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Repository Citation

William J. Rich, *Hiding in Plain View: A Path Around Sovereign Immunity for State Government Employees*, 25 Wm. & Mary Bill Rts. J. 1179 (2017), <http://scholarship.law.wm.edu/wmborj/vol25/iss4/2>

HIDING IN PLAIN VIEW: A PATH AROUND SOVEREIGN IMMUNITY FOR STATE GOVERNMENT EMPLOYEES

William J. Rich*

INTRODUCTION

Privileges or immunities of United States citizens include rights that “owe their existence to the Federal government, . . . its Constitution, *or its laws*.”¹ The Fourteenth Amendment provides that no state shall abridge those rights,² and provisions of that amendment override claims to state sovereign immunity.³ As a result, federal laws that protect the pay and working conditions of workers, and keep them free from discrimination based upon their age or disability, should be fully enforceable against state governments, agencies, or officials.

The United States Supreme Court has repeatedly relied upon a doctrine of state sovereign immunity to block efforts by state employees to enforce their federal rights through suits for monetary damages.⁴ In every case, the Court upheld the underlying federal laws,⁵ but limited enforcement because laws derived from the Commerce Clause remained subject to Eleventh Amendment state immunity,⁶ and, although the Fourteenth Amendment would override that immunity,⁷ none of the laws in question involved enforcement of the Due Process or Equal Protection

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¹ Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872) (emphasis added).

² U.S. CONST. amend. XIV, § 1.

³ *Id.*

⁴ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (blocking enforcement of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (blocking enforcement of the Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (blocking enforcement of the Fair Labor Standards Act).

⁵ See *Garrett*, 531 U.S. at 374 n.9 (holding that “Title 1 of the ADA still prescribes standards applicable to the States”); *Kimel*, 528 U.S. at 91 (holding “only that, in the ADEA, Congress did not validly abrogate the States’ sovereign immunity to suits by private individuals”); *Alden*, 527 U.S. at 760 (Souter, J., dissenting) (noting that the Court merely held that an individual cannot sue a state to enforce her statutory rights under FLSA).

⁶ See *Garrett*, 531 U.S. at 364 (stating that “Congress may not . . . base its abrogation of the States’ Eleventh Amendment immunity upon the powers enumerated in Article I”).

⁷ *Alden*, 527 U.S. at 756 (majority opinion).

Clauses of the Fourteenth Amendment.⁸ No one asked whether any of the acts in question fell within the bounds of the Privileges or Immunities Clause.⁹

Why ignore such an obvious question? Generations of lawyers have been taught that, by failing to incorporate the Bill of Rights into that Clause, the Supreme Court robbed it of significant content.¹⁰ The Justices most recently confirmed that lesson as “settled doctrine.”¹¹ While doing so, they reiterated the traditional phrase: “[T]he Privileges or Immunities Clause protects only those rights ‘which owe their existence to the Federal government, its National character, its Constitution, or its laws.’”¹² Because no one asked, however, they did not address the question about which rights owe their existence to federal laws.¹³ The discussion which follows answers that question, reaffirming a deeply rooted understanding that Americans have the same federal rights, and the same ability to enforce those rights, regardless of the state in which they reside.

Part I of this Article provides background, including an overview of historical conceptions of sovereignty and the debates regarding enforcement of federal law that took place in the decades leading up to the Civil War.¹⁴ Contested issues of state authority to avoid or nullify federal law dominated antebellum constitutional disputes.¹⁵ Records of that era demonstrate that the terms “privileges” and “immunities” did not have precise meaning, but rather reflected rights associated with a particular governing authority, either state or federal, and generally subject to legislative control.¹⁶ Both of those factors influenced the subsequent formation of the Fourteenth Amendment Privileges or Immunities Clause.¹⁷

Part II focuses on interpretations of the Fourteenth Amendment. Exhaustive analysis of congressional debates leaves room for disagreement. Concurrent legislative action, however, consistently linked “privileges” and “immunities” to the Constitution *and laws* of the United States.¹⁸ Subsequent Supreme Court rulings and constitutional commentary confirmed the understanding that the Privileges or Immunities

⁸ See cases cited *supra* note 4.

⁹ Publications in which I have raised this issue include WILLIAM J. RICH, 1 MODERN CONSTITUTIONAL LAW 713–37 (3d ed. 2011); William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 208 (2002) [hereinafter Rich, *Taking “Privileges or Immunities” Seriously*].

¹⁰ See sources cited *supra* note 9.

¹¹ *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (describing reliance upon the Due Process Clause as the source of incorporation of the Bill of Rights as “settled doctrine”).

¹² *Id.* at 754 (majority opinion) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872)).

¹³ See *id.* at 742–91.

¹⁴ Rich, *Taking “Privileges or Immunities” Seriously*, *supra* note 9, at 167.

¹⁵ *Id.* at 167–70.

¹⁶ See *infra* Section I.C.

¹⁷ See *infra* Part I.

¹⁸ See *infra* Section II.B.

Clause protected those rights that “owe their existence to the Federal government, its National character, its Constitution, *or its laws*.”¹⁹

The third and fourth Parts shift to twentieth-century developments and contemporary debates. Part III helps to explain why, although original Supreme Court interpretation of the Privileges or Immunities Clause included enforcement of rights derived from congressional Commerce Clause authority, litigants, judges, and scholars rarely paid attention to that relationship.²⁰ They had good reason for such neglect. By most measures, the Supremacy Clause provided ample authority for such enforcement,²¹ and in any event the scope of rights protected under nineteenth-century conceptions of the Commerce Clause offered minimal protection for individual rights.²² As a result, as described in Part IV, when the Supreme Court majority concluded that Eleventh Amendment state immunity barred claims based upon the Fair Labor Standards Act or the Americans with Disabilities Act, no one considered the relationship to “privileges” or “immunities” as a basis for overcoming such barriers.²³

When litigants wake up to that relationship, however, such conclusions should change. The Supreme Court has already defined the scope of federal “rights, privileges, or immunities” to include rights such as those belonging to government employees.²⁴ Judges who recognize the link between that text and the Fourteenth Amendment should also understand that when Congress explicitly authorizes actions against state agencies or officials, claims for monetary damages by injured parties should be enforced by the courts.

I. ANTEBELLUM BACKGROUND

Actions, disputes, and decisions that preceded the Civil War provide context for understanding subsequent amendments. Out of that background, three points have particular relevance to questions about the scope of the Privileges or Immunities Clause. The first involves the understanding of dual sovereignty built into the original constitutional structure, referred to by Alexander Hamilton as the “plan of the convention.”²⁵ The second involves the conflicts over state and national sovereignty that became a primary focus of constitutional disputes during the antebellum era.²⁶

¹⁹ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872) (emphasis added).

²⁰ Rich, *Taking “Privileges or Immunities” Seriously*, *supra* note 9, at 182.

²¹ See *infra* notes 301–02 and accompanying text.

²² See *infra* note 346.

²³ Rich, *Taking “Privileges or Immunities” Seriously*, *supra* note 9, at 217–18.

²⁴ Congress used this language in the Civil Rights Act of 1871, adopted to enforce the Fourteenth Amendment, and currently found in 42 U.S.C. § 1983. The Supreme Court broadly construed those terms in a series of cases including *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (upholding provisions of the National Labor Relations Act). For discussion, see *infra* text accompanying notes 447–50.

²⁵ THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁶ See Rich, *Taking “Privileges or Immunities” Seriously*, *supra* note 9, at 167–68 (noting

And a third background factor that influenced the choice of language used in the Fourteenth Amendment involved understanding of the terms “privileges” and “immunities” reflected by court decisions and other legal texts generated during that time period.²⁷

At the time of the Constitutional Convention, Americans shared an understanding of “sovereignty” that could be divided, but not shared.²⁸ The concept that states retained sovereignty within the sphere of national authority came later,²⁹ and only gained credence in disputes over slavery and tariffs when advocates of states’ rights asserted a right to nullify federal law.³⁰ National figures countered those claims, but lacked the political strength or judicial authority to protect individuals from state violations of national law.³¹ As a result of this background, those who framed the Fourteenth Amendment understood the need to establish or reaffirm authority to enforce individual rights, including those derived from federal statutes.³² This background helps to explain why no state should be allowed to escape from enforcement of federal statutory rights.

A. Sovereignty and the Plan of the Convention

Participants in the Constitutional Convention of 1787 met for the purpose of rebalancing the relationship between individual states and a new national government.³³ The Articles of Confederation had treated each individual state as an independent sovereign, beginning with the phrase “Each State retains its sovereignty, freedom, and independence,”³⁴ and emphasized in the conclusion that no change could be made in the Articles without unanimous consent.³⁵ That model had failed.³⁶

The new government, which arose through popular participation in state conventions,³⁷ transferred sovereign authority over identified subject areas, ranging

that arguments to nullify federal law prompted historians to regard the antebellum period as one of “constitutional crisis”).

²⁷ See *infra* Section I.C.

²⁸ See *infra* text accompanying notes 33–42.

²⁹ See *infra* notes 30–31 and accompanying text.

³⁰ Pro-slavery individuals hoped to nullify federal law under Privileges or Immunities Clause challenges to protect their property rights. See Rich, *Taking “Privileges or Immunities” Seriously*, *supra* note 9, at 179.

³¹ See *id.* at 167–68. Future Secretary of State Daniel Webster was unable to convince supporters of nullification of federal law supremacy. *Id.*

³² See John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1454–58 (1975).

³³ See George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH. L. REV. 967, 970–73 (1991).

³⁴ ARTICLES OF CONFEDERATION of 1781, art. II.

³⁵ *Id.* art. XXIII.

³⁶ See Anastaplo, *supra* note 33, at 969–73.

³⁷ See *id.* at 969–74.

from interstate commerce to providing for a national defense.³⁸ Outside of the scope of those subject areas, states retained sovereignty.³⁹ Participants in that process of government formation understood the concept of sovereignty in classical terms: To be sovereign meant to have “supreme” authority, and there could be no second or auxiliary “sovereign.”⁴⁰ National and state governments could, however, operate as dual sovereigns, each within its own sphere of authority,⁴¹ and with supremacy recognized in the national government in the event of overlap.⁴²

In reality, however, relationships between state and national sovereigns defied such simple descriptions.⁴³ As recently explained by Justice Kagan, state sovereignty predated national sovereignty and arose from an independent ultimate source,⁴⁴ thus elements of state sovereignty remained after adoption of the Constitution.⁴⁵ In early decades of the nation’s history, disputes arose due to both the complexity of the overlap in responsibility and underlying conflicts over values and policies regarding issues including slavery, tariff disputes, and relationships with Indian Nations.⁴⁶ Many of those disputes could be boiled down to competing claims of sovereignty.⁴⁷

Modern confusion regarding state retention of sovereignty may be traced in part to language used during the ratification debates that some mischaracterize as evidence of state sovereign immunity even within the context of federal statutory authority.⁴⁸ For example, Hamilton wrote that “[i]t is inherent in the nature of

³⁸ THE FEDERALIST NO. 45, at 288–92 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁹ *Id.*

⁴⁰ *See, e.g.*, F. H. HINSLEY, SOVEREIGNTY 26 (2d ed. 1986) (explaining that the “sovereign” was understood to be the “final and absolute political authority in the political community”); SAMUEL WARREN, BLACKSTONE’S COMMENTARIES SYSTEMATICALLY ABRIDGED AND ADOPTED TO THE EXISTING STATE OF THE LAW AND CONSTITUTION WITH GREAT ADDITIONS 27 (1855) (linking “sovereignty” to the “rule of civil conduct prescribed by the supreme power in a state”).

⁴¹ *See infra* note 42.

⁴² Justice Brennan frequently reiterated this point. *See Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184, 191, 196 (1964) (explaining that “States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce”).

⁴³ *See Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863, 1870 (2016) (noting that sovereignty in the context of the territory of Puerto Rico “does not bear its ordinary meaning”).

⁴⁴ *See id.* at 1871 (noting that in the relationship between the United States and Puerto Rico, the United States acts as “ultimate sovereign,” and Puerto Rican authority is derived from that source, thus eliminating the “dual-sovereignty” exception to application of the Double Jeopardy Clause).

⁴⁵ *Id.*

⁴⁶ *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 315 (1978) (involving competing sovereignty claims of federal and tribal courts).

⁴⁷ *See id.*

⁴⁸ For examples of commentary regarding state sovereign immunity, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435 (1987) (explaining that at the time when the Constitution was framed, “the true sovereign . . . must necessarily enjoy the essential attributes of indivisible, final, and unlimited authority,” and concluding that in the United States, ultimate sovereignty resides with the people); Paul E. McGreal, *Saving*

sovereignty not to be amenable to the suit of an individual *without its consent*.⁴⁹ Such comments by Hamilton and others, however, must be understood in context. Hamilton's comments in *The Federalist Papers* addressed lawsuits against states in cases involving diversity jurisdiction,⁵⁰ and within that context states retained sovereignty.⁵¹ He concluded that the Constitution should not be construed to authorize "suits against States for the debts they owe."⁵² Within the same paragraph, however, Hamilton explained that the protection of state sovereignty would not apply if "there is a surrender of this immunity in the plan of the convention."⁵³ When addressing the context of legitimate federal questions, James Madison and John Marshall both recognized the final and exclusive nature of central government authority.⁵⁴ Madison explained this distinction by noting: "With respect to the laws of the union, it is so necessary and expedient that their judicial power should correspond with the legislative, that it has not been objected to."⁵⁵

Claims that state sovereign immunity persists within the sphere of national authority often center upon the Supreme Court's decision in *Chisholm v. Georgia*.⁵⁶

Article I from Seminole Tribe: A View from The Federalist Papers, 55 SMU L. REV. 393 (2002) (arguing for a limited category of cases that meet Hamilton's "plan of the convention" test); Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court's Reformation of the Constitution in Seminole Tribe and Its Progeny*, 45 HOW. L.J. 77 (2001) (arguing that Supreme Court Justices have misread or inappropriately deferred to comments of Hamilton, Madison, and Marshall); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (presenting arguments that the Founders understood courts to lack only personal jurisdiction over sovereign states); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002) (viewing entrenched system of immunities as result of multiple historical errors).

⁴⁹ THE FEDERALIST NO. 81, *supra* note 25, at 487 (Alexander Hamilton).

⁵⁰ For a detailed analysis of Hamilton's comments on diversity jurisdiction, see Michael G. Collins, *Judicial Independence And The Scope of Article III—A View From The Federalist*, 38 U. RICH. L. REV. 675, 697–701 (2004).

⁵¹ *See infra* notes 52–53.

⁵² THE FEDERALIST NO. 81, *supra* note 25, at 488 (Alexander Hamilton).

⁵³ *Id.* at 487.

⁵⁴ Madison explained that national jurisdiction extended to "certain enumerated objects" with the boundary between national and state jurisdiction to be determined by the national government, concluding "in the operation of these powers, it is national, not federal." THE FEDERALIST NO. 39, at 245–46 (James Madison) (Clinton Rossiter ed., 1961). In *Cohens v. Virginia*, Chief Justice Marshall recognized a "general proposition" supporting state sovereign immunity, but explained that states had surrendered that immunity as to matters where the Constitution transferred sovereignty to the national government. 19 U.S. (6 Wheat.) 264, 380–82 (1821).

⁵⁵ 2 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, ON THE 17TH OF SEPTEMBER, 1787, at 390 (J. Elliot ed., 1828).

⁵⁶ 2 U.S. (2 Dall.) 419 (1793).

Public outrage immediately followed the opinion that states could be sued in federal court for debts they owed to citizens of other states.⁵⁷ Both *Chisholm* and the Eleventh Amendment it spawned, however, reinforce the traditional conception of separate state and federal sovereignty.⁵⁸ The Eleventh Amendment preserved state immunity in the context of disputes involving subject matter over which states retained sovereignty;⁵⁹ authors of that amendment were not foolish rubes who failed to choose language that would offer a broader degree of protection, because doing so would have conflicted with the Supremacy Clause.⁶⁰ The sovereignty balance struck in the Eleventh Amendment did not disturb the “plan of the convention” that Hamilton had described and the states accepted.⁶¹ Several Supreme Court justices have made that point,⁶² and numerous commentators agree.⁶³

⁵⁷ See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1058 (1983) (noting Georgian legislative reaction, including a law making it a felony to enforce the federal judgment).

⁵⁸ The Eleventh Amendment provides that: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. By taking away diversity jurisdiction, the Eleventh Amendment effectively barred the federal courts from exercising sovereignty over a state within a sphere of continuing final state authority.

⁵⁹ *Id.*

⁶⁰ See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1927 (1983) (explaining the choice of Eleventh Amendment language and the ease with which authors could have widened its scope).

⁶¹ *Id.* at 1910 n.104.

⁶² See, e.g., *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 46 n.1 (2012) (Ginsburg, J., dissenting) (repeating her assertion of congressional authority to abrogate state immunity when acting pursuant to powers derived from Article I of the Constitution); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 24 (1989) (Stevens, J., concurring) (agreeing with Justice Brennan’s plurality opinion and noting that “numerous scholars [had] exhaustively and conclusively refuted the contention that the Eleventh Amendment embodies a general grant of sovereign immunity to the States”); *Parden v. Terminal Ry. of Ala. State Docks Dep’t*, 377 U.S. 184, 191 (1964) (explaining that “States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce”).

⁶³ See Amar, *supra* note 48, at 1435 (explaining the historical understanding that “the true sovereign . . . must necessarily enjoy the essential attributes of indivisible, final, and unlimited authority”); see also Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1202 (2001) (declaiming sovereign immunity as an antiquated concept that lacks historical or functional support); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988) (rejecting the Supreme Court’s interpretation of state sovereign immunity); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989) (supporting congressional authority to abrogate state immunity except where limited by Eleventh Amendment text); James F. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998) (explaining that the Constitution and the Eleventh Amendment reflected compromise establishing future national fiscal authority and protecting states

In recent decades, however, a slim but persistent majority of Supreme Court Justices rejected that framework.⁶⁴ In order to fully restore the “plan of the convention,” those decisions could and arguably should be overruled. The pages which follow, however, demonstrate that reversing the outcome in those cases would not require overruling prior decisions.⁶⁵ Those who framed the Fourteenth Amendment have already provided a constitutional basis for overriding claims of state sovereign immunity within the context of individual rights based upon federal law.⁶⁶ Current courts need to acknowledge the framework already established by the Privileges or Immunities Clause.

This alternative approach builds upon a general consensus that, even if the national government could not penetrate state sovereign immunity based upon powers exercised pursuant to Article I of the Constitution, no such constraints apply to the Fourteenth Amendment.⁶⁷ The second sentence of that amendment begins with the words “No state shall”⁶⁸ If substantive clauses following that phrase incorporate protection derived from federal statutes, then claims of state sovereignty must yield. Nineteenth-century constitutional disputes regarding the power of Congress and the authority retained by the states help explain why those who promulgated the Fourteenth Amendment would have expected that result.⁶⁹

B. Federal Supremacy and State Nullification

Every law student learns about the case of *Dred Scott v. Sandford*,⁷⁰ whose appeal for freedom personified the constitutional battles of the antebellum era. Most current students, however, are not exposed to the disputes over slavery, tariffs, and states’ rights that generally took place outside of the courts in the preceding years. Those disputes need to be understood in order to appreciate why those who drafted the Fourteenth Amendment cared about the need to reestablish national supremacy.

from liability for preexisting debts); Mark Strasser, Chisholm, *the Eleventh Amendment, and Sovereign Immunity: On Alden’s Return to Confederation Principles*, 28 FLA. ST. U.L. REV. 605, 647 (2001) (explaining the majority’s misconstruction of historical conceptions of sovereignty); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1118 (2001) (decrying protection of state sovereign immunity as “intellectually unfounded and unjust”).

