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## REVIVING THE PRIVILEGES OR IMMUNITIES CLAUSE TO REDRESS THE BALANCE AMONG STATES, INDIVIDUALS, AND THE FEDERAL GOVERNMENT

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### Executive Summary

Shortly after the Civil War, the American people amended the Constitution in an effort to better protect individuals against state violations of their rights. Under the Privileges or Immunities Clause of the new Fourteenth Amendment, constitutional guarantees against the federal government could be raised for the first time against state governments as well. Although targeted initially against the "black codes" that were emerging in the postwar South, the amendment was written broadly to protect all Americans.

But 125 years ago, in 1873, in the infamous Slaughterhouse Cases, a deeply divided Supreme Court effectively eviscerated the Privileges or Immunities Clause. Since then courts have tried to do under the Due Process and Equal Protection Clauses of the amendment what should have been done under the more substantive Privileges or Immunities Clause. The result has been an erratic and often groundless Fourteenth Amendment jurisprudence that has pleased neither liberals nor conservatives, yet both oppose reviving the clause. Liberals tend to favor the latitude judges now have. Conservatives fear revival will lead to still more "judicial activism."

Both sides are wrong. Conservative "originalists" cannot ignore the plain language and history of the Privileges or Immunities Clause. Liberals need to appreciate that a properly read and applied clause will better protect individual rights. In the current federalism debate, both sides should understand that power will be devolved to the states and the people in a principled way only if the principles inherent in the Privileges or Immunities Clause are revived--along with the clause itself.

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### Introduction

The Fourteenth Amendment to the United States Constitution is the focus of a vast body of modern American law and litigation--and a never-ending source of political and legal controversy. Written and ratified during Reconstruction, in the aftermath of the Civil War, the amendment, in essence, provides federal remedies for state violations of individual rights in areas as diverse as religion, speech, privacy, economic liberty, property rights, civil rights, and civil and criminal procedure. As section one of the amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Precisely what rights are protected by that broad language is the main source of controversy, of course, and the main subject of this study. What is clear, however, is that section one authorizes courts, by implication, to adjudicate claims brought pursuant to the amendment, whereas section five authorizes Congress "to enforce, by appropriate legislation, the provisions of this article."

By giving the courts and Congress such sweeping authority over disputes between states and individuals, the amendment altered fundamentally the original relationship between the federal government and the states. For the first time, constitutional guarantees against the federal government could be raised against state governments as well. Given that the Constitution establishes a federal government of enumerated and thus limited powers--leaving most power with the states and the people, as the Tenth Amendment makes clear--it is not surprising that in the wake of the Fourteenth Amendment we have seen repeated tests of the proper scope of both federal and state power and, as a corollary, the proper basis and content of individual rights. While the players have changed names and sides over the years, modern liberals have tended to favor restricting state power, except in the areas of economic regulation and social welfare; modern conservatives, by contrast, have tended to favor allowing states a wide

berth in the name of majoritarian democracy, "states' rights," and "judicial restraint."

Although intense litigation under the amendment should not surprise, what is surprising is that most of it has taken place not under the Privileges or Immunities Clause, which was meant to be the principal font of individual rights, but under the Due Process and Equal Protection Clauses. Using the Due Process Clause, judges have "incorporated" most of the Bill of Rights under the Fourteenth Amendment, then applied those protections against state actions to find the actions unconstitutional. More recently, judges have used the Equal Protection Clause to the same effect and others, raising all manner of questions about the scope of their authority and the grounds of their reasoning. In all of this, however, neither liberals nor conservatives have given more than a moment's attention to the cardinal clause of the Fourteenth Amendment, the Privileges or Immunities Clause, which remains uncited, unlitigated, uncommented upon--in a word, unnoticed. Whole chapters of modern constitutional law casebooks are devoted to due process and equal protection while privileges or immunities are dismissed in a few pages at most. Like the bark of the hound in the canon of Sherlock Holmes, what is most striking about the Privileges or Immunities Clause in the canon of constitutional law is its absence.

Every lawyer knows why the Privileges or Immunities Clause is absent from modern constitutional law, despite its manifest presence in the Fourteenth Amendment: 125 years ago, in 1873, five years after the amendment was ratified, a bitterly divided Supreme Court, by a vote of five to four, effectively removed the clause from the Constitution. That decision, reached in the infamous Slaughterhouse Cases,<sup>1</sup> rendered the clause ever after "a vain and idle enactment"<sup>2</sup>--precisely as predicted by the Slaughterhouse dissenters. Indeed, so profound was the effect of the Court's decision that in the entire history of Fourteenth Amendment jurisprudence only one state law has ever been held to be in violation of the Privileges or Immunities Clause--and that decision was overturned just a few years after it was announced.<sup>3</sup> In a single stroke, the Court had turned the centerpiece of the Fourteenth Amendment into "one of those blessed constitutional provisions that by being ignored has not caused a single bit of trouble"<sup>4</sup>--the view of Professor Lino Graglia of the University of Texas, one of the leading conservative critics today of the Court's "activism" in overseeing state power.

Like Sherlock Holmes, therefore, we would do well to consider the significance of the silence that has ensued. It is unusual, after all, for a single case to permanently derail so important a constitutional provision, especially when the case is decided by a slim five-to-four majority. It is even more unusual for that to happen when the dissents are as vigorous and compelling as they were in Slaughterhouse--so vigorous and compelling, in fact, that much legal opinion, both then and now, holds that the dissenters were right and that the case was wrongly decided.<sup>5</sup> Indeed, in subsequent opinions, Justice Samuel Miller, the author of the majority opinion, came himself to wonder whether his opinion or those of the dissenters should be considered controlling.<sup>6</sup> What is more, the Court quickly backed off the equally restrictive readings it had given the Due Process and Equal Protection Clauses in Slaughterhouse.<sup>7</sup> Thus, the 125-year absence of the Privileges or Immunities Clause is more than unusual: it is unique.

But why, today, should anyone care? Shouldn't we all, as Graglia suggests, simply count our blessings that in this litigious age at least one source of litigation is no longer there? The answer, of course, is that, if we take the Constitution seriously as the law of the land, we can no more ignore any of its parts than we can ignore the document as a whole--which is composed of its parts, after all. That is especially so for "originalists," which most conservatives purport to be. Rightly concerned about judges who decide cases not on the law but by invoking their own values, originalists urge judges to look to the text--or, if necessary to illuminate its meaning, to the original understanding of the text. They believe in the rule of law, that is, not in the ungrounded rule of judges.

It is precisely there, however, on the question of meaning, that the problem arises, say the conservatives. Graglia is but one of a group of leading conservatives, including author and former judge Robert Bork<sup>8</sup> and Harvard Law Professor Emeritus Raoul Berger,<sup>9</sup> who adamantly oppose reviving the Privileges or Immunities Clause on the ground that it is "a constitutional provision whose meaning is largely unknown," as Bork has put it, adding that "it is quite possible that the words meant very little to those who adopted them."<sup>10</sup> Bork then poses a judicial caution: "[T]hat the ratifiers of the amendment presumably meant something is no reason for a judge, who does not have any idea what that something is, to make up and enforce a meaning that is something else."<sup>11</sup>

The conservative claim--that the meaning of the Privileges or Immunities Clause is unknown and unknowable--has its origins in the midcentury work of Charles Fairman.<sup>12</sup> Attempting to show that the clause was not meant to incorporate the Bill of Rights against the states, Fairman claimed to have discovered that it had no meaning at all; thus, he cites Congressman George S. Boutwell of Massachusetts, a member of the joint committee that drafted the amendment, as claiming that the amendment's principal author, Ohio congressman John Bingham, inserted the clause because "its euphony and indefiniteness of meaning were a charm to him."<sup>13</sup> Conservatives thus dismiss the clause by dismissing John Bingham--Berger calling him "muddled" and "inept,"<sup>14</sup> Graglia saying that he used language solely for the purpose of "venting vaporous sentiment,"<sup>15</sup> and Bork contenting himself with repeating Fairman's claim.<sup>16</sup> Those conservatives do not explain, of course, how Congress came to be led by such a fool in so significant a matter as the drafting of the Fourteenth Amendment. Graglia says that happened "for reasons as to which we have no information."<sup>17</sup> Professing such ignorance, Bork can conclude, apparently without irony, that the judicial evisceration of the clause in Slaughterhouse was a "victory for judicial moderation."<sup>18</sup>

Yet even if Bingham can be dismissed as a man with a "peculiar mode of thought,"<sup>19</sup> which the evidence hardly compels,<sup>20</sup> by no means does it follow that the instrument he drafted is meaningless. To discern the meaning, however, we have to ask not simply what the author may have had in mind but what those who passed and ratified the clause may have understood it to mean. Was there a generally accepted meaning for "privileges or immunities" at the time of the adoption of the Fourteenth Amendment? When that question is better answered than it is by conservatives--to say nothing of modern liberals, who too often turn broadly worded clauses into open-ended warrants for judicial lawmaking--it turns out that the loss of the Privileges or Immunities Clause is more than surprising: it is deeply troubling. For not only was the clause meant to be the centerpiece of section one of the Fourteenth Amendment; more important, it was meant to be a reflection of the underlying theory of the original Constitution and a link to the natural rights principles of the Declaration of Independence that form the intellectual foundation of American constitutionalism. Thus, the rejection of the Privileges or Immunities Clause represents a rejection of that moral, political, and legal heritage.

To better appreciate the significance of that rejection, and to urge that the Privileges or Immunities Clause

be revived, this study will examine briefly the historical and theoretical background of the clause, the meaning of the clause in the Fourteenth Amendment, the arguments in the Slaughterhouse Cases, and the legal aftermath of Slaughterhouse. The study will conclude by showing how a revitalized clause, especially in the area of civil rights, could restore the Fourteenth Amendment to its original purpose--to serve as a principled barrier against overweening state government.

In addition to protecting individuals against state actions, a revived Privileges or Immunities Clause would shed light on the modern debate over "judicial activism," much of which springs from adjudication involving the Fourteenth Amendment. In that connection, in fact, Judge Clarence Thomas stated well one of the principal functions of the clause--to protect against "the willfulness of both run-amok majorities and run-amok judges."<sup>21</sup> Liberals today are concerned largely about the former, conservatives largely about the latter. Both sides are right to be concerned. Their differing concerns will not be addressed adequately, however, until we get to the root of the matter, to the classical theory of rights that charts a principled course between them, not through the Due Process or Equal Protection Clauses but through the Privileges or Immunities Clause.

### **The Origins of the Privileges or Immunities Clause**

Debates in Congress surrounding passage of the Fourteenth Amendment and in the states surrounding ratification make it clear that the Privileges or Immunities Clause was linked unequivocally to both the Privileges and Immunities Clause of article IV of the Constitution and the construction of that clause by Justice Bushrod Washington in Coryfield v. Coryell (1823),<sup>22</sup> the leading case on the subject. And article IV's Privileges and Immunities Clause was linked in turn to the similar but more specific clause included in the Articles of Confederation. Thus understood, the inclusion of the Privileges and Immunities Clause in article IV occasioned little recorded debate in the Constitutional Convention of 1787 and only passing mention in the Federalist Papers. That mention, however, was not insignificant: Alexander Hamilton called the Privileges and Immunities Clause "fundamental"--going so far as to say that it was "the basis of the Union."<sup>23</sup> What is more, he made it clear in that brief discussion that, for reasons of impartiality, it is the federal judiciary that must interpret and apply the clause.

