analysis, arguing that such a limited scope added little to the pre-existing Supremacy Clause and could not have been the intended field of action of the Privileges or Immunities Clause. But in making that argument, Justice Field minimized the historical background of the Fourteenth Amendment. In particular, he ignored the central debate of the 1830s, when South Carolina sought to nullify federal statutes, and he ignored the evidence from the 1840s, when the federal government appeared incapable of protecting Judge Hoar. He ignored repeated assurances from proponents of the Fourteenth Amendment that the Privileges or Immunities Clause merely reinforced existing law. Field showed no appreciation whatsoever for the potential federal rights outlined by Justice Miller, preferring instead to align himself with the property rights advocates who believed that the Fourteenth Amendment enshrined a right to free enterprise.

180. Slaughter-House, 83 U.S. at 79.
181. Id. at 96 (Field, J., dissenting).
182. By contrast, Justice Miller's reference to the "right to peaceably assemble and petition for redress of grievances" can be easily construed as a reference to that event. See id. at 79.
183. See supra notes 112 and 118 and accompanying text.
184. As explained by Hugh Evander Willis, "consummation of those arguments] had to wait for Justice Field to come into ascendancy on the Supreme Court and for his extension of the due process clause to matters of substance." Hugh Evander Willis, Constitutional Law of the United States 887-88 (1936).
3. Justice Miller's Legacy

In an especially harsh criticism of Justice Miller, Richard Aynes challenges the credibility of the Supreme Court Justice, asking how a man who had traveled around the country with John Bingham, expounding upon the meaning of the Fourteenth Amendment, could have written an opinion for the Court so inconsistent with the intent of those who framed that Amendment.185 My conclusions contradict those reached by Dean Aynes. Both Miller and Bingham argued that the Privileges or Immunities Clause did not create new substance, but rather reinforced laws and principles already encompassed by the Constitution. Both men articulated views consistent with incorporating the Bill of Rights and applying them to the states. And both men appeared to understand the importance of reinforcing federal supremacy to assure that no states would again rely upon claims of state sovereignty to evade responsibilities imposed by federal law. Both opposed the commitment to private property rights found both in the plaintiffs' appeal to the Supreme Court and in underlying states' rights ideology. When treated with reasonable deference, Justice Miller’s opinion demonstrates integrity, and his legacy warrants respect.

D. REINFORCING FEDERAL SUPREMACY: STATUTES, CASES, AND COMMENTARY

Both before and after the Supreme Court ruled in Slaughter-House that the Privileges or Immunities Clause protected those rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws,”186 Congress, commentators, and courts reinforced this interpretation. This record contradicts the myth that “everyone” disagrees with the ruling in Slaughter-House.187

1. Contemporaneous Legislation

Members of Congress struggled over a period of years to develop “enforcement statutes” that would fulfill the obligations created by the Thirteenth, Fourteenth, and Fifteenth Amendments. The Civil Rights Act of 1866 conferred citizenship on former slaves and protected the rights of “such

185. Aynes, supra note 2, at 662.
186. 83 U.S. at 79.
187. But see Aynes, supra note 2, at 627-28.
citizens” to “full and equal benefit of all laws and proceedings... as is enjoyed by white citizens.”

Congress overrode President Johnson's veto of this Act after a debate that hinged largely upon questions about congressional power. Congressman Bingham, whose heartfelt support for the ideals of the Civil Rights Act of 1866 could never be doubted, nevertheless opposed passage of the Act even in the face of overwhelming support in the House of Representatives because of his belief that Congress lacked the authority to take such actions.

Bingham's central role in promulgating the Fourteenth Amendment reflected his drive to eliminate all doubts regarding congressional power. To underscore this new commitment to federal power, the Civil Rights Act of 1866 was reenacted as section 18 of the Enforcement Act of 1870. The text of that act prohibited conspiracies of two or more persons which threatened a citizen's “enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States.”

In response to continuing civil rights abuses, Congress enacted the Ku Klux Klan Act of 1871 to reinforce provisions of both the Fourteenth and Fifteenth Amendments, imposing liability on persons who “under color of any law... cause... the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States.” A separate section of the same act prohibited conspiracies to deprive “any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.”

Congressman Bingham's defense of the Ku Klux Klan Act began by noting the competence of Congress to "provide by law for the better enforcement of the Constitution and laws of the United States," and then emphasized “the power of Congress to provide by law for the enforcement of the powers vested by the Constitution in the Government of the United States, both

188. Ch. 31, § 1, 14 Stat. 27.
189. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).
190. Ch. 114, § 18, 16 Stat. 140, 144.
191. Id. § 6, 15 Stat. at 141 (emphasis added).
192. For a historical account, see C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974), and WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879 (1979).
194. Id. § 2.
against individuals and States.”¹⁹⁵ The Fourteenth Amendment Equal Protection Clause meant, among other things, that no state should be allowed to “deny to any such person any right secured to him either by the laws and treaties of the United States or of such State.”¹⁹⁶ Bingham then explained how the text of the Fourteenth Amendment Privileges or Immunities Clause evolved from initial language that simply paralleled the text of Article IV, Section 2, to final language protecting the “privileges or immunities of citizens of the United States.” As Bingham explained, Article IV meant that “the State could not refuse to extend to citizens of other States the same general rights secured to its own.”¹⁹⁷ The language was changed in the Fourteenth Amendment to protect “other and different privileges and immunities,” in particular those defined by the first eight amendments to the Constitution “which were not limitations on the power of the States before the fourteenth amendment made them limitations.”¹⁹⁸ By distinguishing between rights of state citizens and rights of national citizenship, Bingham was making the same essential distinction Justice Miller adopted in Slaughter-House. The key difference, of course, was that Bingham made incorporation of the Bill of Rights an explicit element of his rationale, while Miller only impliedly accepted the doctrine of incorporation.¹⁹⁹

The first clause of the Ku Klux Klan Act of 1871 was modified in 1874 by the Committee on Revision of the Laws that had been appointed to overhaul all federal laws, and in particular to make “such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend

１９５.  CONG. GLOBE, 42d Cong., 1st Sess. app. at 81 (1871).
１９６.  Id. at 83.
１９７.  Id. at 84.
１９８.  Id.  It should be noted that in this speech, Bingham contradicted reservations he had expressed at the time when the Fourteenth Amendment was promulgated about whether there were doubts regarding congressional power to enforce all of the negative constraints on state authority included in the original text of the Constitution.  Id. at 83.
１９９.  Note that, while ratification of the Fourteenth Amendment was pending, Bingham and Miller traveled to the west coast together, and Miller frequently listened to Bingham’s rationale for the Fourteenth Amendment. See Aynes, supra note 2, at 662. Aynes believes that Miller’s opinion in Slaughter-House repudiated Bingham’s understanding of the Privileges or Immunities Clause. By contrast, I conclude that Miller and Bingham were on the same page, especially with respect to the issue of federal supremacy.
the imperfections of the original text." As reenacted, the Ku Klux Klan Act provision that eventually became 42 U.S.C. § 1983 protected United States citizens from deprivation of "any rights, privileges, or immunities secured by the Constitution and laws" of the federal government. Congress adopted two separate jurisdictional provisions, one giving district courts jurisdiction to protect "any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof," and the other giving circuit courts authority to protect "any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

Much has been made of these textual variations. The more basic point, however, is that the language which became a permanent part of federal law in 1874 tracked Justice Miller's language from the previous year. Both Congress and the Supreme Court had ruled that, regardless of any other questions about its scope, the Fourteenth Amendment protected privileges or immunities that owed their existence to the Constitution or laws of the federal government.

Jurisdictional statutes enacted subsequent to the Civil War further demonstrate this congressional understanding of "privileges or immunities" and the importance of enforcing federal statutes. The Judiciary Act of 1867 extended Supreme Court jurisdiction to cases decided by the highest courts of the various states "where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of..."

202. Id. § 563(12), 18 Stat. at 95; id. § 629(16), 18 Stat. at 111.
203. Id. § 563(12), 18 Stat. at 95.
204. Id. § 629(16), 18 Stat. at 111.
205. See, e.g., Maine v. Thiboutot, 448 U.S. 1, 6-8 (1980) (holding that state deprivation of welfare benefits protected by the Social Security Act violated the protection of 42 U.S.C. § 1983 for rights, privileges, or immunities secured by federal law); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608-12 (1979) (concluding that the district court lacked jurisdiction over Social Security Act enforcement action because the rights involved were not granted in terms of equality).
the United States."  

In 1875, Congress enacted a general federal question statute to assure that any claim based upon either the Constitution or a federal statute could be brought in federal court. Commentators note that this provision for federal jurisdiction came about after the Civil War had "reshaped the understanding of federalism and, in particular, the federal courts' role in the enforcement of civil rights." An anonymous critic in 1875 explained the federal question jurisdiction statute "as the culmination of a movement which began with the removal legislation of 1864 to strengthen the Federal Government against the states."

2. Supreme Court Precedent

The Supreme Court has repeatedly reinforced the consensus that Congress intended to protect rights based upon federal law when it promulgated the Fourteenth Amendment. Numerous litigants tried, in vain, to argue that the Privileges or Immunities Clause protected inherent, fundamental rights without reference to federal structure, constitution, or legislation. For example, in United States v. Cruikshank, the defendants had been charged with conspiring to prevent two African-Americans from exercising their right of peaceable assembly. The case did not involve government interference with individual rights, and therefore the authority to prosecute could not be based upon direct application of the First Amendment even if the Court had accepted an incorporation doctrine. The Court's ruling left broad scope for the federal government to act, and implied that the defendants could have been charged with violating federally protected privileges or immunities if the indictment had specified that the victims were assembling "for consultation in respect to public affairs.

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211. 92 U.S. 542 (1876).
212. Id. at 544-45.
213. See Newsom, supra note 169, at 714-20 (arguing that in Cruikshank the Supreme Court was again not presented with a genuine argument for incorporation of the Bill of Rights).
and to petition for a redress of grievances."\textsuperscript{214} The Court concluded, however, that on the record before it, the defendants in \textit{Cruikshank} had not violated a privilege or immunity protected by the Constitution or laws of the United States.\textsuperscript{215}

In contrast, Jersey City violated the privileges or immunities of United States citizens when it attempted to prohibit an assemblage of labor organizers. In \textit{Hague v. Committee for Industrial Organization},\textsuperscript{216} the Court's plurality opinion noted that Jersey City had interfered with rights secured by the National Labor Relations Act—a source of federal privileges or immunities.\textsuperscript{217}

Other cases conformed to \textit{Cruikshank} and \textit{Hague}. Individuals who were not members of an organized militia had no Fourteenth Amendment right to organize as a military unit; in order to claim such a right they "must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred."\textsuperscript{218} Extending the \textit{Slaughter-House} framework, state employee discharge laws,\textsuperscript{219} foreign attachment rules,\textsuperscript{220} and state inheritance laws\textsuperscript{221} all survived Privileges or Immunities Clause challenges because the underlying rights in question could not be traced to the federal government. The Supreme Court rejected repeated invitations to recognize privileges or immunities of United States citizens independent of congressional action or other national sources.\textsuperscript{222}

In contrast, Justice Miller, writing for a unanimous Supreme Court, determined that interference with the establishment of a homestead on federal land fell within the purview of federal statutes protecting the "right[s] or

\textsuperscript{214} \textit{Cruikshank}, 92 U.S. at 552-53.