⁶⁴ See, e.g., *Coleman*, 566 U.S. 30; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974).

⁶⁵ See *infra* Part IV.

⁶⁶ See *supra* text accompanying notes 25–63.

⁶⁷ See, e.g., *Garrett*, 531 U.S. at 364 (noting that enforcement provisions of the Fourteenth Amendment necessarily limit state sovereignty).

⁶⁸ U.S. CONST. amend. XIV, § 1.

⁶⁹ See *infra* Section I.B.

⁷⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

Beginning in 1822, all sailors of African ancestry who arrived in southern ports became subject to arrest and imprisonment.⁷¹ Those seizures conflicted with national authority to regulate interstate commerce⁷² and with a federal treaty protecting the rights of British citizens.⁷³ The first case to challenge those laws involved Harry Elkison, a Jamaican sailing under the British flag who was seized and jailed upon his arrival in Charleston Harbor.⁷⁴ That seizure led to British protests and a habeas corpus petition in federal court heard on circuit by Supreme Court Justice William Johnson.⁷⁵ In the case of *Elkison v. Deliesseline*,⁷⁶ Justice Johnson found that the transfer of commerce and treaty powers to the national government eliminated state authority to enact conflicting legislation.⁷⁷ Justice Johnson concluded, however, that the federal court lacked habeas corpus jurisdiction in such cases and therefore could not provide relief to Elkison.⁷⁸

Secretary of State John Quincy Adams, who became the nation's sixth president just two years later,⁷⁹ admonished the South Carolina government for its treatment of British sailors⁸⁰ and turned for support to Attorney General William Wirt, who also concluded that South Carolina's law conflicted with the Commerce Clause and with the laws and treaties of the United States.⁸¹ Rather than accepting Wirt's opinion, however, the South Carolina state senate declared that "[T]he duty of the state to guard against insubordination or insurrection . . . is paramount to all *laws*, all *treaties*, all *constitutions*."⁸²

The election of Andrew Jackson in 1828 effectively ended efforts to enforce federal law against states that defied federal law by arresting seamen with African ancestry. Jackson's first Attorney General, John Berrien, asserted that state authority to exclude goods or persons who endangered a state's social climate fell within the

⁷¹ For more detailed discussion, see William J. Rich, *Lessons of Charleston Harbor: The Rise, Fall and Revival of Pro-Slavery Federalism*, 36 MCGEORGE L. REV. 569, 577–82 (2005). See generally WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816–1836, at 54 (1966).

⁷² See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 22 (1824) (establishing federal authority over navigation).

⁷³ See *Elkison v. Deliesseline*, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4,366) (citing the commercial convention with Great Britain of 1815).

⁷⁴ Rich, *supra* note 71, at 570.

⁷⁵ *Id.* at 580.

⁷⁶ 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366).

⁷⁷ *Id.* at 495.

⁷⁸ *Id.* at 496.

⁷⁹ *John Quincy Adams*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/john-quincyadams> [<https://perma.cc/3HBK-DJ55>] (explaining that John Quincy Adams became president in 1825).

⁸⁰ See Rich, *supra* note 71, at 582.

⁸¹ A reprint of Wirt's opinion appears in FREE COLORED SEAMEN—MAJORITY AND MINORITY REPORTS, H.R. REP. NO. 80, at 35–36 (1843).

⁸² Rich, *supra* note 71, at 581–82.

scope of the Tenth Amendment, and took precedence over federal Commerce Clause authority.⁸³ Roger Taney, known most for his role as the Supreme Court Chief Justice whose decision in *Dred Scott*⁸⁴ helped to trigger the Civil War,⁸⁵ anticipated that decision in an Attorney General's opinion, which demeaned all members of the African race and affirmed state power to defy any federal laws that would interfere with state power to enact laws designed to prevent insurrection among slaves.⁸⁶

When federal authorities failed to act, the Massachusetts legislature took up the cause and sent Judge Samuel Hoar as an emissary to Charleston "for the purpose of instituting suits and bringing the question of the constitutionality of the acts before the Supreme Court."⁸⁷ The South Carolina legislature, however, met Hoar's arrival in Charleston by asserting the state's inherent right to exclude "seditious persons" from their territory.⁸⁸ Before Hoar could be formally expelled, the threat of mob violence forced him to flee from Charleston.⁸⁹ As much as *Dred Scott* came to symbolize the Supreme Court's failure to recognize national authority to limit slavery,⁹⁰ the Hoar affair became symbolic of southern defiance of federal law and

⁸³ 2 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES 427–42 (Benjamin F. Hall ed., Washington, Robert Farnham 1852).

⁸⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (concluding that Congress had no power to free slaves in United States territories because African Americans had no claim to constitutional rights).

⁸⁵ See generally Rich, *supra* note 71, at 599.

⁸⁶ CARL B. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 380 (Paul A. Freund ed., 1974). Taney continued to express such views as Chief Justice. See, e.g., *Passenger Cases*, 48 U.S. (7 How.) 283, 466 (1849) (upholding state authority to prevent entry by "any person or description of persons whom it regards as injurious to their welfare").

⁸⁷ Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1845*, 1 J.S. HIST. 3, 22 (1935). Massachusetts also sent an emissary to New Orleans on the same mission, and with comparable results. *Id.* at 23; see also WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 132–40 (1977) (describing a series of confrontations over the Negro Seamen's Acts, including an opinion by then Attorney General Roger Taney that a state's police powers overrode the federal government's treaty making power); Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 796 (1996).

⁸⁸ STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 238 (Herman V. Ames ed., 1970). On the same day that the news reported South Carolina's legislative effort to expel Hoar, it also reported John Quincy Adams' effort in Congress to rescind rules of the House of Representatives that excluded petitions for abolition. CHARLESTON MERCURY, Dec. 7, 1844. On the day after Hoar's arrival in Charleston, the South Carolina House of Representatives was asked to call a Convention to be held in Charleston of the "Southern States of this Confederacy." CHARLESTON COURIER, Dec. 2, 1844. The purpose of the proposed Convention was "to solicit the cooperation of our sister States of the South in the effort to reform the Legislature of the Federal Government on the subject of the Tariff, and avert the progress of *Abolition*." *Id.*

⁸⁹ See Hamer, *supra* note 87, at 23.

⁹⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). *Dred Scott* became the most notorious court opinion of the nineteenth century. Because of his African ancestry, Scott

the national government's failure to protect its citizens from hostile state actions.⁹¹ Treatment of Judge Hoar remained on the minds of those who framed the Civil War amendments to the Constitution.⁹²

At the same time that national leaders argued over the enforcement of federal law in southern ports, tariff disputes triggered constitutional conflicts based upon southern state claims of authority to nullify federal law.⁹³ From the outset, national tariff policies had provoked sectional conflict,⁹⁴ and when economic stagnation hit southern states in the 1820s, national tariff policies became a ready target to blame for the miseries of cotton farmers.⁹⁵ They also helped to fuel the argument that states possessed inherent authority to nullify federal law.⁹⁶

Memorable events of the 1820s and 1830s included challenges to federal authority at the highest level.⁹⁷ Vice President John C. Calhoun openly defied President Andrew Jackson, asserting an implied state authority to veto actions of the national government.⁹⁸ The "Great Debates" between Senators Daniel Webster, Robert Hayne, and Calhoun could be encapsulated by Calhoun's claim that "sovereignty is in the

could not be an American citizen, he therefore had no standing to sue in court and could not assert the protection of the Privileges and Immunities Clause of Article IV, Section 2. *Id.* at 404–27. Furthermore, classification of slaves as property meant that Congress had no power to grant them freedom when taken to federal territories, and no authority to regulate slavery within those territories. *Id.* at 449–52.

⁹¹ See, e.g., remarks recounting Hoar's experience in the context of debating the Kansas-Nebraska Act, CONG. GLOBE, 34th Cong., 1st Sess. 1598 (1856) (statement of Reps. William Boyce and Edward Dickinson); CONG. GLOBE, 33rd Cong., 1st Sess. 1556 (1854) (statement of Sen. Andrew Butler); CONG. GLOBE, 33rd Cong., 1st Sess. 1012 (1854) (statement of Sen. Charles Sumner); CONG. GLOBE, 33rd Cong., 1st Sess. 1154–55 (1854); Sen. Daniel Webster's denunciation of South Carolina's actions, CONG. GLOBE, 31st Cong., 1st Sess. 482 (1850) (statement of Sen. Daniel Webster); and Sen. Henry Clay's recounting of Hoar's experience, CONG. GLOBE, 31st Cong., 1st Sess. 123 (1850) (statement of Sen. Henry Clay); and remarks of Rep. Charles Hudson explaining Justice Johnson's decision in *Elkison* and South Carolina's efforts to block consideration of such issues by the United States Supreme Court, CONG. GLOBE, 30th Cong., 2d Sess. 418–19 (1849) (statement of Sen. Henry Clay).

⁹² See *infra* text accompanying notes 166–77.

⁹³ For a thorough account of the intellectual history of antebellum slavery and tariff disputes, see MANISHA SINHA, *THE COUNTERREVOLUTION OF SLAVERY: POLITICS AND IDEOLOGY IN ANTEBELLUM SOUTH CAROLINA* (2000). Sinha demonstrates that the nullification doctrine was rooted in a "separatist ideology based on the values of slavery and a rigorous critique of democracy, rather than democratic and republican principles." *Id.* at 2–3. This separatist ideology, in turn, provided support for preservation of state sovereignty even in the face of countervailing constitutional rights and federal laws. *Id.*

⁹⁴ *Id.* at 10.

⁹⁵ *Id.* at 16.

⁹⁶ *Id.*

⁹⁷ *Id.* at 14–16, 19–26.

⁹⁸ See FREDERIC BANCROFT, *CALHOUN AND THE SOUTH CAROLINA NULLIFICATION MOVEMENT* 39–41 (1928).

people of each State”⁹⁹ countered by Webster’s declaration that “we cannot have one rule or one law for South Carolina, and another for other States.”¹⁰⁰ While the debate eventually yielded to Senator Henry Clay’s work as the “Great Compromiser,”¹⁰¹ the competing visions of sovereignty remained formally unresolved.¹⁰²

C. “Privileges” and “Immunities”

Debates about national sovereignty described above help to explain why those who framed the Fourteenth Amendment would have cared about assuring that national laws could be fully enforced against recalcitrant states. For purposes of constitutional interpretation, however, that history only becomes meaningful in relationship to the amendments adopted following the Civil War. In particular, the question is whether the rule that “[n]o [s]tate[s] shall . . . abridge the privileges or immunities of citizens of the United States”¹⁰³ could be reasonably understood to mean that state sovereignty must yield to federal law. That conclusion follows from the general consensus described below, that antebellum understanding of those terms generally referred to a body of law issued by a specific governing authority without regard to the “constitutional” or “statutory” nature of the laws themselves. In other words, privileges or immunities of United States citizens would have been generally understood as a reference to both statutory and constitutional rights established by the federal government.

Antebellum understanding of the words “privileges” or “immunities” begins with Article IV, Section 2 of the Constitution, assuring that “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁰⁴ Prior to the Civil War, no Supreme Court opinions had authoritatively construed that provision.¹⁰⁵ In *Corfield v. Coryell*,¹⁰⁶ however, Justice Bushrod Washington, acting as circuit judge, provided pages of dicta regarding the scope of the Privileges and Immunities Clause.¹⁰⁷ Given the paucity of alternative resources, *Corfield* became

⁹⁹ 9 REG. DEB. 274 (1833).

¹⁰⁰ 9 REG. DEB. 560 (1833).

¹⁰¹ See MARGARET L. COIT, JOHN C. CALHOUN: AMERICAN PORTRAIT 292 (1950).

¹⁰² Dramas over slavery issues, tariff disputes, and state authority to nullify federal law tell only a part of the story regarding constitutional disputes that affected subsequent debates over the need for clarifying amendments. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (explaining that Georgia violated national law involving regulation of property and relationships with Indian nations, but concluding that the Justices lacked jurisdiction to resolve the dispute).

¹⁰³ U.S. CONST. amend. XIV, § 1.

¹⁰⁴ *Id.* art. IV, § 2, cl. 1.

¹⁰⁵ Rich, *supra* note 71, at 606–07 n.323.

¹⁰⁶ 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,320).

¹⁰⁷ David R. Upham, *The Meanings of the “Privileges and Immunities of Citizens” on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117, 1127 (2016).

a common measure of those terms.¹⁰⁸ Unfortunately, his opinion became known as much for the confusion it generated as for the guidance it provided.¹⁰⁹

The case before Justice Washington involved the question of whether New Jersey constables could lawfully seize a boat without becoming liable for trespass when a person from another state owned that boat and used it to illegally gather oysters within New Jersey waters.¹¹⁰ Justice Washington eventually dismissed the case on jurisdictional grounds.¹¹¹ Before doing so, he asserted that the Privileges and Immunities Clause of Article IV did not require absolute equality of citizens and non-citizens.¹¹² A state could have ownership interests that inured to the benefit of its own residents;¹¹³ the Privileges and Immunities Clause only attached when states regulated interests “which [were], in their nature, fundamental.”¹¹⁴ Examples Washington gave included “the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety,”¹¹⁵ but he subjected these rights “to such restraints as the government may justly prescribe for the general good of the whole.”¹¹⁶ Other examples identified by Washington included the right to pursue a trade or profession, to be protected by habeas corpus, and to be “exempt from higher taxes or impositions than are paid by the other citizens of the state.”¹¹⁷

Although in subsequent debates, advocates cited *Corfield* for the proposition that “privileges” and “immunities” only included “fundamental” rights,¹¹⁸ that depiction provided minimal guidance and also ignored Washington’s references to equal treatment of citizens from other states and judicial deference to legislative judgments.¹¹⁹

As recently explained by Professor Kurt Lash, focus on Justice Washington’s reference to “fundamental” interests misses the more prevalent antebellum interpretation of Article IV, Section 2 as protection for principles of equality or comity, extending to the “privileges and immunities (whatever they might be) accorded in each [state] to its own citizens.”¹²⁰

¹⁰⁸ *Id.* at 1127–28.

¹⁰⁹ *Id.* at 1138.

¹¹⁰ *Corfield*, 6 F. Cas. at 555.

¹¹¹ *Id.*

¹¹² *Id.* at 551–52.

¹¹³ *Id.* at 552.

¹¹⁴ *Id.* at 551.

¹¹⁵ *Id.* at 551–52.

¹¹⁶ *Id.* at 552.

¹¹⁷ *Id.*

¹¹⁸ *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1117–18 (1866) (statement of Rep. James Wilson).

¹¹⁹ *See Corfield*, 6 Fed. Cas. at 552.

¹²⁰ *See* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 165 & n.390 (2014) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 293 (1866)); *see also id.* at 45–46 (describing a consensus that the Privileges and

Cases other than *Corfield* illustrated this emphasis on equality. For example, a Maryland court decision from 1797 concluded that alternative attachment proceedings for out-of-state citizens violated the Privileges and Immunities Clause,¹²¹ noting that real and personal property rights should be protected “in the same manner” for citizens of all states.¹²² Justice Joseph Yates, serving on New York’s highest court, similarly rejected challenges to a state monopoly,¹²³ explaining that the law applied to citizens both within and outside of the state and “until a discrimination is made, no constitutional barrier does exist.”¹²⁴ A Kentucky court emphasized both the fundamental nature of privileges and immunities and their source in state law, describing them as “common to the citizens of any State under its constitution and constitutional laws.”¹²⁵ Justice Joseph Story, whose *Commentaries on the Constitution* represented the best extant summary of prevailing constitutional doctrine,¹²⁶ reinforced an understanding of Article IV based upon comity,¹²⁷ and extended a “general citizenship” so that citizens from out of state shared “all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.”¹²⁸ In subsequent debates in Congress, Representative Michael Kerr summed up this understanding with his statement that “the privileges and immunities referred to as attainable in the States are required to be attained, if at all, *according to the laws or constitutions of the States*, and never in *defiance* of them.”¹²⁹

Other nineteenth-century legal texts, in addition to Article IV, used the terms “privileges” and “immunities.”¹³⁰ Treaties and descriptions of the rights of residents within territories of the United States also demonstrate the traditional understanding of these terms.¹³¹ Within these contexts, Congress linked privileges and immunities along with references to “rights,” “advantages,” or “liberties” to the status of United States

Immunities Clause differed from state to state, involving a body of state law to be extended as a matter of comity rather than a fixed identification of “fundamental” rights).

¹²¹ *Campbell v. Morris*, 3 H. & McH. 535, 554, 562 (Md. Gen. Ct. 1797).

¹²² *Id.* at 554.

¹²³ *Livingston v. Van Ingen*, 9 Johns. 507, 547, 560–61 (1812) (opinion of Yates, J.), *overruled by* *N. River Steamboat Co. v. Livingston*, 3 Cow. 182 (1825).

¹²⁴ *Id.* at 561. Chief Justice James Kent made the same point: “The provision that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states . . . means only that citizens of other states shall have equal rights with our own citizens . . .” *Id.* at 577 (opinion of Kent, C.J.).

¹²⁵ *Commonwealth v. Milton*, 51 Ky. (12 B. Mon.) 212, 219 (1851).

¹²⁶ See Arthur E. Sutherland, *Introduction* to 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* v–vi, viii, x (Da Capo Press 1970) (1833).

¹²⁷ See 3 STORY, *supra* note 126, at 674–75.

¹²⁸ *Id.* at 675.

¹²⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866).

¹³⁰ See *McDonald v. City of Chicago*, 561 U.S. 742, 821–22 (2010) (Thomas, J., concurring).

¹³¹ *Id.* at 821–27.

citizenship.¹³² The treaty with Spain involving acquisition of Florida guaranteed those inhabitants “the enjoyment of all the privileges, rights, and immunities, of the citizens of the United States.”¹³³ Comparable language appeared in the Louisiana Cession Act of 1803¹³⁴ and in an 1843 treaty with the Stockbridge Tribe of Native Americans.¹³⁵ Africans aboard the Spanish ship, *The Amistad*, represented by John Quincy Adams,¹³⁶ gained United States Supreme Court recognition of “the privileges, and immunities, and rights belonging to bona fide subjects of Spain, under our treaties or laws.”¹³⁷ And in 1867, the same Congress that ratified the Fourteenth Amendment also ratified a treaty with Russia providing Alaska inhabitants (other than “uncivilized native tribes”) “enjoyment of all the rights, advantages, and immunities of citizens of the United States.”¹³⁸ As explained by Senator Lyman Trumbull when advocating support for the Civil Rights Act of 1866, such language “entitled [the respective populations] to all the rights, privileges, and immunities of such citizens, and shall in all respects be subject to the laws of the United States.”¹³⁹

Use of the terms “privileges” or “immunities” when interpreting the Privileges and Immunities Clause of Article IV, in treaty references, or found in other contexts,¹⁴⁰ illustrated the basic point that the words did not embody a recognized collection of fundamental rights.¹⁴¹ Instead, the key to understanding began with identification of

¹³² These terms tended to be used interchangeably, without specific significance tied to the individual words. See LASH, *supra* note 120, at 14 (noting countless late eighteenth- and early nineteenth-century examples of such interchangeable use); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1095 (2000) (noting interchangeable use of the words “rights” and “privileges”).

¹³³ Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, U.S.-Spain, art. VI, Oct. 24, 1820–Feb. 19, 1821, 8 Stat. 252.