Yet today we read the article IV clause far more narrowly--as devoted essentially to interstate equal protection--following a decision by the Supreme Court in 1948 that held that the clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."<sup>24</sup> That view has been echoed more recently in an article on the subject by Judge J. Harvie Wilkinson III, a conservative sitting on the U.S. Court of Appeals for the Fourth Circuit: "[T]he Article IV clause itself does not require a state to recognize any particular right as being fundamental; it commands only that having recognized a fundamental right, the state must afford it equally to residents and nonresidents."<sup>25</sup> Were we to read the Privileges or Immunities Clause of the Fourteenth Amendment that way, a fundamental question would arise, of course. For if the framers of the amendment had meant the clause to accomplish no more than could be accomplished under the Equal Protection Clause, why did they include both clauses in the amendment? Equal protection may be implicit in the idea of "privileges and immunities," but it is hardly the whole idea, as we shall see.

To appreciate the full scope of the article IV clause, it is useful to look at the text of the fourth article of the Articles of Confederation, which guarantees that all free inhabitants of each state

shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state; and shall enjoy therein all the privileges of trade and commerce.<sup>26</sup>

As that text makes clear, at least some rights were included explicitly under the rubric of "privileges and immunities," namely, rights of "ingress and regress" and "the privileges of trade and commerce." But the privileges and immunities specified are merely illustrative, not exhaustive; for the free inhabitants of "each" state were entitled to "all" privileges and immunities of free citizens of the "several" states. Presumably, free citizens had many more privileges and immunities.

The language of article IV of the Constitution is drawn, however, not simply from the Articles of Confederation but from a long legacy of fundamental governing documents of the American colonies, dating back to the Charter of Virginia of 1606,<sup>27</sup> all of which afforded legal protection for "privileges and immunities." Given that the

delegates to the Constitutional Convention understood the Privileges and Immunities Clause to be "formed exactly upon the principles of the 4th article of the present confederation,"<sup>28</sup> the clause must be read not simply as an equal protection clause, devoid of content, but as a guarantee of substantive rights, much like similar clauses in those other documents.

Prior to the Civil War, the basis and content of those substantive guarantees were addressed in only one significant decision, Corfield v. Coryell, by Supreme Court Justice Bushrod Washington, nephew of George Washington and a delegate to the 1788 Virginia ratifying convention. Although Corfield was a circuit decision, not a decision of the Supreme Court, in both legal and popular opinion it was considered the authoritative interpretation of article IV's Privileges and Immunities Clause.<sup>29</sup> The clause, Washington held, protected rights

which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign.<sup>30</sup>

Contending that it would be "more tedious than difficult" to enumerate those rights, Washington offered illustrative categories, such as "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 safety."<sup>31</sup>

Three points are worth noticing here. First, the Privileges and Immunities Clause is unreservedly read by Washington as imbued with substance: for him, it is not a mere equal protection clause, the content to be supplied later by some legislative body. Second, he obviously considers uncontroversial his view on that and on the scope of the rights protected; indeed, enumerating those rights would be "more tedious than difficult." Finally, Washington's language echoes clearly the language of the Declaration of Independence. Since the decision received no criticism--in fact, it stood as the authoritative explication of the Privileges and Immunities Clause--Washington's use of the Declaration to illuminate the Constitution was apparently considered unremarkable.<sup>32</sup> Indeed, if Corfield stands for anything today, it stands for the idea that we too may need to recapture the view that was obvious to the point of tedium to Americans of the 18th and early 19th centuries: that the Privileges and Immunities Clause was



intended essentially to constitutionalize the natural rights philosophy of the Declaration of Independence.

Lest it be thought that Justice Washington was idiosyncratic in his choice of language, it is important to note that for lawyers and educated laymen alike, "privileges and immunities" was a term of art. In fact, in his Commentaries on the Laws of England, William Blackstone, the primary legal authority for the founding generation, used the term in ways that fully support Washington's exegesis.<sup>33</sup> Discussing the "rights of Englishmen," Blackstone wrote:

The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.<sup>34</sup>

Here, Blackstone defines "privileges" and "immunities" by pointing back explicitly to the natural law. In fact, the terms serve as an explicit bridge between the state of nature and civil society, between natural rights and civil rights: "immunities" are either the natural rights we retain when we enter into civil society or those "privileges" we gain at that time in exchange for surrendering certain of our natural liberties. To fully understand and appreciate the idea of "privileges and immunities," therefore, we need a clear understanding of the theory of natural rights that underpins the American experiment in ordered liberty--and the Declaration of Independence, in particular.

### **Natural Rights, the Social Contract, and the Foundation of American Constitutionalism**

What then is the natural rights philosophy, which earlier generations thought the Privileges and Immunities Clause stood for? As we saw in Corfield, the language of the Declaration of Independence provided the standard American expression of that philosophy. It is useful to begin, therefore, with the relevant passage of the Declaration:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed

by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness--That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

Those justly famous phrases reflect the essence of the natural rights and social contract theories of John Locke, whose Second Treatise of Government was widely read and all but universally subscribed to by the founding generation. To understand America's founding principles, therefore, one must understand how those theories fit together to form the foundation of American constitutionalism.<sup>35</sup>

Notice first that the propositions set forth are said to be "self-evident" truths--that is, truths of reason. It is through ordinary reasoning, accessible to all, that such truths were thought to be discoverable and justified, not through religious conviction, much less through political assertion, whether by a king or a parliament. And notice, too, that the Declaration speaks first about moral truths--natural equality as defined by natural rights--and only second about government. Government is not a given; it has to be justified. Thus, we start not with government but with free individuals, who have rights by nature; we then show how government arises in a way that respects the rights of those individuals.<sup>36</sup>

The heart of the matter is the idea of natural equality: no one has rights superior to those of anyone else; no one by nature has a right to rule anyone else. Rather, every individual has a right, equal to that of everyone else, to be free--which amounts to rights to "life, liberty, and the pursuit of happiness." And all of that can be restated as, or reduced to, "property":<sup>37</sup> for the life and liberty of an individual "belong" to that individual and to no one else; thus, individuals are "entitled" to those goods, equally, and to the life and liberty of no one else. As they pursue happiness in various ways, individuals may gain title to additional property simply by taking possession of unowned things, thereby making those things their things--their property.<sup>38</sup> And with their consent they may associate with others, either to exchange their various goods, including their labor, or

to form associations. What they may not do is engage in forced or fraudulent exchanges, which would amount to taking what belongs to others and hence to violating the rights of others. Thus, the rights of property, and the derivative rights of contract, are the very foundation of a free society.<sup>39</sup> Indeed, it is crucial to appreciate the connection between rights and property, to think of all rights as "property," broadly understood, as goods "owned" by the individual and by no one else. For that is the key to distinguishing true from false "entitlements"--things to which one holds title--as Locke and the Founders clearly understood.

But a state of nature is likely to be insecure: owning property is no guarantee of keeping it; the strong may prey upon the weak; at a minimum, uncertainty about the scope of rights and about the facts surrounding violations will likely lead to disagreement and to violence. Individuals in a state of nature are thus inevitably driven to seek refuge in the strength of a community and to create governments for the purpose of settling such disputes. After outlining the theory of rights, then, the Declaration outlines the theory of legitimate government the moral theory entails: the purpose of government--the reason it is instituted--is "to secure these rights"; to be just, however, government's powers must be derived "from the consent of the governed."

That, in a nutshell, is Locke's idea of the social contract. Individuals exchange their self-defined, self-enforced natural rights for civil rights that, in principle at least, are more clearly, more surely, and more universally defined and enforced by the community. We see that theory in the above passage from Blackstone. When we enter civil society, our natural rights to be immune from the transgressions of others become civil rights to continue being so immune. We "give up" certain of our natural rights, however, such as the right to define and enforce our rights (except in limited situations); in exchange we acquire the privileges of having our rights defined universally and of having them enforced by government.

It is important to notice, however, that natural rights are never really given up; they are merely transformed. Most natural rights, and the rights we create through contract, just take on the label "civil rights"; we continue having and exercising those rights as we did in the state of nature. We "give up" only what Locke calls the "executive power" that each of us has in the state of nature--the power to define and secure our

rights.<sup>40</sup> Through the social contract we create government, then empower that government to exercise the executive power for us--a power that in civil society goes by the name, appropriately, of "police power." Yet even then we retain the executive power in some situations--in the face of imminent danger, for example, when self-defense is required. And if all else fails, we retain the right "to alter or to abolish" the government we create, as the Declaration goes on to make clear.

It is important to notice also that when we yield to the community the right to define our rights--thereby authorizing the recognition of more clearly, more surely, and more universally defined legal rights--we are not saying that whatever the community--some majority, or some court--says those rights are is what they are. The community may be final; it is not infallible. Thus, our rights remain grounded ultimately in reason; they do not, through the social contract, become a function of mere will, majoritarian or otherwise. It must be stressed, therefore, that whatever institutions we may create to better and more universally define our rights must repair to the wellspring of our rights--to principles of reason--to discharge their responsibilities.

In that same vein, if we create government to secure our rights, the means we select must serve that end and not themselves become a source of tyranny. Indeed, if the state of nature, where power is in many hands, is fraught with peril, then civil society, with legal power concentrated in the hands of government, is even more so. The Declaration addresses the problem only briefly, by stating that powers, to be just, must be derived "from the consent of the governed." That raises a practical problem, of course, since any exercise of power, to be legitimate, would seem to require the all-but-impossible unanimous consent of the governed: in fact, rule by anything short of unanimity would mean, by definition, that some of the governed did not consent and that some are ruling others, which violates the natural equality and the equal rights we all have. Clearly, majority rule does not address the problem; it merely raises the question: By what right does the majority rule the minority? Nor does the answer to that question that is given by the standard version of the social contract suffice--the majority's right stems from prior unanimous consent to be ruled thereafter by the majority. That answer asks us to believe both that there was unanimous consent at the outset and that that consent binds the generations that follow, neither of which is true.<sup>41</sup>

Nonetheless, social contract theory does point in a fruitful direction: it points to the supermajoritarian consent that we find in the constitutional ratification and amendment processes, which the Founders instituted when they drafted a constitution some 11 years after the Declaration was written.<sup>42</sup> Aware that unanimity could never be achieved, even at the outset, much less consent by one generation that would bind later generations, but that broad consent of some kind was necessary to institute a government in the first place and authorize its powers, the Founders candidly admitted, in effect, that government is different, that it is unlike ordinary voluntary associations. As George Washington put it, "[G]overnment is not reason, it is not eloquence, it is force."<sup>43</sup> Thus recognizing the essential character of government--that it is a forced association--the Founders sought to limit government in several respects, all of which are related, in one way or another, to the Declaration's consent requirement.