\textsuperscript{215} \textit{Id.} at 556-57.

\textsuperscript{216} 307 U.S. 496 (1939).

\textsuperscript{217} \textit{Id.} at 514. In a separate opinion, Justice Stone did not reject the Court's reasoning, but he did not agree that the record of the case adequately supported the conclusion that such rights arising from the privileges or immunities of national citizenship were at issue. \textit{Id.} at 522 (Stone, J.).

\textsuperscript{218} \textit{Presser v. Illinois}, 116 U.S. 252, 266-67 (1886).

\textsuperscript{219} \textit{Prudential Ins. Co. v. Cheek}, 259 U.S. 530, 539 (1922).


\textsuperscript{221} \textit{Maxwell v. Bugbee}, 250 U.S. 525, 538 (1919).

\textsuperscript{222} As explained by Professor McGovney, "If counsel had put themselves the question, what provision or text of Federal law creates or grants this alleged privilege or immunity the vapidity of the contentions would have been immediately apparent . . . ." \textit{McGovney, supra} note 66, at 224-25.
privilege[s] secured by the Constitution or laws of the United
States."\textsuperscript{223} The Court relied on one of the same statutes in 1895
as authority to prosecute individuals who interfered with
citizen reports of internal revenue law violations.\textsuperscript{224} The Court
explained that allowing Congress to protect the rights or
privileges of national citizenship through such laws was
necessary in order to assure "the independence and the
supremacy of the national government."\textsuperscript{225}

Subsequent Supreme Court opinions reaffirmed the
understanding that the Fourteenth Amendment buttressed
national supremacy. For example, in the \textit{Selective Draft Law
Cases},\textsuperscript{226} Chief Justice White explained for a unanimous court
"how completely [the Fourteenth Amendment] broadened the
national scope of the Government under the Constitution by
caus[ing] citizenship of the United States to be paramount and
dominant instead of being subordinate and derivative."\textsuperscript{227}

3. \textit{Saenz v. Roe}

In 1999, the Supreme Court sparked renewed interest in
the Privileges or Immunities Clause, finding for the first time
in more than sixty years that the Clause provided a direct
source of constitutional authority to invalidate state laws. In
\textit{Saenz v. Roe},\textsuperscript{228} the Supreme Court ruled that the privileges or
immunities of United States citizens include the "right to
travel," and in so doing the Court protected new state residents
from discriminatory treatment. The \textit{Saenz} decision finds deep
roots in the jurisprudence of Justice Miller.\textsuperscript{229}

In the 1867 case of \textit{Crandall v. Nevada},\textsuperscript{230} decided at a
time when the Fourteenth Amendment had been promulgated
and rested in the hands of state legislators, Justice Miller
concluded for the Court that states could not impose a poll tax
on individuals traveling from one state to another.\textsuperscript{231} Miller
rejected arguments that the case had to be resolved through

\textsuperscript{223} United States v. Waddell, 112 U.S. 76, 79 (1884) (upholding the
conspiracy provision derived from the Ku Klux Klan Act of 1871).
\textsuperscript{224} \textit{In re Quarles}, 158 U.S. 532, 537-38 (1895).
\textsuperscript{225} \textit{Id.} at 537.
\textsuperscript{226} 245 U.S. 366 (1918) (upholding the national military draft).
\textsuperscript{227} \textit{Id.} at 389.
\textsuperscript{228} 526 U.S. 489 (1999).
\textsuperscript{229} \textit{Id.} at 502-11.
\textsuperscript{230} 73 U.S. 35 (1867).
\textsuperscript{231} \textit{Id.} at 48-49.
reliance on express provisions of the Constitution, holding that “[w]e are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption.” 232 Six years later, in his Slaughter-House opinion, Miller quoted extensively from Crandall, using language from that case as his first example of a privilege or immunity that owed its existence “to the Federal government, its National character, its Constitution, or its laws.” 233 From Miller’s perspective, the Fourteenth Amendment grounded the right to travel to which he had earlier referred only by implication. In Saenz, the current Supreme Court acknowledged and reaffirmed this framework. 234

Equally significant, Justice Stevens’s opinion for the Saenz Court identified those “privileges and immunities” to which newly arrived state citizens are entitled. 235 The Court noted that cases construing the Privileges and Immunities Clause of Article IV, Section 2 already protected the rights of interstate travelers to “obtain employment,” 236 “procure medical services,” 237 and “even to engage in commercial shrimp fishing” 238 on an equal footing with state residents. Upon becoming a bona fide resident, additional rights apply. As the Court explained, “[t]hat newly arrived citizens ‘have two political capacities, one state and one federal,’ adds special force to their claim that they have the same rights as others who share their citizenship.” 240 The Privileges or Immunities Clause protects the right of new state residents who complete their interstate travel to receive the welfare benefits accorded by state statute. 241

4. Recognition of Statutory Rights

The fact that Saenz is the only Supreme Court case to

232. Id. at 49 (citing The Passenger Cases, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting)).
234. Saenz, 526 U.S. at 503.
235. Id. at 502.
236. Id. (citing Hicklin v. Orbeck, 437 U.S. 518, 527-28 (1978)).
237. Id. (citing Doe v. Bolton, 410 U.S. 179, 200 (1973)).
238. Id. (citing Toomer v. Witsell, 334 U.S. 385, 398-402 (1948)).
239. Id. (citing Toomer v. Witsell, 334 U.S. 385 (1948)).
240. Id. at 504 (quoting U. S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).
241. Id. at 506-07.
directly base its ruling on the Privileges or Immunities Clause contributes to the widely accepted myth that the Clause is unimportant and, therefore, need not be included in the constitutional canon. Proponents of this argument, however, suffer from a peculiar myopia; they appreciate only those rights that originate with the Supreme Court and devalue those rights derived from federal statutes. A central premise of the *Slaughter-House* framework is that the privileges or immunities of United States citizens include those based upon federal law. As noted in the preceding discussion, the Supreme Court has emphasized this element of the doctrine, repeatedly stressing the importance of federal statutes in the creation of privileges or immunities.

To illustrate the relationship between federal statutes and the Privileges or Immunities Clause, one only has to look at the ways in which the Supreme Court has construed federal statutes designed to enforce the Fourteenth Amendment. The text of 42 U.S.C. § 1983 imposes liability on those who, under color of state law, deprive any citizen or other person "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. In keeping with *Slaughter-House* and with the historical development of the Privileges or Immunities Clause, the Supreme Court has repeatedly ruled that the scope of this statute follows from a natural reading of the text. For example, in *Maine v. Thiboutot*, the Court concluded that state deprivation of welfare benefits protected by the Social Security Act violated § 1983. In a clear reference to the historical context recounted above, the majority found "no doubt that [section] 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." In other words, this law, enacted to

242. See, e.g., Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POLY 71, 73-79 (1989) (arguing that *Slaughter-House* should be overruled while acknowledging that "it is hard, if not impossible, to privilege the readings of courts against those of thoughtful legislators").
245. 448 U.S. 1 (1980).
246. Id. at 4-8.
247. Id. at 5 (quoting Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 700-01 (1978) (concluding that municipalities are persons under § 1983)); see also Dennis v. Higgins, 498 U.S. 439, 446 (1991) (finding that rights
enforce the Fourteenth Amendment, protected privileges or immunities derived from federal statutes.

5. Academic Acknowledgment

Constitutional commentators have questioned both the wisdom and the necessity of concluding that the enforcement of federal supremacy is the Clause's primary role. Most, however, at least recognize this role as one of many. Thomas M. Cooley explained in 1880 that the Privileges or Immunities Clause protected rights such as participation in foreign and interstate commerce, benefits of postal laws, or navigation rights, "because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws."\(^{248}\) Cooley questioned the necessity of the provision, given the Supremacy Clause, but noted that the clause provided express authority for at least some principles that had previously been merely implied,\(^{249}\) and concluded that "[m]any abuses of power are forbidden more than once in the federal Constitution, under different forms of expression."\(^{250}\)

In his 1901 treatise, Judge Henry Brannon agreed with Cooley that the Privileges or Immunities Clause was not essential; it merely emphasized "pre-existing law, imbedding it in the Constitution forever, not leaving it to mere implication and court decision."\(^{251}\) He resisted tying down the substantive scope of the clause by noting that "[p]rivileges and immunities of the federal citizen may arise from new legislation, so that legislation be within the scope of national authority. This shows the futility, the danger of any infallible definition of 'privileges or immunities.'"\(^{252}\)

In 1918, Professor D.O. McGovney wrote an article

\(^{248}\) THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 245 (1880).

\(^{249}\) Id. at 248 (citing, as an example, the right to visit the national capital).

\(^{250}\) Id.

\(^{251}\) HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 62 (1901).

\(^{252}\) Id. at 64.
summarizing the privileges or immunities doctrine.\textsuperscript{253} The Association of American Law Schools formally recognized McGovney's article twenty years later as one of a collection of essays considered to have "permanent value."\textsuperscript{254} McGovney concurred with his predecessors that the text of the Privileges or Immunities Clause, as authoritatively construed, simply reinforces federal supremacy. To capture the essence of the doctrine, he paraphrased the clause to read: "No State shall make or enforce any law which shall abridge any privilege or immunity conferred by this Constitution, the statutes or treaties of the United States upon any person who is a citizen of the United States."\textsuperscript{255} He subsequently explained that, to understand the scope of the clause, counsel must ask "what provision or text of Federal law creates or grants this alleged privilege or immunity."\textsuperscript{256}

Recent writers underscore the relationship between the Privileges or Immunities Clause and federal supremacy, even if by doing so they do not appear to consider either the reasons for, or the consequences of, that interpretation. For example, Todd Zubler dismisses the Privileges or Immunities Clause as a source of protection for the right to travel by explaining that "[u]nder \textit{Slaughter-House}, the Privileges or Immunities Clause has no independent function, except as an alternative to using the Supremacy Clause."\textsuperscript{257} In their effort to provide an authoritative statement of constitutional doctrine on behalf of the Congressional Research Service, Johnny H. Killian and George A. Costello echoed this assessment, explaining that \textit{Slaughter-House} reduced privileges or immunities to "a superfluous reiteration of a prohibition already operative against the states."\textsuperscript{258} References like these reveal the lack of contemporary connection to reasons why, following the Civil War, establishing the paramount status of national citizenship seemed so important.

\textsuperscript{253} McGovney, \textit{supra} note 66.
\textsuperscript{254} 1 ASS'N OF AM. LAW SCH., SELECTED ESSAYS ON CONSTITUTIONAL LAW v (1938).
\textsuperscript{255} McGovney, \textit{supra} note 66, at 220.
\textsuperscript{256} \textit{Id.} at 225.
\textsuperscript{258} \textit{THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION} 1569 (Johnny H. Killian & George A. Costello eds., 1996).
E. ASSESSING THE SCOPE OF PRIVILEGES OR IMMUNITIES PROTECTION

Supreme Court cases, congressional actions, and constitutional commentary all reinforce the conclusion that federal statutes are a significant source of privileges or immunities. They do not, however, necessarily determine which laws belong within the scope of this protection. Commentators have identified two possible limitations of this scope: They ask first, whether the clause applies only to legislation narrowly targeted to protect United States citizens, and second, whether it should be limited by judicially conceived standards of "fundamental" rights. Justice Miller's opinion in Slaughter-House provides a point of departure for answering both of these questions.