¹³⁴ Treaty Between the United States of America and the French Republic, U.S.-Fr., art. III, Apr. 30, 1803, 8 Stat. 200 (providing that “inhabitants of the ceded territory” shall enjoy “all the rights, advantages and immunities of citizens of the United States”).

¹³⁵ HENRY WHEATON & WILLIAM BEACH LAWRENCE, *ELEMENTS OF INTERNATIONAL LAW* 899–900 (2d ann. ed. 1863) (guaranteeing every member of the tribe “all rights, privileges, and immunities of [United States] citizens”).

¹³⁶ *United States v. Amistad*, 40 U.S. (15 Pet.) 518, 518–19, 566 (1841).

¹³⁷ *Id.* at 595–96 (freeing slaves who had revolted while being transported to Cuba).

¹³⁸ Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, U.S.-Russ., art. III, Mar. 30–June 20, 1867, 15 Stat. 539, 542. See also *McDonald v. City of Chicago*, 561 U.S. 742, 821–27 (2010) (Thomas, J., concurring), for additional references.

¹³⁹ CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (citing the Stockbridge Treaty).

¹⁴⁰ See, e.g., *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 606 (1834) (using the phrase “privileges and immunities” in a reference to arguments by counsel addressing copyright claims of the official reporter of federal cases); *United States v. Webster*, 28 F. Cas. 509, 516 (D. Me. 1840) (No. 16,658) (referring to “privileges and immunities” in reference to contractual rights of a quartermaster who sought pay for unusual services).

¹⁴¹ See LASH, *supra* note 120, at 12.

the applicable legal authority. Courts and lawmakers used comparable combinations of words to represent a principle of equal application of a related body of law.¹⁴² Much as the privileges and immunities protected by Article IV extended rights based upon state law to citizens from other states,¹⁴³ various treaties promised that new inhabitants would receive equal treatment under applicable laws of the United States.¹⁴⁴ None of these references included narrow or precise definitions of terms,¹⁴⁵ and none distinguished between “statutory” and “constitutional” rights.¹⁴⁶ Given this background, consistent construction of the Fourteenth Amendment Privileges or Immunities Clause depends upon identification of a comparable federal source for the rights in question.

II. “PRIVILEGES OR IMMUNITIES OF UNITED STATES CITIZENS”

When the nation began, concerns of those framing the Constitution focused on constraining the federal government with an enumerated list of congressional powers.¹⁴⁷ By the end of the Civil War, eighteenth-century concerns about constraining the national government had shifted to the importance of assuring that the national government had adequate authority to protect federal rights.¹⁴⁸ The post-war amendments reflected that shift.¹⁴⁹ Congressional debates, contemporaneous legislation, judicial decisions, and constitutional commentary all demonstrate a general understanding that the Privileges or Immunities Clause protected those rights as defined by the Constitution *and laws* of the United States government.¹⁵⁰ A review of each of those sources demonstrates that federal statutory rights belong within the category of privileges or immunities of United States citizens.

A. Congressional Debates

Many of those who have written about interpretations of the Fourteenth Amendment have discussed in detail the extensive recorded debates that took place during the process of promulgation.¹⁵¹ They have often focused on the question of whether

¹⁴² See *id.* at 12–13.

¹⁴³ See, e.g., *Livingston v. Van Ingen*, 9 Johns. 507, 561 (1812) (opinion of Yates, J.), overruled by *N. River Steamboat Co. v. Livingston*, 3 Cow. 182 (1825).

¹⁴⁴ See, e.g., *supra* notes 133–34, 138.

¹⁴⁵ See LASH, *supra* note 120, at 15.

¹⁴⁶ See *id.* at 13.

¹⁴⁷ See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1202 (1992).

¹⁴⁸ See *id.* at 1217.

¹⁴⁹ See *id.*

¹⁵⁰ See discussion *infra* Part II.

¹⁵¹ See, e.g., LASH, *supra* note 120, at 176–229; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1532–1614 (2007).

the phrase “privileges or immunities” included the Bill of Rights,¹⁵² and the most thorough recent assessments of that question conclude that the answer should have been “yes,”¹⁵³ while also acknowledging that the phrase should not be limited to that list.¹⁵⁴ The United States Supreme Court Justices, however, have sent the clear message that they have moved beyond the incorporation debate.¹⁵⁵

Diverted by questions about incorporation and natural law, however, few scholars have studied the question of whether the Fourteenth Amendment would have been understood to include individual rights protected by federal statutes.¹⁵⁶ Kurt Lash sidestepped that issue in an otherwise thorough assessment of the “Privileges and Immunities of American Citizenship.” He documents the “escalating public awareness that adopting the Privileges or Immunities Clause would bind the states to protect substantive rights such as those listed in the first eight amendments to the Constitution.”¹⁵⁷ With respect to federal statutes, however, he finds “nothing clearly incorrect about including statutorily established rights as a portion of the constitutionally secured ‘privileges or immunities’ of citizens of the United States,”¹⁵⁸ but questions whether that is “the *best* reading of the Clause only because the discussions of national privileges and immunities in 1866 focused on constitutionally secured personal rights.”¹⁵⁹

¹⁵² See, e.g., Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 154–56 (2009).

¹⁵³ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xiv–xv (1998); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 8–9* (1986); LASH, *supra* note 120, at vii; Wildenthal, *supra* note 151, at 1510; Wildenthal, *supra* note 152, at 321.

¹⁵⁴ If the phrase “privileges or immunities” only included the Bill of Rights, then the framers would not have used the vague alternative language. At the very least, congressional power to enforce other provisions of the Constitution, such as the Contracts Clause or Bill of Attainder and Ex Post Facto clauses of Article I, Section 10, would also have been included. Evidence also suggests that the Fourteenth Amendment secured congressional authority to enforce the Privileges and Immunities Clause of Article IV. See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 115–23 (1988); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 891–94 (1982) (arguing that the Fourteenth Amendment incorporates a range of rights set out in the Constitution).

¹⁵⁵ See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (rejecting arguments that the Second Amendment should be incorporated into the Privileges or Immunities Clause based upon “settled doctrine” and accepting arguments that the Second Amendment should be incorporated through the Due Process Clause).

¹⁵⁶ But see William J. Rich, *Why “Privileges or Immunities”?* *An Explanation of the Framers’ Intent*, 42 AKRON L. REV. 1111, 1126–27 (2009).

¹⁵⁷ LASH, *supra* note 120, at 226.

¹⁵⁸ *Id.* at 263.

¹⁵⁹ *Id.* Other authors take a somewhat similarly cautious approach to the question about whether the Privileges or Immunities Clause protects rights that extend beyond the Bill of Rights. See, e.g., Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*,

That conclusion, however, conflicts with the antebellum interpretation of references to privileges and immunities that Lash carefully documents.¹⁶⁰

Viewpoints of key participants in congressional debates support a conception of national sovereignty consistent with the importance of securing consistent enforcement of federal law in all states.¹⁶¹ They began their political careers immersed in the series of state sovereignty claims that had provoked constitutional crises in years leading up to the Civil War.¹⁶² They had to have been conscious of the nullification debates, and they understood the full import of Webster's argument in the "Great Debate"¹⁶³ that, "No State law is to be valid which comes in conflict with the [C]onstitution or any law of the United States."¹⁶⁴ They would have been aware of efforts by John Quincy Adams to assert federal supremacy in response to repeated assertions by John C. Calhoun, Roger Taney, and others that states had an inherent right to nullify federal law.¹⁶⁵

Frequent references to Judge Hoar's mission to South Carolina underscore this point.¹⁶⁶ Some have treated references to the Hoar affair as evidence that, when

103 YALE L.J. 57, 70–71 (1993) (noting John Bingham's repeated references to the need for federal authority to enforce, "at a minimum," the Bill of Rights).

¹⁶⁰ See LASH, *supra* note 120, at 45–46:

the gist of the consensus view was that the privileges and immunities of citizens in the states differed from state to state; what was expected was that a certain subset of these privileges would be extended as a matter of comity and constitutional requirement to visiting citizens of other states.

¹⁶¹ See *infra* notes 164–65.

¹⁶² See, e.g., Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 671–79 (2003).

¹⁶³ The "Great Debate" refers to the "debate over the question of the right of a state to secede." William I. Schaffer, *Daniel Webster—The Lawyer*, 7 TEMP. L.Q. 3, 49 (1932). For more on Daniel Webster's role in this debate, see generally *id.* at 48–50.

¹⁶⁴ 6 REG. DEB. 78 (1830).

¹⁶⁵ See *supra* text accompanying notes 83–102. Congressman John Bingham, a protégé of Daniel Webster and the person most responsible for framing the Fourteenth Amendment and guiding it through the House of Representatives, obviously cared about these issues. See LASH, *supra* note 120, at 83 (describing Webster as John Bingham's "political hero"). In 1859, Bingham tried in vain to convince the House of Representatives to deny Oregon admission to the United States because of a clause in the proposed state constitution excluding entry by African Americans, saying, "I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory . . . or from the enjoyment therein of the 'privileges and immunities' of a citizen of the United States." CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859). Bingham lost his argument that the Supremacy Clause of the Constitution precluded such state laws. See *id.* at 983–84. In 1862, in the midst of a debate about funding the Union Army, Congressman Bingham again stressed the importance of federal supremacy: "The Republic can no more live without its supreme law duly obeyed or duly enforced than can its citizens who compose it live without air." CONG. GLOBE, 37th Cong., 2d Sess. 345 (1862).

¹⁶⁶ In 1866, in a speech before Congress in support of an amendment to the Constitution that would protect the "equal rights of every man," Congressman Bingham denounced the

Congress promulgated the Privileges or Immunities Clause of the Fourteenth Amendment, members of Congress had in mind Hoar's freedom of speech and his right to petition the South Carolina government.¹⁶⁷ But Hoar's speech and petition rights tell only a part of the story. He did not travel to South Carolina just to give a speech. Hoar's trip came about in response to South Carolina's laws that jailed free black seamen in defiance of Commerce Clause and Treaty Clause protections of the right to navigate freely in and out of Charleston Harbor.¹⁶⁸ We may logically assume that Hoar did not just want the right to file such lawsuits; he intended to succeed. In *Elkison v. Deliesseline*, Justice Johnson declared that South Carolina violated the "paramount and exclusive right" of Congress to regulate commerce.¹⁶⁹ As Senator Sherman explained, the incident showed the need for effective enforcement of federal rights against states.¹⁷⁰ Individuals lacked the ability to enforce federal law against state authorities; as understood at the time, the Fourteenth Amendment Privileges or Immunities Clause assured that such problems would never arise again.¹⁷¹

Members of Congress made additional references to their concern for federal supremacy during the course of debates over the Fourteenth Amendment.¹⁷² For

lack of safety for "a citizen of Massachusetts . . . to be found anywhere in the streets of Charleston" and he went on to decry the "utter[] disregard[]" of South Carolina for the privileges and immunities of "the honored representative of Massachusetts." CONG. GLOBE, 39th Cong., 1st Sess. 157–58 (1866). Bingham later explained that South Carolina had required that citizens "abjure their allegiance to every other government or authority than that of the State of South Carolina," which led to the situation in which both citizen and stranger lacked "protection by national law from unconstitutional State enactments." *Id.* at 2542–43. Examples from other members of Congress include Congressman John Broomall's lament that,

Strange as it may seem, while the Government of the United States has been held competent to protect the lowest menial of the minister of the most obscure prince in Europe, anywhere between the two oceans, and from the Lakes to the Gulf, it had no power to protect the personal liberty of the agent of the State of Massachusetts in the city of Charleston, or enable him to sue in the State courts.

Id. at 1263; Senator George Edmunds' reference to the time "when Mr. Hoar went down [to South Carolina] in order to give some rights to citizens and was driven away," CONG. GLOBE, 40th Cong., 3d Sess. 1001 (1869); and Senator Trumbull's discussion of the competence of Congress to pass a law protecting Judge Hoar in his travel to South Carolina, CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). In his chronicle of the Reconstruction Debates, Alfred Avins notes thirteen separate references to the "Hoar incident in South Carolina." *See* THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 748 (Alfred Avins ed., 1967).

¹⁶⁷ *See, e.g.*, AMAR, *supra* note 153, at 236, 261, 301.

¹⁶⁸ *See* Hamer, *supra* note 87, at 22.

¹⁶⁹ 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4,366).

¹⁷⁰ CONG. GLOBE, 39th Cong., 1st Sess. 41–42 (1865).

¹⁷¹ *See* Aynes, *supra* note 159, at 71–73 (noting John Bingham's repeated references to the need for federal authority to enforce, "at a minimum," the Bill of Rights).

¹⁷² *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 256 (1866).

example, in addressing questions about enforcement of the Privileges or Immunities Clause, Congressman Baker quoted the text of that provision and asked:

What business is it of any State to do the things here forbidden?
To rob the American citizen of rights thrown around him by the
supreme law of the land? When we remember to what an extent
this has been done in the past, we can appreciate the need of
putting a stop to it in the future.¹⁷³

In historical context, Baker's reference would have been understood as an appeal to reinforce federal supremacy. No one seriously challenged that element of the debate in 1866, precisely because participants accepted the view that Daniel Webster and John Quincy Adams won their debates with John C. Calhoun and Roger Taney.¹⁷⁴ As noted in March of 1866 by Congressman George Latham, "No one, I presume, doubts the power of Congress to place all the inhabitants of the United States upon an equal footing as to all matters within the legitimate scope of congressional legislation."¹⁷⁵

In sum, congressional debates included statements consistent with an inclusive interpretation of the Privileges or Immunities Clause, reinforcing federal supremacy with respect to enforcement of statutory rights while also extending federal power to enforcement of additional constitutional guarantees.¹⁷⁶ It should be acknowledged that language from those debates could also be found to support alternative perspectives.¹⁷⁷ It would be a mistake, however, to place too much emphasis upon statements by members of Congress made in the course of a vigorous debate. Debate references provide little more than a starting place for the discussion.

B. Contemporaneous Legislation

Efforts to construe the Fourteenth Amendment demonstrate the difficulty, if not the futility, of trying to determine "legislative intent" based purely upon references to statements made in the heat of the battle.¹⁷⁸ To the extent that the original understanding of text matters within the context of constitutional interpretation, however,

¹⁷³ *Id.*

¹⁷⁴ See *supra* notes 164–65 and accompanying text.

¹⁷⁵ CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866); see also Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause: Michael Perry's Justification for Judicial Activism or Robert Bork's Constitutional Inkblot?*, 10 SETON HALL CONST. L.J. 321, 416 (2000) (noting that "a constitution-amending majority" readily accepted the proposition that Congress has such power).

¹⁷⁶ See *supra* notes 151–74 and accompanying text.

¹⁷⁷ See *supra* notes 151–74 and accompanying text.

¹⁷⁸ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 30 (2012) (asserting that "[s]ubjective intent is beside the point").

a more consistent and reliable picture emerges from a review of contemporaneous enactments by Congress in which the same words appeared. Congress repeatedly referred to “privileges” and “immunities” in legislation designed to reinforce the constitutional amendments,¹⁷⁹ and in doing so consistently tied those terms to federal laws in addition to provisions of the Constitution.¹⁸⁰

We know from the study of antebellum constitutional disputes that enforcement of federal law often floundered upon lack of jurisdiction.¹⁸¹ Enforcement of the newly enacted constitutional amendments, therefore, required adjustments to federal court jurisdiction.¹⁸² Habeas corpus jurisdiction needed to change in part to assure that persons being held in an equivalent to slavery could seek release from unlawful constraint, and the Habeas Corpus Act of 1867 provided that relief.¹⁸³ The same session of Congress that promulgated the Fourteenth Amendment included language in that Act expanding Supreme Court jurisdiction over cases decided by the highest courts of the various states if that court questions “the validity of a treaty or statute . . . of the United States” or “where any title, right, *privilege, or immunity is claimed under the constitution, or any treaty or statute of . . . the United States*” if a state court rejected that claim.¹⁸⁴ In 1875, Congress enacted a general federal question statute to assure that any claim based upon either the Constitution or a federal statute could be brought in federal court.¹⁸⁵

Other contemporaneous statutes included comparable text in reference to development of valid enforcement statutes. The Civil Rights Act of 1866 conferred citizenship on former slaves and protected the rights of “such citizens” to “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”¹⁸⁶ Congress overrode President Johnson’s veto of that Act after a debate that hinged largely upon questions about congressional power.¹⁸⁷ Subsequently, Congress reenacted the Civil Rights Act of 1866 as Section 18 of the Enforcement Act of 1870.¹⁸⁸ The text of that act prohibited conspiracies of two or

¹⁷⁹ See *infra* notes 184, 189, 194–95, 197, 204 and accompanying text.

¹⁸⁰ See *infra* notes 193–203 and accompanying text.

¹⁸¹ See, e.g., *Elkison v. Deliesseline*, 8 F. Cas. 493, 497–98 (C.C.D.S.C. 1823) (No. 4,366).

¹⁸² See *id.*

¹⁸³ Habeas Corpus Act of 1867, 14 Stat. 385 (1867) (codified at 28 U.S.C. § 1257 (2012)). The reason why Justice Johnson could not protect the rights of Harry Elkison stemmed from the lack of such jurisdiction. See *Elkison*, 8 F. Cas. at 497–98. For discussion of the link between habeas corpus and slavery, see, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Edgar Cowan).

¹⁸⁴ 14 Stat. 385, 386 (1867) (codified at 28 U.S.C. § 1257 (2012)) (emphasis added).

¹⁸⁵ 18 Stat. 470 (1875) (codified at 28 U.S.C. § 1331 (2012)).

¹⁸⁶ 14 Stat. 27 (1866).

¹⁸⁷ See John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1135–36 (1990).

¹⁸⁸ 16 Stat. 141 (1870).

more persons which threatened a citizen's "enjoyment of any right or privilege granted or secured to him by the Constitution *or laws* of the United States."¹⁸⁹

Changes in federal jurisdiction which came about after the Civil War "reshaped the understanding of federalism and, in particular, the federal courts' role in the enforcement of civil rights."¹⁹⁰ An anonymous critic from the year in which Congress established federal question jurisdiction explained that statute "as the culmination of a movement which began with the removal legislation of 1864 to strengthen the Federal Government against the states."¹⁹¹ In every one of those changes to federal jurisdiction, Congress recognized statutory rights within the scope of privileges or immunities that federal courts would henceforth protect.

In response to continuing violations of civil rights,¹⁹² Congress enacted the Ku Klux Klan Act of 1871¹⁹³ to reinforce provisions of both the Fourteenth and Fifteenth Amendments, imposing liability on persons who, "under color of any law . . . cause . . . the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States."¹⁹⁴ A separate section of the same act prohibited conspiracies to deprive "any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws."¹⁹⁵ An 1874 Committee on Revision of the Laws that had been appointed to overhaul all federal law, making "such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text," modified the first clause of the Ku Klux Klan Act of 1871.¹⁹⁶ As reenacted, the Ku Klux Klan Act provision that eventually became 42 U.S.C. § 1983 protected United States citizens from deprivation of "any rights, privileges, or immunities secured by the Constitution *and laws*" of the federal government.¹⁹⁷

Did the addition of the words "and laws" change the meaning of the Ku Klux Klan Act in a significant manner that should also alter our understanding of the scope of the Privileges or Immunities Clause, or did the committee follow its instructions by providing consistency, curing omissions, and thereby perfecting the text? Congressman Bingham, who sponsored the Act in Congress, explained that it would provide for better enforcement of the Constitution and laws of the United States.¹⁹⁸ Viewed in terms

¹⁸⁹ Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140 (1870) (emphasis added).

¹⁹⁰ STEPHEN C. YEAZELL, CIVIL PROCEDURE 216 (5th ed. 2000).

