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THE REVIVAL OF "PRIVILEGES OR IMMUNITIES" AND THE CONTROVERSY OVER STATE BAR ADMISSION REQUIREMENTS: THE MAKINGS OF A FUTURE CONSTITUTIONAL DILEMMA?

The Supreme Court's 1999 decision in Saenz v. Roe relied upon the long-ignored Privileges or Immunities Clause of the Fourteenth Amendment, which had laid dormant since the Slaughter-House Cases of more than a century ago. The Saenz decision sparked considerable debate as to the meaning of the Privileges or Immunities Clause and caused speculation as to the statutes vulnerable to a constitutional challenge under the Clause. This Note examines the potential impact of the Privileges or Immunities Clause on state bar admission requirements and other restrictions on the practice of law. It concludes that the Clause does not create constitutional problems for these laws, except for those which prohibit transactional lawyers from practicing in states in which they hold no bar membership, which are unconstitutional under the right to travel identified in Saenz.

* * *

The Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens."¹ Although the Fourteenth Amendment has played a major role in constitutional jurisprudence,² the Supreme Court's numerous Fourteenth Amendment decisions confer no role on the Privileges or Immunities Clause in our constitutional structure.³ The apparent reason for the Clause's absence is the Court's continued adherence to its holding in the *Slaughter-House Cases*.⁴ However, in 1999, the Court in *Saenz v. Roe*⁵ recognized a fundamental right to

¹ U.S. CONST. amend. XIV, § 1.

² The Due Process Clause of the Fourteenth Amendment has been the basis of many prominent Supreme Court decisions. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Bunting v. Oregon*, 243 U.S. 426 (1917); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Muller v. Oregon*, 208 U.S. 412 (1908); *Lochner v. New York*, 198 U.S. 45 (1905).

³ In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Court found that states had responsibility for protecting the privileges and immunities of citizens. This finding essentially nullified the Privileges or Immunities Clause.

⁴ 83 U.S. (16 Wall.) 36 (1872).

⁵ 526 U.S. 489 (1999).

travel grounded in the Privileges or Immunities Clause.⁶ Because the Privileges or Immunities Clause had been the source of no Supreme Court decision since 1872,⁷ many thought the Court might soon overrule the *Slaughter-House Cases*. A flurry of speculation ensued among commentators concerning the meaning of the Clause and the interpretation it might receive in the future.⁸ In addition, new lawsuits have been filed asserting various rights under the Privileges or Immunities Clause.⁹

In one such suit, *Craigmiles v. Giles*,¹⁰ the owners of casket-selling businesses challenged the constitutionality of the Tennessee Funeral Directors and Embalmers Act (FDEA) as applied to them, claiming, *inter alia*, that the relevant portions of the FDEA violated the Privileges or Immunities Clause.¹¹ The FDEA requires that one obtain a license from the Tennessee Board of Funeral Directors and Embalmers in order to lawfully engage in the sale of caskets in Tennessee.¹² A federal district court held the FDEA unconstitutional on substantive due process and equal protection grounds; while the court agreed that rational basis review was appropriate, it found the state had advanced no legitimate governmental interest rationally related to such interest.¹³ While the court rejected on grounds of *stare decisis* the plaintiffs' argument that the FDEA was also unconstitutional under the Privileges or Immunities Clause,¹⁴ it suggested that a proper interpretation of the Clause would render unconstitutional Tennessee's regulation of the sale of caskets.¹⁵

⁶ *Id.* at 503.

⁷ *But see* *Colgate v. Harvey*, 296 U.S. 404 (1935) (holding that "[t]he right of a citizen of the United States to engage in business, [or] to transact any lawful business . . . in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship").

⁸ *See, e.g.*, Tim A. Lemper, *Recent Case: The Promise and Perils of "Privileges or Immunities,"* 23 HARV. J.L. & PUB. POL'Y 295 (1999).

⁹ For an example of such a lawsuit, see Steve France, *Dusty Doctrines*, A.B.A. J., May 2001, at 46 (discussing a lawsuit challenging the constitutionality of a law restricting the buying and selling of caskets under the Privileges or Immunities Clause).

¹⁰ 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002).

¹¹ *Id.* at 665.

¹² The district court specifically noted that the Tennessee legislature in 1972 passed an amendment to the FDEA permitting only licensed funeral directors to engage in the sale of caskets. *Id.* at 660. In order to obtain a funeral director's license in Tennessee, one must take a course in funeral directing at an approved school and participate in a one-year apprenticeship; or complete a two-year apprenticeship while helping out in twenty-five funerals. *Id.*

¹³ *Id.* at 661-65.

¹⁴ *Id.* at 665 ("It is not for this trial court to breathe new life into the Privileges and Immunities Clause 127 years after its demise. *Stare decisis* requires this Court to reject the plaintiffs' claim that Tennessee has deprived them of a 'privilege and immunity' of citizenship.").

¹⁵ The court stated its apparent conclusion that "[g]iven the historical background of the

The United States Court of Appeals for the Sixth Circuit affirmed the district court's holding using similar reasoning.¹⁶ While the appeals court acknowledged that "[e]ven foolish and misdirected provisions are generally valid if subject only to rational basis review,"¹⁷ it found all of the legitimate governments interests for the FDEA advanced by the state of Tennessee lacking any rational basis.¹⁸ The court declined to address the plaintiffs' argument that the FDEA was unconstitutional under the Privileges or Immunities Clause, reasoning that it "need not break new ground . . . to hold . . . the application of the FDEA to funeral merchandise retailers . . . unconstitutional under the Fourteenth Amendment."¹⁹ The court denied that it was "elevat[ing] its economic theory over that of legislative bodies" as courts arguably did during the era of *Lochner*.²⁰ Nonetheless, because the decisions of both the district court and appeals court invalidated the FDEA on grounds similar to those used by courts during the *Lochner* era,²¹ one must wonder if courts using *Craigmiles*-style analysis would find other laws constitutionally inadequate.

Perhaps the most subtle but significant aspect of both decisions is that they express profound distrust of the merits of licensure requirements. The district court declared that Tennessee's casket sale licensure requirement "certainly has nothing

Fourteenth Amendment . . . and its . . . legislative intent to nullify the 'black codes' which Southern states were adopting to limit the economic rights of the former slaves; the argument of the *Slaughter-House* dissenters may reflect historical truth." *Id.* at 666. Furthermore the court noted that the dissenting justices in *Slaughter-House* expressed their view that the Privileges or Immunities Clause grants to every citizen "the right to pursue a lawful employment in a lawful manner." *Id.* (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 97 (1872) (Field, J., dissenting)).

¹⁶ *Craigmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002).

¹⁷ *Id.* at 223–24. The court further noted that "a statute is subject to a 'strong presumption of validity' under rational basis review, and we will uphold it 'if there is any reasonably conceivable state of facts that could provide a rational basis.'" *Id.* (quoting *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001)).

¹⁸ *Id.* at 224–29. The court characterized the relevant provisions of the FDEA as "ha[ving] the effect . . . of preventing individuals who are not licensed funeral directors from selling caskets, potentially at a lower price." *Id.* at 224. It further declared that "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

¹⁹ *Id.* at 229. Nevertheless, the court acknowledged that "[t]here has been some recent speculation that the Privileges and Immunities Clause should have a broader meaning." *Id.* (citing *Saenz v. Roe*, 526 U.S. 489, 521–23 (1999) (Thomas, J., dissenting)).