1. Citizenship

Professor McGovney used Justice Miller's opinion to explain why United States citizenship could not logically be seen as a confining element of that federal legislation authorized by the Privileges or Immunities Clause. McGovney noted that non-citizens share in more than half of Miller's illustrations. The right to peaceably assemble, to petition for redress of grievances, and the privilege of the writ of habeas corpus apply to all persons, and are not limited to citizens. Similarly, the right to travel from one state to another, reiterated by the current Supreme Court in Saenz v. Roe, will not lose its status as a privilege or immunity of United States citizens if shared by resident aliens. The conclusion reached by McGovney, and the only conclusion consistent with judicial precedent, is that the privileges or immunities of a United States citizen include rights "conferred upon him by national law, whether it is conferred upon him because he is a citizen, or because he is a human being. . . . [I]t is none the less a privilege 'of citizens of the United States' that others have the same privilege."

This interpretation of privileges or immunities also helps to explain why the text of the Clause restricts its application to

259. See, e.g., McGovney, supra note 66, at 232-42.
260. Id. at 238-42.
261. Id. at 238.
262. Id. at 238 n.42.
263. Id. at 240-41.
citizens, while the Due Process and Equal Protection Clauses apply to all persons. The distinction follows directly from the understanding that privileges or immunities are rooted in other sources of positive law. Aliens do not necessarily enjoy all of the same benefits of domestic legislation as citizens. If federal statutes establish privileges or immunities, then it follows that the benefits guaranteed by that positive law might be limited to United States citizens. Reference to citizenship recognizes both the responsibility and the discretion vested with Congress.264

2. Fundamental Rights

In significant part, confusion surrounding the argument that the Privileges or Immunities Clause protects only “fundamental” rights can be traced back to Justice Washington’s Corfield opinion.265 Grounding his conclusion that non-residents cannot claim an interest in the common property of a state, Washington declared that Article IV, Section 2 should be confined to “those privileges and immunities which are, in their nature, fundamental.”266 Justice Thomas, in dissent, seized on this language to suggest the need to identify an exclusive list that would not include “every public benefit established by positive law.”267 The long history of references to privileges and immunities in the centuries preceding adoption of the Fourteenth Amendment, however, contradicts the view that the phrase only encompassed a limited list of specific rights. The alternative message, articulated by Justice Washington and consistent with common usage at the time,268 was that the list in Corfield was only a beginning. Washington emphasized that “privileges and immunities” included “the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”269 He

264. An illustration of the reasons for allowing this flexibility can be found in the federal patent law enacted in 1870 in which Congress restricted the “privilege” of patents to United States citizens or to a resident alien who “made oath of his intention to become a citizen.” Act of July 8, 1870, § 40, 16 Stat. 204 (1870); see also infra text accompanying notes 316-21.
266. Id. at 551.
268. For a more complete account of broad references to privileges and immunities in years prior to the enactment of the Fourteenth Amendment, see Rich, supra note 17, at 240-49.
269. Corfield, 6 F. Cas. at 551-52.
concluded his long and general list with a reference to “[t]hese, and many others which might be mentioned.”

Another source of confusion for Justice Thomas may have been the Supreme Court opinion in *Twining v. New Jersey*, which rejected arguments that the Fifth Amendment privilege against self-incrimination could be applied to the states by virtue of either the Privileges or Immunities Clause or the Due Process Clause. The holding in that case has obviously been overruled. In dictum, the Court gave a grossly distorted account of the holding in *Slaughter-House*: “Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States.” To illustrate the error of this account, consider the *Twining* Court’s inclusion of the “right to enter the public lands” on the short list of privileges or immunities. There is, of course, no such inherent right. Congress determines whether to make federal lands open to the public, and the Homestead Act transformed the right to enter public lands into a privilege or immunity of United States citizens. In reaching that conclusion, Justice Miller explained that “[n]o such right exists or can exist outside of an act of Congress.” In subsequent cases and commentary, federal legislation became the key to unlocking protection of the Privileges or Immunities Clause.

Justice Miller grasped the breadth of such rights, noting in *Slaughter-House* that the scope of privileges and immunities defined in *Corfield* “embraces nearly every civil right for the establishment and protection of which organized government is instituted.” Justice Clifford made essentially the same point

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270. *Id.* at 552.
271. 211 U.S. 78 (1908).
272. *Id.*
273. *See, e.g., Malloy v. Hogan, 378 U.S. 1, 6 (1964)* (establishing state defendant’s rights to freedom from compulsory self-incrimination). For an account of the way in which Supreme Court opinions misinterpreted *Slaughter-House* and thereby rejected arguments for incorporation, see *Wildenthal, supra* note 170.
274. *Twining*, 211 U.S. at 97 (citation omitted).
275. *Id.* (citing United States v. Waddell, 112 U.S. 76 (1884)).
277. *See McGovney, supra* note 66, at 220 (“Amendment XIV . . . has to do with privileges and immunities created by national law.”).
278. The *Slaughter-House Cases*, 83 U.S. 36, 76 (1873).
two years later when he explained that “[v]aluable rights and privileges, almost without number, are granted and secured to citizens by the Constitution and laws of Congress.” Judicial interpretation of 42 U.S.C. § 1983 reinforces this point. The Supreme Court has rejected arguments that privileges or immunities protected by that statute should be limited to a short or exclusive list. In reaching that conclusion, none of the justices contended that the Fourteenth Amendment had a more limited scope than the broad enforcement language chosen by Congress.

Justice Thomas concluded his dissent in *Saenz* by emphasizing the importance of avoiding “the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the ‘predilections of those who happen at the time to be Members of this Court.’” With this language, Justice Thomas identified a legitimate concern, one entirely consistent with Justice Miller’s admonition that the Court must avoid becoming a “perpetual censor” of all state legislation. The Privileges or Immunities Clause did not empower judges to pick and choose based upon their own conceptions of “fundamental rights.” The solution arrived at by Justice Miller—who sought substance from the constitution, structure, and laws of the federal government—continues to be the best resolution of this dilemma consistent with historical authenticity, democratic theory, and judicial restraint.

3. The Test for Privileges or Immunities

Additional questions about the scope of statutory privileges or immunities could lead to extensive debate, were it not for the fact that the Court has already addressed this issue. After the justices decided, in *Maine v. Thiboutot*, that Congress meant to provide a broad remedy for violations of federal rights when it enacted the Civil Rights Act of 1871, they explained that

283. 448 U.S. 1 (1980).
invoking the law required convincing the courts that the aggrieved party has a “right secured” by federal law. The justices refined and clarified that requirement in *Golden State Transit Corp. v. City of Los Angeles*, upholding rights conferred by the National Labor Relations Act and identifying a three-part test to determine the scope of liability under § 1983. To wit, rights, privileges, or immunities have been established by federal statutes if: (1) the law establishes binding obligations; (2) the interest is not too “vague and amorphous” for judicial enforcement; and (3) the person claiming the right was an intended beneficiary of the federal law.

Supreme Court decisions construing § 1983 reveal the authority of Congress to enforce privileges or immunities. Whenever federal statutory rights have been enforced against recalcitrant states, courts have implicitly accepted and applied the Privileges or Immunities Clause. One may argue that, by protecting such statutory rights, 42 U.S.C. § 1983 does nothing more than reinforce the Supremacy Clause. Understood in its historical context, however, that role rests squarely within the Fourteenth Amendment vision of Congressman Bingham and Justice Miller.

II. RECONSIDERING THE CONSTITUTIONAL CANON

A review of the background of the Privileges or Immunities Clause illustrates several basic points. Those who framed the Fourteenth Amendment understood that they reinforced federal supremacy, protected individual rights secured by national legislation, and eliminated claims of state authority to nullify federal statutes. Both the Supreme Court and Congress subsequently reiterated this understanding. In the pages that follow, this Article will explain why this element of

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286. Id. at 106.
287. Id.
288. See id. (citing Pennhurst, 451 U.S. at 19).
289. See id. (citing Wright v. Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 431-32 (1987)).
290. See supra notes 109-26 and accompanying text.
291. See supra notes 168-83, 207-46 and accompanying text.
constitutional law should now be taken seriously. Where Part I described the “what,” Part II explains the “why.”

Giving due respect to the Privileges or Immunities Clause leads to a robust and coherent understanding of the Constitution. It establishes an approach to federalism in accord with the sense of nationhood and democracy embraced by the Civil War Amendments to the Constitution. It provides a constitutional structure for recognizing positive as well as negative legal rights. It also allocates appropriate institutional responsibility to Congress and the courts, respectively, for development and preservation of those rights. Finally, it does all of this within the confines of existing constitutional doctrine.

A. CLARIFYING STATE AND FEDERAL RELATIONSHIPS

1. Commitment to Nationhood

The Civil War Amendments changed the relationship between state and federal citizenship, putting to rest arguments about the supremacy of state sovereignty. Contemporary analysis of federalism, however, often focuses upon 1787 perspectives without taking seriously the commitment to national citizenship that became a part of our Constitution in 1868. Understanding the Privileges or Immunities Clause will help to reverse the flow of constitutional doctrine that currently propels us towards an eighteenth-century conception of federalism.

The importance of the issue of federal power to those who framed the Fourteenth Amendment merits elaboration. George Fletcher has explained that the constitutional amendments ratified following the Civil War embraced three fundamental values: nationhood, equality, and democracy. In Fletcher’s words, the “least appreciated” of these postbellum guiding values is the “commitment to nationhood.” As he describes it, a “more powerful central government was a critical part of

292. See, e.g., Trisha Olson, The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment, 48 ARK. L. REV. 347, 393 (1995) (noting that “[b]y the 1840s, national citizenship was a topic in all political camps, and its relevance extended beyond the slavery issue”). Olson argues that principles of natural law were attached to the prevailing conception of national citizenship. Id. at 392-93.
293. FLETCHER, supra note 33, at 57.
294. Id.
the new constitutional order," with its concomitant authority to raise income taxes, enact welfare legislation, and protect and secure individual autonomy.\textsuperscript{295}

Few, if any, writers have disagreed with the proposition that the Privileges or Immunities Clause reinforced federal supremacy. Some have suggested that this supremacy function could not have been the sole, or even primary, role intended by framers of the Clause.\textsuperscript{296} Such comments should be accorded their due. I readily agree that the Privileges or Immunities Clause was intended to do more than simply reinforce federal supremacy. As previously noted,\textsuperscript{297} I agree with those who argue for incorporation, and that other inherent rights, such as the right to travel, gained textual support from that clause. I would also highlight, however, the fundamental importance of federal supremacy to those who promulgated the Fourteenth Amendment.

As explained on the floor of Congress, the Fourteenth Amendment's clear establishment of federal supremacy did not really change the structure of the Constitution as Bingham and others believed it should have been understood.\textsuperscript{298} In particular, it did not expand the substantive scope of federal power; Congress must still identify an independent source of constitutional authority for its actions. Reinforcing federal supremacy, however, meant that Congress had unquestioned authority to enforce federal statutes in all states and to require state compliance with those statutes.


\textsuperscript{296} Justice Field may have been the first person to make this argument with his dissenting opinion in the \textit{Slaughter-House Cases}, noting that the "supremacy of the Constitution and the laws of the United States always controlled any State legislation." 83 U.S. 36, 96 (1873).