¹⁹¹ FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 n.34 (1928).

¹⁹² For a historical account, see WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869–1879 (1979); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1974).

¹⁹³ 17 Stat. 15 (1871).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 13.

¹⁹⁶ Act of June 27, 1866, ch. 140, § 2, 14 Stat. 74, 75, *amended by* Act of May 4, 1870, ch. 72, 16 Stat. 96.

¹⁹⁷ 42 U.S.C. § 1983 (2012) (emphasis added).

¹⁹⁸ CONG. GLOBE, 42nd Cong., 1st Sess. 81 (1871).

of the broader statutory context, the addition of those two words brought the text into conformity with other contemporaneous legislation, including the Civil Rights Act of 1866,¹⁹⁹ the Enforcement Act of 1870,²⁰⁰ and the acts expanding federal jurisdiction.²⁰¹ Addition of the reference to federal laws also eliminated ambiguity that could arise from the reference to “privileges or immunities secured by the Constitution,”²⁰² it would be reasonable to ask whether the Constitution “secured” federal statutes that fell within the scope of the Supremacy Clause, and addition of the words “and laws” answered such questions. All of this helps to establish a broader point: By 1874, Congress had repeatedly linked the terms “privileges or immunities” with federal statutes, with no suggestion that those terms differed in content from the Fourteenth Amendment reference to “privileges or immunities of citizens of the United States.”²⁰³

The failure of judges, advocates, and scholars to focus upon this conclusion, however, obscures the clarity of the answer. It may be possible to argue that statutory references to “rights,” “privileges,” or “immunities” secured by the “Constitution or laws of the United States” referred to a different body of laws when compared to the “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment. It may also be possible to argue that the words “privileges and immunities” used in Article IV had a different character when compared to the same words used in the Fourteenth Amendment, so that the words pertaining to state citizens included statutory rights, but the Fourteenth Amendment did not. It seems more likely, however, that twentieth-century observers ignored this issue based upon an assumption that it was irrelevant; the Supremacy Clause eliminated the need to revisit questions about the enforcement of federal rights, especially when accompanied by the assumption that Daniel Webster and his cohorts had won the Great Debate. Additional assessment of case law and commentary reinforces this explanation.

C. Contemporaneous Judicial Interpretations

In the years surrounding enactment of the Fourteenth Amendment, questions continued to be raised and resolved with respect to the meaning of constitutionally protected privileges and immunities. As previously noted, antebellum references to “rights,” “privileges,” or “immunities” had been commonly understood to protect equal government treatment regardless of the constitutional or legislative source of those laws.²⁰⁴ The United States Supreme Court illustrated this understanding in the same year that the Fourteenth Amendment became law. In *Paul v. Virginia*,²⁰⁵ Justice

¹⁹⁹ See *supra* note 186 and accompanying text.

²⁰⁰ See *supra* note 188 and accompanying text.

²⁰¹ See *supra* notes 182–85 and accompanying text.

²⁰² See *supra* notes 184, 189 192–95, 197 and accompanying text.

²⁰³ U.S. CONST. amend. XIV, § 1; see also *supra* notes 184, 189, 192–95, 197 and accompanying text.

²⁰⁴ See LASH, *supra* note 120, at 45–47. For discussion, see *supra* notes 120–46 and accompanying text.

²⁰⁵ 75 U.S. (8 Wall.) 168 (1868).

Stephen Field rejected arguments that the Privileges and Immunities Clause of Article IV, Section 2 encompassed a body of substantive law to which states must adhere.²⁰⁶ Instead, he reaffirmed the more established explanation that Article IV places all citizens upon “the same footing with citizens of other States” with respect to privileges or immunities derived from the “constitution and laws” of the forum state.²⁰⁷

In the first United States Supreme Court case to construe the Fourteenth Amendment, the plaintiffs in the *Slaughter-House Cases*²⁰⁸ argued that Louisiana should not be allowed to force a group of private butchers in New Orleans to carry out their activities within a state-established slaughterhouse.²⁰⁹ Opponents of the law relied upon the Citizenship Clause and the Privileges or Immunities Clause, with limited references to other provisions of the Fourteenth Amendment.²¹⁰ They did not argue for incorporation of the Bill of Rights.²¹¹ Instead, they argued in effect that the Privileges or Immunities Clause transformed the Supreme Court into a general guardian of common law contract and property rights,²¹² an approach that would have taken the Court in the opposite direction from that adopted in *Paul v. Virginia*.

In rejecting their challenge, Justice Samuel Miller explained that the Privileges or Immunities Clause prohibited state interference with rights of United States citizens derived from federal law in the same way that the content of privileges and immunities protected by Article IV arises out of positive state law.²¹³ Drawing from this analogy, Miller concluded that the substantive scope of privileges or immunities of United States citizens should be determined by reference to federal sources of law rather than through enforcement of judicially defined inherent rights.²¹⁴ In reaching this conclusion, Miller’s opinion remained in tune with the understanding that the terms “privileges” and “immunities” refer to a body of law establishing significant rights and derived from a given governmental authority.²¹⁵

²⁰⁶ *Id.* at 177–81.

²⁰⁷ *Id.* at 180; *see also* *Downham v. Alexandria Council*, 77 U.S. (10 Wall.) 173, 175 (1869) (noting “[i]t is only equality of privileges and immunities between citizens of different States that the Constitution guarantees”).

²⁰⁸ 83 U.S. (16 Wall.) 36 (1872). Prior to the Supreme Court interpretation of the Privileges or Immunities Clause, lower courts had also considered the issue. In the first recorded lower court opinion, Judge Luther Day for the Ohio Supreme Court had explained that the clause included those privileges or immunities “derived from, or recognized by, the constitution of the United States.” *Ohio ex rel. Garnes v. McCann*, 21 Ohio St. 198, 210 (1871).

²⁰⁹ *Slaughter-House*, 83 U.S. (16 Wall.) at 59–60.

²¹⁰ *Id.* at 51–56 (arguing against the monopoly).

²¹¹ *See id.*

²¹² *Id.*

²¹³ *Id.* at 76–77 (noting that the Privileges and Immunities Clause of Article IV does not give federal courts control over state government decisions regarding “the rights of its own citizens”).

²¹⁴ *Id.* at 78–79 (explaining that, in comparison, the Fourteenth Amendment refers to privileges and immunities which are under the care of Congress).

²¹⁵ *Id.*

Generations of American lawyers, however, learned about *Slaughter-House* as a case that failed to live up to promises of federal protection for individual rights, but otherwise lacked importance.²¹⁶ Commentators focused upon what the case failed to do, rather than on its merits.²¹⁷ The criticism looks good in hindsight; subsequent Supreme Court decisions rejected incorporation of the Bill of Rights into the Privileges or Immunities Clause, and critics charged that *Slaughter-House* opened the door for those decisions.²¹⁸ Casting blame in that manner, however, distorts the text of Miller's opinion and ignores a more reasonable assessment of the *Slaughter-House* framework.²¹⁹

In recent years, a number of constitutional scholars have rejected the traditional, pejorative assessment of Justice Miller's opinion in *Slaughter-House*.²²⁰ As Laurence Tribe explained:

It was only a series of later decisions that oddly attributed to Justice Miller's majority opinion in the *Slaughter-House Cases* the expulsion of the Bill of Rights from the privileges or immunities cathedral, an expulsion nowhere to be found on the face of the Miller opinion and indeed inconsistent with much of its language and logic.²²¹

²¹⁶ See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1020 (1998) (stating that "no one in the legal academy thinks it very important to explain [the Privileges or Immunities Clause]").

²¹⁷ See, e.g., CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 55 (1997) (characterizing Justice Miller's opinion in *Slaughter-House* as "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court"); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990) (comparing the clause to a provision "written in Sanskrit or . . . obliterated past deciphering by an ink blot"); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1119 (1953) (labeling judicial interpretation of the clause "completely nugatory and useless").

²¹⁸ See, e.g., Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 628 (1994) (arguing that "almost all sources" agree that the Court misinterpreted the Privileges or Immunities Clause).

²¹⁹ For a more favorable view of Justice Miller's perspective in *Slaughter-House*, see MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 202–03, 206, 208, 210 (2003) (describing Justice Miller's background as a physician, his support for public health measures, and his support for the biracial government in Louisiana that enacted the slaughterhouse regulations).

²²⁰ See, e.g., Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 683 (2000); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, U. ILL. L. REV. 739, 750 (1984); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1111–15 (2000).

²²¹ Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV.

By distorting Justice Miller's opinion with respect to the issue of incorporation, traditionalists also failed to recognize implications of the *Slaughter-House* framework with respect to application of federal law more generally.

The core of the conflict between Justice Miller and dissenting Justices, led by Justice Stephen Field,²²² involved the question of authority to recognize rights that had no roots in either constitutional text or federal statutes.²²³ Foreshadowing the Supreme Court's decision in *Lochner v. New York*,²²⁴ Field sought to "incorporate" citizen entitlement to "all pursuits, all professions, all avocations . . . open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition."²²⁵ He based his argument upon references to the common law and libertarian theory, citing Adam Smith's *Wealth of Nations* as authority.²²⁶ In rejecting Field's approach, Miller remained faithful to the vision of the Fourteenth Amendment repeatedly described by John Bingham and the moderate Republicans during prior congressional debates.²²⁷

The *Slaughter-House* debate simply did not involve incorporation of the Bill of Rights,²²⁸ even though subsequent criticism focused upon that claim.²²⁹ The most direct reference to the Bill of Rights came from Justice Miller's use of First Amendment text as an example of the privileges or immunities that warranted protection.²³⁰ Miller argued that plaintiffs' arguments would trigger a major shift in state and federal relationships, making the national government a "perpetual censor" of the common law,²³¹

110, 183–84 (1999). To underscore Tribe's point, note that when William Guthrie addressed this issue in 1898, the argument for incorporating the first eight amendments into the Privileges or Immunities Clause had "either not [been] made or was inadequately presented" in all prior Supreme Court cases. WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 63 (Boston, Little, Brown & Co. 1898).

²²² *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1872) (Field, J., dissenting).

²²³ *Id.* at 99–100.

²²⁴ 198 U.S. 45 (1905) (adopting the doctrine of "substantive due process" to protect a right to freedom of contract).

²²⁵ *Slaughter-House*, 83 U.S. (16 Wall.) at 110.

²²⁶ *Id.* at 110 n.*.

²²⁷ In order to assure moderate Republican support of civil rights acts and constitutional amendments after the Civil War, participants in the congressional debates provided repeated assurances that changes limited federal power within a traditional sphere of national authority, extended to include rights identified in the constitutional text, but without opening a door for federal control over a panoply of civil rights beyond that scope. See, e.g., James Wilson's response to concerns by Bingham and others that the Civil Rights Act of 1866 related only "to matters within the control of Congress." CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866); see also LASH, *supra* note 120, at 152 (describing Bingham's commitment to dual sovereignty).

²²⁸ See generally *Slaughter-House*, 83 U.S. (16 Wall.) 36.

²²⁹ See, e.g., *supra* note 220 and accompanying text.

²³⁰ *Slaughter-House*, 83 U.S. (16 Wall.) at 79 (majority opinion) (referring to the "right to peaceably assemble and petition for redress of grievances").

²³¹ *Id.* at 78.

and that framers of the Fourteenth Amendment did not intend to bring about that result.²³² Miller’s opinion for the Court protected community rights to remove “noxious slaughter-houses”²³³ from city centers and to generally protect the “convenience, health, and comfort of the people,”²³⁴ and he upheld the state’s decision to establish a monopoly designed to achieve those ends.²³⁵

Critics of *Slaughter-House* generally ignore overtones of pre–Civil War debates that accompanied the case as it arrived on the Court’s docket. John A. Campbell, a former Supreme Court Justice and disciple of John C. Calhoun²³⁶ who had helped to uphold slavery in *Dred Scott v. Sanford*,²³⁷ represented the *Slaughter-House* petitioners.²³⁸ In contrast, lead counsel for Louisiana held a “passionate personal attachment to Daniel Webster,”²³⁹ and had organized an armed force to support President Jackson’s anti-nullification efforts.²⁴⁰

Campbell attempted to use defeat in the Civil War to his advantage, arguing that the Fourteenth Amendment had “forever destroyed” the states’ rights doctrine of Calhoun.²⁴¹ He asked the Court to recognize an “indefinite enlargement” of resulting federal power.²⁴² He made that argument, however, to assert private property rights in a manner that paralleled antebellum support for the property rights of slave holders.²⁴³ The “enlargement” he sought involved the very concerns about expansion of federal powers that moderate Republicans had opposed during Fourteenth Amendment congressional debates.²⁴⁴

In contrast, lawyers for the slaughterhouse monopoly argued before the Supreme Court of Louisiana that efforts to overturn Louisiana law echoed the “dangerous doctrine”²⁴⁵ by which “people were urged to nullify the tariff laws of Congress,

²³² *Id.*

²³³ *Id.* at 64.

²³⁴ *Id.*

²³⁵ *Id.* at 64–66. Although less eloquent, Miller’s opinion for the majority in *Slaughter-House* came to the same conclusion that Justice Holmes reached a generation later with his dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

²³⁶ See Mitchell Franklin, *The Foundations and Meaning of the Slaughterhouse Cases*, 18 TUL. L. REV. 1, 88 (1943) (citing RANDELL HUNT, *SELECTED ARGUMENTS, LECTURES AND MISCELLANEOUS PAPERS OF RANDELL HUNT* xviii–xix (1876)).

²³⁷ 60 U.S. (19 How.) 393, 493–518 (1857) (Campbell, J., concurring) (stating a theory of state supremacy over “property,” and denouncing congressional claims of “supreme and irresponsible power . . . over boundless territories”).

²³⁸ Franklin, *supra* note 236, at 52.

²³⁹ *Id.*

²⁴⁰ *Id.* (describing background of Christian Roselius, Randell Hunt, and William H. Hunt).

²⁴¹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 52 (1872) (argument of Plaintiffs’ counsel).

²⁴² *Id.* at 52–53.

²⁴³ See LASH, *supra* note 120, at 37–38.

²⁴⁴ *Id.* at 160 (explaining the understanding that the Fourteenth Amendment left “the general regulation of unenumerated individual rights to the . . . states”).

²⁴⁵ See Franklin, *supra* note 236, at 87 (citing HUNT, *supra* note 236, at 91–92).

because it was pretended that those laws tended to create a monopoly.”²⁴⁶ Justice Miller also made reference to concerns about nullification,²⁴⁷ but in his opinion he characterized petitioners’ argument as an effort to give the Court “authority to nullify such [legislation] as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.”²⁴⁸

In opposing the plaintiffs’ argument for constitutional recognition of a right to free enterprise, Justice Miller ruled that the Privileges or Immunities Clause had not expanded federal authority to control substantive rights derived from the common law.²⁴⁹ Responsibility for determining the content of state privileges and immunities remained with the states,²⁵⁰ and Article IV, Section 2 continued to be a comity clause rather than a source for protecting inherent rights.²⁵¹ The Fourteenth Amendment Privileges or Immunities Clause would play a comparable role by assuring enforcement of federal law in all states.²⁵² By reaching this decision, Miller closed the door to a literally defensible but expansive vision of individual rights,²⁵³ while emphasizing the open door to federal enforcement of rights based upon the Constitution or laws of the United States.²⁵⁴

D. *The Slaughter-House Framework*

The framework of the Privileges or Immunities Clause described by Justice Miller differs markedly from the common caricature of the opinion. With a series of examples, Miller identified four potential sources of federal privileges or immunities.²⁵⁵ They could be based upon (1) constitutional text that specifically limited the states (examples including bans on ex post facto laws, bills of attainder, or laws that impair contract rights),²⁵⁶ (2) implied or structural rights, such as the right to travel;²⁵⁷ (3) rights found in the first eight amendments to the Constitution (exemplified by the “right to peaceably assemble and petition for redress of grievances” drawn explicitly from

²⁴⁶ *Id.*

²⁴⁷ *Slaughter-House*, 83 U.S. (16 Wall.) at 78.

²⁴⁸ *Id.* (emphasis added).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 75.

²⁵² *Id.*

²⁵³ See D.O. McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219, 226 (1918) (noting that “a literal interpretation of the clause . . . would have resulted in extreme centralization, leaving to State governments little more than administrative functions”).

²⁵⁴ *Id.*

²⁵⁵ *Slaughter-House*, 83 U.S. (16 Wall.) at 77, 79.

²⁵⁶ *Id.* at 77 (referencing “the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligations of contracts”).

²⁵⁷ *Id.* at 79 (citing *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 36 (1867), for the implied right to travel “to the seat of government to assert any claim he may have upon that government”).

the text of the First Amendment);²⁵⁸ or (4) rights established through the exercise of congressional and executive power as defined in Article I, Section 8 of the Constitution (referenced in terms of the “right to use the navigable waters of the United States”) and in Article II, Section 2 (described by Miller as “all rights secured to our citizens by treaties with foreign nations”).²⁵⁹ All of his illustrations supported the more general proposition that federal privileges or immunities “owe[d] their existence to the Federal government, its National character, its Constitution, or its laws.”²⁶⁰

In listing these rights, Justice Miller carefully noted that these were suggestions, and were never intended to be an exclusive list.²⁶¹ In doing so, he emphasized the potential breadth of such interests while distinguishing between rights enacted by states and those derived from the national government or from constitutional text.²⁶² By referencing both treaty rights and laws regulating navigable waters, Miller explicitly recognized the authority of other government branches to determine the specific scope of the rights in question.²⁶³ Furthermore, Miller’s rejection of the plaintiffs’ claims and his distinctions from the rights identified in *Corfield* had nothing to do with the nature of the rights, and everything to do with the source of authority to establish the rights in question.²⁶⁴ The parallel he drew between Article IV and the Fourteenth Amendment could not have been more clear.

Justice Field’s dissenting opinion questioned this analysis, arguing that such a limited scope added little to the pre-existing Supremacy Clause,²⁶⁵ and was therefore too narrow an interpretation for the Privileges or Immunities Clause.²⁶⁶ By leaving the door open for incorporation of the Bill of Rights along with other protective provisions of the Constitution that had not previously been viewed as within the scope of national sovereign authority,²⁶⁷ however, Miller’s approach paralleled comments made on the floor of Congress by Congressman Bingham and others.²⁶⁸ The

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 79–80.

²⁶⁴ *Id.* at 75–76.

²⁶⁵ *Id.* at 96 (Field, J., dissenting).

²⁶⁶ *Id.*

²⁶⁷ David S. Bogen, *Rebuilding the Slaughter-House: The Cases’ Support for Civil Rights*, 42 AKRON L. REV. 1129, 1140 (2009).

²⁶⁸ There are good reasons for believing that Miller understood and shared Bingham’s vision for the Fourteenth Amendment. In 1871, they traveled together to the west coast, with Bingham presenting public presentations about the meaning of the Amendment. Aynes, *supra* note 218, at 662 (citing THE DIARY OF JUDGE MATTHEW P. DEADY 28 (Malcolm Clark, Jr. ed., 1975) (entry of July 18, 1871)). While revisionist characterization of *Slaughter-House* may depict things differently, text of the opinion supports an interpretation that united judicial and legislative majority perspectives.

change brought about by the Fourteenth Amendment assured that states must comply with all national law, including provisions of the Bill of Rights,²⁶⁹ and that individuals would have a right to enforce those laws against state governments.²⁷⁰

Most important for purposes of the current discussion, none of the Justices objected to inclusion of the rights described in Justice Miller's opinion.²⁷¹ In their dissents, Justices Field and Bradley argued for a broader interpretation of the Fourteenth Amendment, but never questioned the controlling nature of federal law.²⁷² Justice Field explained that "[t]he supremacy of the Constitution and the laws of the United States always controlled any State legislation [that interfered with national laws]."²⁷³ Justice Bradley was even more effusive regarding this point, noting that "the [F]ourteenth [A]mendment itself [now settled the question] that citizenship of the United States is the primary citizenship in this country"²⁷⁴ and that a United States citizen has "an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right."²⁷⁵ While Field and Bradley wanted more, including a newly recognized right to choose any lawful employment,²⁷⁶ neither would have objected to any elements of the *Slaughter-House* framework described above.