²⁰ *Id.* at 229; see also *Lochner v. New York*, 198 U.S. 45, 53 (1905) (striking down on due process grounds legislation regulating the number of hours per week an employee could work).

²¹ See *Craigmiles*, 312 F.3d at 224–29; *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 661–67 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002); see also *Lochner*, 198 U.S. at 53.

to do with public health and safety” and that “[t]he evidence also shows that Tennessee does not really believe that caskets play any role in the promotion of public health and safety.”²² The appellate court also rejected Tennessee’s claims that the FDEA had a rational basis, claiming instead that the state’s “proffered explanations indicates that the . . . [FDEA is] nothing more than an attempt to prevent economic competition.”²³

Interestingly, some have argued that state bar admission requirements serve no real purpose other than the suppression of economic competition,²⁴ meaning that such laws could be vulnerable to a constitutional challenge should the Supreme Court eventually accept the reasoning of *Craigmiles*. This Note will explore whether state requirements for admission to the bar, such as laws requiring passage of the bar examination, are constitutional under the Privileges or Immunities Clause. The prospect of such a constitutional challenge succeeding may seem far-fetched considering the Supreme Court’s rejection of economic substantive due process.²⁵ However, subsequent to the issuance of the *Saenz* decision, various constitutional lawsuits have asserted that the Privileges or Immunities Clause protects a fundamental right to work.²⁶ Even if the Court refuses to explicitly recognize such a right, should it begin to apply to state economic regulations *Craigmiles*-style analysis under the Privileges or Immunities Clause, paralegals and legal websites will have a strong argument on which to challenge these laws.²⁷ The resulting decisions could profoundly impact the legal profession and the topic itself raises interesting philosophical questions concerning whom the fifty states should allow to practice law.

²² *Craigmiles*, 110 F. Supp. 2d at 662.

²³ *Craigmiles*, 312 F.3d at 225. The court further stated:

The licensure requirement imposes a significant barrier to competition in the casket market. By protecting licensed funeral directors from competition on caskets, the FDEA harms consumers in their pocketbooks. If consumer protection were the aim of the 1972 amendment, the General Assembly had several direct means of achieving that end. None of the justifications offered by the state satisfies the slight review required by rational basis review under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Id. at 228–29.

²⁴ See France, *supra* note 9, at 48.

²⁵ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

²⁶ As previously mentioned, a federal judge in one such suit struck down a Tennessee law permitting the sale of caskets only by licensed funeral home directors. *Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000). Although the judge did not ground his decision in the Privileges or Immunities Clause, he stated that a higher court should find that the Clause protects a “constitutional ‘right to pursue lawful employment in a lawful manner.’” France, *supra* note 9, at 48 (quoting *Craigmiles*, 110 F. Supp. 2d at 666).

²⁷ France, *supra* note 9, at 48.

In addition to the potential entrance of the Privileges or Immunities Clause into constitutional jurisprudence, other trends in the legal profession itself make this topic a timely one. One such trend is that the scope of the practice of law has become increasingly national. The last several decades have seen the rise of air transportation and telecommunications technology,²⁸ making possible the expansion of many business into new areas of the country.²⁹ Consequently, these businesses have developed a need for multistate legal representation.³⁰ However, every state prohibits the practice law without a license.³¹ Thus, many transactional lawyers struggle with the apparent conflict between the interstate legal needs of their clients and the illegality of practicing law in a state in which they hold no license.³² As a result, some commentators have called for the alteration of state laws prohibiting the unlicensed practice of law in order to accommodate transactional lawyers whose clients have multistate legal interests.³³ Others have suggested the more radical step of completely eliminating state laws requiring admission to the bar.³⁴

Another issue currently before the legal profession is the desirability of allowing lawyers to engage in multidisciplinary practices. In such a practice, states would permit the sharing of profits between lawyers and nonlawyers.³⁵ A hypothetical example is a firm that provides its clients both auditing and legal services.³⁶ Profit-sharing between lawyers and nonlawyers presents state bar admission requirements with a couple of challenges. First, multidisciplinary practices directly challenge the professional ideals on which the legal profession stands. Professional ideals encompass, among other things, the ethical regulations in all states governing lawyers' professional conduct.³⁷ Should states allow these

²⁸ La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1136 (2001).

²⁹ *Id.*

³⁰ *Id.* at 1135.

³¹ *Id.* at 1137 (citing John F. Sutton, *Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on Ethics and the Multijurisdictional Practice of Law*, 36 TEX. L. REV. 1027, 1034 (1995)).

³² However, litigators whose clients' have multistate legal needs experience no similar conflicts. Many courts will grant out-of-state litigators admission to their respective state's bar through *pro hac vice* admission. This process requires no examination. *Id.* at 1137-38.

³³ *See id.*

³⁴ *But see id.* at 1145-46 (arguing that passage of the bar examination promotes the competence of the legal profession).

³⁵ *See, e.g.,* Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315 (2000); Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042 (2001).

³⁶ The Securities and Exchange Commission has stated that such an arrangement would compromise the independence of auditors. Needham, *supra* note 35, at 1318.

³⁷ Wald, *supra* note 35, at 1044.

practices, they must either alter or abolish many ethical standards to which lawyers must adhere in order to hold bar membership. Furthermore, the possibility of multidisciplinary practices have caused some to question the very foundations of the legal profession. Judge Richard Posner has argued in his writings that the public's conception of the practice of law as a profession is misguided.³⁸ He contends that lawyers use this perception to maintain monopoly power over the legal market, thereby harming clients by forcing them to pay monopolistic prices for legal services.³⁹ The logical extension of such an argument is that states should radically alter or even abolish requirements for admission to the bar.

In addition, many openly question the desirability of states regulating the practice of law.⁴⁰ Such criticisms find their roots in arguments made in favor of deregulation generally.⁴¹ Negative critiques of state regulation of the legal profession seem to embrace many economists' distrust of the concept of professionalism.⁴² These economists contend that professions use regulation to restrict entry, thereby decreasing the supply of professionals.⁴³ Thus, regulation has allowed professionals to charge higher prices for their services than an unregulated market would permit.⁴⁴ Those embracing this position dismiss claims that regulation of professions benefits consumers by ensuring professionals' competence and the quality of work consumers receive.⁴⁵ Such claims, in their view, lack merit and serve only to preserve the economic advantage held by members of professions.⁴⁶ Because of the many trends in the legal profession that raise questions concerning current state laws governing admission to the bar, one must consider the constitutionality of such laws.

The Privileges or Immunities Clause may very well be a source of substantive rights. However, the thesis of this Note is that the Clause recognizes no right to work, and even if it did, such a right would lack sufficient breadth to render unconstitutional state laws restricting bar admission. Nevertheless, the structure of the Fourteenth Amendment almost certainly means there are equal protection

³⁸ *Id.* at 1049 (citing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 187 (1999)); see also Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 *FORDHAM L. REV.* 579 (1992); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 *U. CHI. L. REV.* 1 (1998).

³⁹ Wald, *supra* note 35, at 1049 (citing POSNER, *supra* note 38, at 201).

⁴⁰ E.g., Benjamin Hoorn Barton, *Why Do We Regulate?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 *ARIZ. ST. L.J.* 429, 431 (2001).

⁴¹ *Id.* at 432 (citing MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 137-60 (1962)); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 97-98 (1981).

⁴² Wald, *supra* note 35, at 1147.

⁴³ *Id.* at 1148.

⁴⁴ *Id.*

⁴⁵ See, e.g., Rhode, *supra* note 41.