First, and most important, they devised the doctrine of delegated and enumerated powers: power originates with the people, who then delegate it to government; government's powers are enumerated in a founding document, a constitution, which limits power by saying, in effect, that the government has only those powers. The preamble to our Constitution makes the initial point when it says, "We the People . . . do ordain and establish this Constitution." The next point is made by the very first sentence of article I: "All legislative Powers herein granted shall be vested in a Congress." By implication, only certain powers are "herein granted"--those that are enumerated in the document, largely in article I, section 8. Finally, the Tenth Amendment, the last documentary writing of the founding period, draws those points together when it states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, the Constitution authorizes a government of delegated, enumerated, and therefore limited powers. Through the constitutional ratification process, imperfect though it may have been at achieving unanimity, the founding generation consented to be ruled under the powers thus granted or delegated.

Second, given the impossibility of achieving unanimity, at least the powers granted in article I, section 8, are largely powers that each of us would have by right in the state of nature. They are legitimate per se, not because they were agreed upon unanimously. Thus, we would have them in the first place and accordingly would be able to grant or delegate them to government to exercise on our

behalf. That would not be true of redistributive powers, for example, for none of us would have such powers by right in a state of nature. Nor would it be true of the power of eminent domain that is implicit in the Fifth Amendment--the power to take private property for public use upon payment of just compensation--for no individual would have such a power in the state of nature. The best that can be said of that power is that the founding generation did consent to it, however imperfectly, and that victims of its exercise are at least left whole, provided the compensation is just; we cannot say that the power is otherwise legitimate, which is why it was known in the 17th and 18th centuries as "the despotic power."<sup>44</sup>

Third, recognizing that consent is an imperfect device for achieving legitimacy, the Founders incorporated a wide range of checks and balances in the Constitution, pitting power against power as a way to further guard against overweening government. Thus, they divided power between the federal and the state governments. And they separated power, largely along functional lines, among the three branches of the federal government they had created. Most important among such checks, perhaps, is "the judicial Power" they granted to the Supreme Court, which extends "to all Cases, in Law and Equity, arising under [the] Constitution." The judicial power enables the Court to say that the political branches have acted beyond their authority and hence unconstitutionally. It provides a legal check on political power, thus better securing the rule of law.

Finally, in addition to the supermajoritarian consent that was required for constitutional ratification and amendment--which served, as far as practically possible, to legitimately institute government, authorize its powers, and change those powers--the Founders provided for periodic elections, which were meant to serve as an ultimate check on power. In that connection, however, it is important to note that elections are not meant to authorize new powers of government; rather, they are meant merely to authorize certain people to exercise the enumerated powers that have already been authorized--and limited--through constitutional ratification. Thus, except for a certain range of discretionary powers, the exercise of which elections might affect, elections are not meant to expand or contract the powers of government, which are set by the Constitution. Elections are meant simply to enable the governed to change the parties authorized to govern. Periodic elections, in short, lend legitimacy to a government, not to its powers.

During the ratification debates, however, it became clear that, if the Constitution was to be ratified, a bill of rights would be required--for extra caution. Thus, more than two years after the Constitution took effect, during which time the new government began operating under it, 10 amendments were added to the document--the Bill of Rights. In the course of the debate, however, some argued that the failure to list all of our rights--which would be impossible to do--would be construed, by ordinary principles of legal construction, as denying or disparaging the rights not so listed. Thus, the Ninth Amendment was written: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." That amendment made it clear that we had both enumerated and unenumerated rights--that the fact that a right was not mentioned in the amended Constitution did not mean it was not protected.<sup>45</sup>

Today, many conservatives disparage the Ninth Amendment itself, fearing it empowers judges to impose their own conception of rights upon the rest of us--and upon political majorities, in particular. The amendment does indeed empower judges, by implication; and it empowers them, in appropriate circumstances, to restrain political majorities, just as the other amendments do--which also require substantial judicial interpretation if they are to be given effect. But it does not empower judges to draw rights indiscriminately from their own imaginations, from "evolving social values," or from any of the other illegitimate sources that too many judges, in recent years, have admittedly drawn upon. Rather, there was a broadly understood and fairly well worked out theory of rights that the Founders had in mind when they drafted the Constitution--and drafted the Ninth Amendment, in particular. Rooted in reason, as outlined above, and manifest largely in the common law,<sup>46</sup> that theory was incorporated into the Constitution by the founding generation when it ratified the Bill of Rights. If we are to follow the rule of law as originalists--if judges are to eschew politics and apply law, neither making it up nor ignoring it--we must recognize that the classical theory of rights, grounded in property and contract, is what stands behind the Ninth Amendment. It is the law of that amendment. Consistent with their oaths of office, judges must apply that law.

But even before ratifying the Bill of Rights, with its Ninth Amendment, Americans lived under a ratified Constitution. Are we to suppose that during that period of more than two years they had only those very few rights that were mentioned in the unamended Constitution? That

is the implication of the position taken today by many conservatives who, when confronting someone claiming to have a constitutional right, will ask, "Where do you see that right in the (amended) Constitution?" Given that the unamended Constitution listed very few rights, those conservatives must suppose that for over two years Americans enjoyed few rights against the federal government. That implication is absurd, of course; yet it follows from the premise that is buried in the conservatives' challenge--that if a right is not "in" the Constitution, we don't have it. Not all of the rights we have are explicitly "in" the Constitution (unamended or amended); in fact, most are not, for reasons that led to the Ninth Amendment in the first place. It is for that reason, precisely, that a judge must have a grasp of the theory of rights that stands behind and supports the Constitution--a grasp of the "higher law" background of the Constitution, as Princeton University's Edward S. Corwin once put it. A judge who can apply only a few rights--those that are explicitly enumerated--or a few close implications from such rights, is simply not equipped to do his job. He needs to come to grips with the forest, not simply notice a few trees.

The contention that the classical theory of rights stood behind the Constitution from the start, even before the Bill of Rights was added "for extra caution," is only buttressed by the realization that the Privileges and Immunities Clause was already there in the original, unamended Constitution, ready to limit the federal government as its authors surely meant it to, prior to the addition of the Bill of Rights. Understood in that way, what the Bill of Rights did was simply elaborate upon and make more explicit many of the same guarantees that were already incorporated in the Privileges and Immunities Clause--albeit by implication, but by common understanding of the meaning and scope of that clause. When they set about the task of drafting a new constitution, the Founders focused primarily on limiting power--through the doctrine of enumerated powers--in the course of which they mentioned only a few rights, relying primarily on the Privileges and Immunities Clause to encompass the rest. When it became necessary to add a bill of rights--to add more explicit limits on power--they did so. But they were adding nothing that was not already there in 1789, more than two years before the Bill of Rights was ratified. They were simply making the limits more clear and explicit. And even then there was just so much they could do to make those limits explicit, as the need for the Ninth Amendment attests, and the need for continuing judicial interpretation still attests.



All of that applied against the federal government alone, of course, as the Court made clear in 1833 when it held that, absent explicit language to the contrary, the Constitution's limits apply only against the government created by the document, the federal government.<sup>47</sup> Thus, it remained to apply those limits against the states--to secure the promise of the Declaration, the Constitution, and the Bill of Rights against the governments of general power. Indeed, it took a bloody Civil War to bring that promise to fruition--at least in law--through the Civil War Amendments, to which we now turn. As we consider the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, however, it will be crucial to keep in mind the meaning of its counterpart in article IV. Whatever its more recent history of interpretation or enforcement, the article IV clause was meant to constitutionalize the natural rights that were never surrendered but were merely transformed when we formed a new nation in 1776 and reconstituted ourselves between 1787 and 1791. It was that understanding of the Privileges and Immunities Clause that informed Corfield in 1823. As we shall see, it was that understanding that also informed and animated the authors of the Fourteenth Amendment.<sup>48</sup>

### **The Framing of the Fourteenth Amendment**

The Fourteenth Amendment was drafted in the aftermath of the Civil War by a Reconstruction Congress dominated by the new Republican Party. Thus, to appreciate the role Congress saw for the amendment's Privileges or Immunities Clause, it is important to review the political and intellectual origins of the new party.<sup>49</sup>

The Republican Party was born amidst the political firestorm ignited by the Kansas-Nebraska Act of 1854, which repealed the Missouri Compromise and opened the Nebraska territory to settlement on the basis of "popular sovereignty."<sup>50</sup> What that meant was that settlers would decide, by a simple majority, whether to allow slavery in the territory. Republicans came together in opposition to the act. They realized--none so profoundly as the man who would soon lead the party, Abraham Lincoln--that what bound them together was not simply opposition to Democratic policy but a commitment to restoring America's founding principles. Mere popular sovereignty, they argued, was based on an enervated understanding of democracy, which reduced the idea to a simple question of majority rule.

Speaking against Stephen Douglas, his great antagonist and the author of the Kansas-Nebraska Act, Lincoln addressed the issue as follows:

The doctrine of self-government is right--absolutely and eternally right, but it has no just application as here attempted. . . . When the white man governs himself that is self-government; but when he governs himself, and also governs another man, that is more than self-government--that is despotism. . . . My ancient faith teaches me that "all men are created equal"; and that there can be no moral right in connection with one man's making a slave of another. . . . No man is good enough to govern another man, without that other's consent. I say this is the leading principle--the sheet anchor of American republicanism.<sup>51</sup>

Americans had been led astray, Republicans believed, by Democratic rhetoric that identified self-government entirely with majority rule. They needed to be reattached to the "sheet anchor of American republicanism," which is the link between equality and democracy found in the Declaration of Independence.

Both Douglas and, more infamously, Chief Justice Roger Taney in his Dred Scott opinion had argued that the Declaration was not a statement of fundamental political principles animating American government. Rather, it was merely an assertion that Englishmen born in America were entitled to the rights of Englishmen born in the mother country; thus, the apparently universal principle of equality the Declaration announced was only a limited, and largely irrelevant, technical appeal to British justice.<sup>52</sup> By contrast, Republicans argued that it was only by maintaining a commitment to the principle of equality as the bedrock principle of democratic government that majority rule had any claim to legitimacy. Republicans thus saw the Democratic distortion of our fundamental principles as threatening not only to extend and perpetuate slavery but to undermine the rights of all Americans, white as well as black. Indeed, they saw the Democratic distortion as a threat to liberty itself. As Lincoln put it:

Little by little, but steadily as man's march to the grave, we have been giving up the old for the new faith. Near eighty years ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for some men to enslave

others is a "sacred right of self-government." These principles cannot stand together. . . . The spirit of seventy-six and the spirit of Nebraska are utter antagonisms, and the former is being rapidly displaced by the latter. . . . Is there no danger to liberty itself in discarding the earliest practice and first precept of our ancient faith? In our greedy chase to make profit of the negro, let us beware lest we "cancel and tear in pieces" even the white man's charter of freedom.<sup>53</sup>

That was the core of Republican principle. It was on that ground that Lincoln was elected and on that ground that the Civil War was fought and won--not just to save the Union but to save it "so as to . . . keep it forever worthy of the saving."<sup>54</sup>

As has often been noted, Republicans were not abolitionists, by and large, because they thought there was no federal power to eliminate slavery at the state level. Some, of course, were racists; and their distrust and fear of the "slave power" had as much or more to do with how the slave states treated whites as with how they treated blacks: the gag rule violating the right to petition the government; the suppression of anti-slavery materials from the mails; and especially the treatment of pro-Union whites before, during, and after the war.<sup>55</sup> Still, while many Republicans may not have been abolitionists, neither did they support slavery, much less its extension into the territories. And they shared a common outlook: that the rights of blacks needed to be protected in order to protect the rights of all Americans.