\textsuperscript{297} See supra text accompanying notes 59-60.

\textsuperscript{298} Note that Congressman Bingham presumably believed that the states should have always been constrained by the Bill of Rights, and promulgated the Fourteenth Amendment in part to reverse the Supreme Court rejection of that argument in \textit{Barron v. Baltimore}, 32 U.S. 243, 249 (1833). See CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866). As a result, arguments that the Fourteenth Amendment did not "change" the federal structure were not inconsistent with a belief that the Fourteenth Amendment incorporated the Bill of Rights.
2. Recent Supreme Court Decisions

The consensus in both case law and commentaries that the Privileges or Immunities Clause reinforced federal supremacy seemed unremarkable prior to a recent series of Supreme Court decisions. In *Seminole Tribe of Florida v. Florida*, the Court, by a vote of five to four, ruled that the Indian Gaming Regulatory Act could not be enforced directly against a state. In reaching that conclusion, the Court resolved a festering dispute regarding congressional authority to abrogate the Eleventh Amendment when it acted pursuant to its Article I powers. This 1996 decision marked the first time that the Court had ruled against Congress on this point.

The Court's failure to address possible arguments based upon the Privileges or Immunities Clause when deciding *Seminole Tribe* might be explained on several levels. Most obviously, the petitioners did not argue for, and failed to even discuss the possibility of, a statutory cause of action based upon 42 U.S.C. § 1983. One might excuse that failure by acknowledging ambiguity surrounding whether the privileges or immunities of United States citizens should protect the gambling rights of an Indian tribe, in spite of the Supreme Court's broad construction of § 1983. In a more fundamental sense, however, the failure to present privileges or immunities arguments reflected the unfortunate view that had prevailed for several generations—that such claims were unimportant. For more than one hundred years, no one had seriously questioned the supremacy of legitimate federal legislation, and our ability to appreciate the need to reinforce supremacy had all but disappeared.

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300. Id. at 47.
301. In *Seminole Tribe*, the Court reversed course, overruling a disputed plurality opinion in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), in which the Court upheld congressional power to abrogate the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 72. In a strained reading of federal statutes, the Court also reasoned that alternative remedial provisions in the federal law precluded injunctive relief despite the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Seminole Tribe*, 517 U.S. at 73-75.
303. See *Maine v. Thiboutot*, 448 U.S. 1, 6-7 (1980) (concluding that a § 1983 cause of action could be used to vindicate rights based upon all federal law and not just civil rights law).
While we may easily excuse the failings of the court and the litigants to address the Privileges or Immunities Clause in 1996, that failure becomes more difficult to defend in subsequent cases after lawyers had received both notice of the issues and the time to consider them. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court was asked to block enforcement of the Patent Remedy Act, which had been recently amended to explicitly authorize private actions against state agencies. To support the argument that Congress could not directly rely upon Article I as a basis for abrogating state immunity, the Court mechanically applied its holding in *Seminole Tribe*. Because the power of Congress to protect patent rights predated the Eleventh Amendment, the Court held, those rights were subject to the restrictions of that amendment and could not be abrogated by Congress.

In *Florida Prepaid*, plaintiffs presented the Court with a second reason why Congress could abrogate the Eleventh Amendment, arguing that state violation of patent rights constituted a violation of due process rights, and section 5 of the Fourteenth Amendment had empowered Congress to remedy such violations. The Court majority, however, rejected that argument, not because it lacked theoretical support, but rather because, when Congress provided for enforcement of the Patent Remedy Act against the states, it lacked “evidence that unremedied patent infringement by States had become a problem of national import.”

The test used by the Court to determine the scope of permissible remedies for due process violations had been

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304. In fairness to the lawyers who participated in *Seminole Tribe*, it should be noted that all of the decisions in which the Court has blocked congressional authority to abrogate the Eleventh Amendment arose prior to the *Seminole Tribe* decision.
307. *See* 35 U.S.C. § 296(a) (2000) (providing that “[a]ny State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity”).
309. *Id.* at 636.
310. *Id.*
311. *Id.* at 641.
introduced in 1997 in the case of City of Boerne v. Flores. In that case, the Court had asserted primary responsibility for determining the scope of the Bill of Rights. When the justices applied that ruling to patent legislation, they found the federal law "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Asserting its independent authority to construe the Due Process Clause, the Court concluded that congressional action had been disproportionate to the scope of the problem caused by state patent infringements.

The Court reached its decision in Florida Prepaid in spite of the fact that patent rights constitute quintessential federal privileges or immunities when viewed in light of the historical roots of that concept. In 1870, Congress overhauled its intellectual property legislation. The legislation generally reserved patent rights to United States citizens, providing that "an alien shall have the privilege herein granted, if he shall have resided in the United States one year . . . and made oath of his intention to become a citizen." Courts in that era commonly and repeatedly referred to the "privilege" secured by federal patents.

When Justice Miller distinguished state and federal privileges or immunities in the Slaughter-House Cases, he emphasized the need to show a basis in the Constitution or in federal statutes to establish the latter. In Florida Prepaid, litigants could have conceivably pointed to both sources, since

313. Id. at 524.
314. Fla. Prepaid, 527 U.S. at 646 (quoting Boerne, 521 U.S. at 532).
315. Id. at 647.
316. See Act of July 8, 1870, ch. 230, 16 Stat. 198 (revising, consolidating, and amending the statutes relating to patents and copyrights).
317. Id. § 40 (emphasis added). The same act also reserved trademark rights to those domiciled in the United States or in a "foreign country which by treaty or convention affords similar privileges to citizens of the United States." Id. § 77 (emphasis added).
318. See, e.g., Russell v. Place, 94 U.S. 606, 607 (1876) (referring to the "ordinary form of such actions for infringement of the privileges secured by a patent"); Fuller v. Yenter, 94 U.S. 288, 289 (1876) (referring to "the exclusive privilege secured to him by the letters-patent"). aff'd, 94 U.S. 299 (1876).
320. See id. at 79 (suggesting that some privileges and immunities "owe their existence to the Federal government, its National character, its Constitution, or its laws").
the Constitution explicitly empowers Congress to secure "to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," and the Patent Remedy Act embodies that authority. Furthermore, federal law precludes states from independently recognizing or enforcing patent rights in that federal courts provide an exclusive forum for resolving intellectual property disputes. Few rights established by federal law could more clearly satisfy the standards set forth by Justice Miller in the Slaughter-House Cases. No principled distinction can be made between the protection of intellectual property on one hand, and the federal homestead rights the Supreme Court has recognized as privileges or immunities of United States citizens on the other. The Court, however, was never asked to make that distinction, because litigants ignored any arguments based upon the Privileges or Immunities Clause.

In Kimel v. Florida Board of Regents, the Supreme Court ruled that Congress could not abrogate state Eleventh Amendment immunity when it authorized a private cause of action to enforce the Age Discrimination in Employment Act (ADEA). The pattern of the Court's decision paralleled the analysis in Florida Prepaid. The distinguishing question in this case was whether age discrimination could be considered a violation of the Equal Protection Clause or, in other words, whether the federal law could be premised on congressional authority to remedy violations of that clause. In her opinion for the Court, Justice O'Connor noted that age discrimination only triggered rational basis review of equal protection claims, and that state age classifications generally satisfied that minimal standard. O'Connor concluded that the ADEA could not be enforced against a state agency through a private cause of action for monetary damages, because the federal law

321. U.S. CONST., art. 1, § 8, cl. 8.
324. See United States v. Waddell, 112 U.S. 76, 79 (1884) (recognizing that through making a homestead in accordance with federal laws, a person "acquired a patent or title in fee to the land").
326. Id. at 91.
327. See id. at 66-67.
328. Id. at 84 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979)).
329. Id. at 84.
failed the *City of Boerne v. Flores* 330 test for "congruence and proportionality." 331

One year later, the Court reinforced this conclusion in *Board of Trustees of the University of Alabama v. Garrett*. 332 After Patricia Garrett underwent a lumpectomy, radiation treatment, and chemotherapy for treatment of her breast cancer, she sought to resume work as a director of nursing at the University of Alabama. 333 She then learned that, because she needed to schedule time for her treatments, she would have to give up her director's position. 334 When she sued for relief under the Americans with Disabilities Act (ADA), Garrett was told that the Eleventh Amendment barred her claim for monetary damages against a state agency. 335 As in *Kimel*, the litigants and the *Garret* Court restricted their Fourteenth Amendment analysis to whether congressional action could be based upon application of equal protection doctrine. 336 The majority ruled that, as in the case of age discrimination, mere rational basis review governed cases of state discrimination against individuals with disabilities, 337 and, in spite of an extensive record of discrimination against persons with disabilities, 338 the ADA failed the test for "congruence and proportionality." 339

Chief Justice Rehnquist's opinion in *Garrett* explicitly noted that the majority did not question Congress's Article I authority to enact the ADA or to prescribe standards to which

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331. *Kimel*, 528 U.S. at 82-83 (quoting *Boerne*, 521 U.S. at 520). Justice O'Connor concluded her opinion by advising litigants to seek relief on the basis of state age discrimination statutes which could be found "in almost every State of the Union." *Id.* at 91-92 (citing statutes from forty-eight states). She ignored the fact that at least two of the parties to the consolidated litigation before the Court were from Alabama, a state not included in her list of states with protective legislation. *Id.* at 69, 91. It seems remarkable that forty-eight states viewed the problem of age discrimination so seriously as to warrant protective legislation, but Congress was precluded from passing protective legislation for individuals from those two states that failed to provide protection.
333. *Id.* at 362.
334. *Id.* at 365.
335. *Id.* at 374.
336. *Id.* at 366-67 (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985)).
337. *Id.* at 381-82 (Breyer, J., dissenting).
338. *Id.* at 372 (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).
states must acquiesce. The majority explained that ADA “standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*.“ Garrett could not recover money damages because equal protection doctrine could not be stretched to include the anti-discrimination provisions of the ADA. In the absence of a Fourteenth Amendment basis for its action, Congress could not abrogate the Eleventh Amendment by allowing individuals to sue states for monetary relief.

In *Alden v. Maine*, the Supreme Court went one step further to limit individual enforcement of federal law against state agencies, finding, “consistent with the views of the leading advocates of the Constitution’s ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.” As a result, the Fair Labor Standards Act could not be enforced by suits for monetary damages commenced in state courts. Erwin Chemerinsky, a leading figure among scholars who have criticized the Court’s opinion in *Alden*, notes the ambiguous silence of the framers on the issue of state sovereign immunity. He questions why the Supreme Court majority, in light of that ambiguity, should place higher value on protecting state treasuries than on providing a remedy for the victims of unlawful state action.

To Professor Chemerinsky’s question, I would add another: Why should the analysis of this issue leap from the undocumented beliefs held by some in 1787 to the present-day conclusion that our constitutional structure inherently protects state sovereign immunity? Assumptions about the application of federal law to state sovereigns were directly questioned in the years leading up to the Civil War, and explicitly answered in the Fourteenth Amendment of 1868. At the time when

340. *Id.* at 374 n.9.
341. *See id.* at 374.
342. *Id.* at 363-64.
344. *Id.* at 728.
345. *Id.* at 759-60.
347. *Id.* at 1298.
348. *See supra* notes 86-124 and accompanying text.
states were asked to ratify the Fourteenth Amendment, everyone understood that the Privileges or Immunities Clause established the supremacy of national citizenship. Subsequent writers, citing the Supremacy Clause, asked why federal supremacy needed reinforcement. The United States Supreme Court appears to have finally answered the question that others forgot to ask.