⁴⁶ See Wald, *supra* note 35, at 1148.

ramifications for the Clause. Thus, one could make a credible challenge to a law allowing only state bar members to practice law in that state because, at its core, such a law discriminates between state residents and nonresidents. However, this Note argues the Clause is primarily a source of substantive rights going directly to the relationship between the individual and government.⁴⁷

Part I of this Note provides a brief history of the emergence of state bar restrictions and the ways in which states currently regulate the practice of law. Part II analyzes the *Slaughter-House Cases*, the subsequent Supreme Court decisions on the Fourteenth Amendment, and *Saenz* in order to present the context in which we currently find ourselves with respect to the Privileges or Immunities Clause. Part III considers various interpretations the Clause has received and analyzes under each interpretation the constitutionality of state laws restricting admission to the bar. Part IV states the best way in which to interpret the Privileges or Immunities Clause.

I. THE HISTORY OF STATE BAR RESTRICTIONS AND THE CURRENT REGULATION OF THE LEGAL PROFESSION

Throughout most of American history, states have placed on the legal profession a limited number of regulations. Beginning in the 1870s, the level of regulation has gradually increased as the legal profession responded to perceived threats and changing economic conditions. Today, every state has regulations which lay out in some detail the requirements for membership in that state's bar.⁴⁸

A. Regulation of the Bar in Historical Context

After the American Revolution, the public came to hold the legal profession in extremely low regard.⁴⁹ Excessive litigation over debt collection and contract disputes, as well as the imposition of high courts costs, contributed to lawyers' unpopularity.⁵⁰ Many state legislatures responded by passing laws which banned the imposition of court fees.⁵¹ Because of the belief that lawyers held a monopoly over the practice of law, some states took the more radical step of allowing nonlawyers to provide legal representation.⁵² The Massachusetts state legislature, for example, approved a statute allowing parties to select anyone to prepare their

⁴⁷ See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1394 (1992).

⁴⁸ Barton, *supra* note 40, at 429–30.

⁴⁹ Charles Warren, *A History of the American Bar*, reprinted in DENNIS R. NOLAN, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 97 (1980).

⁵⁰ *Id.*

⁵¹ *Id.* at 99.

⁵² *Id.*

legal work, regardless of whether that individual was a practicing attorney.⁵³ Other states permitted any registered voter to engage in the practice of law.⁵⁴

Up until the turn of the century, many states required passage of an oral examination for admission to the bar.⁵⁵ However, states rarely enforced this requirement, meaning that one need not obtain bar membership in order to provide legal services.⁵⁶ Ethical standards governing the practice of law were virtually nonexistent.⁵⁷ Although lawyers had never previously faced extensive state regulation, one can attribute this early to mid-nineteenth century tendency towards deregulation of the legal profession to the public's dislike of lawyers.

The legal establishment's response in the later half of the nineteenth century to the practice of law by nonlawyers began the modern trend towards regulation of the legal profession.⁵⁸ Lawyers formed bar associations in order to address both the perceived threat of increased entry into the profession and the public's perception of lawyers.⁵⁹ These bar associations exerted substantial influence, causing states to raise standards for admission to the bar.⁶⁰ Many states began to require that applicants for bar admission pass a written examination.⁶¹ Moreover, in the early twentieth century, some bar associations responded to the corporate "practice" of law.⁶² Specifically, bar associations fought insurance companies, accountants, banks, credit agencies, and mortgage companies, among others, for the exclusive right to perform various tasks.⁶³ These included drafting wills, collecting claims, and providing representation before administrative agencies.⁶⁴ In addition, the ABA's promulgation of its first code of ethics in 1908 made lawyers' professional conduct a central concern of both bar associations and the legal profession as a whole.⁶⁵

The Great Depression brought with it an acceptance by lawyers nationwide of

⁵³ *Id.*

⁵⁴ Barton, *supra* note 40, at 429.

⁵⁵ *Id.* at 429.

⁵⁶ *Id.* at 431.

⁵⁷ *Id.* at 429.

⁵⁸ See generally Maxwell Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 AM. J. LEGAL HIST. 269, 269–77 (1971), reprinted in NOLAN, *supra* note 49, at 138–43.

⁵⁹ Michael J. Thomas, *The American Lawyer's Next Hurdle: The State-Based Bar Examination System*, 24 J. LEGAL PROF. 235, 237 (2000). The American Bar Association (ABA), one of the country's first bar associations, began its existence in 1878. *Id.* at 238.

⁶⁰ See *id.* at 238.

⁶¹ *Id.*

⁶² See RICHARD L. ABEL, AMERICAN LAWYERS 112–13 (1989).

⁶³ *Id.* at 113.

⁶⁴ *Id.*

⁶⁵ See *id.* at 142.

the need for increased regulation of the legal profession.⁶⁶ Previously, only a few states had passed laws expressly forbidding nonlawyers from practicing law.⁶⁷ Moreover, the efforts bar associations exerted to prevent corporations from performing legal work occurred only in states in which businesses had expanded into areas lawyers had previously controlled.⁶⁸ Suddenly, bar associations and lawyers in all areas of the country recognized a danger in the unauthorized practice of law.⁶⁹ The increasing popularity of a regulated market during the 1930s probably influenced the legal profession to regulate itself. Since the Great Depression, states have gradually passed more laws restricting admission to the bar.⁷⁰

B. Current Regulation of the Bar

Today, states require that candidates for admission to the bar demonstrate two things. First, candidates must show a minimum knowledge of the law. They satisfy this requirement by passing a written bar exam and obtaining a law degree from an accredited law school. All states require passage of the bar exam in order to obtain bar membership,⁷¹ and nearly every state mandates that members of the bar graduate from law school.⁷² Second, every state requires that those applying for bar membership demonstrate good moral character and fitness to practice law.⁷³ The purpose of this requirement is to ensure that, once an individual obtains bar membership, she will uphold the administration of justice.⁷⁴ States may reject a candidate's application for admission to the bar when her past conduct, whether criminal or not, indicates a lack of integrity.⁷⁵

⁶⁶ Rhode, *supra* note 41, at 6–9.

⁶⁷ *Id.* at 7.

⁶⁸ *Id.*

⁶⁹ *Id.* at 8.

⁷⁰ Thomas, *supra* note 59, at 238.

⁷¹ See *id.* at 238 & n.18. In addition, forty-seven states and the District of Columbia require that candidates for bar admission take the Multistate Bar Examination. Barton, *supra* note 40, at 435 n.21.

⁷² Forty-five states restrict bar entry to those who have earned a degree from an ABA accredited law school. See Barton, *supra* note 40, at 434–35 n.17.

⁷³ *Id.* at 435 n.22. (citing Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 67 (1984)).

⁷⁴ See *Hallinan v. Comm. of Bar Exam'rs*, 421 P.2d 76, 87 (Cal. 1966).

⁷⁵ See, e.g., *In re Stover*, 224 P. 771, 771 (Cal. Ct. App. 1924) (per curiam).