Here, then, we have the basic tenets of Republican thought with their roots in the Declaration of Independence: a commitment to natural rights based on a premise of equality as the foundation of civil liberty; an appreciation for the limits of democratic government and for the need to protect minority rights if such government is to be legitimate; and a conviction, especially in the context of the postwar South, that there is an irreducible link between protecting the rights of blacks and protecting the rights of whites. As we search for the meaning of the Fourteenth Amendment, and the Privileges or Immunities Clause in particular, it will be important to keep those principles in mind, for they animated and continue to illuminate the debates surrounding the adoption of the amendment.

Although it is often difficult to discern the original meaning of an enactment--and that difficulty is exacerbated here by the tensions that surrounded Reconstruction--it hardly follows that we can know nothing about meaning. With the Fourteenth Amendment, however, we know a good deal, contrary to the conservative doubts noted earlier. We know, for example, that immediately after the Civil War Congress was intensely concerned with the "black codes" that southern states began passing, which discriminated against the newly freed slaves in a variety of ways. We know, too, that in seeking to address that problem, Congress passed the Civil Rights Act of 1866, which prohibited states from denying citizenship to blacks and required them to treat citizens "of every race and color" as equal to white citizens in respect to certain specifically enumerated civil rights--rights, among others, pertaining to personal integrity, property, contract, and access to the courts.<sup>56</sup> In addition, we know that there was widespread agreement in the first Reconstruction Congress regarding the substance of the act; but there was also considerable unease about its constitutionality. In fact, one of the principal reasons offered for the amendment was to "constitutionalize" the Civil Rights Act. Immediately after the amendment was ratified, therefore, Congress repassed the act to assuage any lingering doubts about its constitutionality.<sup>57</sup>

The record makes it clear, moreover, that those who framed the Fourteenth Amendment intended first to overturn the power of states to define "citizenship"--a power Taney had formulated in the Dred Scott case.<sup>58</sup> But they did not stop there. Michael Kent Curtis of Wake Forest University has shown that they said repeatedly that the purpose of the amendment was not simply to define U.S. citizenship but to include under that privilege, for blacks and whites alike, a broad array of rights against state interference. (It is not for nothing, after all, that Curtis entitled his book No State Shall Abridge, drawing from the amendment itself.)<sup>59</sup> Finally, to protect those rights, the framers of the amendment looked first and foremost to the Privileges or Immunities Clause. Consider, for example, this statement by Congressman John Bingham, the principal author of the amendment:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. . . . It is the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same

shall be abridged or denied by the unconstitutional acts of any State.<sup>60</sup>

Note especially Bingham's mention of "the inborn rights of every person"--our natural rights. Those ideas were echoed in the Senate where Jacob Howard introduced the amendment by saying, "[T]his is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. This is its first clause, and I regard it as very important." Going on to discuss the nature of the privileges and immunities the amendment protected, Howard relied substantially and explicitly on an expansive reading of Corfield--adding that the clause also included the guarantees of the Bill of Rights.<sup>61</sup>

The substantive reading Congress gave to the Privileges or Immunities Clause stands in sharp contrast to the procedural reading many members gave to the Due Process and Equal Protection Clauses--the clauses that today bear the entire substantive burden, however uncomfortably and unevenly. That contrast is found also in the ratification debates that took place in the states. There too it was the Privileges or Immunities Clause that was expected to be the principal source of rights--for whites and blacks alike, and especially for southern unionists for whom Reconstruction Republicans were especially concerned. Thus, during the Ohio ratification campaign, we find a Republican congressman saying:

I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of Southern slaveholders. . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected.<sup>62</sup>

After the Fourteenth Amendment was ratified in 1868, Congress continued to read the Privileges or Immunities Clause, through Corfield, as the substantive heart of the amendment.<sup>63</sup> It remained only for the Court to confirm that reading, to take the active role Congress and the American people meant for it to take when they passed and ratified the amendment. Unfortunately, by a bare majority, the Court chose restraint; it chose to shirk its responsibility--indeed, its duty--to do the intellectual

work necessary to uphold the Constitution as recently amended.

### The Slaughterhouse Cases

Five years after the Fourteenth Amendment was ratified, the Supreme Court, in the infamous Slaughterhouse Cases, effectively eviscerated the Privileges or Immunities Clause, thereby fundamentally changing the course that Congress and the American people had meant the Court to follow. Subsequent courts would try to do under the Due Process Clause what was meant to be done under the Privileges or Immunities Clause, and when that ultimately failed they would turn to the even less substantive Equal Protection Clause. The result has been a Fourteenth Amendment jurisprudence that at various times has been a nightmare for liberals and conservatives alike--precisely as should be expected when the substantive anchor of the amendment has been abandoned.

The Slaughterhouse Cases grew out of an 1869 Louisiana law that granted a monopoly on the slaughtering of cattle in the New Orleans area to the Crescent City Company. The law was billed as a public health measure, but that was a ruse: the act was in fact the result of disdainfully unconcealed bribery; its true aim was the enrichment of the incorporators of the company.<sup>64</sup> Indeed, the extent of the corruption underlying the legislation was made plain in the farcically apt denouement of the affair: When the originator of the scheme--a man named Durbridge, who owned the land to be used for the new slaughterhouse--sued his erstwhile partners for his promised share of the stock in the new company, the company defended, after realizing that another participant in the escapade had already made off with the stock, by arguing that the value of the stock that Durbridge sought came from the corruption in which he himself had participated. Thus, the company concluded, he was not entitled to protection from the courts in enforcing his claim. At trial it was proven that the Crescent City monopoly had been obtained by bribing members of both houses of the Louisiana legislature, the governor, and the owners and editors of the New Orleans Times and the Republican newspapers. The New Orleans Picayune and Bee, overlooked in the distribution of the Crescent City largesse, reported extensively on both the corruption and the legal maneuvering that resulted from the creation of the monopoly.<sup>65</sup>

Not surprisingly, the litigation that ensued was a mess. The initial action was brought by the Butchers

Benevolent Association, whose members were denied employment under the act. The Crescent City Company and the state vigorously defended. As parties raced from courtroom to courtroom collecting injunctions forbidding and requiring enforcement of the act, the thicket of litigation grew so tangled that at the height of the controversy there were more than 200 suits in play. Counsel for the parties could not decide what the court orders meant. Neither side felt bound by orders brandished by their opponents. A notable example of defiance occurred when the Crescent City Company, ignoring a federal order issued by Justice Joseph P. Bradley on circuit that allowed the butchers to ply their trade, went to a newly created state district court and obtained an injunction against the butchers. Armed with that injunction, Crescent City called out the New Orleans police. They confiscated all the meat being offered for sale in the city and held it in the June heat until it spoiled, leaving the city without meat for a weekend. It is little wonder that the New Orleans Bee described the situation as the "Farcical Administration of Law."<sup>66</sup>

The parties finally agreed that six suits would be filed in the U.S. Supreme Court, but three were dropped after key opponents of the Crescent City Company were bought off with land deals, shares of stock, and seats on the Crescent City Board of Directors. The remaining three cases were consolidated as the Slaughterhouse Cases.<sup>67</sup> A Louisiana court ruling prevented the butchers from bringing the issue of corruption as part of their challenge. The butchers therefore focused on their substantive legal argument: that in creating an exclusive monopoly the legislature had denied the butchers' fundamental right to labor at a common profession, thereby abridging their privileges or immunities as citizens of the United States.

Thus it was that the Supreme Court came to face its first opportunity to interpret the extent of protection afforded by the Privileges or Immunities Clause of the Fourteenth Amendment. Former Supreme Court Justice John Campbell, counsel for the butchers, put forward the main argument:

Your petitioners represent that the first clause of the 14th amendment . . . prohibits the States to abridge the privileges and immunities of citizens of the United States, and secures to all protection from State legislation that involves the rights of property, the most valuable of which is to labor freely in an honest avocation.<sup>68</sup>

Campbell's brief developed that theme in some detail, contending that "the general principle of the law is that every person has individually, and the public have collectively, a right to require that the course of trade should be free from unreasonable obstruction." It argued that the Fourteenth Amendment had placed that principle under the protection of the federal government; that under the amendment, "conscience, speech, publication, security, freedom, and whatever else is essential to the liberty, or is proper as an attribute of citizenship, are now held under the guarantee of the Constitution of the United States." Campbell's brief pointed also to the Due Process and Equal Protection Clauses, and it drew in the Thirteenth Amendment as well, linking the granting of a monopoly with feudal conceptions of servitude.

Representing the Crescent City Company was Charles Allen, who had served as Massachusetts attorney general. His rebuttal drew upon "states' rights" themes heard during the ratification debates from opponents of the Fourteenth Amendment: in particular, that Campbell's reading of the Fourteenth Amendment would undermine federalism, would lead to the centralization of power, and would "bring with in the jurisdiction of this court all questions . . . and deprive the legislatures and State courts of the several States from regulating and settling their internal affairs."

By a vote of five to four, the Supreme Court came down against the butchers, upholding the state and the Crescent City Company. Writing for the majority, Justice Samuel F. Miller gave the nation a new Fourteenth Amendment, in essence, and a new legislative history to accompany it.

According to Miller's rendition, "the most casual examination" of the Civil War Amendments shows them to be concerned almost exclusively with the rights of blacks.<sup>69</sup> Despite the plain language of the Fourteenth Amendment, which speaks of "citizens" and "persons," Miller maintained that, particularly where whites were concerned, the amendment was not intended "as a protection to the citizen of a state against the legislative power of his own state." He reached that conclusion on the basis of an extraordinary reading of the Citizenship Clause. Ignoring overwhelming and uncontroverted evidence that the clause was added to the Fourteenth Amendment to overturn Dred Scott's contention that U.S. citizenship is derived from state citizenship, Miller held that the clause creates distinct citizenships--state and national, each conferring its own set of rights--and that the Privileges or Immunities



Clause protects only rights of national citizenship, which he then read narrowly.<sup>70</sup> The rights of state citizenship, Miller said, comprehend "nearly every civil right for the establishment and protection of which organized government is instituted"; thus, the new Privileges or Immunities Clause, pertaining to national citizenship, covers very little of substance. In fact, the only examples of rights protected by the Privileges or Immunities Clause that he could come up with were either rights that had already been explicitly recognized by the Supreme Court, prior to ratification of the Fourteenth Amendment, or rights, such as protection on the high seas, that state governments could not possibly abridge.<sup>71</sup>

Naturally, the effect of Miller's opinion was to render pointless the passage and ratification of the Fourteenth Amendment's Privileges or Immunities Clause. Since the entire domain of privileges and immunities of citizens of the states "lay within the constitutional and legislative power of the states, and without that of the Federal government," we are left with a clause that "seems to be unnecessary," said James Bradley Thayer of the Harvard Law School.<sup>72</sup> Miller's construction flew in the face not only of the language and history of the clause but of the basic canons of judicial construction: judges, after all, must assume that lawmakers--and constitution makers, in particular--mean something when they act, even when they are unsure just what that something may be.<sup>73</sup>

Needless to say, Miller's opinion did not go unchallenged. In fact, three separate dissents were entered, the most searching of which were those of Justices Field and Bradley.<sup>74</sup> Field focused on the relationship between natural and civil rights and on the role of constitutional government in securing those rights. Rejecting the majority's construction of the Privileges or Immunities Clause, which reduced it to "a vain and idle enactment which accomplished nothing," Field sought to interpret the clause in a manner consistent with both the meaning of the amendment and the basic canons of constitutional interpretation.