E. Subsequent Court Interpretations

The Supreme Court decision in *Slaughter-House* represented the opening salvo in the debate regarding the Privileges or Immunities Clause. Participants in that debate, however, paid relatively little attention to rights that, in Miller's terms, "owe their existence to the Federal government, its National character, its Constitution, or its laws."²⁷⁷ Instead, the primary focus shifted to questions about judicial identification of rights that could not be traced to such sources. Litigants tried in vain to argue that the Privileges or Immunities Clause protected inherent, fundamental rights without reference to federal structure, constitution, or legislation.

A notorious case for such arguments came in *United States v. Cruikshank*,²⁷⁸ in which the Justices overturned a conviction of defendants charged with conspiring

²⁶⁹ *Slaughter-House*, 83 U.S. (16 Wall.) at 67–68 (majority opinion).

²⁷⁰ *Id.* at 54–55.

²⁷¹ Justice Stevens emphasized the same point with respect to the "right to travel" that he relied upon in his opinion for the Court in *Saenz v. Roe*, 526 U.S. 489, 503 (1999). For discussion, see *infra* text accompanying notes 343–46.

²⁷² See *Slaughter-House*, 83 U.S. (16 Wall.) at 83–111 (Field, J., dissenting); *id.* at 111–24 (Bradley, J., dissenting).

²⁷³ *Id.* at 96 (Field, J., dissenting).

²⁷⁴ *Id.* at 112 (Bradley, J., dissenting).

²⁷⁵ *Id.* at 112–13.

²⁷⁶ *Id.* at 113–14.

²⁷⁷ *Id.* at 79 (majority opinion).

²⁷⁸ 92 U.S. 542 (1875).

to prevent two African Americans from exercising their right of peaceable assembly.²⁷⁹ If any one case deserves blame for steering the Supreme Court in the wrong direction regarding incorporation of the Bill of Rights into the Privileges or Immunities Clause of the Fourteenth Amendment, *Cruikshank* best fits that description. Justices in the majority expressed doubts about the scope of the First Amendment and the extent to which that Amendment could be relied upon by Congress as a basis for protecting a right of assembly regarding matters that could not be directly tied to interests of the national government.²⁸⁰ That language, and the conception of federalism that it reflected, provided a basis for subsequently rejecting incorporation of the Bill of Rights.²⁸¹

That incorporation debate, however, should not be allowed to obscure the point on which all Supreme Court Justices at the time appeared to agree: Privileges and immunities of United States citizens included those rights protected by federal statutes.²⁸² The Justices rejected the broad indictment at issue in *Cruikshank* because it lacked reference to a specific federal statutory source.²⁸³ The Court's ruling left wide scope for the federal government to act, including a direction that defendants could have been charged for violation of federally protected privileges or immunities if the indictment had specified that the victims had assembled "for consultation in respect to public affairs and to petition for a redress of grievances."²⁸⁴ The Court concluded, however, that on the record before it, defendants in *Cruikshank* had not violated any right or privilege "granted or secured . . . by the [C]onstitution or laws of the United States."²⁸⁵

Other cases followed the pattern illustrated by *Cruikshank*. Individuals who were not members of an organized militia had no Fourteenth Amendment right to organize as a military unit; in order to claim such a right they "must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred."²⁸⁶ Continuing to apply the *Slaughter-House* framework, state employee

²⁷⁹ *Id.* at 556–57.

²⁸⁰ *Id.* at 552.

²⁸¹ *But see* Newsom, *supra* note 220, at 714–20 (arguing that, in *Cruikshank*, the Supreme Court was again not presented with a genuine argument for incorporation).

²⁸² *See generally* *Cruikshank*, 92 U.S. 542; *Slaughter-House*, 83 U.S. (16 Wall.) 36.

²⁸³ *Cruikshank*, 92 U.S. at 562.

²⁸⁴ *Id.* at 552.

²⁸⁵ *Id.* at 548 (emphasis added). For contemporary readers, it is also important to understand the limited scope of the First Amendment freedom of speech as understood in the nineteenth century. At the time when *Cruikshank* was decided, no Supreme Court opinion had established anything like a modern conception of freedom of speech. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 9 (2000) (explaining that "[w]e tend to forget how recent robust national judicial protection is"). (I also explain the same point in section 5.1 of my treatise, but not in the same detail. I have tremendous respect for the work of Professor Curtis, who credits the *William & Mary Bill of Rights Journal* for publishing part of the work that contributed to his book.)

²⁸⁶ *Presser v. Illinois*, 116 U.S. 252, 266 (1886) (emphasis added).

discharge laws,²⁸⁷ foreign attachment rules,²⁸⁸ and state inheritance laws²⁸⁹ all survived challenges based upon the Privileges or Immunities Clause because the underlying rights in question could not be traced to the federal government.²⁹⁰ The Supreme Court rejected repeated invitations to discover privileges or immunities of United States citizens independently from congressional action or other national sources.²⁹¹

Along with the Supreme Court rulings rejecting relief based upon the Privileges or Immunities Clause came a series of decisions affirming recognition of rights, privileges, or immunities defined by federal statutes. Writing for a unanimous Supreme Court in the case of *United States v. Waddell*,²⁹² Justice Miller determined that interference with establishment of a homestead on federal land fell within the purview of federal statutes protecting the “right[s] or privilege[s] secured by the Constitution or laws of the United States.”²⁹³ The Justices relied upon the same federal statute in 1895 as valid authority for prosecuting individuals who interfered with citizen reports of internal revenue law violations.²⁹⁴ The Justices explained the need to allow Congress to protect the rights and privileges of national citizenship through such laws in order to assure “the independence and the supremacy of the national government.”²⁹⁵

Subsequent Supreme Court opinions reaffirmed the understanding that the Fourteenth Amendment buttressed national supremacy. For example, in the *Selective Draft Law Cases*,²⁹⁶ Chief Justice White explained for a unanimous court “how completely [the Fourteenth Amendment] broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative.”²⁹⁷ Jersey City violated the privileges or immunities of United States citizens when it attempted to prohibit an assemblage of labor organizers.²⁹⁸ In *Hague v. Committee for Industrial Organization*,²⁹⁹ the Court’s plurality opinion noted that Jersey City had interfered

²⁸⁷ *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530 (1922).

²⁸⁸ *Ownbey v. Morgan*, 256 U.S. 94 (1921).

²⁸⁹ *Maxwell v. Bugbee*, 250 U.S. 525 (1919).

²⁹⁰ *See supra* notes 286–89.

²⁹¹ As explained by Professor McGovney, “If counsel had put themselves the question, what provision or text of Federal law creates or grants this alleged privilege or immunity the vapidness of the contentions would have been immediately apparent.” McGovney, *supra* note 253, at 224–25.

²⁹² 112 U.S. 76 (1884) (upholding conspiracy provision derived from the Ku Klux Klan Act of 1871).

²⁹³ *Id.* at 79.

²⁹⁴ *In re Quarles*, 158 U.S. 532 (1895).

²⁹⁵ *Id.* at 537.

²⁹⁶ 245 U.S. 366 (1918) (upholding national military draft).

²⁹⁷ *Id.* at 389.

²⁹⁸ *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

²⁹⁹ 307 U.S. 496 (1939).

with rights secured by the National Labor Relations Act when it attempted to prohibit an assemblage of labor organizers, and by doing so the city had infringed upon “privileges and immunities of the individual respondents as citizens of the United States.”³⁰⁰ In 1948, the Court found that denial of property rights based upon Japanese ancestry “deprive[d] Fred Oyama of the equal protection of California’s laws and of his *privileges as an American citizen*.”³⁰¹ The “privileges or immunities” dimension of these decisions received relatively little attention, however, because they could be explained as easily by reference to the Supremacy Clause or the Equal Protection Clause. The debate about incorporation of the Bill of Rights had shifted to the Due Process Clause, which had become the focal point of questions about the Supreme Court’s role in identification of fundamental rights.³⁰²

F. Commentary

For more than a century following ratification of the Fourteenth Amendment, commentators who addressed the issue agreed that “privileges or immunities of United States citizens” included rights derived from federal statutes. Thomas Cooley, a highly respected constitutional law treatise writer of his time, explained in 1880 that the Privileges or Immunities Clause protected rights such as participation in foreign and interstate commerce, benefits of postal laws, or navigation rights, “because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws.”³⁰³ He questioned the necessity of the provision, given the Supremacy Clause, but noted that the clause provided express authority for at least some principles that had previously been merely implied,³⁰⁴ concluding that “[m]any abuses of power are forbidden more than once in the federal Constitution, under different forms of expression.”³⁰⁵

³⁰⁰ *Id.* at 514. In a separate opinion, Justices Stone, Reed, and Butler did not reject the reasoning that Congress created privileges or immunities of United States citizens when it enacted the National Labor Relations Act, but they did not agree that the record of the case adequately supported the conclusion that such rights were at issue. *Id.* at 522 (Stone, J., dissenting).

³⁰¹ *Oyama v. California*, 332 U.S. 633, 640 (1948) (emphasis added). Although the quoted text represents a reference to both the Equal Protection Clause and the Privileges or Immunities Clause, the Justices did not extend their analysis of those texts, and concurring Justices indicated a preference for declaring California’s law invalid on its face based upon the Equal Protection Clause. *See id.* at 647 (Black, J., concurring).

³⁰² *See Palko v. Connecticut*, 302 U.S. 319 (1937) (triggering debate regarding Due Process Clause incorporation of the Bill of Rights); *Lochner v. New York*, 198 U.S. 45 (1905) (recognizing a fundamental right of “freedom of contract,” analogous to the right that Justice Miller had rejected in *Slaughter-House*).

³⁰³ THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES* 245 (Boston, Little, Brown & Co. 1880).

³⁰⁴ *Id.* at 248 (citing, as an example, the right to visit the national capital).

³⁰⁵ *Id.*

In his 1901 treatise, Judge Henry Brannon agreed with Cooley that the Privileges or Immunities Clause was not essential, that it emphasized “pre-existing law, imbedding it in the Constitution forever, not leaving it to mere implication and court decision.”³⁰⁶ He explained the reasons for not trying to tie down the substantive scope of the clause by noting that “[p]rivileges and immunities of the federal citizen may arise from new legislation, so that legislation be within the scope of national authority. This shows the futility, the danger of any infallible definition of ‘privileges or immunities.’”³⁰⁷

In 1918, Professor D.O. McGovney wrote an article summarizing privileges or immunities doctrine in which he concurred with his predecessors that the text of the Privileges or Immunities Clause, as authoritatively construed, reinforced federal supremacy.³⁰⁸ To capture the essence of the doctrine, he paraphrased the clause to read: “No State shall make or enforce any law which shall abridge any privilege or immunity conferred by *this Constitution, the statutes or treaties of the United States* upon any person who is a citizen of the United States.”³⁰⁹ He subsequently explained that, to understand the scope of the clause, counsel must ask “what provision or text of Federal law creates or grants this alleged privilege or immunity.”³¹⁰

III. TWENTIETH-CENTURY DEVELOPMENTS

In the twentieth century, litigants collectively lost sight of the Privileges or Immunities Clause. A primary reason for this lack of interest, as implied from the discussion above, was the sense that the clause did not serve a useful purpose separate from the role already played by the Supremacy Clause. Another factor had to do with a parallel rejection of the Privileges and Immunities Clause of Article IV, which lost but eventually regained its status as a significant source of protection for individual rights based upon state law. As described in the discussion that follows, in 1999 the Supreme Court revived the Privileges or Immunities Clause³¹¹ even while simultaneously cutting back on individual rights to enforce federal statutes against state agencies.³¹² More recently, the Supreme Court resolved to preserve the “settled doctrine” that the Due Process Clause incorporated most provisions of the Bill of Rights, eliminating any need to revive the Privileges or Immunities Clause for that purpose, but without discussing broader questions about what that settled doctrine

³⁰⁶ HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 62 (1901).

³⁰⁷ *Id.* at 64.

³⁰⁸ *See* McGovney, *supra* note 253.

³⁰⁹ *Id.* at 220.

³¹⁰ *Id.* at 225.

³¹¹ *See* Saenz v. Roe, 526 U.S. 489 (1999).

³¹² *See, e.g.,* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (denying monetary damages to plaintiffs who sued to enforce the Americans with Disabilities Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (rejecting patent claims against state actors).

entails.³¹³ When that discussion takes place, it should include both the recognition of federal statutory rights, and an understanding of how those rights expanded as a result of twentieth-century interpretations of the Commerce Clause.

A. Interpretations of Article IV, Section 2

During the time when the Privileges or Immunities Clause virtually disappeared from the arsenal of litigants, a similar pattern of restrictive interpretations and available alternatives led to avoidance of the Privileges and Immunities Clauses of Article IV, Section 2. Lack of development of that provision may explain why such little attention has been given to arguments favoring a parallel approach to the constitutional clauses protecting “privileges” and “immunities.” Just as Article IV requires equal application of rights originating from state governments, the Fourteenth Amendment requires equal enforcement of federal rights by all states. Neglect of both clauses, however, limited consideration of that comparison.

As previously noted, the Article IV provision lost its role as a possible source of judicially created substantive rights with the Supreme Court decision in *Paul v. Virginia*.³¹⁴ A more significant roadblock to development of the non-discrimination principle identified in *Paul*, however, emerged in the early twentieth century, when the Supreme Court stifled Article IV Privileges and Immunities Clause litigation by drawing a line between “residence” and “citizenship,” holding that protection extended only to the latter.³¹⁵ States could freely discriminate against nonresidents as long as they did not discriminate on the basis of “state citizenship.”³¹⁶ As a result, the Justices sustained a state statute mandating that insurance brokers reside within the state, reasoning that the class discriminated against included citizens of the enacting state who resided elsewhere.³¹⁷ A subsequent line of cases reinforced the distinction between nonresidents and noncitizens, which explains the minimal use of Article IV in the decades that followed.³¹⁸

³¹³ See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (accepting as “settled doctrine” decisions that incorporation of the Second Amendment should be based upon the Due Process Clause rather than the Privileges or Immunities Clause).

³¹⁴ 75 U.S. (8 Wall.) 168 (1868). For discussion, see *supra* text accompanying notes 205–07. This is not to say that courts could apply the Privileges and Immunities Clause of Article IV, Section 2 without making substantive judgments. As with all procedural issues, there continues to be an underlying need to identify those cases to which equal treatment of non-residents should apply. If confined to rights previously recognized within a state, however, that inquiry need not be seen as an open-ended search for substantive rights.

³¹⁵ 75 U.S. (8 Wall.) at 168.

³¹⁶ *Id.* at 180. For discussion, see RICH, *supra* note 9, § 19:3.

³¹⁷ *La Tourette v. McMaster*, 248 U.S. 465, 469–70 (1919) (upholding a South Carolina statute allowing only two-year residents to be licensed insurance brokers).

³¹⁸ Litigants challenging state laws which discriminated against nonresidents generally had more success with the Commerce Clause than with the Privileges and Immunities Clause,

The Supreme Court Justices revived meaningful use of Article IV, Section 2 in 1975 when they eliminated the distinction between residency and citizenship.³¹⁹ Those terms became interchangeable.³²⁰ That shift unleashed the power of the Privileges and Immunities Clause.³²¹

Even with restoration of the equality assurances of Article IV, however, claims based upon the dormant Commerce Clause or the Equal Protection Clause overshadowed the Privileges and Immunities Clause of Article IV as a basis for protecting the rights of nonresidents. Litigants lacked incentive to rely upon Article IV, encumbered by the need to prove that underlying interests fell within a nebulous definition of protected interests, when references to the Commerce Clause served their purposes. That changed, however, in the early 1980s with contrasting experiences in challenges to the hiring practices of municipal contractors in Boston and Camden.³²²

In 1983, businesses seeking contracts with the City of Boston relied upon the dormant Commerce Clause to challenge a local ordinance requiring that at least half of a contractor's workforce must be bona fide residents of the city.³²³ The Justices rejected that challenge, explaining that protection of interstate commerce did not apply when a state or local government acted as a market participant rather than as a market regulator.³²⁴ One year later, however, the Justices considered a Camden, New Jersey, ordinance requiring that at least forty percent of employees of city contractors be Camden residents.³²⁵ In the Camden case, challengers relied upon the Privileges and Immunities Clause of Article IV instead of the dormant Commerce Clause, and the Court ruled in their favor.³²⁶ "[T]he pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."³²⁷

The turnaround from Boston to Camden, and the reversal in constitutional assessments brought about by that change, provide a template for reassessment of the Fourteenth Amendment Privileges or Immunities Clause. Resurrection of a neglected or forgotten clause of the Constitution made a difference, and litigation based upon the Privileges and Immunities Clause became commonplace.³²⁸ The question now is

hence the former was used more often than the latter. That balance shifted with the Court's decision in *United Building & Construction Trades Council v. Mayor of City of Camden*, 465 U.S. 208 (1984). For discussion, see RICH, *supra* note 9, § 19:4.

³¹⁹ See *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975).

³²⁰ See also *United Bldg.*, 465 U.S. 208; *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

³²¹ See Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

³²² See *United Bldg.*, 465 U.S. 208; *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204 (1983).

³²³ *White*, 460 U.S. at 205–06.

³²⁴ *Id.* at 214.

³²⁵ *United Bldg.*, 465 U.S. at 210.

³²⁶ *Id.* at 212, 223.

³²⁷ *Id.* at 219.

³²⁸ See, e.g., *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998) (rejecting tax burdens that only applied to nonresidents); *Supreme Court of N.H. v. Piper*, 470 U.S. 274

whether courts will repeat that pattern by recognizing the power of the Privileges or Immunities Clause when due process or equal protection doctrine fails to provide authority for Congress to act.

B. Revival of Privileges or Immunities

By the late 1990s, it may have appeared that the Privileges or Immunities Clause had become “moribund,” therefore precluding reliance on traditional interpretations of that text.³²⁹ The Supreme Court, however, rejected such views in the case of *Saenz v. Roe*,³³⁰ referencing Justice Miller’s historical framework, and concluding that the clause protects a “right to travel” by limiting discrimination against new residents who had recently moved from other states.³³¹

In the years leading up to that decision, the Justices had followed a meandering path, searching for the right constitutional text on which to base the principle they agreed to protect. In the leading case of *Shapiro v. Thompson*,³³² a three-judge panel in Connecticut had relied upon the Privileges or Immunities Clause in rejecting a one-year residence requirement for welfare assistance,³³³ while a panel from the District of Columbia had reached the same conclusion based upon equal protection principles.³³⁴ In his opinion for the Court, however, Justice Brennan did not even acknowledge the privileges or immunities argument and relied instead upon the Equal Protection Clause to strike down discrimination against new residents seeking welfare assistance.³³⁵ Using that approach allowed him to cite the Fifth Amendment Due Process Clause as a basis for rejecting the same limitations as imposed by Congress

(1985) (striking down state residency requirements for bar admission). *But see* *McBurney v. Young*, 133 S. Ct. 1709 (2013) (concluding that public access to records under the Virginia Freedom of Information Act did not violate the Privileges or Immunities Clause).