Within its recent decisions, the Supreme Court reaffirmed the rule that the Fourteenth Amendment overrides the Eleventh Amendment, and that if congressional power has been properly grounded in the Fourteenth Amendment, then claims to state sovereign immunity collapse. Chief Justice Rehnquist, who authored the majority opinion in Garrett, stressed that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of [section] 5 of the Fourteenth Amendment."\(^3\)\(^4\)\(^9\) In other words, if congressional action could have been based upon the Fourteenth Amendment, Patricia Garrett would have been entitled to relief.

Throughout their opinions, however, the justices never mentioned the Privileges or Immunities Clause. Nor did advocates who sought to enforce the federal law identify their clients' rights as privileges or immunities of United States citizens. Their collective lapse can be understood by reference to the constitutional canon. The current generation of lawyers and judges has been trained to ignore the Privileges or Immunities Clause. This ignorance does not reflect a lack of clarity in the constitutional doctrine that privileges or immunities encompass federal legislation, but rather confirms an assumption that privileges or immunities are unimportant.\(^3\)\(^5\)\(^0\)


350. Failure to present the Court with arguments that the Privileges or Immunities Clause governed its decision is not unique to these recent cases. A remarkably similar historical path recently was traveled by lawyers who initially failed to recognize the importance of the Privileges or Immunities Clause. Generations of lawyers had been trained to ignore that provision of the Constitution. In 1919, the Court distinguished between "residence" and "citizenship," holding that Article IV protection only applied to the latter. See La Tourette v. McMaster, 248 U.S. 465, 469-70 (1919) (upholding a South Carolina law imposing a two-year residency requirement on licensed insurance brokers). Due to the doctrine that developed pursuant to this holding, protections of Article IV virtually disappeared from the constitutional canon. States could easily express their laws in terms of residency...
Reviewing the history and text of the Fourteenth Amendment provides a lesson about federalism that many citizens seem to have forgotten. Approximately 500,000 Americans died in the Civil War, and the amendments to the Constitution following that conflict should not be taken lightly. Contemporary advocates for states' rights need to understand that slavery was not simply a case of "bad facts," and that 1868 saw an important reassertion of federal supremacy. In a speech commemorating the centennial of the Constitution, Justice Miller emphasized the unmistakable lesson of the Civil War that "those who believed the source of danger to be in the strong powers of the Federal Government were in error, and that those who believed that such powers were necessary to its safe conduct and continued existence were in the right." This lesson does not mean that courts must give a blank check to Congress when asked to determine whether a federal action falls within a legitimate realm of action. The Supreme Court requires that, if Congress intends to abrogate state immunity, it must pass the "simple but stringent test" of requirements rather than state citizenship. The Supreme Court reversed this course in 1975, see Austin v. New Hampshire, 420 U.S. 656, 665-66 (1975) (striking down a New Hampshire commuters' tax), but because historical success with the Privileges or Immunities Clause had been so limited, lawyers challenging employment laws that discriminated against out-of-state residents generally relied upon the Commerce Clause rather than Article IV. For example, Boston lawyers learned in 1983 that the dormant Commerce Clause did not protect employees who were discriminated against by a Boston hiring preference for contractors who employed city residents. See White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 205-06 (1983). Just one year later, however, the Supreme Court reached quite a different conclusion when plaintiffs challenged a Camden ordinance comparable to that of Boston. See United Bldg. & Constr. Trades Council of Camden County v. Mayor of Camden, 465 U.S. 208, 222-23 (1984). Unlike in White, the Court held that the "market participant exception" did not apply to Article IV, id. at 220, and concluded that "Camden's ordinance discriminates against a protected privilege," id. at 222. These cases teach the lesson that attorneys should think outside of the traditional canons to determine which arguments may be important. See 2 ANTIEAU & RICH, supra note 17, at 242 (warning that "[w]hile much remains for future development of this body of law, lawyers now ignore these provisions at their peril").


“making its intention unmistakably clear in the language of the statute.” When Congress meets that test, however, courts should defer to congressional development of privileges or immunities much as they would defer to all other legislative development of the positive law.

Americans adopted the Fourteenth Amendment to eliminate arguments that proponents of state sovereignty could rely upon “states’ rights” to diminish the privileges or immunities of United States citizens. In this era of “cooperative federalism,” expectations of federal government protection no longer fit within the narrow categories imagined by some Supreme Court justices. As understood and respected at least until 1996, we should rely primarily upon the political process to establish our privileges and immunities and to balance the respective interests of state and national governments.

B. BALANCING NEGATIVE AND POSITIVE RIGHTS

A reversal of trends in the federalism doctrine could be the most obvious outcome of recognizing the Privileges or Immunities Clause, but it might not be the most profound. Expanding the constitutional canon will also modify the way we think about the nature of constitutional rights. Constitutional scholars have promoted clashing theories in this regard. “Liberal” theorists emphasize the fundamental importance of negative constraints upon government, while “republican” or “progressive” theorists counter that government has an affirmative obligation to sustain a good and just society. The


357. See Lopez, 514 U.S. at 580-83 (Kennedy, J., concurring) (making the anachronistic argument that education should be kept within the realm of state rather than federal responsibility). See generally Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 YALE L.J. 619 (2001) (critiquing the Court’s categorical approach to federalism).

358. Justice Kennedy acknowledged this point in his concurring opinion in Lopez, noting “it is axiomatic that Congress does have substantial discretion and control over the federal balance.” Lopez, 514 U.S. at 577.

359. See, e.g., Robin West, Rights, Capabilities, and the Good Society, 69
privileges or immunities doctrine changes the contours of this debate. Traditional constitutional doctrine generally reserves the language of "rights" for negative constraints on government action.\textsuperscript{360} The First Amendment begins with the words, "Congress shall make no law."\textsuperscript{361} Each element of the Bill of Rights imposes limits on the government, and the "state action doctrine" circumscribes the Equal Protection and Due Process Clauses of the Fourteenth Amendment.\textsuperscript{362} Invidious action by one private individual against another does not trigger a claim for constitutional protection.\textsuperscript{363} For example, when a social worker failed to remove a child from an abusive environment, her inaction did not violate the child's constitutional rights, because the Due Process Clause does not generally impose a positive requirement upon government officials to take protective action.\textsuperscript{364} Such examples illustrate the rule that prevailing constitutional doctrine builds upon negative rights theory.

From an alternative perspective, however, the government also owes positive obligations to members of society. A progressive constitution guides us to understand what government should do—not just what it should be barred from doing. A "good society" ensures "for its citizens the minimum material preconditions of a decent life."\textsuperscript{365} Recognizing the Privileges or Immunities Clause enables us to locate this conception of society within existing doctrine.

1. Traditional Views of Privileges or Immunities

In debates about the positive or negative nature of

\textsuperscript{360} See, e.g., Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (commenting that "the Constitution is a charter of negative rather than positive liberties").

\textsuperscript{361} U.S. CONST., amend. I.

\textsuperscript{362} See United States v. Morrison, 529 U.S. 598, 621 (2000) (holding that the Fourteenth Amendment only prohibits state action); The Civil Rights Cases, 109 U.S. 3, 18 (1883) (holding that legislation by Congress enforcing the Fourteenth Amendment must be aimed at correcting state actions).

\textsuperscript{363} See Civil Rights Cases, 109 U.S. at 11 (stating that "[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment").

\textsuperscript{364} DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189, 201-03 (1989).

\textsuperscript{365} West, supra note 359, at 1901.
constitutional rights, existing privileges or immunities doctrine either has been neglected or scorned. Advocates of using the Privileges or Immunities Clause to incorporate the Bill of Rights usually cite the Clause as a preferable mechanism for applying traditional negative constraints upon states. Literature devoted to that issue generally ignores the distinction between negative and positive rights or the prospects for using that doctrine to promote a more progressive interpretation of the Constitution.

Within the positive rights literature, the Privileges or Immunities Clause has at times been treated with the benign neglect consistent with an assumption that, because the clause is not a part of the normal canon, it does not require explanation and need not be considered. An example of this treatment can be found in Robin West’s book about “progressive constitutionalism,” which she begins by quoting from the Fourteenth Amendment: “No state shall . . . deprive any person.” West skips over the Privileges or Immunities Clause, and leaves it out of an entire text devoted to reconstructing the Fourteenth Amendment. Professor West goes to great lengths to argue that the Equal Protection and Due Process Clauses should be interpreted to encompass positive government obligations to guarantee liberty and freedom. In making this argument, she challenges the prevailing constitutional canon that limits equal protection and due process doctrine to their characteristic negative applications. Unfortunately, however, she never questions the part of the canon that presumes the unimportance of privileges or immunities.

Some critics who embrace the positive rights agenda have argued that the Privileges or Immunities Clause could have been the source of such rights, but blame the Supreme Court—

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366. Cf. Curtis, supra note 12, at 1149-50 (noting both the positive role a more extensive use of the Privileges or Immunities Clause would have on full incorporation of the Bill of Rights and the Clause’s original understanding as setting limits on state powers).
367. The reader will note that this phenomenon is sadly circular. That circularity, however, is not inescapable; the conception of the Privileges or Immunities Clause that this Article proposes provides a means of overcoming this cycle.
369. Id.
370. Id. at 105-51.
and in particular the *Slaughter-House Cases* decision—for failing to acknowledge those rights and leading the nation down the barren, negative rights path.\(^{371}\) Ample history, bestowed upon us by both debates and the legislative record, supports the belief that a postbellum Congress envisioned a federal government responsible for promoting a broadly construed public welfare.\(^{372}\) Unfortunately, we have generally accepted the myth that the Supreme Court “dropped the ball” by failing to independently construe the Privileges or Immunities Clause as a repository of such rights, thereby forcing us to accept an account of the Constitution that respects only the negative constraints on government. That myth continues to obscure the reality.

2. Recognizing Privileges as Rights Granted by Law

The Privileges or Immunities Clause should be considered the repository of positive rights, but only in a limited sense. Placement within that clause does not occur through independent judicial discovery. Rights to protection, to work, to subsistence, or to independence take on only the substance that can be otherwise derived from the Constitution, structure, or laws of the federal government. At least some of those who participated in framing the Privileges or Immunities Clause understood this distinction. For example, when the United States Senate debated promulgation of the Fifteenth Amendment, Senator Frelinghuysen, a New Jersey Republican who had participated in drafting the Fourteenth Amendment,
explained why the "right" to vote had not been protected by the Privileges or Immunities Clause. He noted that the Fourteenth Amendment "makes no provision for rights by that name; a privilege is a different thing from a right. It is a right granted by law."373

Critics have characterized this conception of privileges or immunities as "completely nugatory and useless."374 Before accepting such views at face value, however, we need to consider the content of the "rights granted by law" that Congress developed in the century following Senator Frelinghuysen's statement, and we need to compare those rights to the progressive constitution advocated by critics of a constitutional doctrine built solely upon negative constraints.