In so doing, he followed the approach advocated by Justice Joseph Story, the great constitutional commentator who had written that constitutional provisions should be interpreted in a manner that, "without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design" of the provision in question, in the context of "the structure of the instrument, viewed as a whole, and also viewed in its component parts."<sup>75</sup>

Thus, Field examined the Fourteenth Amendment in the context of the overall meaning and purpose of constitutional government, arguing that the purpose of the amendment was

to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.

Here we see Field, in the tradition of Blackstone, making explicit the implicit connection between natural rights and constitutional government that the Privileges or Immunities Clause represents. Given that interpretation, Field could hardly find the Louisiana statute constitutional, since

[a]ll monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness.

For Field, our liberties are a seamless web, which no state, after ratification of the Fourteenth Amendment, could abridge.

Justice Bradley's dissent went even further in emphasizing the substantive force of the Privileges or Immunities Clause. Thus, he took sharp issue with the limitations the majority put on the reach of the clause:

[T]o say that these rights and immunities attach only to state citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient interpretation of the constitutional history and the rights of men, not to say the rights of American people.

In Bradley's view, not only was the Privileges and Immunities Clause of article IV best interpreted in the broad substantive manner of Corfield, but the purpose of the citizenship language in the Fourteenth Amendment was to broaden, rather than narrow, the scope of the clause. That purpose, according to Bradley, was to guarantee to all citizens the protection of all rights guaranteed by the Constitution and the Bill of Rights.

### **The Aftermath of Slaughterhouse**

Whatever the men who wrote, passed, and ratified the Fourteenth Amendment may have thought they were doing, it

surely was not to leave unchanged the reach of the federal government in protecting citizens against actions by the states. Yet that is what the Slaughterhouse majority accomplished. Commentators at the time--such as Harvard's Thayer, a strong advocate of judicial restraint<sup>76</sup>--acknowledged the superiority of the dissenters' arguments. Even Justice Miller seemed uneasy about his ruling; for a year later, in Bartemeyer v. Iowa, his opinion for a unanimous Court would note its consistency with both the majority and minority constructions in Slaughterhouse<sup>77</sup>--suggesting that the minority opinion might still have some hold.

The Bartemeyer case is interesting also in that it helps us to see just how radical the Slaughterhouse majority was. In his concurrence in Bartemeyer, Justice Field states that

no one has ever pretended . . . that the fourteenth amendment interferes in any respect with the police power of the State. . . . It was because the act of Louisiana transcended the limits of police regulation . . . that dissent was made.<sup>78</sup>

Justice Miller might have upheld the Slaughterhouse statute, that is, on narrower, police power grounds--as a sanitary measure for the health of the community. That would doubtless have been a stretch, and Field and Bradley might still have dissented, arguing that the sanitary rationale was a ruse. But there would have been no need, on that reading, to narrow the Privileges or Immunities Clause so radically. Miller could have reached his result without doing such extensive violence to the meaning, history, and purpose of the Fourteenth Amendment.<sup>79</sup>

We come, then, to the larger questions: Why did the Court write the opinion it did, and why did that opinion have such a significant and lasting impact, despite its manifest defects? At this remove, it is difficult to answer those questions with certainty, of course, but there seem to be two answers, at bottom. The first has to do with a genuine concern about federalism. The second relates to uncertainty about the natural rights foundations of government, the decline of belief in those foundations, and the rise of progressivism, especially among America's intellectual elites.

Several members of the Court were concerned about the effect the Civil War Amendments might have on our federal structure. As expressed in Miller's opinion for the Court, the Fourteenth Amendment threatened to "radically

[change] the whole theory of the relations of the state and Federal government"; if that happened, it would "fetter and degrade the state governments" by transforming the federal government into a "perpetual censor upon all the legislation of the states."<sup>80</sup> Thus, the majority was trying to protect the states' reserved powers, notwithstanding the history and purpose of the Fourteenth Amendment. In fact, a few years after Slaughterhouse was decided, an influential legal scholar of the day, Christopher Tiedeman, wrote approvingly of the Court as having "dared to withstand the popular will as expressed in the letter of the amendment" in order to save the federal structure of the government and the reserved powers of the states.<sup>81</sup>

Such judicial resistance to popular will--expressed through constitutional amendment, no less--is exactly what conservatives today decry, of course, as they shout "judicial activism." It is not a little ironic, therefore, to find those same conservatives defending the Slaughterhouse majority's "activism" in overturning the nation's decision to institute a constitutional mechanism for federal oversight of state actions. The Civil War generation meant to rewrite, in this limited way, the relationship between the federal government and the states. Once that was done, through the Constitution, the Court had no authority to impose its views on the matter--especially since the rewrite brought the Constitution into conformity, at last, with its underlying moral theory. The Court's job, rather, was simply to apply that law, as conservatives today rightly remind us.

Still, the need to preserve the original form of federalism, however compelling it may have seemed to the 1873 Court, cannot today explain why the Court has failed for so long to revisit so clearly erroneous a decision. Indeed, over the years, until rather recently, the Court itself has played a central role in eroding federalist principles.<sup>82</sup> We turn then to the second question and the reason for the enduring significance of the Slaughterhouse decision, namely, the great sea change in basic outlook that was just getting started at the time the case was decided.

From the nation's beginnings until after the Civil War, political and legal thought in America was dominated largely by the philosophy of natural rights. Indeed, it was because the Democratic Party had strayed from that philosophy, as discussed above, that the Republican Party was created. After the war, however, new ideas started to take root. Drawn from the theory of evolution in biology, the emergence of the social sciences, British utilitarian-

ism, German conceptions of "good government"--even the arts and literature--the new wave would come to the fore toward century's end in the form of the Progressive Era,<sup>83</sup> but it was already in the air when Slaughterhouse was decided. In fact, it was only eight years after the decision was handed down that Oliver Wendell Holmes published his influential study on the common law, which took a progressive, evolutionary approach to nature and to the development of the law.<sup>84</sup>

Under the new view, not only the Fourteenth Amendment but the entire Constitution--indeed, the very idea of constitutionalism--would come in time to be stripped largely of substance.<sup>85</sup> Rather than seeing the Constitution as an instrument designed to secure inherent rights, the new outlook asked whether talk of rights, especially "natural" rights, made any sense at all. Progressives would see the document as a more or less arbitrary set of institutional arrangements that enabled society, through government, to realize "evolving social values." Deprived thus of substance, the Constitution would become an instrument regulating process, through which transient majorities and competing interest groups would strive to secure their various conceptions of the common good. The Progressive Era, during which government was seen not as a necessary evil but as an instrument for solving social and economic "problems," would reach fruition, institutionally, only with the New Deal and the seminal Carolene Products case, whose famous footnote 4 recast the Bill of Rights as an instrument aimed at facilitating democratic decision-making.<sup>86</sup> But the themes of the Progressive Era were incipient even before Slaughterhouse was decided.<sup>87</sup>

Given that perspective, rights are not inherent attributes revealed by reasoned reflection on the human condition but mere competing political claims put forth by groups seeking government sanction. In this view, the traditional conception of privileges or immunities as providing a bridge between natural and civil law, and so between natural and civil rights, is quite literally meaningless. If there is no such thing as the nature of man, there can be no natural rights. Thus, the idea that natural rights can provide a limit to the permissible reach of government is likewise meaningless.

Although Justice Miller's opinion in Slaughterhouse makes no explicit use of the new thinking, it is nonetheless entirely consistent with that thinking. One imagines a Court majority largely unfamiliar with such issues, or at least inclined to avoid them, yet unsure of its ability to derive and justify a result the intellectual founda-

tions of which were already in doubt. Thus, the Court finds refuge instead in a more familiar, preamendment federalism. But whatever the ultimate explanation for its holding, growing skepticism about natural rights and the dawning promise of progressive government go a long way toward explaining why the decision has stood for so long.

The Progressive Era's skepticism about natural rights and deference to democratic decisionmaking continue to this day, of course, even in quarters not ordinarily associated with progressivism. Thus, Robert Bork, reflecting a substantial body of modern conservative thought, comes to those same progressive positions, albeit by a different route. His ultimate concern, like that of so many modern conservatives, seems to be with "judicial activism." With the Privileges or Immunities Clause, however, that concern is especially acute because Bork believes, as noted earlier, that "we do not know what the clause was intended to mean."<sup>88</sup> Were that true, one could understand his reluctance to grant judges a free rein to give the clause meaning.

Yet Bork contradicts his own claim at least three times. He admits that when they introduced the Fourteenth Amendment in their respective houses, "Representative Bingham and Senator Howard . . . referred to Corfield v. Coryell" (which he then disparages as "a singularly confused opinion"). And he admits that "Corfield lists rights already secured by the Constitution against adverse federal action and goes on to suggest a number of others." Finally, he says that "[w]e know the ratifiers intended . . . [to apply] the restrictions of the United States Constitution to the states." It would seem, in short, that even Bork has a fairly good idea of what the Privileges or Immunities Clause was meant to do.

What are we to make, then, of his contention that "Bingham and Howard meant [the] additional rights [suggested in Corfield]"? One would think that enough for an "originalist." Yet for Bork it is not, for he immediately adds:

That the ratifiers [meant these additional rights] is far less clear. But even the full list of rights set out by one Justice in Corfield is something far different from a judicial power to create unmentioned rights by an unspecified method. Certainly, there is no evidence that the ratifying conventions intended any such power in judges, and it is their intent, not the drafters', that counts.

One wonders how the ratifiers imagined those rights would be enforced if not through cases or controversies brought before judges. But setting that issue aside for the moment, Bork never tells us just why it is that it is the ratifiers' intent that counts rather than the drafters'. Nor does he offer any evidence to support his contention that the ratifiers' intent is unclear. Perhaps he has in mind an argument commonly used against originalists: there were many ratifiers and few records of their deliberations; no doubt they had many things on their minds, which we can never know.