³²⁹ In a 1998 bankruptcy case, a Third Circuit Court refused to identify such rights on grounds that the Privileges or Immunities Clause had become “moribund.” *Sacred Heart Hosp. v. Pennsylvania*, 133 F.3d 237, 244–45 (3d Cir. 1998). The United States Supreme Court rejected that response just one year later in *Saenz v. Roe*, 526 U.S. 489 (1999) (striking down a one-year residency requirement for welfare applications as a violation of rights that owe their existence to the “national character” of the United States).

³³⁰ 526 U.S. 489 (1999).

³³¹ *Id.* at 498–99, 502 n.15 (noting also that the “Framers of the Fourteenth Amendment modeled this Clause upon the ‘Privileges and Immunities’ Clause found in Article IV”).

³³² 394 U.S. 618 (1969).

³³³ *Thompson v. Shapiro*, 270 F. Supp. 331, 338 (D. Conn. 1967). Note that in 1941, Justice Jackson would have preferred reliance on the Privileges or Immunities Clause rather than the Dormant Commerce Clause to prohibit states from blocking migration of “indigents.” *Edwards v. California*, 314 U.S. 160, 181–82 (1941) (Jackson, J., concurring) (noting that the Privileges or Immunities Clause “was adopted to make United States citizenship the dominant and paramount allegiance among us”).

³³⁴ *Harrell v. Tobriner*, 279 F. Supp. 22 (D.D.C. 1967).

³³⁵ *Shapiro*, 394 U.S. at 627.

on new District of Columbia residents.³³⁶ Justice Stewart found a “right of entering and abiding in any state in the union” independent of the Fourteenth Amendment.³³⁷ In a dissenting opinion, Justice Harlan discussed the Privileges or Immunities Clause, but rejected that alternative because it would not have provided relief to parties from the District of Columbia.³³⁸ Subsequent decisions struck down durational residence requirements deemed unnecessary to establish bona fide residence with respect to issues ranging from public assistance for medical care³³⁹ to job preferences,³⁴⁰ state dividends from mineral income,³⁴¹ and extended residence prior to voter registration,³⁴² but did so without reference to the Privileges or Immunities Clause.

In his opinion for the Court in *Saenz v. Roe*, Justice Stevens discussed the opinions expressed in the *Slaughter-House Cases*.³⁴³ He noted the diverging views of the Justices in that case, but emphasized the common ground, which in *Saenz* meant that a citizen of the United States can move to any other state and in doing so assume the same rights as other citizens of that state.³⁴⁴ In emphasizing that point, Stevens noted the parallel between the definition of “privileges” and “immunities” described in the Fourteenth Amendment and Article IV.³⁴⁵ He did not, however, have any reason to address the additional “common ground” that could be derived from Justice Miller’s opinion in *Slaughter-House*, assuring that rights which “owed their existence to the federal government” would be fully protected in all states.³⁴⁶

³³⁶ See *id.* at 642 (relying upon the Equal Protection Clause to reject discrimination against new state residents seeking welfare assistance).

³³⁷ *Id.* (Stewart, J., concurring).

³³⁸ *Id.* at 667 (Harlan, J., dissenting) (noting that the Privileges or Immunities Clause “is limited in terms to instances of state action”).

³³⁹ *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (striking down an Arizona statute requiring one year of residence in a county in order to receive non-emergency hospital care at county’s expense).

³⁴⁰ *Att’y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) (barring New York from limiting its preference to veterans who had previously resided in the state).

³⁴¹ *Zobel v. Williams*, 457 U.S. 55 (1982) (rejecting Alaska payments that increased compensation based upon length of state residence).

³⁴² *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating Tennessee law requiring individuals to reside in the state for fifteen months to be able to vote).

³⁴³ *Saenz v. Roe*, 526 U.S. 489, 503–04 (1999).

³⁴⁴ *Id.* at 502–04.

³⁴⁵ *Id.* at 501–03 (explaining different aspects of the “right to travel”).

³⁴⁶ Contrast the opinion of Justice Thomas, which provided an inaccurate depiction of Justice Miller’s opinion in *Slaughter-House*, asserting that Justice Miller’s definition stated “that ‘nearly every civil right for the establishment and protection of which organized government is instituted,’ including ‘those rights which are fundamental,’ are not protected by the Clause.” *Id.* at 522 (Thomas, J., dissenting) (quoting 83 U.S. (16 Wall.) 46, 76 (1872)). In the quoted passages, Justice Miller described the breadth of the phrase “privileges and immunities” with respect to rights defined by state law and protected by Article IV as defined by Justice Washington in *Corfield v. Coryell*, but also emphasized the potential breadth of “privileges or immunities” protected by the Fourteenth Amendment and derived from sources

Based upon the reasoning of Justice Stevens, it would be fair to suggest that congressional use of the same words in the Fourteenth Amendment that already appeared in Article IV created a presumption favoring harmonious treatment of the two clauses. Article IV assures that residents from one state will be treated as “welcome visitors” by other states, and the Fourteenth Amendment protects the rights of those who have moved from one state to another.³⁴⁷ Article IV also places all citizens upon “the same footing with citizens of other states” with respect to privileges and immunities derived from state law,³⁴⁸ and in parallel terms, the Fourteenth Amendment assures that United States citizens receive the same protection of privileges or immunities that “owe their existence” to federal law regardless of the state in which they reside.³⁴⁹

C. Commerce Clause Expansion

When looking for reasons why the *Slaughter-House* dissenters disparaged Justice Miller’s interpretation of the Privileges or Immunities Clause, their list would be topped by their belief that reinforcement of federal supremacy had minimal significance.³⁵⁰ Although rights derived from the Commerce Clause had been at the heart of prior disputes targeting African-American seamen arriving in Charleston Harbor,³⁵¹ that particular battle ended with the elimination of slavery.³⁵² In 1873, relatively few individual rights could be routinely traced to federal statutes.³⁵³ The Justices could not have anticipated the landscape that would emerge from twentieth-century interpretations of the Commerce Clause.

Every student of constitutional history knows about the battle between Congress and the Supreme Court over power to address issues affecting interstate commerce. The rights of workers became a focal point of that conflict when the Court struck down

of federal law. Of course, with the expansion of federal Commerce Clause authority, current breadth of federal rights far exceed specific rights that Justice Miller might have contemplated in 1873.

³⁴⁷ *Id.* at 500.

³⁴⁸ *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (concluding that the Privileges and Immunities Clause does not prohibit discrimination against corporations from other states).

³⁴⁹ *Slaughter-House*, 83 U.S. (16 Wall.) at 79 (limiting “privileges or immunities” to those which “owe their existence to the Federal government, its National character, its Constitution, or its laws”).

³⁵⁰ *See id.* at 96 (Field, J., dissenting) (arguing that “supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character” and “[i]f this inhibition . . . only refers . . . to such privileges and immunities designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment”).

³⁵¹ *See Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366).

³⁵² *Slaughter-House*, 83 U.S. (16 Wall.) at 79 (majority opinion).

³⁵³ *Id.*

a law restricting child labor.³⁵⁴ Subsequent decisions upholding the Fair Labor Standards Act became emblematic of judicial recognition of expanded federal authority.³⁵⁵

Expansion of federal authority led to new questions about whether the Fair Labor Standards Act could be applied to state workers. In 1968, a majority rejected Maryland's challenge to a requirement that states comply with minimum wage legislation.³⁵⁶ Eight years later, a new majority on the Court reversed course, concluding that application of minimum wage legislation to state employees interfered with "integral governmental functions" in a manner that permitted the national government to "devour the essentials of state sovereignty."³⁵⁷ After another nine years, however, the Court again changed course when Justice Blackmun decided that such attempts to limit federal regulation of state workers were "unsound in principle and unworkable in practice."³⁵⁸ In a brief dissent, Justice Rehnquist warned that it was not "incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."³⁵⁹ In the years that followed, however, the Court did not revive the approach that blocked application of federal law to state workers. Instead, led by Chief Justice Rehnquist, a majority seized upon the concept of sovereign immunity as a mechanism for achieving a parallel constraint.³⁶⁰

Missing from the debate about the application of federal law to state workers was any discussion of the Privileges or Immunities Clause. The rights in question, however, fell squarely within the traditional descriptions of such rights as defined by the Privileges and Immunities Clause of Article IV. The distinction between Article IV and the Fourteenth Amendment that Justice Miller made in *Slaughter-House* reflected the division between state and federal authority as understood in 1873, with a clear implication that rights controlled by Congress would constitute privileges or immunities. The relevant question for Justice Miller was whether the privilege in question owed its existence to the federal government.³⁶¹

Current federal statutes address a much broader range of interests than Justice Miller might have contemplated. Characterization of *Slaughter-House* as the source of a "narrow" category of rights³⁶² fails to consider changes that have taken place in

³⁵⁴ See *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

³⁵⁵ See, e.g., *Darby*, 312 U.S. 100.

³⁵⁶ See *Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled by* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

³⁵⁷ *Usery*, 426 U.S. at 855, *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

³⁵⁸ *Garcia*, 469 U.S. at 546.

³⁵⁹ *Id.* at 580 (Rehnquist, J., dissenting).

³⁶⁰ See, e.g., *Okl. Tax Comm'n v. Citizen Bond Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (elaborating on Justice Rehnquist's use of sovereign immunity as a restraint on federal power).

³⁶¹ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1872).

³⁶² *McDonald v. City of Chicago*, 561 U.S. 742, 755 (2010) (citing the language used by

the role of the national government. While the list may have been narrow in 1873, today that would be a ridiculous description. Furthermore, attempts to limit the scope of federal statutory rights that constitute privileges or immunities should be understood as indistinguishable from attempts to block congressional Commerce Clause authority a century ago. When viewed as an attempt by courts to block federal regulation because of a lack of federal power,³⁶³ the analogy becomes clear. For the same reason that Congress now has authority to enact the Fair Labor Standards Act even though that power may not have been recognized in 1868, provisions of that Act now constitute privileges or immunities of United States citizens.

D. State Immunity

By the terms described above, enforcement of federal rights should not vary from one state to another; Section Five of the Fourteenth Amendment assured that Congress had authority to protect those rights.³⁶⁴ A citizen from Massachusetts should be able to travel to South Carolina and secure full protection of the federal law. Throughout the last century, commentators appeared to agree that the Privileges or Immunities Clause had reinforced federal supremacy. They did so while questioning the need for reinforcement and lamenting such a limited role for a provision that could have accomplished so much more.³⁶⁵ The need to reinforce federal rights re-emerged, however, near the end of the twentieth century.

Two cases set the stage for rulings that limited enforcement of federal statutory rights against state agencies. In *Seminole Tribe of Florida v. Florida*,³⁶⁶ the Supreme Court held that the Indian Gaming Regulatory Act could not be enforced directly against a state, ruling for the first time that Congress could not rely upon powers derived from Article I of the Constitution to abrogate the Eleventh Amendment.³⁶⁷ In *Seminole Tribe*, the issue of whether the Fourteenth Amendment might override

Justice Miller to sharply distinguish between state and national citizenship, and emphasizing the narrow scope of privileges and immunities as defined by Justice Miller).

³⁶³ See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (concluding that federal attempts to regulate child labor in the states through the Commerce Clause were invalid), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

³⁶⁴ U.S. CONST. amend. XIV, § 5.

³⁶⁵ See, e.g., CONG. RESEARCH SERV., *THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION*, S. DOC. NO. 108-17, at 1675 (2d Sess. 2004) (explaining that *Slaughter-House* reduced privileges or immunities to “a superfluous reiteration of a prohibition already operative against the states”); Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 VAL. U. L. REV. 893, 917 (1997) (asserting that “[u]nder *Slaughter-House*, the Privileges or Immunities Clause has no independent function, except as an alternative to using the Supremacy Clause”).

³⁶⁶ 517 U.S. 44 (1996).

³⁶⁷ *Id.* at 72–73. In a strained reading of federal statutes, the Court also reasoned that alternative remedial provisions in the federal law precluded injunctive relief based upon the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). See *Seminole Tribe*, 517 U.S. at 74.

the Eleventh Amendment state immunity never arose; that absence could be easily understood in a context involving gambling rights of a Native American tribe. Although disputes about sovereign immunity in such contexts had already become familiar,³⁶⁸ the parties focused on core concepts of sovereignty and the ambiguous nature of the Eleventh Amendment text.³⁶⁹

A second case, decided one year after *Seminole Tribe*, also helped to shape subsequent decisions regarding the nature and scope of arguments about enforcement of federal statutes against states. In *City of Boerne v. Flores*,³⁷⁰ the Supreme Court struck down provisions of the Religious Freedom Restoration Act³⁷¹ in which Congress had attempted to exercise its authority under Section Five of the Fourteenth Amendment to impose a “compelling interest” test on state or municipal laws that impinged upon individual religious freedom, emphasizing primary judicial responsibility for determining the scope of the Bill of Rights.³⁷² The majority concluded that only those federal statutes “congruen[t] and proportiona[l]” to Supreme Court interpretations of the Due Process or Equal Protection Clauses fell within the scope of Section Five enforcement authority.³⁷³ For obvious reasons, no one mentioned the Privileges or Immunities Clause.

The direct onslaught on enforcement of federal statutes that could reasonably fit within the scope of the Privileges or Immunities Clause began in 1999. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,³⁷⁴ plaintiffs claimed that Florida had infringed on its patented method for administering its college investment program.³⁷⁵ Florida asked the Court to block enforcement of the Patent Remedy Act³⁷⁶ even though Congress had amended the Act explicitly to

³⁶⁸ See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 18 (1989) (plurality opinion of Brennan, J.) (noting that “language of the Eleventh Amendment gives us no hint that it limits congressional authority”).

³⁶⁹ For an example of critical commentary regarding this issue, see Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 523–27 (1997).

³⁷⁰ 521 U.S. 507 (1997).

³⁷¹ Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³⁷² *City of Boerne*, 521 U.S. at 507.

³⁷³ *Id.* at 520. For a critique of the congruence and proportionality test in the context of issues pertaining to sovereign immunity, see Y. Frank Ren, Note, *Fixing Fourteenth Amendment Enforcement Power: An Argument for a Rebuttable Presumption in Favor of Congressional Abrogation of State Sovereign Immunity*, 94 B.U. L. REV. 1459 (2014).

³⁷⁴ 527 U.S. 627 (1999).

³⁷⁵ *Id.* at 631.

³⁷⁶ 35 U.S.C. § 271(h) (1994) (providing that “any State, any instrumentality of a State, and any officer or employee of a state or instrumentality of a State acting in his official capacity, shall not be immune, under the [E]leventh [A]mendment of the Constitution of the United States or under any other doctrine of sovereign immunity”).

authorize private actions against state agencies.³⁷⁷ To support the argument that Congress could not rely upon Article I as a basis for abrogating state immunity, the Court mechanically applied its holding in *Seminole Tribe*.³⁷⁸ The power of Congress to protect patent rights predated and therefore fell victim to the Eleventh Amendment.

In *Florida Prepaid*, plaintiffs presented the Court with a second reason why Congress could abrogate the Eleventh Amendment, arguing that a state violation of patent rights constituted a violation of due process rights, and as a result Congress had been empowered by Section Five of the Fourteenth Amendment to remedy such violations.³⁷⁹ The Supreme Court majority rejected that argument, accepting the fact that the Fourteenth Amendment would override the Eleventh, but concluding that Congress lacked “evidence that unremedied patent infringement by States had become a problem of national import.”³⁸⁰ Enforcement of the Patent Remedy Act against states therefore failed the “congruen[t] and proportiona[]” test of *Boerne v. Flores*.³⁸¹

Subsequent cases reflected a similar pattern. In *Kimel v. Florida Board of Regents*,³⁸² the Supreme Court ruled that Congress could not abrogate state Eleventh Amendment immunity when it authorized a private cause of action to enforce the Age Discrimination in Employment Act.³⁸³ The distinguishing question in that case was whether congressional authority to enforce the Equal Protection Clause extended to protecting victims of age discrimination.³⁸⁴ The majority noted that age discrimination only triggers rational basis review of equal protection claims, and state age classifications generally satisfied that standard.³⁸⁵ Although the federal law remained otherwise valid as action authorized under congressional Commerce Clause authority, it could not be enforced through a private cause of action for monetary damages against a state agency because it failed the *Boerne* test.³⁸⁶ One year later, the Justices applied the same rationale to rule that Patricia Garrett, who underwent a lumpectomy, radiation treatment, and chemotherapy for treatment of her breast cancer, could not seek monetary damages against the University of Alabama for its failure to abide by the Americans with Disabilities Act.³⁸⁷

Chief Justice Rehnquist’s opinion in *Garrett* explicitly noted Congress’s Article I authority to enact the ADA and to prescribe standards to which states must acquiesce, explaining that ADA “standards can be enforced by the United States in actions

³⁷⁷ See 35 U.S.C. § 296(a) (2000).

³⁷⁸ *Fla. Prepaid*, 527 U.S. at 636–37.

³⁷⁹ *Id.* at 633.

³⁸⁰ *Id.* at 641.

³⁸¹ *Id.* at 630, 637; *City of Boerne v. Flores*, 527 U.S. 507, 520 (1997).

³⁸² 528 U.S. 62 (2000).

³⁸³ *Id.* at 92.

³⁸⁴ *Id.* at 66–67.

³⁸⁵ *Id.* at 84 (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

³⁸⁶ *Id.* at 71, 73, 82.

³⁸⁷ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360–61 (2001).

for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*.³⁸⁸ He also noted that “the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.”³⁸⁹ Patricia Garrett could not avail herself to those provisions, however, because equal protection doctrine could not stretch to include the anti-discrimination provisions of the ADA. Without a recognized Fourteenth Amendment basis for its action, Congress could not abrogate the Eleventh Amendment by allowing individuals to sue states for monetary damages, leaving Garrett with nothing more than a limited claim for injunctive relief.³⁹⁰

Because the Eleventh Amendment only applies to actions in federal courts, litigants could theoretically have found a way around those constraints by bringing their actions in state courts. The Supreme Court majority closed that door, however, in *Alden v. Maine*,³⁹¹ finding, “consistent with the views of the leading advocates of the Constitution’s ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.”³⁹² As a result, the Fair Labor Standards Act could not be enforced by suits for monetary damages commenced in state courts.

Numerous scholars responded to *Alden* by demonstrating inadequacies in the Court’s analysis of original views, and the equally prevalent understanding by those who ratified the Constitution that states did not retain sovereign immunity with respect to subject matter transferred to federal control.³⁹³ None of the critics, however, considered the fundamental structural changes brought about by the Fourteenth Amendment, ignoring the long-standing principle that the Privileges or Immunities Clause reaffirmed federal supremacy with respect to rights established by federal law.

Issues relating to state reliance upon the Eleventh Amendment in order to avoid compliance with federal law arose most recently in a claim by Daniel Coleman that the Court of Appeals of Maryland violated the Family and Medical Leave Act (FMLA) by responding to his request for sick leave with notice that he would be terminated if he did not resign.³⁹⁴ As in prior cases, the majority opinion relied upon

³⁸⁸ *Id.* at 374 n.9.

³⁸⁹ *Id.* at 364 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

³⁹⁰ *Contra Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (upholding application of the ADA against a state that failed to provide access to a courthouse, citing a fundamental right of access to courts protected by the Due Process Clause).

³⁹¹ 527 U.S. 706 (1999).

³⁹² *Id.* at 728.