II. THE CASES DEALING WITH PRIVILEGES AND IMMUNITIES UNDER THE FOURTEENTH AMENDMENT

A. *The Slaughter-House Cases*

The first case to come before the Supreme Court that stated a claim under the recently enacted Fourteenth Amendment was the *Slaughter-House Cases*.⁷⁶ The controversy arose over a Louisiana law permitting only the Crescent City Live-Stock Landing and the Slaughter-House Company to engage in the livestock landing and slaughterhouse trade.⁷⁷ The law was challenged under the Privileges or Immunities Clause of the Fourteenth Amendment for “depriv[ing] . . . the whole of the butchers of [New Orleans] . . . of the right to exercise their trade.”⁷⁸ However, Justice Miller’s majority opinion rejected this contention, stating that “privileges and immunities . . . are left to the State governments for security and protection, and [therefore], we may hold ourselves excused from defining . . . privileges and immunities.”⁷⁹ Because the Court gave states an almost exclusive right to define privileges and immunities, this holding conferred upon states virtually unlimited authority to pass laws that they thought appropriate. Although Miller’s opinion strengthens state power, it does not explicitly rule out the possibility that the Clause might either protect substantive rights or empower the federal government to protect such rights.⁸⁰ However, one should not overstate this point, as Miller noted that the Fourteenth Amendment was, in his view, designed primarily to protect the newly emancipated slaves from discrimination. Thus, one would have difficulty arguing that the Amendment performed any other function.⁸¹

Justice Field’s dissent granted the newly enacted Fourteenth Amendment, as well as the Privileges or Immunities Clause, a much broader meaning. While acknowledging the right of the state of Louisiana to issue some regulation in this area under its police powers,⁸² he argued that the Privileges or Immunities Clause

⁷⁶ WILLIAM H. REHNQUIST, *THE SUPREME COURT* 95 (2001).

⁷⁷ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 44 (1872).

⁷⁸ *Id.* at 45.

⁷⁹ *Id.* at 78–79.

⁸⁰ Justice Miller wrote in his opinion that the Court would refrain from deciding the meaning of privileges or immunities “until some case . . . make[s] it necessary to do so.” *Id.* at 79. In addition, he seemed to base this decision on the theory that the Fourteenth Amendment left the privileges and immunities asserted in this case to the states to regulate. Miller explicitly left open the possibility that some privileges and immunities “owe their existence to the Federal Government, . . . its Constitution, or its laws.” *Id.* at 78–79.

⁸¹ *See id.* at 66–67.

⁸² In Field’s view, the states’ police powers granted them the right to make “[a]ll sorts of restrictions” to protect the health, good order, and safety of society. *Id.* at 93 (Field, J., dissenting).

derives its meaning from the Civil Rights Act of 1866,⁸³ which "[c]learly [includes] the right to pursue a lawful employment in a lawful manner."⁸⁴ Field also recognized that the Clause prevents states from discriminating against citizens of other states by imposing greater burdens on them than its own citizens.⁸⁵ More importantly, he believed that the Clause gave to the federal government responsibility for securing the privileges and immunities of citizens from state interference.⁸⁶

Justice Bradley also filed a dissenting opinion which laid out in some detail his interpretation of the Privileges or Immunities Clause. Bradley's dissent makes clear that he viewed the Clause as a source of individual rights based on national citizenship.⁸⁷ While acknowledging the right of states to regulate in many areas, he nonetheless stated that "there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves. I speak now of the rights of citizens of *any free government*."⁸⁸ For Bradley, these seem to include those rights contained in the Bill of Rights, as well as other rights that are economic in nature.⁸⁹

This decision is significant for at least two reasons. The first is rather obvious: it essentially rendered the Privileges or Immunities Clause meaningless.⁹⁰ However, the decision played a greater role in the evolution of Fourteenth Amendment jurisprudence than one could have possibly imagined at the time of its issuance. By concluding that the Fourteenth Amendment merely provided former slaves protection from discrimination, Justice Miller's majority seemed to reach a

⁸³ *Id.* at 102.

⁸⁴ *Id.* at 97. In addition, Field might have endorsed a view of the right to contract similar to the one expressed in *Lochner*. See *id.* at 110 & n.39 (recognizing "the right of free labor, one of the most sacred and imprescriptible rights of man").

⁸⁵ *Id.* at 100–01.

⁸⁶ *Id.* at 89.

⁸⁷ *Id.* at 112. On this point, Bradley turned to Justice Washington's opinion in *Corfield* that spoke to privileges and immunities:

The inquiry is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign.

Id. at 117 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230)).

⁸⁸ *Id.* at 114 (emphasis added).

⁸⁹ *Id.* at 114–16.

⁹⁰ See Lempert, *supra* note 8, at 295.

conclusion at odds with the spirit of the Fourteenth Amendment.⁹¹ After *Slaughter-House*, the Fourteenth Amendment gradually received a much broader interpretation.⁹² Eventually, Justice Field's vision of the Fourteenth Amendment received the Court's acceptance for a time.⁹³ Although the Court eventually dismissed the idea that the right to contract is a fundamental right,⁹⁴ it did grant the federal government a larger role in ensuring the civil rights of its citizens.⁹⁵ So the *Slaughter-House Cases*, in an odd way, contributed to the development and evolution of the Fourteenth Amendment.

B. The Fourteenth Amendment Subsequent to the Slaughter-House Cases

With the Privileges or Immunities Clause essentially dead, the Supreme Court would look to other parts of the Fourteenth Amendment to effectuate what many believed to be the Amendment's purpose. The Court eventually recognized that the Due Process Clause of the Fourteenth Amendment, in addition to being a constitutional requirement for procedural fairness, was also a source of substantive rights.⁹⁶ In the *Slaughter-House Cases*, the Court had rejected a similar interpretation of the Privileges or Immunities Clause.

The most well-known use of the doctrine of substantive due process appears in the Court's cases relating to a right to contract. The first case in which the Court held that the Due Process Clause protects a fundamental right to contract was *Allgeyer v. Louisiana*.⁹⁷ Here, the Court found unconstitutional a Louisiana law forbidding the making of marine insurance contracts with companies that failed to comply with the state's laws.⁹⁸ Justice Peckham reasoned that "[t]he liberty mentioned in [the Fourteenth] amendment means . . . the right of the citizen to . . . earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be . . . necessary . . . to a successful conclusion [of] the purposes above mentioned."⁹⁹

⁹¹ CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT: 1862-1890, at 184 (1939).

⁹² *Id.* at 197.

⁹³ See *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a statute forbidding an employer from permitting an employee to work more than sixty hours per week violated the right to contract guaranteed by the Fourteenth Amendment).

⁹⁴ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

⁹⁵ See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce . . . the provisions of this article."); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁹⁶ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14-15 (1980).

⁹⁷ 165 U.S. 579 (1897).

⁹⁸ *Id.* at 579-80.

⁹⁹ *Id.* at 589.

In *Lochner v. New York*,¹⁰⁰ the Court once again relied on a fundamental right to contract grounded in the Due Process Clause to overturn a state law restricting economic freedom.¹⁰¹ In this case, the Court struck down a New York law imposing penalties on an employer for either requiring or permitting an employee to work more than sixty hours per week.¹⁰² However, the *Lochner* decision itself, as well as the entire concept of liberty to contract, became extremely controversial. The chief criticism of *Lochner* was that in overturning validly enacted state laws restricting commerce, the Court essentially set economic policy for states.¹⁰³

Nonetheless, the Court continued throughout the early twentieth century to invalidate various economic regulations. The Court's decision in *Adair v. United States*¹⁰⁴ overturned an Act of Congress prohibiting railroad employers from terminating the employment of workers who joined or remained members of labor unions.¹⁰⁵ Justice Harlan, who dissented in *Lochner*, found the law "an unreasonable, unnecessary, and arbitrary interference with the right of an individual to . . . contract[] in relation to labor."¹⁰⁶ Likewise, in *Coppage v. Kansas*,¹⁰⁷ the Court struck down a Kansas law making unlawful contracts between an employer and a potential employee providing that the employee, as a condition of employment, may not join a labor union.¹⁰⁸ The Court reasoned that the statute "ha[d] [no] reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune."¹⁰⁹ Nevertheless, despite these decisions, most legislation said to place too heavy a burden on freedom of contract withstood constitutional challenge.¹¹⁰

The rise of the New Deal eventually lead to the end of economic substantive

¹⁰⁰ 198 U.S. 45 (1905).