Taken to its limits, of course, that is an argument against constitutionalism, as Bork well knows. In fact, it is the very distortion of originalism against which he himself has so often argued. Clearly, whatever they may have thought the Fourteenth Amendment meant, those who ratified it meant at least to do that, to ratify the amendment. Given that much, we can say at least this: when a constitutional provision is (as the Privileges or Immunities Clause was) clearly defined (in Blackstone), adjudicated (in Corfield), and explained by its authors (Bingham, Howard, and others), the subjective thoughts or motives of those who ratify it are really beside the point. We are not talking here about some monumental historical mistake whereby the provision meant one thing and those who ratified it thought it meant something entirely different. We are talking rather about a fairly straightforward matter: by their votes the ratifiers revealed their intent to ratify the Fourteenth Amendment as commonly understood at the time, whatever their subjective and varied intentions or understandings may have been. In an imperfect world, that is the best we can do.

Thus, we must look, in the end, to objective evidence of original understanding, not to subjective intent. Doing so makes plain what the Privileges or Immunities Clause was meant to accomplish, as discussed above. And it is plain also that that understanding not only empowered judges to interpret and apply the clause in cases brought before them but limited that power as well. Thus, Bork's concern about judges is overstated when he speaks, as above, about judicial power to "create" unmentioned rights. When adjudicating within the scope of their authority, judges do not "create" rights. They derive rights. There is all the difference in the world between the two. As discussed earlier, rights are secured through cases or controversies that ordinarily require judicial interpretation of broad language. That often requires a judge to derive more narrowly defined rights from such language without going beyond its scope. That is not

always easy, of course. But if done correctly, the "new" rights are not really new at all. They are simply more specifically defined derivations, entailed by the broad language from which they are derived.

Bork is right, of course, to be critical of those who would urge judges to go "beyond" the constitutional provision in question. But again, going "beyond" and going "behind" a provision are two very different things. Nothing in the debates surrounding the Fourteenth Amendment suggests that the drafters or ratifiers thought they were empowering judges to "create" rights; rather, those rights would be and were "recognized," constitutionally, through ratification. Nor was there any intent to have courts "supplant legislatures" or to "[command] judges to abandon clause-bound interpretation." Likewise, the amendment grants judges no "unlimited power" to frustrate legislatures or to "subordinat[e] the legislatures of all the states . . . to the uncontrolled discretion of judges." Bork's characterizations simply misstate, by overstating, the original understanding of the amendment. To be sure, judges were empowered to "frustrate" legislatures when warranted by the amendment, but that is hardly an "unlimited" power or a grant of "uncontrolled" discretion. For at the same time the amendment authorizes the power it also limits it and controls judicial discretion. Whether judges will abide by those limits is another matter, of course; but faced with that problem we criticize the judging, we do not urge that the amendment be ignored.

#### **The Privileges or Immunities Clause and Contemporary Constitutionalism**

Had the Slaughterhouse Court properly read and applied the Privileges or Immunities Clause, we would doubtless have today a very different body of constitutional law than we have--and a very different nation, not least in the area of race relations, but not there alone. Jim Crow and the de jure segregation that characterized it would not have been permitted, but neither would the far-reaching state regulation of economic activity that came later. Most important, absent any subsequent constitutional amendments to the contrary, we would have had, in all likelihood, a more coherent and well-grounded body of constitutional thought and law. And that could have helped judges and scholars resist the intellectual and political onslaught that came with the Progressive Era--an era brought about, in part, as a reaction to conditions that arose from the kind of "law" that was upheld in Slaughterhouse.



The most immediate concern of the Civil War Amendments, of course, was to address constitutionally the evils of slavery that had been left unaddressed when we reconstituted ourselves between 1787 and 1791. But the amendments were written, consciously, in the name not just of freed slaves but of "persons" and "citizens." Their larger purpose, therefore, was to reorder fundamentally the relationship between the federal and the state governments--more precisely, to better protect the rights of individuals against state violations by affording them federal remedies.

It is crucial to appreciate, however, that although that fundamental reordering would have changed federalism, it would not have destroyed it--as conservatives today too often contend. For after the Civil War Amendments were ratified, the federal government was still limited to its enumerated powers, which meant that most powers, including the police power, remained with the states. Thus, what the amendments instituted was not a wholesale subjugation of the states to the federal government but simply a constitutional restraint on the exercise of state power. States retained their powers; they simply had to exercise them in ways that respected the rights of individuals--their rights as Americans. Far from stripping states of their legitimate powers, then, the Civil War Amendments sought simply to confine states to such powers. States no longer had a power to enforce slavery. But neither did they have a power to impede individuals in their pursuits of lawful callings, among other things, even if they might regulate such pursuits, if warranted, in an effort to secure the rights of others.

After Slaughterhouse the courts did not stop overseeing state actions, of course. But their oversight was done without benefit of the Privileges or Immunities Clause and all it entailed. Relying instead on the less substantive Due Process Clause, until that was abandoned,<sup>89</sup> and then on the still less substantive Equal Protection Clause, courts have fashioned a Fourteenth Amendment jurisprudence that would be all but unrecognizable to those who wrote the amendment. Whereas the Privileges or Immunities Clause could have given the Court direction in its oversight of state actions, that oversight has been increasingly without direction--until today we have an essentially directionless body of Fourteenth Amendment jurisprudence that often reflects little more than each succeeding Court's conception of "evolving social values." Does anyone seriously believe that modern economic regulation or modern civil rights law--directed largely at the private sector, no less--looks anything like what those

who wrote and ratified the Civil War Amendments had in mind? They wanted to free individuals from government regulation--slavery and then the black codes, above all--not impose new regulations in the name of "equal protection."

Perhaps the clearest way to illustrate those points is with Justice John Marshall Harlan's lone dissent in the 1896 case of Plessy v. Ferguson,<sup>90</sup> which Justice Thomas, while still a circuit court judge, called "our best guide to the purpose behind the Privileges or Immunities Clause" because it is "one of our best examples of natural rights or higher law jurisprudence."<sup>91</sup> At issue in that case was another Louisiana statute, which required "equal but separate accommodations for the white and colored races" on passenger trains traveling through the state. Best known today for the infamous "separate but equal" doctrine, Plessy upheld the statute as consistent with the Equal Protection Clause of the Fourteenth Amendment. Harlan's dissent addressed the equal protection issue too, of course, but it did so by attending first to the substance of the matter, to the civil rights the amendment was written to protect.

Like Justice Field before him, Harlan approached the case by first taking into account the overall purpose of the Fourteenth Amendment--in fact, he included the Thirteenth Amendment as well. That purpose, he argued, was to ensure "the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before law of all citizens of the United States without regard to race." Thus understood, the amendment was consistent with the larger framework of a Constitution that is, in Harlan's memorable phrase, "colorblind, and neither knows nor tolerates classes among citizens." On those grounds, Harlan had no difficulty denying

that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent, not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by everyone within the United States.<sup>92</sup>

Free people, in short, have a right to associate freely. Thus, it was not so much equality as personal liberty that drove Harlan's dissent. His opinion was grounded in our

civil rights, our rights of freedom, which we all enjoy equally.

As Harlan's dissent demonstrates, a Fourteenth Amendment jurisprudence that reaches beyond equal protection to the civil rights that the Privileges or Immunities Clause was meant to secure not only would be more clear but, as Judge Thomas put it, would have "the strength of the American political tradition behind it."<sup>93</sup> For the clause--grounded, again, in natural and common law--is rich in the substance on which the nation was founded: it was meant to protect our freedom. Were it so used, Congress and the courts, simply by invoking the theory of rights that stands behind it, could carry out their duties under the clause far more directly, simply, and easily than they do today.

When judges try to derive rights from equal protection alone, however, rather than from the common law of liberty, property, contract, and due process, they get into trouble because they have so little to work with. Indeed, by itself, equal protection is a veritable invitation to judicial mischief because it is not really a source of rights: rather, it protects against government discrimination; government, because it belongs to all of us, cannot discriminate in its main business of securing rights or, except on narrowly tailored grounds, in providing public goods or benefits.<sup>94</sup> Before we can reach any conclusions about discrimination, however, we have to be clear about the rights at issue. Thus, substance comes first; the enforcement or legislative processes that might give rise to an equal protection complaint come second. Indeed, it is no accident that equal protection is the third element in the trilogy of protections found in section one of the Fourteenth Amendment.

But if adjudication from equal protection alone is fraught with peril, it hardly follows that equal protection is superfluous. In fact, equal protection is implicit already in the ideas of "privileges or immunities" and "due process of law"; thus derived, however, it is a function of the rights those ideas denote, not a free-standing source of rights. To be sure, Congress made equal protection separate and explicit in the Fourteenth Amendment; but it did that, doubtless, because under the circumstances then before it, it wanted to make it crystal clear to states that they were obligated to treat people equally, especially in the matter of protecting their rights. From Congress's having so acted, however, we cannot conclude, as Bork does,<sup>95</sup> that Congress thought that equal protection was no part of either "privileges or immuni-

ties" or "due process of law." Equal protection is a part of those ideas. But the main business of those two concepts, unlike that of equal protection, is substantive: it is freedom.<sup>96</sup>

At the end of the day, however, we need to revitalize the Privileges or Immunities Clause not simply to correct Fourteenth Amendment jurisprudence but as part of a much larger effort to revive constitutionalism in this nation and restore, in particular, the fundamental connection between the Constitution and its natural law foundations. Today, we live under what is essentially a positivist conception of the Constitution, to which both liberals and conservatives have subscribed. As a result, many of the principles the Founders drew upon and protections they instituted are all but dead letters--none more than the doctrine of limited, enumerated powers. Grounded in the idea that all power originates with the people, who delegate only certain of their powers to government, that doctrine was meant, as noted earlier, to be our principal defense against overweening federal power. It was lost, however, when the New Deal Court, following President Roosevelt's notorious Court-packing threat, essentially eliminated it from the Constitution.

As government at all levels has grown, our rights too have been seriously eroded, especially since they were bifurcated by that same Court in the infamous Carolene Products case of 1938,<sup>97</sup> leaving us vulnerable thereafter to both federal and state tyranny. As part of its effort to "democratize" the Constitution--to convert it into an all but empty vessel through which succeeding majorities might pursue their ever-changing ends--the Roosevelt Court reduced a vast body of rights that might frustrate such pursuits to a kind of second-class status. Thus, the Court said that acts implicating "fundamental" rights such as speech or voting would get "strict scrutiny" and would probably be found unconstitutional; but measures concerning "ordinary commercial relations," implicating "economic rights" such as property and contract, would receive minimal scrutiny and would be overturned only if there were no "rational basis" for them. That, of course, is a far cry from what the Founders had in mind when they wrote the Constitution--and a far cry, too, from what those who wrote the Fourteenth Amendment had in mind.<sup>98</sup>

As we saw earlier, the conception of rights that stands behind the Constitution, and the Privileges or Immunities Clause in particular, draws no distinction at all between "fundamental" and "nonfundamental" rights--much less between differing "levels" of judicial review. Those

ideas were made of whole cloth by the New Deal Court to clear a constitutional path for the modern redistributive and regulatory state.<sup>99</sup> Indeed, we need look no further than to James Madison, the principal author of the Constitution, for the original, unitary conception of rights. Discussing the meaning of "property" in his famous essay on the subject, Madison wrote:

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. . . . [A] man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may equally be said to have property in his rights.<sup>100</sup>

Clearly, the modern distinction between "fundamental" and "nonfundamental" rights--between "personal" or "political" and "economic" rights--would have been irrelevant if not nonsensical to the Founders.<sup>101</sup> For them, as discussed earlier, all rights are property: indeed, we distinguish legitimate from illegitimate claims about rights by determining whether the claimant holds clear title--whether he is "entitled"--to the good claimed. Whether that good is real property or labor or personal liberty or something else is really irrelevant to the question.