Robin West identifies several depictions of the "good society" envisioned by proponents of positive rights. At a minimum, government has an "instrumental" obligation to ensure some basic level of material goods for its citizens.375 A second conception, which West describes as "welfarist," adds to the instrumental analysis a state obligation to "do whatever it takes to provide that minimal level of well-being to each of its citizens" in order to protect basic human dignity.376 Still another perspective obligates a "decent and liberal state in a good society" to "ensure that citizens achieve and enjoy certain fundamental human capabilities . . . including the capability to live a safe, well-nourished, productive, educated, social, and politically and culturally participatory life of normal length."377 These alternative conceptions of positive rights all fall within a familiar spectrum that has deep historical roots. Remember the words used by Justice Washington when he identified the privileges and immunities protected by Article IV, Section 2 of the Constitution: "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and

373. CONG. GLOBE, 40th Cong., 3d Sess. 980 (1869).
374. CROSSKEY, supra note 7, at 1119.
375. See West, supra note 359, at 1901 (citing MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 329-38 (1996)).
376. Id. at 1902 (citing Frank I. Michelman, Constitutional Welfare Rights: One View of Rawls' Theory of Justice, 121 U. PA. L. REV. 962 (1973)).
377. Id. (citing MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 75-83 (2000); Aamartya Sen, Rights as Goals, in EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE 11, 16-19 (Stephen Guest & Alan Milne eds., 1985)).
safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."^378

When Justice Miller spoke for the Supreme Court in the *Slaughter-House Cases*, he deferred to Justice Washington’s basic definition of privileges and immunities, noting that it “embraces nearly every civil right for the establishment and protection of which organized government is instituted.”^379 The meaning of the terms “privileges” and “immunities” did not change when they were repeated in the Fourteenth Amendment. The challenge Miller faced was to distinguish federal privileges or immunities—those rights dependent upon “the Federal government for their existence or protection,”^380—from those protected by state governments. He answered that challenge by directly referring to existing sources of federal authority.^381

In other words, privileges or immunities of United States citizens include rights protected by those federal laws Congress enacts for the purpose of securing minimum welfare standards and ensuring our opportunities to make the most of our lives. We may quarrel over whether the United States government meets these obligations, and we may not agree with the way in which politicians and courts allocate relative federal and state responsibility. We should be able to agree, however, that the traditional concept of privileges and immunities encompasses these positive statutory rights. Those who disparage judicial interpretations of the Privileges or Immunities Clause as having merely reinforced federal supremacy^382 fail to take seriously the assault on federal values that preceded the Civil War, and also fail to recognize similar assaults that are taking place today.

Contemporary understanding of protected positive rights should begin with those explicitly included in the text of Article I, Section 8 of the Constitution. Where Justice Miller referred

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^379. The Slaughter-House Cases, 83 U.S. 36, 76 (1873). For prior discussion, see supra text accompanying note 278.


^381. Id. at 79-80.

to the right to use our navigable waters, he might just as well
have referred to rights derived from any of the other sources of
Article I authority. As previously explained, Congress and
the courts consistently referred to patent rights as "privileges"
that were restricted by law to citizens or those seeking
citizenship. The Bankruptcy Act of 1867, produced by Congress
one year after the promulgation of the Fourteenth Amendment,
serves as another example. Bankruptcy had been historically
intertwined with "debt slavery," and the 1867 Act expanded
access to voluntary bankruptcy, broadened exemptions, and
liberalized discharge rules. With that Act, Congress
protected the right of citizens to a fresh start free from
oppressive obligations of state law. In the absence of
congressional action, the federal right to declare bankruptcy
would disappear, and it could not be resurrected by direct
judicial action. To paraphrase Justice Miller, bankruptcy
rights depend upon the federal government for their existence.
As a result, Congress has authority under section 5 of the
Fourteenth Amendment to abrogate state Eleventh
Amendment immunity from actions brought in bankruptcy
courts.

Employment rights have been consistently linked to our
understanding of "privileges or immunities." When the phrase
was used in the Articles of Confederation, it was tied to "the
privileges of trade or commerce." In Corfield v. Coryell,

383. See supra text accompanying notes 316-21.
384. See Vern Countryman, A History of American Bankruptcy Law, 81
COM. L.J. 226, 228 (1976).
385. Id. at 229-30.
386. In a recent bankruptcy proceeding, South Carolina challenged the
jurisdiction of a federal court to resolve questions about the discharge of debts
owed to the state. See In re Wilson, 258 B.R. 303, 305 (S.D. Ga. 2001). The
Georgia bankruptcy court rejected that argument, explaining that bankruptcy
rights were protected by the Fourteenth Amendment Privileges or Immunities
Clause, which "remains a vital source of individual freedom and protection." 
Id. at 310. But cf. Sacred Heart Hosp. v. Pennsylvania (In re Sacred Heart
Hosp.), 133 F.3d 237, 244-45 (3d Cir. 1998) (rejecting arguments that
bankruptcy rights were protected by the Privileges or Immunities Clause).
The Third Circuit opinion characterized the Privileges or Immunities Clause as "essentially moribund" since the Slaughter-House Cases, id. at 244,
parroting the contemporary constitutional canon without considering
countervailing evidence. See generally Hon. Randolph J. Haines, Getting to
Abrogation, 75 AM. BANKR. L.J. 447 (2001) (advocating recognition of
bankruptcy rights as "privileges or immunities" subject to congressional
abrogation).
387. ART. OF CONFED., art. IV, cl. 1 (1781).
Justice Washington referred to the right to pass through or reside in any state “for purposes of trade, agriculture, professional pursuits, or otherwise.”388 In a contemporary interpretation of the Article IV Privileges and Immunities Clause, the Supreme Court noted that “the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.”389 Constitutional scholars have also recognized a “generous, pluralistic conception of valued ‘work’” as a positive right tied to the concept of “social citizenship.”390 Deprived of their ability to enforce their federal employment rights, Daniel Kimel,391 Patricia Garrett,392 and John Alden393 lost out on the privileges or immunities provided by the federal government to citizens of the United States.

In cases involving Kimel and Garrett, the Court explained its decisions by finding that federal relief could not be derived from the Equal Protection Clause of the Fourteenth Amendment.394 The lawyers who presented the cases to the Court, and the justices who responded to the cases as presented, viewed the ADEA and the ADA solely from the perspective of the negative rights that equal protection doctrine has historically safeguarded.395 Because of the traditional preoccupation with negative rights, they did not recognize the positive elements of both acts that belonged within the scope of the Privileges or Immunities Clause.

In John Alden’s case, the justices in the majority relied upon their sense of the importance of state sovereignty to those

388. 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).
who established the structure of the Constitution in 1787 to support the conclusion that the Fair Labor Standards Act could not be enforced against state agencies in state courts.\textsuperscript{396} Neither the litigants nor the Justices considered the evolution of that structural understanding that emerged as a product of the Fourteenth Amendment.

Justice Miller could not have anticipated the twentieth-century welfare state or the broad scope of contemporary federal employment law. From a nineteenth-century perspective, states had a broader role than Congress in protecting "the enjoyment of life and liberty" or the right "to pursue and obtain happiness and safety."\textsuperscript{397} Miller, nevertheless, would have understood that rights based upon the Spending or Commerce Clauses of Article I, Section 8 were privileges or immunities of United States citizens.\textsuperscript{398} Unfortunately, modern lawyers and academics have left the Privileges or Immunities Clause out of the constitutional canon, and thereby have failed to recognize how the framework Justice Miller established protects our contemporary conception of workers' rights.

Some will object to use of the term "rights" in reference to statutory claims. They are not rights in the strong sense articulated by Ronald Dworkin, because they can be changed, or even eliminated, by simple legislative action.\textsuperscript{399} Dworkin's views on this issue, however, are a part of the problem, guiding our serious attention to rights controlled by the judiciary and diminishing the importance of legislatively-derived rights. Statutory privileges or immunities can have the status of rights in a significant legal sense: They represent claims for positive support or protection potentially enforceable against federal, state, and local government entities. To repeat Senator Frelinghuysen's distinction, "a privilege . . . . is a right granted by law."\textsuperscript{400} The general public comprehends that workers' rights and social security rights belong in this category; those charged with preserving the constitutional canon miss this

\begin{flushleft}
\textsuperscript{396} \textit{Alden}, 527 U.S. at 714-30.  \\
\textsuperscript{397} \textit{Corfield v. Coryell}, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).  \\
\textsuperscript{398} See supra notes 177-179 and accompanying text.  \\
\textsuperscript{399} See \textit{RONALD DWORKIN, TAKING RIGHTS SERIOUSLY} 191 (1977) (noting that our fundamental constitutional rights "represent rights against the Government in the strong sense").  \\
\textsuperscript{400} See supra note 373.
\end{flushleft}
point when they take Professor Dworkin too seriously.

3. Preserving Negative Constraints

We need not give up on our theory of negative rights to accept a theory of positive rights based upon the Privileges or Immunities Clause. As Frank Michelman recently noted, there is little point in fantasizing about a constitutional doctrine completely outside of the courts: “However receptive mainstream American constitutional thought may be to the idea of a constitution extending beyond the courts, it is not, today, about to imagine the constitution taken away from the courts.”401 As explained in more detail in the section that follows, the theory of positive rights I propose does not directly affect the Supreme Court’s role as superintendent of the Due Process and Equal Protection Clauses. It would, however, significantly redress the imbalance in traditional perceptions of constitutional rights.

Preservation of existing negative rights doctrine may not satisfy those writers who perceive a fundamental conflict between negative and positive rights.402 There is, however, a constructive purpose to be served in recognizing both positive and negative rights within the Fourteenth Amendment text. This recognition elevates the discussion of statutory rights and facilitates their comparison with the negative rights that traditionally draw our exclusive attention. Negative and positive rights are cousins, residing in the same house, and not mere distant relatives. This recognition also prevents courts from undermining positive rights based upon theories—such as state sovereignty—that lack the stature of countervailing constitutional rights. I am not advocating the transformation of constitutional law to reverse the emphasis we place on positive and negative rights. I do, however, advocate restoring balance to that relationship within the contours of existing doctrine.

402. See, e.g., Morton J. Horwitz, Rights, 23 HARV. C.R.-C.L. L. REV. 393, 404 (1988) (discussing the “undesirable long-term risks of [individual] rights conceptions” and the need to “ground rights theory in a substantive conception of the good society”); West, supra note 359, at 1904 (noting that “liberal rights, for better or for worse, but virtually by definition, are all obstacles to, rather than a possible vehicle for, any welfarist effort”).
C. ALLOCATING JUDICIAL AND LEGISLATIVE RESPONSIBILITY

Our collective failure to understand or appreciate Justice Miller’s language in the *Slaughter-House Cases* reflects a more general preoccupation with the issue of judicially enforced, inherent rights. Recognition of a theory of positive rights also entails admitting the fact that lawyers and judges do not occupy the center of the legal universe. This observation requires a willingness to adjust our traditional approaches to legislative and judicial responsibilities.

Ever since Alexis de Tocqueville traveled across the United States, we have acknowledged the premise that most political questions eventually become judicial questions. In the context of the Privileges or Immunities Clause, however, the Supreme Court has repeatedly stressed that the claims in question must be traced to a source in the federal constitution, structure, or law. Accepting this framework means admitting that Congress, rather than the courts, plays the dominant role in defining privileges or immunities. For generations, Justice Miller has been excoriated for failing to independently conjure a right to free enterprise. But most recent theorists who emphasize the importance of positive rights should easily understand why Miller rejected the role advocated by the Louisiana butchers who were being forced to relocate their businesses.