¹⁰¹ *Id.* at 53.

¹⁰² *Id.*

¹⁰³ *See id.* at 75–76 (Holmes, J., dissenting).

¹⁰⁴ 208 U.S. 161 (1908).

¹⁰⁵ *Id.* at 167–69, 179–80.

¹⁰⁶ *Id.* at 174. Justice Harlan further stated that "[i]n all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." *Id.* at 175.

¹⁰⁷ 236 U.S. 1 (1915).

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 18. The Court went on to note that, in its view, "an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare." *Id.*

¹¹⁰ Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 740 (1999). Dean Kmiec further argues that "legislation which was found invalid [during *Lochner* era jurisprudence] often was impregnated with class favoritism, or what economists today call rent-seeking — the imposition of regulatory disability on competitor for economic advantage." *Id.*

due process. Because of the disastrous economic effects of the Great Depression, expanded regulation of the economy gained overwhelming political support.¹¹¹ Perhaps this led the Court to erase the limitations it had placed on regulation through substantive due process.¹¹² The Court issued some significant decisions on this matter. In *Nebbia v. New York*,¹¹³ the Court upheld a statute that allowed a board to set retail prices for milk, and in so doing made an unequivocal declaration that states, and not courts, would decide economic policy.¹¹⁴ Another decision, *West Coast Hotel Co. v. Parrish*,¹¹⁵ upheld a federal minimum wage law for women. Writing for the Court, Chief Justice Charles Evans Hughes stated that “[e]ven if the wisdom of the policy [of the legislature] be regarded as debatable and its effect uncertain, still the legislature is entitled to its judgment.”¹¹⁶ The retirement of justices who had dissented in these two decisions and the addition of new justices by President Roosevelt solidified the demise of *Lochner*.

C. *Saenz v. Roe*

Despite the prominent place of the Fourteenth Amendment in constitutional law, the Privileges or Immunities Clause lay dormant until the Supreme Court’s recent decision in *Saenz v. Roe*.¹¹⁷ In *Saenz*, the Court found that a California statute restricting the maximum welfare benefits available to newly arrived residents violated the Privileges or Immunities Clause.¹¹⁸ Specifically, Justice Stevens’ majority opinion held the statute unconstitutional under a right to travel flowing from the Privileges or Immunities Clause.¹¹⁹ However, Justice Stevens claimed that the Constitution’s text “expressly protects” a right to travel, thereby differentiating this right from other unenumerated rights.¹²⁰ Additionally, he asserted that the Privileges or Immunities Clause guarantees new citizens of a state the same rights the state affords other citizens.¹²¹ Thus, Stevens also recognized that the right to travel contains an equal protection element.

Saenz was not the first case in which the Court had recognized a right to

¹¹¹ See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 51–61 (1990).

¹¹² Another important factor in the Court’s reversal of its position is the attempt by President Roosevelt to “pack the Court.” See *id.* at 54–56.

¹¹³ 291 U.S. 502 (1934).

¹¹⁴ *Id.* at 537.

¹¹⁵ 300 U.S. 379 (1937).

¹¹⁶ *Id.* at 399.

¹¹⁷ 526 U.S. 489 (1999).

¹¹⁸ *Id.* at 506–07.

¹¹⁹ *Id.* at 501.

¹²⁰ *Id.*

¹²¹ *Id.* at 504–05. “[T]he right to travel embraces the citizen’s right to be treated equally in her new State” *Id.* at 505.

travel.¹²² However, this decision is significant because it is the only case in which the Court identified as the source of this right a previously unused constitutional provision known as the Privileges or Immunities Clause. In *Shapiro v. Thompson*,¹²³ the Court failed to name any specific textual provision which confers upon citizens a right to travel, but instead found that "constitutional concepts of personal liberty. . . require that all citizens be free to travel."¹²⁴ Furthermore, *Shapiro* held that any law burdening the right to travel also violates the Equal Protection Clause.¹²⁵ The *Saenz* decision not only retained the equal protection element the Court had identified in *Shapiro*,¹²⁶ but also found that the Privileges or Immunities Clause is the source of this right to travel.¹²⁷

Chief Justice Rehnquist and Justice Thomas each filed dissenting opinions that the other joined. Remarkably, both disagreed with the majority only as to the specific application of the right to travel to this case, not with the general principles behind the majority's opinion.¹²⁸ Indeed, Chief Justice Rehnquist declared in his dissent that "[m]uch of the Court's opinion is unremarkable and sound."¹²⁹ Justice Thomas criticized the majority for "fail[ing] to address [the Clause's] historical underpinnings or its place in our constitutional jurisprudence,"¹³⁰ perhaps because he feared that "the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'"¹³¹ However, he also declared in his dissent that he "would be open to reevaluating [the] meaning [of the Privileges or Immunities Clause] in an appropriate case."¹³²

Saenz is a significant case for at least two reasons. First, the majority opinion identifies two essential aspects of the right to travel, one of which is that traveling from one state to another, regardless of an individual's state of residence, is a basic fundamental right.¹³³ Standing alone, this seems unremarkable because the Court in previous decisions had found that the Constitution guarantees a right to travel.¹³⁴ However, the fact that this right finds protection in the Privileges or Immunities

¹²² See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160 (1941).

¹²³ 394 U.S. 618 (1969).

¹²⁴ *Id.* at 629.

¹²⁵ *Id.* at 634.

¹²⁶ *Saenz*, 526 U.S. at 504–05.

¹²⁷ *Id.* at 501–04.

¹²⁸ *Id.* at 511 (Rehnquist, C.J., dissenting); *id.* at 521 (Thomas, J., dissenting).

¹²⁹ *Id.* at 511 (Rehnquist, C.J., dissenting).

¹³⁰ *Id.* at 527 (Thomas, J., dissenting).

¹³¹ *Id.* at 528 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)).

¹³² *Id.*

¹³³ *Id.* at 498.

¹³⁴ See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 613 (1969).

Clause, a part of the Constitution that has been in hibernation for well over one hundred years, is very significant.¹³⁵ The other is that the right to travel also contains an equal protection component, meaning that when a state denies a citizen of the United States the right to travel, it discriminates against that citizen.¹³⁶ Second, every member of the Court appears open to identifying other fundamental rights that find protection under the Privileges or Immunities Clause.