Thus, a unitary theory of rights not only is closer to the truth of the matter but helps the judge get to that truth by helping him sort legitimate from illegitimate claims: he asks not whether the right claimed is "fundamental"--a subjective value judgment--but whether in fact it is held free and clear. If it is, then government can restrict or take it, in certain cases, only in narrowly tailored ways--such as by paying for it under a power of eminent domain. Absent such a power, individuals must be left free to enjoy their rights.

Naturally, there will always be those who want to use a revitalized Privileges or Immunities Clause as "a fresh source of distinctly personal rights,"<sup>102</sup> such as rights to government-provided health and welfare benefits, and that too has prompted many conservatives to urge that the

clause not be revived. The danger is real, to be sure, but the argument, when generalized, is an argument against the power of judicial review as such. Yes, judges may abuse their power of review by going beyond the text as it was meant to be understood. But again, that is reason to criticize their reasoning, not their authority. Thus, the kind of "positive" rights that are at issue here could not possibly have been included under the Privileges or Immunities Clause because the clause secures our "natural" rights--the rights that antedate government: of necessity, "rights" created only by government are excluded. Here, too, a unitary theory of rights yields the same conclusion, showing why there are no such rights: for the things claimed, by definition, are things held not by the claimant but by others. Indeed, it is only because those things are not held by the claimant that he is asking government to transfer them from their rightful owners to him.

Perhaps the most respectable argument against reviving the Privileges or Immunities Clause is from a consideration of stare decisis: out of respect for legal stability, the Court should continue on the path it has taken for the past 125 years. Even Judge Thomas observed that "it may be idle to think in terms of overruling the Slaughterhouse Cases."<sup>103</sup> Yet we all know that the claims of stare decisis are weakest in the area of constitutional law--witness the reversal of Plessy nearly 60 years after it was decided.<sup>104</sup> And we know, too, in our public consciousness, that in a contest between stability and justice, going to our first principles as a nation, the claims of justice should eventually prevail. The claims of justice at issue here have been plain from the time the Court came down with its bitterly argued five-to-four ruling and the butchers of New Orleans lost their right to pursue a lawful calling. Those claims, in a thousand variations, have only grown stronger over the years.

But the claims of stability have grown stronger, too--in an ironic way. Indeed, can anyone seriously contend that under the Fourteenth Amendment jurisprudence that has evolved we have stability? Today, neither individuals nor states nor Congress nor the courts have a clear idea about what they may or may not do with respect to each other. If anything, the Slaughterhouse Cases need to be overruled, and the Privileges or Immunities Clause revived, just to bring about some stability.

That argument is made stronger, moreover, by the rebirth of federalism over the past two decades. If the era of big government is indeed over, at least in principle,

and power continues to devolve to the states and the people, then it is imperative, if the process is to continue smoothly, that we have a better grasp of the proper constitutional relationships among the two levels of government and the people than we currently have. Modern liberals often resist devolution because they do not trust the states--even as they misplace their trust in the federal government.<sup>105</sup> Modern conservatives lend credence to liberal fears when they urge devolution, in the name of "states' rights," with "no strings attached."

The truth, of course, is that most of the power now under consideration for devolution should never have been assumed by the federal government to begin with--it is beyond the federal government's enumerated powers. But if such powers belong properly to state governments, under their respective state constitutions, then they must be exercised consistent with the rights of individuals--their rights as Americans, as protected by the Privileges or Immunities Clause; and that, if necessary, is a federal matter. Thus, a revived Privileges or Immunities Clause, by assuring liberals that individuals would be protected, would encourage devolution, which is what conservatives want. It would be a win for all sides.

In the end, however, it is constitutionalism itself that must be revived, for that is the idea we have lost as government at all levels has grown. That idea, at bottom, is really quite simple: a constitution is an instrument through which a people "constitutes" itself politically--authorizing, empowering, and limiting the institutions of government that are thereby brought into being. Over the course of the 20th century, as we have asked government to do more and more for us, we have tended to forget the "limiting" part--and have paid the price with our liberty. Let us remember Lincoln's question, "Is there no danger to liberty itself in discarding the . . . first precept of our ancient faith?" It is no accident that the Civil War generation returned to our first principles as a nation. Like the founding generation before them, they had just fought a bitter war to secure liberty. The Privileges or Immunities Clause, with its rich history in the natural and common law traditions, was their way of securing liberty constitutionally. It is a reminder to us of our roots in those traditions, a reminder of the moral heritage of our enduring Constitution.

### Notes

1. Butchers' Benevolent Association v. Crescent City Livestock Landing and Slaughterhouse, 83 U.S. (16 Wall) 36 (1873).
2. *Ibid.* at 96 (Field, J., dissenting).
3. Colgate v. Harvey, 296 U.S. 404 (1935), overturned in Madden v. Kentucky, 309 U.S. 83 (1940). For a fuller discussion, see Laurence Tribe, American Constitutional Law, 2d ed. (Cambridge, Mass.: Harvard University Press, 1988), pp. 558-59.
4. Lino Graglia, "Do We Have an Unwritten Constitution? The Privileges or Immunities Clause of the Fourteenth Amendment," Harvard Journal of Law and Public Policy 12 (1989): 83.
5. See, for example, several of the essays in Harvard Journal of Law and Public Policy 12 (1989).
6. Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874).
7. See the discussion in Tribe, pp. 566-70.
8. Robert Bork, The Tempting of America: The Political Seduction of the Law (New York: Free Press, 1990), pp. 37-40, *passim*.
9. See, for example, Raoul Berger, Government by Judiciary (Cambridge, Mass.: Harvard University Press, 1977).
10. Bork, p. 39. It should be noted that much scholarly discussion of the meaning of the Privileges or Immunities Clause is directed to a single question: whether it was intended to "incorporate" the Bill of Rights, making those guarantees good against state actions, not just the actions of the national government.
11. *Ibid.*
12. Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" Stanford Law Review 2 (1949): 5-173. Fairman's influence is readily acknowledged by conservative scholars and in fact is quite pervasive; see, for example, Michael Curtis, No State Shall Abridge (Durham, N.C.: Duke University Press, 1986), pp. 4-6, *passim*.



13. The quote from Boutwell is found in Charles Fairman, Reconstruction and Reunion, 1864-88, vol. 6 of History of the Supreme Court of the United States (New York: Macmillan, 1971), p. 1270.
14. Berger, pp. 137, 145.
15. Graglia, p. 87.
16. Bork, p. 39.
17. Graglia, p. 88.
18. Bork, p. 39.
19. Fairman, Reconstruction and Reunion, p. 1270.
20. See, for example, Curtis, pp. 120-26.
21. Clarence Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," Harvard Journal of Law and Public Policy 12 (1989): 64.
22. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (no. 3230).
23. Alexander Hamilton, Federalist no. 80, in The Federalist, ed. Clinton Rossiter (New York: Modern Library, 1937), p. 575.
24. Toomer v. Witsell, 334 U.S. 385, 395 (1948).
25. J. Harvie Wilkinson III, "The Fourteenth Amendment Privileges or Immunities Clause," Harvard Journal of Law and Public Policy 12 (1989): 43. See also John Hart Ely, Democracy and Distrust (Cambridge, Mass.: Harvard University Press, 1980), p. 23.
26. Quoted in George Anastaplo, The Constitution of 1787: A Commentary (Baltimore: Johns Hopkins University Press, 1989), p. 170.
27. F. Thorpe, ed., The Federal and State Constitutions, Colonial Charters and Other Organic Laws (Washington: Government Printing Office, 1909), vol. 7, p. 3788. Michael Conant, The Constitution and the Economy (Norman: University of Oklahoma Press: 1991), pp. 203-6, has a discussion of the historical background of the concept of privileges and immunities in the colonial charters and

the bearing of that history on the Privileges and Immunities Clause of article IV.

28. Charles Pinckney, quoted in Max Farrand, ed., Records of the Federal Convention of 1787 (New Haven, Conn.: Yale University Press, 1966), vol. 3, p. 12. On the other hand, John Harrison states that the clause "has no effect, either substantive or equality-based, on the treatment a state gives its own citizens." John Harrison, "Reconstructing the Privileges or Immunities Clause," Yale Law Journal 101 (1992): 1398.

29. See, for example, Tribe, p. 530.

30. Corfield at 551.

31. Ibid. at 551-52.

32. In fact, Slaughterhouse itself gives evidence of the significance of Washington's opinion in Corfield: both Miller, for the Court, and Field and Bradley, in their separate dissents, grounded their (radically different) interpretations of the Privileges or Immunities Clause in Washington's construction of the Privileges and Immunities Clause. See Slaughterhouse at 76 (Miller), 97 (Field), 117 (Bradley).

33. Blackstone was hardly idiosyncratic in his definition; similar definitions can be found in other contemporary legal dictionaries. Conant, pp. 202-4, discusses the point.

34. William Blackstone, Commentaries on the Laws of England, 1st ed. (1765; facsimile, Chicago: University of Chicago Press: 1979), pp. 125-29. The Blackstone connection is pointed out by Curtis, p. 64.

35. For a fuller discussion of the issues that follow, see Roger Pilon, "The Purpose and Limits of Government," in Limiting Leviathan, ed. Don Racheter and Richard Wagner (Aldershot, UK: Edward Elgar, forthcoming), chap. 2.

36. For a modern effort to justify government that takes Locke's state-of-nature approach, see Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974).

37. "Lives, Liberties and Estates, which I call by the general Name, Property." John Locke, "Second Treatise of Government," in Two Treatises of Government, ed. Peter Laslett (New York: Mentor: 1965), para. 123. For a more analytical reduction of rights to property, see Roger

Pilon, "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," Georgia Law Review 13 (1979): 1171-96.

38. See Richard A. Epstein, "Possession as the Root of Title," Georgia Law Review 13 (1979): 1221-43.

39. For modern treatments of these issues, see, for example, Nozick; Roger Pilon, "A Theory of Rights: Toward Limited Government (Ph.D. diss., University of Chicago, 1979); Jan Narveson, The Libertarian Idea (Philadelphia: Temple University Press, 1988); Douglas B. Rasmussen and Douglas J. Den Uyl, Liberty and Nature (La Salle, Ill.: Open Court, 1991); Richard A. Epstein, Simple Rules for a Complex World (Cambridge, Mass.: Harvard University Press, 1995); Richard A. Epstein, Principles for a Free Society (Reading, Mass.: Perseus, 1998); and Randy E. Barnett, The Structure of Liberty (Oxford: Oxford University Press, 1998).