1. Legislative Responsibility and Judicial Deference

In her advocacy of progressive constitutionalism, Robin West underscores the need for legislative responsibility: “[T]he relevance of the progressive interpretation of the Constitution depend[s] not only on the merits of its interpretive claims but also, and perhaps more fundamentally, on a federal Congress reenlivened to its constitutional obligations.” Michael Gerhardt blames the Supreme Court’s decision in *Slaughter-House* for leading us down a track of exclusively negative constitutional rights, but then emphasizes that section 5 of the Fourteenth Amendment empowered Congress to establish a “positive, comprehensive federal program” defining and

403. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J. P. Mayer & Max Lerner eds. & George Lawrence trans., 1966).
404. See supra text accompanying notes 218-25.
405. WEST, supra note 368, at 219.
protecting fundamental civil rights. Lawrence Sager also favors a theory of affirmative social rights, and recognizes that such rights would “elude judicial enforcement.” In his words, “affirmative rights come wrapped with questions of judgment, strategy, and responsibility that seem well beyond the reach of courts in a democracy.” The judicial role should remain secondary. Courts should not be encouraged to take over such rights, because by doing so they would intrude upon the responsibilities of democratic government. As explained by Frank Michelman, judicial enforcement of broadly defined constitutional rights could “sweepingly preempt major public policy choices from the ordinary politics of democratic debate and decision.”

The judicial framework constructed to limit the scope of the Equal Protection Clause embodies some of the concerns of these writers. Good reasons exist for not giving “strict judicial scrutiny” to age and disability classifications. Elderly citizens and those with disabilities deserve freedom from unfair or invidious discrimination, but lines to be drawn in these contexts entail an unavoidable exercise of discretion. Furthermore, both age and disability cut across social and economic spectra in ways that reinforce political protection. As a result, we expect the legislative and executive branches of government to delineate these issues free from the intense judicial constraints implied by strict scrutiny standards.

In light of these concerns, the Supreme Court had to make a choice. In Kimel and Garrett, the justices could have allowed Congress to enforce the Equal Protection Clause without regard to the contours of Supreme Court doctrine. They could have ruled that, although states do not violate judicial standards of

406. Gerhardt, supra note 371, at 443 (quoting ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 36 (1947) (emphasis added)).


408. Id.; see also Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 NW. U. L. REV. 410, 435 (1993) (discussing the “gap between constitutional case law and political justice”).


410. Sager, supra note 407, at 425 (noting that the imposition of welfare programs by the judiciary could cause those programs to atrophy).

411. Michelman, supra note 401, at 1895.
protection for the elderly or disabled unless they act irrationally, an entirely different set of standards applies when Congress weighs these issues. Taking that course, however, would have expanded the scope of federal power and also introduced a level of incoherence into equal protection doctrine. A majority of justices were not prepared to accept such results. Those justices concluded that the divide between rational basis and strict scrutiny standards used by the courts to determine whether states violated the Equal Protection Clause should also be used as the guide to determine the scope of congressional remedial authority derived from that clause.

In rejecting a broad approach to congressional power to enforce the Equal Protection Clause, the Supreme Court made two fundamental points. First, laws to protect the interests of elderly or disabled citizens should be generated by the legislature. As Chief Justice Rehnquist explained, “[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.” Significantly, the Court never questioned congressional Commerce Clause authority to enact such laws; Chief Justice Rehnquist affirmed their validity even in the context of enforcement against the states through either suits for injunctive relief or direct federal government action. Patricia Garrett lost her claim, however, because the Chief Justice failed to recognize any authority by which federal positive law could supercede the Eleventh Amendment.

Critics of the Court’s opinions in Kimel and Garrett focus almost exclusively on the second step in the Court’s analysis—that negative constraints on constitutional power will be controlled by the judiciary. The Court addressed this distinction in City of Boerne v. Flores. In Boerne, the Court ruled that Congress could not override perceived limitations in Supreme Court protection for the free exercise of religion. The Court explained its conclusion by noting that separation of powers gives the Supreme Court primary responsibility for interpreting the “self-executing prohibitions on government action.” Equal protection principles bind Congress as well as the states, and the majority in Garrett opposed giving Congress

413. Id. at 374 n.9.
415. Id.
the authority to define the scope of those principles\textsuperscript{416} even when, as in \textit{Boerne}, Congress sought to be more generous than the Court in the protection that it offered.\textsuperscript{416}

Relying upon the distinctions between negative and positive rights, the Supreme Court can defend its test for congruence and proportionality in the context of due process and equal protection standards. But this rationale for elevated Supreme Court scrutiny disappears in the context of privileges or immunities. The Privileges or Immunities Clause encompasses a different set of separation of powers concerns from those discussed by the Court in \textit{Boerne}. The positive rights embodied by that clause are derived, in significant part, from Article I, Section 8 of the Constitution. Contours of congressional authority under Article I have long been governed, first and foremost, by the political process and only marginally through judicial enforcement.\textsuperscript{417}

Fourteenth Amendment doctrine is built around the division between Supreme Court authority to recognize and supervise enforcement of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, on one hand, and legislative authority to determine the scope of positive law that does not conflict with the principles embodied by those clauses, on the other. This distinction has been the primary source of confusion and complaint by those who have challenged the Supreme Court's decisions or have tried, in vain, to steer a different course. In the \textit{Slaughter-House Cases}, the dissenting justices wanted the Court to recognize an inherent right to engage in trade free from the health and safety regulations imposed by the state.\textsuperscript{418} Justice Miller blocked that approach, holding that federally protected privileges or immunities must be based upon an existing source of national law.\textsuperscript{419}

Early civil rights legislation also recognized this issue. For several years, Congress debated whether to protect African-Americans from private discriminatory acts, and eventually enacted the Civil Rights Act of 1875.\textsuperscript{420} But the Supreme Court

\textsuperscript{416} Garrett, 531 U.S. at 374.
\textsuperscript{417} See Jesse H. Choper, \textit{Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court} 171-259 (1980) (explaining that Article I limits on national power should only be enforced through the political process).
\textsuperscript{418} See supra notes 143-46 and accompanying text.
\textsuperscript{419} See supra notes 171-83 and accompanying text.
\textsuperscript{420} Civil Rights Act of 1875, 18 Stat. 335 (1875).
ruled in the *Civil Rights Cases* that the Fourteenth Amendment had not empowered Congress to address racial discrimination in the absence of state action. In a prescient passage, however, Justice Bradley observed in his opinion for the Court that different conclusions could follow if Congress had the authority to address such issues directly—for example, through the exercise of its power to regulate commerce. The full panoply of modern civil rights legislation meets this test. The Privileges or Immunities Clause assured that states could not avoid compliance with federal statutory rights derived from existing sources of congressional power.

The Thirteenth Amendment stands as a solitary exception to the traditional theory that the United States Constitution established only negative rights. Experience with that Amendment further illustrates the line between congressional responsibility for development of the positive law and Supreme Court supervision of constraints on government. Individuals have a constitutional right to freedom from slavery regardless of whether there has been government complicity in activity that amounted to involuntary servitude. While plaintiffs have argued that the Thirteenth Amendment broadly protects individual rights, courts have generally avoided the responsibility of developing such rights. In keeping with the rule that Congress has general authority over development of

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421. 109 U.S. 3 (1883).
422. *Id.* at 13.
423. *See id.* at 19 (noting that the issue of Commerce Clause regulation was not before the Court). Even when the contemporary Supreme Court ruled that Congress lacked Commerce Clause authority to impose criminal sanctions on gun possession near schools, Justices in the center of the Court assured that they did not challenge the breadth of congressional power to enact civil rights legislation. *See United States v. Lopez,* 514 U.S. 549, 573-74 (1995) (Kennedy, J., concurring) (citing *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) and *Katzenbach v. McClung,* 379 U.S. 294 (1964), and noting that such cases "are not called in question by our decision today").
424. This distinction was noted in the *Civil Rights Cases,* 109 U.S. 3 (1883), where the Court found that the Thirteenth Amendment did not include a state action requirement, but concluded that acts of racial discrimination in public accommodations did not fall within the scope of the ban on slavery. *Id.* at 20.
positive rights, the Court's approach to the Thirteenth Amendment differs from its recent insistence upon judicial control over the content of due process or equal protection guarantees. When asked whether psychological coercion to work constituted involuntary servitude, the Court denied relief, leaving the door open for Congress to broaden the protection. As Justice O'Connor explained: "Whether other conditions are so intolerable that they, too, should be deemed to be involuntary is a value judgment that we think is best left for Congress." In different words, positive rights, like freedom from involuntary servitude, require an exercise of legislative judgment.

Finally, the recent Supreme Court ruling in *Saenz v. Roe* also conforms to the pattern I have described. The Court relied in part upon *Slaughter-House* and concluded that a "right to travel" protected by the Fourteenth Amendment included "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." The judicial role in *Saenz*, however, remained secondary; the legislative branch continues to be responsible for determining the existence and scope of the underlying rights in question. In *Saenz*, the majority recognized statutory rights to welfare assistance as "privileges and immunities" that could not be denied to the newly arrived citizen. Consistent application of that holding reinforces the conclusion that federal legislation, and, in particular, the Social Security Act, establishes privileges or immunities of United States citizens.

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426. See, e.g., Runyon v. McCrary, 427 U.S. 160, 170 (1976) (holding that the Thirteenth Amendment authorized Congress to assure all United States citizens "the same right to make and enforce contracts as is enjoyed by white citizens" (quoting Civil Rights Act, ch. 31, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1983)); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (ruling that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation").


429. Id. at 502.

430. Id. Note the statement by the Court in *Saenz* that "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment," id. at 508, should not be confused with the understanding that Congress can change and even eliminate the positive law that constitutes a "privilege" of United States citizens. Thus, Congress cannot alter the right to travel guaranteed by the structure of the Constitution, but Congress can decide whether or not to establish welfare laws or employment rights.
2. A Role for Conscientious Legislators and Judges

Taking seriously the congressional role in shaping the privileges or immunities of United States citizens also means rethinking traditional conceptions of the "conscientious legislator's" role. When Paul Brest initially coined that phrase, he emphasized the responsibility of legislators to assure that their motives conform to constitutional doctrine. In the context of privileges or immunities, we move beyond questions about legislative motive and adherence to judicially-crafted doctrine, and instead emphasize the constitutional responsibilities of legislators. Privileges or immunities doctrine imposes an affirmative obligation on lawmakers to determine what the legally enforceable rights of United States citizens should be, and how those rights should be protected. When they otherwise conform to the text of the Constitution, and when they are enforceable against the government itself, the rights in question take on great significance. A conscientious legislator should be expected to take that role seriously.

The fact that the legislature has responsibility for shaping privileges or immunities should also move us towards recognizing a judicial counterpart to the role of the conscientious legislator. A conscientious judge should be responsible for recognizing and reinforcing congressional judgments regarding the privileges or immunities of all Americans. The judge who undermines enforcement of legitimate statutory rights—who fails to value the rights-defining role assigned to Congress—runs the same risk of violating the constitutional oath as does a legislator whose motives conflict with those constitutional rights that the courts have properly defined.