III. WAYS TO INTERPRET PRIVILEGES AND IMMUNITIES

Legal commentators have offered two basic interpretations of the Privileges or Immunities Clause. One espouses an antidiscrimination interpretation of the Clause and the other interprets it as a source of substantive rights.¹³⁷ Generally, those who subscribe to the latter interpretation either support the theory that the Clause incorporates the Bill of Rights against the states, or else hold that the Clause protects economic liberties.¹³⁸

A. Antidiscrimination

Although the Supreme Court partially based its *Saenz* decision on the view that the Privileges or Immunities Clause contains an equal protection element,¹³⁹ few commentators actually hold that the Clause merely prohibits states from discriminating against noncitizens.¹⁴⁰ At one point, David Currie appeared to be the only commentator to embrace this position.¹⁴¹ Under such a view, privileges and immunities flow from state law, meaning that the Clause itself is not a source of substantive rights.¹⁴² Rather, a state must afford noncitizens the same rights its laws guarantee its own citizens.¹⁴³ A state does not abridge the privileges and immunities of citizens when it alters these rights, only when it discriminates.¹⁴⁴ Proponents of this view believe that granting both citizens and noncitizens the same rights under

¹³⁵ *Saenz*, 526 U.S. at 501.

¹³⁶ *Id.* at 504–05.

¹³⁷ Harrison, *supra* note 47, at 1394.

¹³⁸ *Id.*

¹³⁹ *See Saenz*, 526 U.S. at 504–05.

¹⁴⁰ *See* Harrison, *supra* note 47, at 1393. Most commentators espouse a view that the Equal Protection Clause of the Fourteenth Amendment performs this function, not the Privileges or Immunities Clause. *See id.* at 1433.

¹⁴¹ *See id.* For a more extensive discussion of Currie's views on privileges and immunities, see DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 342–51 (1985).

¹⁴² *See* Harrison, *supra* note 47, at 1393.

¹⁴³ *See id.*

¹⁴⁴ *Id.* at 1396–97.

state laws would constitutionalize the Civil Rights Act of 1866.¹⁴⁵

One should note that the Constitution mentions privileges and immunities in Article IV, Section 2, otherwise known as the Comity Clause.¹⁴⁶ Here, the requirement is that states treat noncitizens the same as its own citizens by granting them the "privileges and immunities" that come from citizenship in that state.¹⁴⁷ This view of the Comity Clause appears to have been prevalent during the nineteenth century.¹⁴⁸

Perhaps the greatest strength of the antidiscrimination interpretation of the Privileges or Immunities Clause is that the term "privileges and immunities" as it is used in the Comity Clause encompasses an essentially equalitarian view with respect to how states must treat noncitizens. The Framers of the Fourteenth Amendment were certainly aware of the meaning that most nineteenth century scholars attributed to this phrase. As such, they certainly could have intended that the Privileges or Immunities Clause take on a similar meaning to that of the Comity Clause.¹⁴⁹

Another argument in favor of the antidiscrimination theory is that the structure of the Fourteenth Amendment tends to favor an antidiscrimination reading of the Privileges or Immunities Clause. Section 1 of the Fourteenth Amendment, which contains the Clause, seems to have egalitarian overtones. In addition, Section 1 also appears to have been designed primarily to prevent states from favoring certain citizens over others.¹⁵⁰

Such a view, however logical it may seem, is not without its weaknesses. In the first place, it does not follow that simply because a term has a certain meaning in one clause of the Constitution that it retains that meaning in another. Many commentators argue that the term "privileges or immunities" takes on a different meaning in the Privileges or Immunities Clause than does "privileges and immunities" in the Comity Clause.¹⁵¹ In addition, much of the history surrounding the Fourteenth Amendment's ratification suggests that the Amendment's Framers did not intend that the Privileges or Immunities Clause merely prohibit

¹⁴⁵ See *id.* at 1393.

¹⁴⁶ U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

¹⁴⁷ Harrison, *supra* note 47, at 1398.

¹⁴⁸ *Id.* at 1400-01.

¹⁴⁹ See Harrison, *supra* note 47, at 1397.

¹⁵⁰ Section 1 of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁵¹ See, e.g., 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1098-95* (1953); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION 46-71* (1983).

discrimination, but also that it protect substantive rights.¹⁵² One could argue that the Privileges or Immunities Clause is separate and distinct from both the Due Process Clause and the Equal Protection Clause.¹⁵³ As such, the egalitarian structure of Section 1 does not necessarily indicate that the Privileges or Immunities Clause has a similar meaning to those of other clauses in Section 1.

One might initially conclude that courts would likely reject a challenge to laws restricting admission to the bar under an antidiscrimination translation of the Privileges or Immunities Clause. The reason is that under this interpretation, a state need not grant anyone substantive rights, but must merely afford both citizens and noncitizens equal rights under its own laws. However, at least in a literal sense, such laws are discriminatory because they distinguish between two groups of people, one that is apparently qualified for the practice of law and the other that is not. However, as long as states allow otherwise qualified attorneys from other states to practice within their borders, an antidiscrimination interpretation of the Privileges or Immunities Clause would not appear to present a serious constitutional challenge.

At this point, one must note that an antidiscrimination interpretation of the Clause seems to present serious problems for state laws that permit only members of a state's bar to practice law within that state. These laws do not grant citizens and noncitizens of a state the same rights. Rather, they seem to draw a distinction based on citizenship, which an antidiscrimination interpretation expressly forbids. States could counter by arguing that these laws draw a distinction based on membership in a particular state's bar, not on an individual's state citizenship.¹⁵⁴ However, this argument seems to fail because the practical reality is that these laws prohibit most lawyers who are not citizens of a state from practicing law in that state because they are not members of the state's bar. Thus, an antidiscrimination interpretation of the Privileges or Immunities Clause would appear to afford transactional lawyers the opportunity to represent clients in states in which they are

¹⁵² Although the majority in the *Slaughter-House Cases* seemed to take a similar, and perhaps more narrow, view of the Clause than an antidiscrimination interpretation, Justice Field in his dissent noted that similarities existed between the Fourteenth Amendment and the Civil Rights Act of 1866. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 102, 111–12 (1872) (Field, J., dissenting); see also Harrison, *supra* note 47, at 1397 (suggesting that the Framers of the Fourteenth Amendment put forward more than one view of the Privileges or Immunities Clause).

¹⁵³ Section 1 states that “[n]o State shall . . . abridge the privileges or immunities of citizens . . . nor shall any State deprive any person of life, liberty, or property, without due process . . . nor deny to any person . . . the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

¹⁵⁴ In *Supreme Court of New Hampshire v. Piper*, 470, U.S. 274 (1985), the United States Supreme Court, invoking the Comity Clause, invalidated a New Hampshire law requiring state residency as a precondition for admission to the state's bar. See *id.*

not citizens.

Ordinarily, a state could make another strong argument in defense of its restrictions on bar admissions. Ensuring the quality of the legal work its citizens receive seems to qualify as a compelling state interest and requiring bar passage is the least restrictive means of ensuring that end.¹⁵⁵ However, under an antidiscrimination interpretation, most of these laws would not face strict scrutiny in the first place as they draw no distinction between citizens and noncitizens. Accordingly, most state laws restricting admission to the bar do not seem to face a serious constitutional challenge under an antidiscrimination interpretation of the Privileges or Immunities Clause.

B. Substantive Rights

Although many commentators agree with Justice Field that the Privileges or Immunities Clause is a source of substantive rights,¹⁵⁶ few would accept his position as to the rights the Clause protects.¹⁵⁷ In general, two schools of thought exist among commentators embracing this position. The first holds that the Privileges or Immunities Clause incorporates the Bill of Rights against the states.¹⁵⁸ This group contains many divergent points of view. Some hold to the doctrine of total incorporation, which says the Privileges or Immunities Clause incorporates only the first eight amendments,¹⁵⁹ while others reject total incorporation, claiming the Clause incorporates only those "fundamental" liberties.¹⁶⁰ The second endorses a view of the Privileges or Immunities Clause similar to the doctrine embodied in *Lochner*. It takes the position that the Clause protects economic rights, such as the

¹⁵⁵ However, one could plausibly argue that laws requiring that candidates for bar admission also obtain a law degree are not the least restrictive means as bar exam passage sufficiently ensures competency.