³⁹³ See, e.g., Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1290–91, 1298, 1307 (2000) (questioning why, in light of the ambiguous silence regarding the Framers’ views about state sovereign immunity, the Supreme Court majority should place higher value on protecting state treasuries than on providing a remedy for the victims of unlawful state action); Strasser, *supra* note 63, at 605 (explaining how the *Alden* majority misconstrued history and contradicted Framers’ intent).

³⁹⁴ *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1332–33 (2012).

the premise that states, as sovereigns, remained immune from suits for private damages unless the basis for the claim arose from a constitutional amendment that overrode the Eleventh Amendment.³⁹⁵ Claims based upon the FMLA complicated this issue because of a prior Supreme Court opinion finding that family leave provisions reflected congressional efforts to remedy discrimination against women, and therefore met the “congruen[t] and proportional[.]” test based upon prior Court interpretations of the Equal Protection Clause.³⁹⁶ Petitioners limited their arguments to that issue.³⁹⁷ The personal sick leave requirements that Coleman sought to enforce, however, failed to pass the test.³⁹⁸

As with all of these cases, *Coleman* reflects a conception of state sovereignty within a context where many have argued that states surrendered that sovereignty from the outset.³⁹⁹ In her dissenting opinion, Justice Ginsburg reaffirmed her view “that Congress can abrogate state sovereign immunity pursuant to its Article I Commerce Clause power,” without any need for an assist from the Fourteenth Amendment.⁴⁰⁰ Although Justice Breyer shared that view, Justices Sotomayor and Kagan notably joined the Ginsburg opinion but explicitly withheld endorsement of the footnote reference to Commerce Clause authority.⁴⁰¹ Their reluctance to assert the primacy of national sovereignty based upon the Commerce Clause heightens the current need to pursue an alternative approach to federal enforcement power based upon the Privileges or Immunities Clause.

Coleman also illustrates a logical fallacy contained within the Court’s current approach. The FMLA can be enforced against state employers for claims based upon its family-care provision, but not for personal sick leave, because current interpretations of the Equal Protection Clause extend heightened scrutiny to claims that involve gender discrimination, but defer to the legislature for claims based upon interests such as illness, age, or disability. Good reasons exist for not applying “strict scrutiny” to age and disability classifications.⁴⁰² Questions about the age or nature of a disability that should trigger enforcement entail an unavoidable exercise of political discretion. Furthermore, both age and disability cut across the social and

³⁹⁵ *Id.* at 1333.

³⁹⁶ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (concluding that the FMLA was “congruent and proportional” to prior Supreme Court interpretations of the Equal Protection Clause as applied to cases of sex discrimination).

³⁹⁷ *See* Brief for Petitioner at 20–21, *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012) (No. 10-1016) (conceding that “Congress has this broad authority to abrogate the states’ immunity only in the areas of suspect classification discrimination such as gender and race” (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000))).

³⁹⁸ *Coleman*, 132 S. Ct. at 1338.

³⁹⁹ *See supra* notes 62, 64.

⁴⁰⁰ *Coleman*, 132 S. Ct. at 1339 n.1 (Ginsburg, J., dissenting).

⁴⁰¹ *Id.*

⁴⁰² *See* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445–46 (1985)) (explaining difficulty of line-drawing decisions regarding matters such as accommodations for disabilities).

economic spectrum in ways that reinforce political protection. As a result, we expect the legislative and executive branches of government to delineate these issues free from the intense judicial constraints implied by strict scrutiny standards, but that does not mean that federal efforts to address problems of age or disability discrimination are any less legitimate, or that victims of such discrimination are less deserving of protection. The fact that courts should defer to Congress when reviewing questions about such discrimination seems incongruent with a conclusion that courts should not defer to Congress within the context of enforcement.

IV. THE PATH FORWARD

The forgoing analysis establishes that the Privileges or Immunities Clause protects federal statutory rights of United States citizens. That interpretation reflects the historical understanding, repeatedly expressed by Congress, the courts, and commentators, and embedded within the “settled doctrine” of *Slaughter-House*.⁴⁰³ Because few contemporary courts have considered that alternative, however, the task falls upon future litigants to fill the void. In doing so they will need to explain that Fourteenth Amendment references to the rights of “citizens of the United States” should not be viewed as a constraint on the scope of protection. The perception that federal rights protected by the Privileges or Immunities Clause fit into a narrow or limited category has no more relevance today than the belief that federal power to regulate interstate commerce gives Congress a narrowly defined authority that does not extend to manufacturing or to issues involving civil rights.

Litigants must also address perceptions that Fourteenth Amendment boundaries lie totally within judicial hands, and the United States Constitution does not allow for the recognition of positive rights involving deference to legislative judgments. For reasons described below, constraints of *City of Boerne v. Flores* have little application to the Privileges or Immunities Clause.⁴⁰⁴ The operable test for privileges or immunities has already been established by judicial precedent, and unless judges now decide to overrule *Slaughter-House* and its progeny, they must enforce claims for monetary damages based upon federal statutes against state agencies and officials.

A. Rights of Citizens

Unlike the Due Process and Equal Protection Clauses, which protect all “persons,”⁴⁰⁵ the Privileges or Immunities Clause refers to the rights of “citizens of the

⁴⁰³ See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring); *Saenz v. Roe*, 526 U.S. 489, 503–04 (1999) (discussed *supra* text accompanying notes 343–46). In his opinion for the Court in *McDonald*, Justice Alito repeats the language from Justice Miller’s opinion in *Slaughter-House*, that the Privileges or Immunities Clause protects those rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.” *McDonald*, 561 U.S. at 754 (majority opinion) (citation omitted).

⁴⁰⁴ See *infra* notes 447–55 and accompanying text.

⁴⁰⁵ U.S. CONST. amend. XIV, § 1.

United States.”⁴⁰⁶ That limitation, however, does not constrain the substance of those rights as long as their source can be traced to the government of the United States.

In *Slaughter-House*, Justice Miller distinguished between rights “dependent upon citizenship of the United States, and not citizenship of a State.”⁴⁰⁷ Those seeking to limit the scope of federal privileges or immunities may seize upon that language as if it confined such protection to rights that only citizens could enjoy, or rights that only the national government could confer. Such restrictions, however, would defy both text and precedent. The line that Miller drew referred to relative sources of legal authority.⁴⁰⁸ More than half of the examples provided by Justice Miller involved matters such as the right to peaceably assemble or to petition for redress of grievances that also apply to noncitizens, and states may unquestionably protect the same rights.⁴⁰⁹ Miller also explicitly included rights derived from the broad powers of Article I, Section 8 of the Constitution.⁴¹⁰

In his seminal article on the meaning of the Privileges or Immunities Clause, Professor McGovney cited all of the factors described above as evidence that the Privileges or Immunities Clause extends beyond a narrow category of rights attached exclusively to citizenship.⁴¹¹ He concluded with the explanation that protected rights of an individual include those conferred “by national law, whether it is conferred upon him because he is a citizen, or because he is a human being . . . it is none the less a privilege ‘of citizens of the United States’ that others have the same privilege.”⁴¹² Almost a century later, in a comprehensive review of the Privileges or Immunities Clause, Professor David Bogen made the same point, explaining that “Citizens of the United States have privileges or immunities because the Constitution or federal government provides them rights, even though the rights may be available to noncitizens as well[,]” and concluding that “any right that the federal government secures for its citizens by statute or treaty may be a privilege or immunity of citizenship.”⁴¹³ All of the scholars who, over the years, have described the Privileges or Immunities Clause as a reaffirmation of federal supremacy,⁴¹⁴ and all of the scholars whose research demonstrates an original understanding that the Clause

⁴⁰⁶ *Id.*

⁴⁰⁷ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872).

⁴⁰⁸ *See id.*

⁴⁰⁹ *See id.* at 79.

⁴¹⁰ *See id.* at 49. As described in the case of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the navigation right referred to by Justice Miller was based upon a federal license authorized by Congress.

⁴¹¹ *See McGovney, supra* note 253, at 238–42. In 1938, the Association of American Law Schools recognized McGovney’s article for its “permanent value.” 1 ASS’N OF AM. LAW SCH., SELECTED ESSAYS ON CONSTITUTIONAL LAW, at v (1938).

⁴¹² McGovney, *supra* note 253, at 240–41.

⁴¹³ DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 123 (2003).

⁴¹⁴ *See supra* note 413 and accompanying text.

incorporated the Bill of Rights,⁴¹⁵ should concur. Neither of those perspectives would be compatible with a narrow interpretation that limits the scope of privileges or immunities to a list defined by national citizenship.

B. Judicial Deference and Positive Rights

A key difference between the Privileges or Immunities Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment involves the level of deference that judges extend to the legislative and executive branches of government. Tests for congruence and proportionality with judicial interpretations only apply to the latter provisions. As discussed below, the Justices have already implicitly recognized the need for this shift,⁴¹⁶ bringing Supreme Court interpretations of the Fourteenth Amendment more closely in line with expectations of those who crafted the Amendment.

Explicit delegation of congressional authority to enforce the Civil War Amendments to the Constitution reflected both an assumption that Congress would be in charge and a distrust of the judicial branch that existed at that time.⁴¹⁷ Congressman Bingham's defense of the Ku Klux Klan Act began by noting the competence of Congress to "provide by law for the better enforcement of the Constitution and laws of the United States,"⁴¹⁸ and then emphasized "the power of Congress to provide by law for the enforcement of the powers vested by the Constitution in the Government of the United States both against individuals and States."⁴¹⁹ As Professor Rebecca Zietlow has noted, "the Reconstruction Era Congress was primarily preoccupied with its *own* role, and *not* the role of the Court, in defining and enforcing constitutional values."⁴²⁰

When the Supreme Court Justices addressed the need for judicial control over negative rights in *City of Boerne v. Flores*, they noted separation of powers reasons for giving judges primary responsibility for interpreting the "self-executing prohibitions

⁴¹⁵ See, e.g., *supra* text accompanying note 171.

⁴¹⁶ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (noting in Chief Justice Rehnquist's opinion for the Court that changes in the positive law should be generated by the legislature rather than the judiciary).

⁴¹⁷ Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & C.R. L. REV. 485, 492 (2004) (noting that "any influential members of the 39th Congress emphatically rejected the argument that the court was the only branch that could create constitutional meaning").

⁴¹⁸ CONG. GLOBE, 42d Cong., 1st Sess. 81 (1871).

⁴¹⁹ *Id.*

⁴²⁰ See Zietlow, *supra* note 417, at 492. Zietlow also points out that constitutional scholars have contributed to the judicial centric view of the Constitution. *Id.* at 490 (noting that "constitutional scholars have played an important role in enabling the Court to view itself as the only legitimate interpreter of the Fourteenth Amendment because they have focused almost exclusively on the Court, and not Congress, as a constitutional actor").

on governmental action.”⁴²¹ This rationale for elevated Supreme Court responsibility disappears, however, in the context of privileges or immunities, when the set of separation of powers concerns turn in the opposite direction from those discussed by the Justices in *Boerne*.

Members of the Supreme Court majority who insisted upon standards of congruence and proportionality to limit congressional authority acknowledged this distinction between negative and positive rights. In rejecting a broad approach to congressional power to enforce the Equal Protection Clause, Chief Justice Rehnquist explained that laws to protect interests of elderly or disabled citizens should be generated by the legislature: “If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.”⁴²² Significantly, the Justices did not question congressional Commerce Clause authority to enact such laws; Chief Justice Rehnquist affirmed their validity even in the context of enforcement against the states through either suits for injunctive relief or direct federal government action.⁴²³ Patricia Garrett lost her claim, however, because she sought monetary damages, and the Chief Justice failed to recognize any authority by which federal positive law could supersede the Eleventh Amendment.⁴²⁴

Recognition of congressional authority over the definition and implementation of positive rights admittedly conflicts with the conception of “rights . . . in the strong sense,”⁴²⁵ but that perceived weakness may also be its strength.⁴²⁶ An approach to privileges or immunities based upon deference to Congress avoids many if not all of the objections traditionally raised against constitutional recognition of positive rights.⁴²⁷ For example, the problem of indeterminacy⁴²⁸ has been solved by respecting the role that the popularly elected branches of government will play in promulgating and enforcing such rights. The difficult lines will be drawn by the parties best equipped to manage that role. Judges may be poorly suited for exercising the difficult strategic line-drawing needed to determine whether the minimum wage should

⁴²¹ *City of Boerne v. Flores*, 521 U.S. 507, 523–24 (1997).

⁴²² *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001).

⁴²³ *Id.* at 374 n.9.

⁴²⁴ *Id.* at 360, 363.

⁴²⁵ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 191 (1977) (explaining that “Constitutional rights that we call fundamental . . . are supposed to represent rights against the Government in the strong sense”).

⁴²⁶ But see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2329 (1990) (arguing for positive rights defended by the judiciary, and not left entirely to legislative or executive action).

⁴²⁷ See generally Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).

⁴²⁸ *Id.* at 901–09; see also Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 818–19 (2002) (noting benefits of deferring to a state legislative definition of positive rights which “affords the state flexibility in defining and elaborating the scope and content of the basic right to meet new and changing circumstances”). Note that Hershkoff argues for a level of entrenchment in state constitutions. *Id.*

be limited to certain enterprises, or when the minimum should be adjusted for inflation.⁴²⁹ Such decisions should be made by the legislative and executive branches, but allocating that authority should not undermine the enforceability of such rights once they have been established.

Deference to congressional recognition of positive rights also helps to address concerns about politicizing the judiciary. Few would question the characterization of federal judges as political actors, at least when defined as individuals who have discretionary authority that will have political consequences, and with perspectives regarding such issues that likely differ depending upon the political interests of those who make judicial appointments.⁴³⁰ Because the parameters of rights housed within the Privileges or Immunities Clause would be defined by Congress, however, politicization of judicial decision-makers would be constrained. Although judges could still attempt to limit the scope of prescribed statutory rights, their emphasis should shift to protecting remedial authority, understanding that such decisions remain subject to legislative correction.⁴³¹

Still another advantage of giving legislators rather than judges the primary responsibility for defining the rights protected by the Privileges or Immunities Clause has to do with the very nature of democratic governance. Arguments have been made that legislators act less responsibly when they know that final decisions will be made by the judges.⁴³² Those fears could take on even greater weight if judges had primary responsibility for defining positive rights, when one could imagine legislators refusing to meet needs of vulnerable groups because they knew that societal interests will be protected by someone else. The positive rights embodied by federal law and included under the Fourteenth Amendment umbrella avoid this problem.

One more reason for not giving courts primary authority to recognize positive constitutional rights stems from recognizing that enforcement requires resources, and the most likely recipients of positive rights often lack the resources to bring such actions.⁴³³ Lodging rights within the Privileges or Immunities Clause and recognizing congressional responsibility for defining the scope of those rights, however, reinforces the enforcement resources of the federal government. Designation of federal statutory rights as “privileges or immunities” will add individual enforcement powers within the context of claims against states without diluting other resources.⁴³⁴

⁴²⁹ See Cross, *supra* note 427, at 924 (concluding that “[i]f judges did involve themselves actively in an effort to secure such rights, they would probably make matters worse”).

⁴³⁰ For discussion about the political nature of entrenched constitutional issues, see generally MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* (2010).

⁴³¹ For additional discussion of “non-court-bound rights,” see generally William E. Forbath, *Why Is This Rights Talk Different From All Other Rights Talk?: Demoting the Court and Reimagining the Constitution*, 46 *STAN. L. REV.* 1771 (1994).

⁴³² See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

⁴³³ See Cross, *supra* note 427, at 880–81.

⁴³⁴ Note in particular the importance of continuing to recognize private actions against state governments based upon the Supremacy Clause which have come under assault in

None of these arguments suggest that courts must give a blank check to Congress when asked to determine whether federal action falls within a legitimate realm and constrains state governments. The Supreme Court requires that if Congress intends to abrogate state immunity, it must pass the simple but “stringent” test of “making its intention unmistakably clear in the language of the statute.”⁴³⁵ The greater obligation of the courts, however, would be to reinforce congressional judgments, both by deferring to congressional decision-making and by doing so in a manner that reflects the broad remedial spirit that characterized the original design of the Fourteenth Amendment and the civil rights laws that it spawned.⁴³⁶

Some may object to a characterization of privileges or immunities based upon federal statutes as “constitutional rights,” asserting that the combination of ambiguity and congressional control conflict with our conceptions of “entrenched” rights. Of course, there is no inherent need to equate “privileges or immunities” with traditional conceptions of “rights,” but the similarity may run more deeply than first appearances suggest. The ambiguous nature of these words does not distinguish them from other rights associated with the Fourteenth Amendment. The Due Process Clause and the Equal Protection Clause share similar characteristics. And although constitutional “entrenchment” as traditionally defined implies judicial control, within this context the task of prohibiting state and local government abridgment arguably satisfies the definition of a “constitutionally recognized, judicially enforceable restraint on popular government.”⁴³⁷ The judicial enforcement role in this context parallels the role already played within the context of Article IV, where judicial deference to legislative judgments has been a given.⁴³⁸ What results is a partnership between Congress and the courts in protecting our privileges and immunities. As

recent years. Elimination of such actions would mark another substantial departure from the constitutional structure represented by the Fourteenth Amendment, and in particular by the Privileges or Immunities Clause.

⁴³⁵ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241–42 (1985).

⁴³⁶ *See* *Maine v. Thiboutot*, 448 U.S. 1 (1980) (noting the need to broadly construe 42 U.S.C. § 1983 which protects federal privileges or immunities). Although beyond the scope of this Article, it should be noted that, for reasons described by the United States Supreme Court in *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978) (concluding that local government units should be “included among those persons to whom § 1983 applies”), the Court should also see this as an opportunity to overrule the decision made in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (applying reasoning that was subsequently rejected in *Monell* to conclude that state agencies were not “persons” as that term was used in what is now 42 U.S.C. § 1983). *See also* *Zietlow*, *supra* note 417, at 487 n.15 (noting the “particular deference” that the Supreme Court should exercise when reviewing statutes that create “rights of belonging”).

⁴³⁷ *See* *Cross*, *supra* note 427, at 860 (defining “positive rights”).

⁴³⁸ *See* *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,320) (noting deference to “such restraints as the government may justly prescribe for the general good of the whole”).

Edward Rubin has noted, “[w]hen the courts act in partnership with the legislature, they can be seen as supporting democracy, rather than undermining it.”⁴³⁹

Privileges or immunities of today look different than the nineteenth-century versions, and die hard originalists may use that difference to object to the conclusions that privileges or immunities encompass statutory rights.⁴⁴⁰ Their observations may be accurate, but ultimately insignificant. The national government plays a different role in the lives of Americans living in the twenty-first century than it did in the eighteenth and nineteenth centuries, and the very fact of these changes illustrates the practical utility of the terms “privileges” and “immunities.”⁴⁴¹ Like all modern democracies, we live in a welfare state with an enormous federal bureaucracy, and we gain little by attempting to confine constitutional interpretation to a mind frame that existed in a different century.⁴⁴²

C. *The Test for Privileges or Immunities*

In order to restore uniform enforcement of federal law, litigants should now turn to the enforcement power derived from the Privileges or Immunities Clause and Section Five of the Fourteenth Amendment. Doing so, however, requires an answer to the question of whether matters such as an employee’s right to a minimum wage or unpaid sick leave falls within the scope of government conferred “privileges” or “immunities.” In the absence of precedent, this could be a difficult line-drawing problem. Fortunately, however, precedent abounds.