432. Id. at 589-92.
433. Frank Michelman expresses concern about debasing the "rhetorical currency" by naming something a constitutional right that might not be taken seriously by presumably conscientious public officials. Michelman, supra note 401, at 1898. When the responsibility to shape and enforce rights is fully understood, however, I do not see any reason why it should not be taken seriously. Contemporary political battles surrounding such issues as Social Security, Medicare, or the minimum wage suggest that legislators probably have a firmer grasp of their responsibility than lawyers who are waiting for the Supreme Court to designate our rights.
III. CONCLUSIONS: RESTORING INTEGRITY TO THE CONSTITUTIONAL CANON

Those who describe the Privileges or Immunities Clause as moribund because it does little more than reinforce federal supremacy are half right. But which half? If, as everyone seems to agree, the clause embodies the principle that federal law is supreme, and that state sovereignty yields to this principle, then the Clause should have a significant impact on current constitutional doctrine. If, on the other hand, the Clause does not protect federal statutory rights, then we might as well offer a final benediction for the provision that our ancestors worked so diligently to secure.

Restoring life to privileges and immunities supports what Vicki Jackson recognizes as our obligation to develop a holistic view of the Constitution, "an approach that seeks to take into account the basic structure and values of the Constitution in the interpretation of all of its provisions." Jackson argues that the Fourteenth Amendment "complement[ed] the original Article I commitment to uniform and effective national laws on subjects of importance to the Union with a commitment to equal national citizenship." While Jackson gives only "tentative" support to the argument that the Privileges or Immunities Clause empowered Congress to abrogate the Eleventh Amendment, pending a review of the historical record, my conclusions following such a review confirm her suspicions.

Although the members of Congress who debated the Privileges or Immunities Clause in 1866 did not refer to Eleventh Amendment immunity, this should hardly be a surprise; at that time it was not obvious that the Eleventh Amendment even applied to enforcement of federal statutes.

434. Jackson, supra note 17, at 1281.
435. Id. at 1310.
436. Id. at 1306.
437. See John E. Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 COLUM. L. REV. 1413, 1454, 1469 (1975) (concluding that Eleventh Amendment history supports the principle that "Congress should be free to determine the extent of federal court jurisdiction over state governments, and this principle was reaffirmed by the ratification of the Fourteenth Amendment").
438. When Congress promulgated the Fourteenth Amendment, it was logical to assume that the Eleventh Amendment did not apply to cases in which citizens sued their own state to enforce federal rights. See Osborn v.
Without mentioning the Eleventh Amendment, however, the Fourteenth Amendment framers meant to assure that state sovereignty could not be used as a shield to avoid compliance with federal law. Furthermore, contemporaneous federal statutes and Supreme Court opinions—sources entitled to “great weight”—confirmed those intentions. Leading commentators, including Thomas Cooley, Henry Brannon, and D.O. McGovney, all agreed.

Thus, in addition to providing a holistic interpretation of the Constitution, concluding that the Privileges or Immunities Clause establishes a basis for enforcing federal statutes against states also satisfies traditional tests for integrity. The Supreme Court directs us to “history, practice, precedent, and the structure of the Constitution” for guidance to resolve constitutional disputes. Following that directive, I am not advocating a switch to the Privileges or Immunities Clause as a source for incorporating the Bill of Rights, even though good arguments can be made that the framework identified by Justice Miller in Slaughter-House incorporated the first eight amendments. Many will view that issue as water over the dam; changing the source of the incorporation doctrine is unlikely given the precedent surrounding the Due Process Clause.

Bank of the United States, 22 U.S. 738, 850-52 (1824) (allowing suit against officers or agents of a state when the Eleventh Amendment prohibited naming the state itself as a party); Cohens v. Virginia, 19 U.S. 264, 412 (1821) (upholding Supreme Court appellate jurisdiction in an appeal by a state citizen from state prosecution). The Supreme Court applied the Eleventh Amendment to federal question jurisdiction in Hans v. Louisiana, 134 U.S. 1 (1890), holding for the first time that, regardless of textual limits, the Amendment barred citizens from suing their own state in federal court. Id. at 15.

See supra text accompanying notes 356-61.

See Cohens, 19 U.S. at 418.

See supra text accompanying notes 248-59. In 1997, the Supreme Court majority relied upon both Cooley and Brannon to support their interpretation of section 5 of the Fourteenth Amendment in City of Boerne v. Flores, 521 U.S. 507, 523 (1997). More than two hundred Supreme Court opinions cite Cooley's treatises as authoritative.

See RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 11 (1996) (explaining that “our constitution is law, and like all law it is anchored in history, practice, and integrity”).


See Newsom, supra note 169, at 647.

See also AMAR, supra note 11, at 231-83 (developing a “refined” model of incorporation). Compare Tribe, supra note 15, at 182-98 (advocating use of Privileges or Immunities Clause to protect substantive rights, but expressing
A more constructive reason reinforces the preference for the historical and jurisprudential division between the clauses. If we continue to understand that the Fourteenth Amendment Due Process Clause embodies "negative" constitutional constraints, while the Privileges or Immunities Clause reinforces the protection of positive law, it becomes easier to allocate institutional responsibilities of Congress and the courts on that basis. This approach embraces the historical understanding that privileges connote positive law, and that Congress has primary responsibility for development of that law.

This thesis faces an implicit challenge from contemporary Supreme Court declarations of state immunity from individual claims for monetary damages based upon federal law; I, however, do not need to second guess the justices' reasoning in those cases since they responded to the questions they were asked. I accept the Court's legitimate supervisory authority over the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and in that context the majority opinions in *Florida Prepaid*, *Kimel*, and *Garrett* fall within legitimate boundaries of coherent constitutional doctrine.

These recent Supreme Court opinions conflict with this Article's thesis only in a superficial sense. Underlying assumptions made in these cases—in particular, assumptions regarding judicial responsibility for determining the scope of negative constitutional constraints, while deferring to legislative judgments regarding development of positive law—actually reinforce, rather than threaten, the thesis. Recall the words of Chief Justice Rehnquist, that "special accommodations for the disabled ... have to come from positive law and not through the Equal Protection Clause."446 The Fourteenth Amendment provides for positive as well as negative rights, but it lies with Congress to develop the positive law rather than the judicial bodies, which remain poorly suited to that task. At the same time, the Amendment limits congressional control over the substantive scope of negative constitutional constraints based upon an understanding that legislators lack the
doubt that current Supreme Court doctrine will lead to that conclusion), *with* Shankman & Pilon, *supra* note 13, at 2 (arguing that "a properly read and applied clause will better protect individual rights," *with* particular emphasis on property rights).

446. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001). For discussion, see *supra* text accompanying notes 394-98.
institutional competence to determine the substance of their own constraints. The rational basis test used to review questions of discrimination based upon age or disability illustrates this distinction. The principles that lead to judicial deference to the legislature in this context, however, should not be inverted to limit congressional actions when Congress acts within the legitimate scope of its authority. Our Constitution is not that perverse.

The Privileges or Immunities Clause empowers Congress to enforce the positive law that it enacts. For this reason, the constraints embodied by the Supreme Court decision in City of Boerne v. Flores should not apply to congressional remedies enacted pursuant to the Privileges or Immunities Clause. If, in keeping with the admonition of the Chief Justice, the Supreme Court's role in developing the positive law remains secondary, then a search for "congruence and proportionality" would be wholly out of place in a context designed for a determination of appropriate scope of the positive law. As constitutional doctrine illustrates, judicial review of privileges or immunities derived from federal statutes should seek to root out only irrationality. As long as no conflict exists with the applicable negative constraints on government authority, this underlying principle of judicial deference applies.

The real heart of the Supreme Court's recent Eleventh Amendment doctrine lies in its insistence upon safeguarding the independent authority of state governments. Justice Scalia explains that the "honest textualist" should nevertheless be guided by "the principle that federal interference with state sovereign immunity is an extraordinary intrusion,"447 and the Court's decision in Alden v. Maine embodies that principle. But the current majority recognizes that the Fourteenth Amendment, when properly construed, supercedes this principle. In Alden, Justice Kennedy explained that "in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its section 5 enforcement power."448

448. Alden, 527 U.S. at 756.
Unfortunately, Justice Kennedy did not pause to consider the tie between the Fair Labor Standards Act and the Privileges or Immunities Clause.

I would not place primary blame on either the Court or the litigants for failing to consider the Privileges or Immunities Clause in *Alden*. The real fault lies with the academy, which carries the responsibility for identifying and promoting the constitutional canon. With his opinion in *Slaughter-House*, Justice Miller provided a constitutional framework that offers a remarkable degree of coherence and stability. We now verge on losing those qualities by virtue of our failure to give Miller’s framework the respect it deserves.

The *Slaughter-House* framework I have described is thus consistent with precedent and with traditional principles of judicial deference to legislative development of positive law. It is also consistent with contemporaneous federal statutory language, and with Supreme Court interpretations of that language. In 1870, when Congress referred to “any right or privilege granted or secured . . . by the Constitution or laws of the United States,” it sought to enforce the Fourteenth Amendment. In 1980 and 1989, the Supreme Court construed statutory protection of “rights, privileges, or immunities secured by the Constitution and laws” of the federal government in the only way that makes linguistic sense—to include protection of rights established by the Social Security Act and the National Labor Relations Act. Unless Congress understood its statutory language differently from the same words used in the constitutional text, those decisions establish binding authority for construing the Privileges or Immunities Clause.

Finally, this approach provides coherence in one additional sense. Though the terms “privileges” and “immunities” that appear in Article IV and in the Fourteenth Amendment retain consistent meaning, it lies with state and national legislatures to develop their substance. In both contexts, the Supreme Court’s role remains secondary. In both clauses, the terms

453. Although I describe the Court’s role as secondary in both contexts, I would acknowledge a significant distinction. Because the Privileges and
retain their historical meaning as references to positive law, helping to guide this assignment of institutional responsibility. States cannot abridge rights derived from federal legislation any more than they can abridge the rights of new arrivals to receive benefits defined by state law. Failing to recognize federal law as a source of privileges or immunities would destroy this symmetry.

After the Civil War, the Fourteenth Amendment reinforced federal supremacy. A review of text, context, contemporaneous legislation, and more than a century of practice and precedent, demonstrates this conclusion. To preserve the integrity of the Constitution, courts should continue to recognize congressional authority to establish and protect privileges or immunities of United States citizens.

Immunities Clause of Article IV, Section 2 imposes a negative constraint on states, and because the Constitution does not include any form of subject matter constraints on state legislation, there is a heightened need for the Court to determine which state statutes fall within the ambit of "privileges and immunities." The line drawn by the Court between commercial fishing rights and sport hunting licenses illustrates this line drawing responsibility. Compare Toomer v. Witsell, 334 U.S. 385, 398-402 (1948) (striking down a state requirement that non-residents obtain a commercial fishing license at one hundred times the cost paid by state residents), with Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 391 (1978) (allowing the state to charge a higher fee for nonresident hunting license). Comparable line drawing occurs when the Court is asked to find violations of the dormant Commerce Clause, which is another issue historically tied to privileges or immunities of United States citizens. See Dennis v. Higgins, 498 U.S. 439, 446 (1991) (finding dormant Commerce Clause rights protected by 42 U.S.C. § 1983); Crutcher v. Kentucky, 141 U.S. 47, 57 (1891) (noting that "[t]o carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States").