¹⁵⁶ See Harrison, *supra* note 47, at 1393.

¹⁵⁷ See *id.* at 1393–94. Justice Field seems to have held a view of the Fourteenth Amendment that is similar to the one espoused in *Lochner v. New York*. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 111–12 (1872) (Field, J., dissenting).

¹⁵⁸ Harrison, *supra* note 47, at 1393.

¹⁵⁹ Justice Hugo Black was the most famous proponent of this view. See *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting):

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states.

Id. at 71–72.

¹⁶⁰ See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

right to contract and the right to work.¹⁶¹

1. Incorporation

The doctrine of incorporation is not a new idea. However, because the Privileges or Immunities Clause has played no role in constitutional law, courts have used the Due Process Clause as the vehicle by which Incorporation occurs.¹⁶² Although many commentators agree with this theory to some extent, prior to the mid-twentieth century, the doctrine of incorporation had few supporters.¹⁶³ Justice Black was the first major proponent of incorporation and perhaps the most well-known supporter of total incorporation.¹⁶⁴ Scholars, however, are somewhat skeptical of his views, largely because the scholarship of Charles Fairman brought to light some weaknesses in Black's position.¹⁶⁵ Fairman's view, which is that the Fourteenth Amendment incorporates only those rights that are fundamental, has held more sway in the courts.¹⁶⁶

Some have expressed doubt that the Fourteenth Amendment incorporates any provision of the Bill of Rights. This criticism is not without merit, given that history does not show conclusively that the Framers of the Fourteenth Amendment intended the Bill of Rights to apply to the states.¹⁶⁷ Another general problem with incorporation is that those who have attempted to determine exactly which rights the Fourteenth Amendment incorporates against the states have encountered a difficult task. Both Justice Black and Fairman base their views of incorporation, at

¹⁶¹ Harrison, *supra* note 47, at 1393–94; *see also, e.g.*, SIEGAN, *supra* note 151, at 46–71.

¹⁶² *See* RAUOL BERGER, *GOVERNMENT BY JUDICIARY* 139 (1977).

¹⁶³ *See id.* at 134–36.

¹⁶⁴ For a lengthy discussion of Justice Black's position, *see Adamson*, 332 U.S. at 68–123 (Black, J., dissenting).

¹⁶⁵ For criticism of Justice Black's position, *see* Fairman, *supra* note 160; Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

¹⁶⁶ *See* Fairman, *supra* note 160, at 138–39 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)):

If the founders of the Fourteenth Amendment did not intend the privileges and immunities clause to impose Amendments I to VIII, then what, it may be asked, did they mean? . . . [They] undoubtedly purposed to . . . establish a federal standard below which state action must not fall. . . . Justice Cardozo's gloss on the due process clause — what is 'implicit in the concept of ordered liberty' — comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause.

One must note that under Fairman's position, the Privileges or Immunities Clause need not incorporate against the states all of the first eight amendments. Additionally, the Clause can also incorporate certain unenumerated rights so long as they are "fundamental." *Id.*

¹⁶⁷ *See* BERGER, *supra* note 162, at 134–56 (claiming that the history of the ratification of the Fourteenth Amendment does not support the doctrine of incorporation).

least in part, on an examination of the history behind the adoption of the Fourteenth Amendment.¹⁶⁸ However, the history surrounding any particular event, in this case the ratification of the Fourteenth Amendment, can at times be difficult to determine. Thus, one encounters problems arguing that history shows precisely which rights come under the doctrine of incorporation.

In addition, incorporation faces another problem when one confronts the reluctance of many judges to apply to the states the amendments of the Bill of Rights, even *after* the adoption of the Fourteenth Amendment.¹⁶⁹ Had the Framers of the Fourteenth Amendment really intended that the Privileges or Immunities Clause force state compliance with the Bill of Rights, what explains the hesitation of many nineteenth century judges to comply?¹⁷⁰ A defender of incorporation could answer this charge by arguing that a fear of the federal government and a certain level of trust in state governments marked the nineteenth century.¹⁷¹ However, even among those judges less inclined to favor states' rights, the doctrine of incorporation still held little influence.¹⁷²

Perhaps the strongest argument that the Privileges or Immunities Clause incorporates against states at least some provisions of the Bill of Rights is that incorporation seems to receive support from the history of the ratification of the Fourteenth Amendment. Although the use of history to determine the meaning of the Clause might yield inconclusive results, one can make a powerful argument that the history behind the adoption of the Fourteenth Amendment is sufficiently conclusive to support the doctrine of incorporation. Many Republicans in the mid-to late-1860s favored requiring Southern states to accord respect to those rights contained in the Bill of Rights, such as freedom of speech.¹⁷³ In their view, slavery had denied all citizens of these most basic of constitutional rights.¹⁷⁴ While

¹⁶⁸ See *Adamson*, 332 U.S. at 68–123 (1947) (Black, J., dissenting); Fairman, *supra* note 160, at 134.

¹⁶⁹ The Supreme Court did not move toward the position advocated by Justice Black in his *Adamson* dissent until relatively recently. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that Article III, the Sixth Amendment, and the Fourteenth Amendment guaranteed criminal defendants the right to trial by jury in both federal *and* state courts). However, the Court has never adopted Black's theory of total incorporation.

¹⁷⁰ BERGER, *supra* note 162, at 134–36.

¹⁷¹ *Id.* at 135–36.

¹⁷² See *id.*

¹⁷³ See 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, 1132–34 (2000); see also AKHIL REED AMAR, *THE BILL OF RIGHTS* 166–69 (1998) (providing examples from the founding of our country to the Reconstruction Era of the words "privileges" and "immunities" being used to refer to a right listed in the Bill of Rights).

¹⁷⁴ Curtis, *supra* note 173, at 1132. In addition, Curtis believes the words "privileges" and "immunities" had English origins and were used to describe the rights guaranteed by the Bill of Rights from the time prior to the American Revolution to the Civil War. See *id.* at

debating the ratification of the Thirteenth and Fourteenth Amendments, many expressed this very concern and frequently used the words "privileges" and "immunities" when referring to rights expressed in the Bill of Rights.¹⁷⁵ In addition, Justice Bradley's *Slaughter-House* dissent seems to echo this very conclusion. He wrote that:

[W]e are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies . . . only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. . . . But others of the greatest consequence were enumerated, although they were only secured . . . from invasion by the Federal government; such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law*.¹⁷⁶

Should the Privileges or Immunities Clause incorporate all or part of the Bill of Rights, those who wish to challenge state laws restricting admission to the bar face a seemingly impossible battle. A fair analysis of the Constitution's first eight amendments seems to provide no basis for striking down such laws. Perhaps the only possible argument one could make is that these laws restrict freedom of speech by prohibiting certain people from communicating their legal opinions to others. The speech at issue occurs within a commercial setting; therefore, courts would apply the four-pronged test laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*¹⁷⁷ for assessing the constitutionality of laws restricting commercial speech.¹⁷⁸

In applying this test, courts must first determine whether the First Amendment gives the commercial speech at issue its protection.¹⁷⁹ In order to come under the First Amendment, the speech must: (1) concern a lawful activity; and (2) not be

1094–1124.