In *Maine v. Thiboutot*,⁴⁴³ the Justices concluded that state deprivation of welfare benefits protected by the Social Security Act violated Section 1983.⁴⁴⁴ The majority found “no doubt that § 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.”⁴⁴⁵ After the Justices decided in *Thiboutot* that Congress meant to

⁴³⁹ See Edward Rubin, *The Affordable Care Act, The Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639, 1710 (2012). Note that the fundamental basis of “entrenchment” lies within American culture, and few would contest the cultural commitment to Social Security or a minimum wage when compared to either the right to bear arms or the choice to have an abortion.

⁴⁴⁰ But see Michele L. Landis, *Fate, Responsibility, and “Natural” Disaster Relief: Narrating the American Welfare State*, 33 LAW & SOC’Y REV. 257 (1999); William P. Quigley, *The Earliest Years of Federal Social Welfare Legislation: Federal Poor Relief Prior to the Civil War*, 79 U. DET. MERCY L. REV. 157 (2002).

⁴⁴¹ See BRANNON, *supra* note 306, at 64 (noting the danger and futility of precise definitions of privileges or immunities given the role of new legislation); Rubin, *supra* note 439, at 1663 (noting that “[a]n evolutionary approach to the [C]onstitution captures the dynamic way that the interpretation of particular constitutional provisions responds to changing situations”).

⁴⁴² As Chief Justice Marshall admonished, “we must never forget, that it is a *constitution* we are expounding.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

⁴⁴³ 448 U.S. 1 (1980).

⁴⁴⁴ *Id.* at 5.

⁴⁴⁵ *Id.* (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700–01 (1978) (concluding that municipalities are persons under § 1983)); see also *Dennis v. Higgins*, 498 U.S. 439, 446

provide a broad remedy for violations of federal rights when it enacted the Civil Rights Act of 1871, they explained that to invoke that law, plaintiffs must convince the courts that they have a “right secured” by federal law.⁴⁴⁶ The Justices refined and clarified that requirement in *Golden State Transit Corp. v. City of Los Angeles*,⁴⁴⁷ upholding rights conferred by the National Labor Relations Act and identifying a three-part test to determine the scope of liability under Section 1983. Rights, privileges, or immunities have been established by federal statutes if: (1) the law establishes binding obligations;⁴⁴⁸ (2) the interest is not too “vague and amorphous” for judicial enforcement;⁴⁴⁹ and (3) the person claiming the right was an intended beneficiary of the federal law.⁴⁵⁰

Identification of federal privileges or immunities may also be drawn from analogies to case law enforcing the Privileges and Immunities Clause of Article IV. In doing so, it should again be emphasized that the distinction between privileges and immunities of Article IV and those recognized by the Fourteenth Amendment involve distinctions in the source of state or federal authority, and not in the nature of the rights themselves.⁴⁵¹ One of the most frequently cited privileges and immunities

(1991) (finding that rights implied by the dormant Commerce Clause gave rise to “rights, privileges, or immunities” protected by § 1983); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112–13 (1989) (enforcing the National Labor Relations Act).

⁴⁴⁶ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) (finding lack of congressional intent to establish a personal cause of action to enforce provisions of a federal financial aid program for treatment of the developmentally disabled).

⁴⁴⁷ 493 U.S. 103 (1989).

⁴⁴⁸ *Id.* at 112 (citing *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 154 (1976)).

⁴⁴⁹ See *id.* at 106 (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431 (1987)).

⁴⁵⁰ See *id.* (citing *Wright*, 479 U.S. at 431–32 (1987)); see also *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (concluding that a federal child support enforcement program had not created a federal right). This analysis does not address the separate question of whether a federal statutory scheme establishes a private cause of action within a context of dual state and federal agency responsibility. See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387–88 (2015) (rejecting implied cause of action based upon the Supremacy Clause to enjoin state Medicaid reimbursement rates); *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012) (remanding for consideration of federal Medicaid law preemption when federal agency had accepted state statutes at issue). Although that issue lies beyond the scope of this discussion, renewed understanding that private interests in federal law may constitute privileges or immunities of United States citizens provides a basis for reconsideration of those issues, and in particular for assured protection of “parties actually affected by a State’s violation of its statutory obligations.” *Armstrong*, 135 S. Ct. at 1393 (Sotomayor, J., dissenting).

⁴⁵¹ Note also that the judicial role in recognizing “privileges” or “immunities” recognized under Article IV and the Fourteenth Amendment also differs in that some subject matters acted upon by states allow for legitimate distinctions between state residents and persons from out of state, thus necessitating line-drawing between such claims. That issue does not arise within the federal context. Fourteenth Amendment text explicitly allows for protection

cases involved an 1871 Maryland statute which the Supreme Court struck down because it assessed a license fee against nonresidents to trade in goods not manufactured within the state.⁴⁵² In 1880, Justice Harlan noted for the Court that the Privileges and Immunities Clause of Article IV secures “the equality of commercial privileges . . . to citizens of the several States” and forbids any State to materially abridge and impair such privileges.⁴⁵³ Justice Steven’s opinion for the *Saenz* Court identified those “privileges and immunities” to which newly arrived state citizens are entitled,⁴⁵⁴ emphasizing that cases construing the Privileges and Immunities Clause of Article IV, Section 2 already protect rights of interstate travelers to obtain employment, procure medical services, and “even to engage in commercial shrimp fishing” on an equal footing with state residents.⁴⁵⁵ Based upon this precedent, it would be difficult to argue that a state could restrict the benefits of sick leave requirements or minimum wage laws to its own citizens. If such discrimination would violate Article IV, then sick leave or minimum wage laws belong within the category of “privileges and immunities.”⁴⁵⁶

The remaining question should be whether such rights fall within a category that owes its existence to the federal government. If so, then a consistent approach to the same words should mean that Daniel Coleman and John Alden had rights to enforcement of the FMLA or the Fair Labor Standards Act against the states of Maryland and Maine. Patricia Garrett should have been able to sue the University of Alabama for violations of her rights under the ADA. In other words, federal statutes that protect the rights of state employees fall within the ambit of the Fourteenth Amendment Privileges or Immunities Clause.

D. Future Litigation

As implied by the preceding discussion, not every statute that involves federal rights will provide a path to establishing state liability. A primary roadblock results from the Supreme Court ruling that when Congress imposed liability on “persons” who violate Section 1983, that term did not encompass states, state agencies, or even state officials acting in their official capacity.⁴⁵⁷ As a result, prospective plaintiffs

that is limited to citizens of the United States, and given that authority, deference to Congress should become the guiding principle in recognizing federal privileges or immunities.

⁴⁵² *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870).

⁴⁵³ *Guy v. City of Baltimore*, 100 U.S. 434, 439–40 (1879).

⁴⁵⁴ *Saenz v. Roe*, 526 U.S. 489, 502 (1999).

⁴⁵⁵ *Id.* (citing *Toomer v. Witsell*, 334 U.S. 385 (1948)).

⁴⁵⁶ Judges seeking to constrain federal remedies for state violations of federal statutory rights may claim that such interests do not fall within the category of privileges or immunities reserved for United States citizens. As previously explained, however, such arguments cannot be squared with historical interpretations by Congress, courts, or commentators. *See supra* text accompanying notes 414–15.

⁴⁵⁷ *See Monroe v. Pape*, 365 U.S. 167 (1961) (ruling that state officers could not be sued in their official capacity for monetary damages). Arguments based upon a more accurate

must find an alternative basis for establishing federal claims against states. Instances in which Congress explicitly established a statutory basis for claims against states provide appropriate starting points for future litigation.

For a number of reasons, federal statutory rights of state employees belong near the top of a list of claims that should now be brought to enforce the Privileges or Immunities Clause. The Fair Labor Standards Act, the ADA, the Age Discrimination in Employment Act, and the FMLA all specifically provide for state liability.⁴⁵⁸ Furthermore, from Justice Washington's opinion in *Corfield v. Coryell*⁴⁵⁹ to recent holdings of the United States Supreme Court,⁴⁶⁰ equal employment rights have been consistently included within the scope of "privileges" or "immunities." Although the Supreme Court denied claims against states for monetary damages with respect to each of these laws, none included references to the Privileges or Immunities Clause. As a result, granting relief would not involve overruling precedent. To the contrary, in each case deeply rooted precedent mandates that privileges or immunities embodied by these laws fit squarely within the enforcement powers of Congress.

Although this discussion has focused upon the rights of state employees, the principles of uniform protection of federal law extend to other contexts. Thus, litigants should be encouraged to target states that violate intellectual property rights. *Florida Prepaid*⁴⁶¹ provided a textbook example of our collective amnesia regarding the Privileges or Immunities Clause. If plaintiffs had considered the full depths of the legislative record, they could have brought to the Court's attention statutes overhauling intellectual property by many of the same members of Congress who drafted the Fourteenth Amendment.⁴⁶² The authors of those statutes generally reserved patent rights to United States citizens, providing that "an alien shall have the *privilege* herein granted if he shall have resided in the United States one year . . . and made oath of his intention to become a citizen."⁴⁶³ Courts in that era commonly and

understanding of the Privileges or Immunities Clause provide a basis for challenging that ruling, but asserting such claims should not fall within the first order of business for those seeking to expand protection of federal rights.

⁴⁵⁸ See 29 U.S.C. § 203(d) (2012) (FLSA provision defining "employer" to include public agencies); 29 U.S.C. § 630(b)(2) (2012) (Age Discrimination in Employment Act provision defining "employers" to include states or political subdivisions of states); 29 U.S.C. § 2911 (4)(B) (2012), *invalidated by* Alden v. Maine, 527 U.S. 706 (1999) (FMLA provision including public agencies as "persons engaged in commerce"); 42 U.S.C. § 12111(7) (2012) (ADA provision incorporating definition of "person" that includes government agencies).

⁴⁵⁹ For discussion, see *supra* text accompanying notes 106–20.

⁴⁶⁰ See, e.g., *United Bldg. & Constr. Trades Council v. Mayor of City of Camden*, 465 U.S. 208, 223 (1984) (limiting preference for city residents in municipal contracts); *Hicklin v. Orbeck*, 437 U.S. 518, 533–34 (1978) (striking down employment preference for "qualified" Alaska residents).

⁴⁶¹ For discussion, see *supra* text accompanying notes 374–80.

⁴⁶² See Act of July 8, 1870, ch. 230, 16 Stat. 198.

⁴⁶³ *Id.* § 40 (emphasis added). The same Act also reserved trademark rights to those

repeatedly referred to the “privilege” that federal patents provided to United States citizens.⁴⁶⁴ Furthermore, federal law precludes states from independently recognizing or enforcing patent rights; federal courts provide an exclusive forum for resolving such disputes.⁴⁶⁵ Few rights established by federal law could more clearly satisfy the standards set forth by Justice Miller in *Slaughter-House*, and every member of the Court that decided that case would presumably have agreed.⁴⁶⁶ Nevertheless, litigants in *Florida Prepaid* relied entirely upon attempts to stretch the concept of due process in order to find a Fourteenth Amendment cause of action that would override the Eleventh Amendment. None of the briefs filed with the Court mentioned the Privileges or Immunities Clause.

Contemporary rights building upon the platform of *Corfield* and *Slaughter-House* could also include the right to live in a healthy environment, free from toxins and protected from degradation.⁴⁶⁷ To the extent that Congress has recognized an individual cause of action against state actions that threaten the environment,⁴⁶⁸ the Privileges or Immunities Clause becomes a source of authority to enforce such rights. As in other contexts, as a result of recognizing this Fourteenth Amendment source of authority, actions brought against state agencies or officials should not be limited by claims of Eleventh Amendment immunity.

Rights associated with the Bankruptcy Clause belong in a unique category with respect to issues of state immunity. In 2006, the Supreme Court Justices concluded that claims against state agencies holding property claimed by a bankruptcy estate were not subject to Eleventh Amendment constraints.⁴⁶⁹ Justice Stevens’ opinion for the Court emphasized the constitutional commitment to uniformity in bankruptcy, and the in rem nature of such proceedings.⁴⁷⁰ Based upon that history, he arrived at an “ineluctable conclusion . . . that States agreed in the plan of the Convention not

domiciled in the United States or in a “foreign country which by treaty or convention affords similar *privileges* to citizens of the United States.” *Id.* § 77 (emphasis added).

⁴⁶⁴ See, e.g., *Fuller v. Yentzer*, 94 U.S. 288, 299 (1876) (denying relief in a patent infringement action); *Russell v. Place*, 94 U.S. 606, 607 (1876) (referring to the “ordinary form of such actions for infringement of the privileges secured by a patent”).

⁴⁶⁵ See 28 U.S.C. § 1338 (2012).

⁴⁶⁶ See *supra* text accompanying notes 256–76. Note that Intellectual Property rights are also commonly protected by international treaties, another category explicitly included in the *Slaughter-House* framework. Enforcement of rights derived from international trade agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C, 1869 U.N.T.S. 299 (TRIPS), should therefore also be enforceable against state actors.

⁴⁶⁷ See *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,320) (protecting the rights to “enjoyment of life and liberty . . . and to pursue and obtain happiness and safety”).

⁴⁶⁸ See, e.g., 42 U.S.C. § 7604(a) (2012) (allowing “any person” to “commence a civil action on his own behalf”).

⁴⁶⁹ *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 375 (2006).

⁴⁷⁰ See *id.* at 360–77.

to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”⁴⁷¹ The claim that bankruptcy claims fall within a narrowly defined “plan of the convention” because of the reference to uniformity within that narrow context provides just one version of the “plan” originally referred to by Alexander Hamilton, and details remain obscure.⁴⁷² The Court’s decision in *Central Virginia Community College v. Katz*⁴⁷³ left an open door for state avoidance of bankruptcy jurisdiction in some cases, especially when the in rem label of the bankruptcy proceedings might not apply.⁴⁷⁴ A rationale based upon the Privileges or Immunities Clause, however, would close that gap.

The claims described above are based upon congressional power derived from either the Commerce Clause, the Intellectual Property Clause, or the Bankruptcy Clause. Historic text can be readily tied to those sources of congressional authority, with the national government having exclusive control within the context of intellectual property and bankruptcy, and with extensive precedent establishing the scope of federal power within the context of interstate commerce. Furthermore, in all of those contexts Congress has explicitly provided for enforcement against state governments.

Another significant body of rights that should fall within the scope of the Privileges or Immunities Clause came about as a result of congressional exercise of its Spending Clause authority to “provide for the General Welfare.”⁴⁷⁵ Topics ranging from welfare assistance to health care and education fall within this category.⁴⁷⁶ Although state sovereign interests remain generally intact with respect to internal governance of matters relating to the general welfare, federal supremacy arises with

⁴⁷¹ *Id.* at 377–78 (distinguishing *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

⁴⁷² Justice Stevens, who wrote the opinion for the Court in *Katz*, had previously argued that states surrendered their claims to immunity with respect to all powers granted to Congress in Article I of the Constitution. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 144 (1996) (Stevens, J., dissenting); *see also Alden*, 527 U.S. at 773 (Souter, J., dissenting). The Supreme Court decision in *Katz* could also be used to restore the original “plan of the convention,” but to this date lower courts have rejected such claims. *See, e.g., Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1314–15 (11th Cir. 2011) (rejecting application of *Katz* to intellectual property enforcement); *Ramirez v. State ex. rel. Children, Youth & Families Dep’t*, 326 P.3d 474, 480 (N.M. Ct. App. 2014) (rejecting application of *Katz* to case involving congressional action under the War Powers Act cited in relationship to employment rights of a National Guard member), *rev’d*, 372 P.3d 497 (N.M. 2016).

⁴⁷³ 546 U.S. 356 (2006).

⁴⁷⁴ *See, e.g., Phila. Entm’t & Dev. Partners v. Pa. Dep’t of Revenue*, 549 B.R. 103, 155 (Bankr. E.D. Pa. 2016) (finding that claims were distinguishable from in rem proceedings, and state immunity remained); *Ginn-La St. Lucie Ltd. v. Ginn*, No. 08-29769-BKC-PGH, 2010 WL 8756757 (Bankr. S.D. Fla. 2010).

⁴⁷⁵ U.S. CONST. art. I, § 8, cl. 1.

⁴⁷⁶ *See Rubin, supra* note 439, at 1643 (explaining how statutes such as the Affordable Care Act change “the way we think about American Citizenship . . . , [and suggest] that the U.S. Constitution guarantees so-called positive rights, such as rights to sustenance, decent housing, an adequate education, and, of course, basic health care”).

the advent of congressional expenditures, including the pattern of federal and state partnership programs that characterize much of this field. In 1974, the Supreme Court expanded the reach of sovereign immunity by holding that states were not liable for retroactive monetary damages resulting from their failure to comply with federal law in administering financial aid and health care to aged, blind, and disabled persons.⁴⁷⁷ Although the sovereignty issues become more complex within that context, especially given the dual nature of state and federal management responsibilities,⁴⁷⁸ the text of the Eleventh Amendment should never have been stretched to apply to such actions.⁴⁷⁹ Review of the Privileges or Immunities Clause will provide an opportunity for correction, including a renewed emphasis upon the judicial role in assuring that intended beneficiaries of federal law receive promised protection.

A more complete identification of federal statutory rights that should no longer be subject to state claims of immunity remains beyond the scope of this Article. Additional review of this topic would provide an appropriate forum for recognizing Franklin Roosevelt's "Second Bill of Rights" proposed as a response to the Great Depression and embedded within federal laws that followed.⁴⁸⁰ Additions to the list may also come from an examination of positive rights that already appear in many state constitutions;⁴⁸¹ parallels could be drawn between the evolution of positive rights within states and the development of counterparts in federal law. As a first step, however, judges should be asked to recognize that the Privileges or Immunities Clause provides a path for developing these alternatives.

⁴⁷⁷ *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

⁴⁷⁸ Opening the door to monetary damages does not eliminate more complicated questions regarding availability of a private cause of action that arises within the context of dual state and federal management of various welfare programs. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015). For discussion, see *supra* note 450.

⁴⁷⁹ *See* JOHN PAUL STEVENS, SIX AMENDMENTS 98–101 (2014) (arguing for amending the Constitution to correct the overreach of sovereign immunity in cases like *Edelman v. Jordan*). Justice Stevens proposed a constitutional amendment to correct such problems, providing that "[n]either the Tenth Amendment, the Eleventh Amendment, nor any other provision of this Constitution, shall be construed to provide any state, state agency, or state officer with an immunity from liability for violating any act of Congress, or any provision of this Constitution." *Id.* at 106. Proper interpretation of the Privileges or Immunities Clause, however, should obviate much of the need for such an amendment.

⁴⁸⁰ *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 105–08 (2004) (describing the traditional view of America's Constitution as a charter of negative rather than positive liberties but rejecting this view of "American exceptionalism" as a basis for denial of positive constitutional rights); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 211 (2001).

⁴⁸¹ *See, e.g.,* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 67–105 (2013) (focusing on positive rights to education, workers' rights, and environmental protection); Hershkoff, *supra* note 428; Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989).

CONCLUSION

Lack of constitutional recognition for the statutory rights established by Congress became a serious problem in the late twentieth century when a majority of Supreme Court Justices ruled that millions of United States citizens could not fully enforce their rights against state employers or agencies. As a result, the degree of protection afforded by federal law varies from one state to another. The Court's rulings reflected an incoherent conception of state and federal sovereignty that conflicts with the original understanding of the Fourteenth Amendment. Because the Justices only addressed the scope of congressional power under the Equal Protection and Due Process Clauses of the Constitution, however, a door remains open to seek enforcement of the Privileges or Immunities Clause. When asked the proper question, future courts should conclude that individual rights established by federal law belong within the category of privileges or immunities of United States Citizens. No states should be allowed to "make or enforce any law which shall abridge" those rights.⁴⁸²

⁴⁸² U.S. CONST. amend. XIV, § 1.