40. Locke, para. 13.

41. For a fuller discussion of these points, see Roger Pilon, "On the First Principles of Constitutionalism: Liberty, Then Democracy," American University Journal of International Law and Policy 8 (1992-93): 531-49.

42. As an indication of how seriously the Founders took the unanimity requirement of social contract theory, see article VII of the Constitution, the Ratification Clause: "The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same" (emphasis added). Setting aside the very real problem of how individuals may be bound without their consent, when it came to the states, at least, only those states that had consented to be bound by the new Constitution could be bound by it. Consent was thus unanimous among those states.

43. Quoted in Frank J. Wiltstach, A Dictionary of Similes, 2d ed. (Detroit: Omnigraphics, 1924), p. 526.

44. See William Stoebuck, "A General Theory of Eminent Domain," Washington Law Review 47 (1972): 553-608.

45. See generally Randy E. Barnett, ed., The Rights Retained by the People (Fairfax, Va.: George Mason University Press, 1989).

46. "[T]he notion that the common law embodied right reason furnished from the fourteenth century its chief claim

to be regarded as higher law." Edward S. Corwin, The "Higher Law" Background of American Constitutional Law (Ithaca and London: Cornell University Press, 1955), p. 26.

47. Barron v. Mayor & City of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

48. For a more detailed look at the relationship between the Privileges or Immunities Clause of the Fourteenth Amendment and the natural rights principles of the Declaration of Independence, see Robert J. Reinstein, "Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment," Temple Law Review 66 (1993): 361-418.

49. Historical analysis of the intellectual origins of the Republican Party can be found in Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War (New York: Oxford University Press, 1970). Harry Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln Douglas Debates (New York: Doubleday, 1959), provides an illuminating account of the political thought of Abraham Lincoln and how that thought formed the policies of the newly created party.

50. The first anti-Nebraska meeting, which led to the first local-level Republican Party organization, was held in Ripon, Wisconsin, in 1854.

51. Abraham Lincoln, "Speech at Peoria, October 16, 1854," in Selected Writings and Speeches of Abraham Lincoln, ed. T. Harry Williams (New York: Hendricks House, 1980), pp. 36-37.

52. Dred Scott v. John F.A. Sandford, 19 Howard 193, 209-12 (1857).

53. Lincoln, pp. 43-44.

54. Ibid.

55. See, for example, Curtis, pp. 26-56, passim; see also Reinstein, pp. 393-410.

56. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

57. For a fuller discussion of the relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment, see John Harrison, "Reconstructing the Privileges or

Immunities Clause," Yale Law Journal 101 (1992): 1402-5.

58. See, for example, Don Fehrenbacher, The Dred Scott Case (Oxford: Oxford University Press, 1978), pp. 579-81.

59. See *ibid.*, pp. 57-153; and William E. Nelson, The Fourteenth Amendment (Cambridge, Mass.: Harvard University Press 1988), pp. 40-63.

60. Congressional Globe, 39th Cong., 1st sess., 1866, p. 2542 (emphasis added).

61. *Ibid.*, pp. 2765-66.

62. Cincinnati Commercial, August 31, 1866, p. 2. Quoted in Curtis, pp. 138-39.

63. Curtis, pp. 131-70.

64. The corruption is discussed in some detail in Fairman, Reconstruction and Reunion, pp. 1321-44. For a more restrained view, see Charles Lofgren, "The Slaughterhouse Cases: A Review and Evaluation," Paper prepared for an Institute for Justice Conference, "Slaughterhouse and the Future of Economic Liberty," Monterey, California, December 1-3, 1995.

65. Fairman, Reconstruction and Reunion, p. 1323.

66. New Orleans Bee, March 30, 1869, quoted in Fairman, Reconstruction and Reunion, p. 1325.

67. Fairman, Reconstruction and Reunion, p. 1340.

68. That quotation and those that follow immediately are taken from the record of the proceedings in Slaughterhouse and are found in *ibid.*, pp. 1324-47.

69. Slaughterhouse. The quotations that follow immediately are from the opinion of the court, per Justice Miller.

70. See Curtis, chap. 3.

71. See Fairman, Reconstruction and Reunion, p. 1354.

72. The phrase from Thayer's teaching notes is quoted in Nelson, p. 163.

73. For the clearest statement of the basic canons of constitutional interpretation, see Joseph Story,

Commentaries on the Constitution of the United States (1833; reprint, Durham, N.C.: Carolina Academic Press, 1987), vol. 3, pp. 285-86.

74. For a different view, see Fairman, Reconstruction and Reunion, pp. 1355-64; cf. Nelson, pp. 156-58. The quotations that follow are from Field's and Bradley's dissents.

75. Story, vol. 3, pp. 285-86.

76. See Nelson, p. 159 n. 54.

77. Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874).

78. Ibid. at 138-39.

79. This point is emphasized in Nelson, pp. 158-64.

80. Slaughterhouse at 78.

81. An analysis of the work of Tiedeman, including that quotation, is found in David Mayer, "The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism," Missouri Law Review 55 (1990): 94-161. We are indebted to Professor Mayer for drawing our attention to that point.

82. Although "federalism" is thought to refer primarily to federal-state relations, at bottom it concerns the doctrine of enumerated powers and the Tenth Amendment's instruction that if a power has not been delegated to the federal government, it belongs to the states or the people. Thus, the greatest erosion of federalism took place during the New Deal, in cases like United States v. Butler, 297 U.S. 1 (1936), Helvering v. Davis, 301 U.S. 619 (1937), and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), which allowed, in essence, a massive expansion of federal redistributive and regulatory powers. More recently the Court has shown a limited willingness to revisit its federalism jurisprudence in such cases as New York v. United States, 505 U.S. 144 (1992), United States v. Lopez, 514 U.S. 549 (1995), and Printz v. United States, 521 U.S. 898 (1997).

83. Thus, in 1900 the editors of the Nation could write, in an essay lamenting the eclipse of liberalism, that "[t]he Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away." "Eclipse of Liberalism," Nation 71 (1900): 105. See generally Arthur A. Ekirch Jr., The Decline of American Liberalism (New York: Longman Green,

1955).

84. Oliver Wendell Holmes, The Common Law (Boston: Little, Brown, 1881). See also Oliver Wendell Holmes, "The Path of the Law," Harvard Law Review 10 (1897): 457-78. For discussions of those changes and their impact on American law and politics, see Glenn Thurow, "Equality and Constitutionalism: The Relationship of the Declaration of Independence and the Constitution As Understood Today," in Sarah Thurow, ed., Constitutionalism in America, vol. 1, To Secure the Blessings of Liberty (Lanham, Md.: University Press of America, 1988), pp. 305-20; and Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," Notre Dame Law Review 68 (1993): 507-47. Mayer also has a brief discussion of this issue, with references to many additional sources (see especially pp. 95-96 and attendant notes).

85. Thus, by 1905 Holmes could write--albeit, still in dissent--that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire," notwithstanding the explicit mention in the Constitution of the rights of property and contract, the foundations of laissez faire capitalism. Lochner v. New York, 198 U.S. 45, 75 (1905). See Roger Pilon, "On the Foundations of Economic Liberty," Freeman 38 (September 1988): 338-45.

86. United States v. Carolene Products Co., 304 U.S. 144 (1938). Footnote 4 has been called "[t]he great and modern charter for ordering the relations between judges and other agencies of government." Owen M. Fiss, "The Supreme Court, 1978 Term--Forward: The Forms of Justice," Harvard Law Review 93 (1979): 1, 6. For a devastating critique of the politics behind the case, see Geoffrey P. Miller, "The True Story of Carolene Products," 1987 Supreme Court Review (1987): 397-428.

87. In fact, the modern attack on natural rights had begun long before Slaughterhouse, in 1791 in England, with the famous remark of Jeremy Bentham, the father of British utilitarianism, that talk of moral or natural rights was "simple nonsense: natural and imprescriptible rights, rhetorical nonsense,--nonsense upon stilts." Jeremy Bentham, "Anarchical Fallacies," in The Works of Jeremy Bentham, ed. John Bowring (Edinburgh: Tait, 1843), vol. 2, p. 501.

88. Bork, p. 180. The quotes from Bork that follow are from pp. 180-82 (emphasis added).

89. For a discussion of the demise of "economic due process," see Bernard H. Siegan, Economic Liberties and the Constitution (Chicago: University of Chicago Press, 1980).

90. Plessy v. Ferguson, 163 U.S. 537 (1896).

91. Thomas, p. 66.

92. Plessy at 556.

93. Thomas, p. 68.

94. That is not the law today, of course. For a critique of modern anti-discrimination law from a consideration of first principles, see Roger Pilon, "Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues," American University Law Review 45 (1996): 775-90.

95. Bork, pp. 83-84. Bork's concern here is to criticize the Court's effort, in Bolling v. Sharpe, 347 U.S. 497 (1954), to find equal protection in the Fifth Amendment's Due Process Clause, which he takes to be "a clear rewriting of the Constitution." Admittedly, the Court has gone on to abuse what Bork calls its "invention," but those abuses should be criticized on their own terms; they are no warrant for ignoring the implications of "due process of law."

96. For a discussion of how even the Due Process Clause is ultimately substantive, see Roger Pilon, "Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty," in Economic Liberties and the Judiciary, ed. James A. Dorn and Henry G. Manne (Fairfax, Va.: George Mason University Press, 1987), pp. 183-203.

97. Carolene Products at 144.

98. See generally Siegan.

99. See, for example, the remark of Rexford G. Tugwell, one of the principal architects of the New Deal, reflecting on those years some 30 years later: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them." "A Center Report: Rewriting the Constitution," Center Magazine, March 1968, pp. 18, 20. Cf. Gary Lawson, "The Rise and Rise of the Administrative State," Harvard Law Review 107 (1994). "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to



nothing less than a bloodless constitutional revolution" (p. 1231).

100. James Madison, "Property," National Gazette, March 29, 1792; reprinted in The Papers of James Madison, vol. 14, 6 April 1791-16 March 1793, ed. Robert A. Rutland et al. (Charlottesville: University Press of Virginia, 1983) (emphasis in original).

101. See Thomas G. West, "Property and the Public Good: The Founders' View," Claremont Institute Briefings, January 8, 1992.

102. See Tribe, pp. 558-59; and Philip B. Kurland and Ralph Lerner, The Founders' Constitution (Chicago: University of Chicago Press, 1987), vol. 1, p. 419.

103. Thomas, p. 69.

104. Brown v. Board of Education, 347 U.S. 483 (1954).

105. For a discussion of federalism against a background of congressional mistrust of the states, see Roger Pilon, Testimony before the Subcommittee on Human Resources and Intergovernmental Relations of the House Committee on Government Reform and Oversight, July 20, 1995; reprinted as "On the First Principles of Federalism," Cato Policy Report 17, no. 6 (1995), and in St. Croix Review 29, no. 4 (August 1996): 13-17.

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