¹⁷⁵ *Id.* at 1132.

¹⁷⁶ The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 118 (1872) (Bradley, J., dissenting).

¹⁷⁷ 447 U.S. 557 (1980).

¹⁷⁸ *Id.* at 566.

¹⁷⁹ *Id.*

misleading.¹⁸⁰ If the First Amendment applies, the government must then show a substantial interest in regulating the speech.¹⁸¹ Should a substantial interest exist, the subsequent inquiry is twofold: "whether the regulation directly advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest."¹⁸²

Here, the speech at issue clearly does not concern a lawful activity because practicing law without a license is illegal. Therefore, the First Amendment is not applicable in this context, which seems proper. Were courts to strike down as a First Amendment violation laws forbidding unlicensed legal practitioners from giving legal advice, they would unwittingly deprive state bar admission requirements of most, if not all, of their meaning. Accordingly, courts would not strike down as unconstitutional state laws restricting admission to the bar should they find that the Privileges or Immunities Clause incorporates the Bill of Rights.

One must qualify this conclusion by noting that "privileges or immunities" need not refer to just the Bill of Rights.¹⁸³ Many commentators who hold to the doctrine of incorporation also believe the Privileges or Immunities Clause protects other rights in addition to the Bill of Rights.¹⁸⁴ Therefore, claims challenging the constitutionality of state restrictions on admission to the bar do not automatically fail should the Privileges or Immunities Clause incorporate any portion of the Bill of Rights.

2. Economic Liberties

Another interpretation of the Privileges or Immunities Clause holds that the Clause protects economic freedoms. Although few of today's commentators accept this view, the general idea seems to have found many supporters throughout American history; among them is the former chief justice of the United States Supreme Court, John Marshall. Marshall himself held that the Contract Clause of the Constitution protected a right to contract.¹⁸⁵ Although the Court rejected

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See, e.g., Curtis, *supra* note 173, at 1145.

¹⁸⁴ See *supra* notes 165–66 and accompanying text (discussing the influential critique of Justice Black's *Adamson* dissent by Charles Fairman); see also Curtis, *supra* note 173, at 1145 (arguing that the Privileges or Immunities Clause protects other rights in addition to those found in the Bill of Rights). But see *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting) (arguing that the Privileges or Immunities Clause incorporates against the states only the entirety of the first eight amendments of the Constitution).

¹⁸⁵ Even prior to the adoption of the Fourteenth Amendment, many prominent legal thinkers believed the Constitution protected economic liberties. Marshall himself thought the Contract Clause prohibited states from restricting freedom of contract. He wrote that an individual's right to contract "is intrinsic, and is conferred by the act of the parties." Ogden

Marshall's broad view of the Contract Clause,¹⁸⁶ its *Ogden* decision did not settle the question for all time. After the Civil War, some thought the newly enacted Fourteenth Amendment would outlaw many economic regulations.¹⁸⁷ Economic liberties eventually found support in the courts during the late nineteenth and early twentieth centuries.¹⁸⁸ However, even during this era, most such regulations withstood constitutional challenges.¹⁸⁹

The rise of the New Deal directly coincided with the decline of economic substantive due process. In today's constitutional jurisprudence, a right to contract is nowhere to be found.¹⁹⁰ Liberal and conservative scholars alike tend to reject *Lochnerism*. The former rejects economic substantive due process because they tend to favor economic regulation as a policy matter, whereas the latter cannot find such legislation unconstitutional lest they offend the notion of judicial restraint they strongly espouse.¹⁹¹

Nevertheless, some continue to hold that the Constitution protects economic liberties. Perhaps the most prominent commentator to advance such a view is Richard Epstein of the University of Chicago School of Law, who believes that

v. Saunders, 25 U.S. (12 Wheat.) 213, 346 (1827) (Marshall, C.J., dissenting). Justice Story espoused this view as well, joining Marshall's dissent in *Ogden*.

¹⁸⁶ The Contract Clause states that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 10. The *Ogden* majority perhaps feared the Clause would be used to dismantle state power to regulate commerce. SIEGAN, *supra* note 151, at 63.

¹⁸⁷ In addition, Justice Field's *Slaughter-House* dissent hints that the majority opinion stripped the Fourteenth Amendment of much of its intended meaning. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1872) (Field, J., dissenting) ("If this inhibition has no reference to privileges and immunities of this character, but only . . . to such privileges and immunities as were before its adoption specifically designated in the Constitution . . . , [the Privileges or Immunities Clause] was a vain and idle enactment, which accomplished nothing.") (alteration in original).

¹⁸⁸ In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Court recognized for the first time that the Constitution protects a liberty to contract. In an opinion written by Justice Peckham, the Court grounded this newly-found liberty in the Due Process Clause of the Fourteenth Amendment rather than the Contract Clause or the Privileges or Immunities Clause. *Id.* at 589. Other decisions protecting freedom of contract followed *Allgeyer's* lead. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁸⁹ Kmiec, *supra* note 110, at 740. For an example of a case sustaining economic regulations during this period, see *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a ten-hour work day for women employed in factories or laundries).

¹⁹⁰ One should note that property rights, which have long been associated with economic libertarianism, seem to have made a revival under the Rehnquist Court. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nolan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

¹⁹¹ See Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 703-04 (1984).

freedom of contract finds protection in the Contract Clause.¹⁹² Specifically, Epstein believes that the Constitution "leaves to state governments only a very limited control over . . . economic activities."¹⁹³ In taking such a view, he finds himself much closer to the position Chief Justice Marshall espoused in his *Ogden* dissent than to the rationale used by Justice Peckham in *Lochner*.¹⁹⁴ Marshall himself held that the Constitution delegated to the federal government virtually all authority to regulate commerce through the Commerce Clause and that the Contract Clause stripped states of virtually all power to issue economic regulations, even within its own borders.¹⁹⁵

Another commentator who has embraced this view is Bernard Siegan. Unlike Epstein, Siegan's theory of constitutionally protected economic liberty is more in line with *Lochner*. Although he would certainly limit the extent to which states can regulate the economy, Siegan apparently does leave room for states to regulate through their police powers.¹⁹⁶ Part of Siegan's defense of *Lochnerism* is that without some judicial oversight of economic regulations, "the legislatures and regulatory agencies will determine with finality when . . . individuals [can] pursue a business . . . or profession."¹⁹⁷ In his book, *Economic Liberties and the Constitution*, Siegan further explains this proposition:

The *Lochner* principle is suited to a society of limited government. By creating an additional hurdle that must be surmounted, its application screens the legislative processes and requires due consideration for the plight of the losers in political struggles. Unlike the contemporary Supreme Court, the *Lochner* majority found it impossible "to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."¹⁹⁸

Additionally, Siegan appears untroubled that economic freedoms seem to find no place in the text of the Constitution. Indeed, he states that "[t]he technique by which liberty of contract was established was neither unique nor extraordinary in American jurisprudence Justices have . . . found limitations on state authority

¹⁹² *Id.* at 750–51.

¹⁹³ *Id.* at 705.

¹⁹⁴ Compare *Lochner v. New York*, 198 U.S. 45 (1905), with *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212, 332 (1827) (Marshall, C.J., dissenting).

¹⁹⁵ SIEGAN, *supra* note 151, at 61.

¹⁹⁶ One should not overstate this point. Siegan has written that "government[s] . . . [may] seek to impose regulation, but its authority had to be justified." *Id.* at 112.

¹⁹⁷ *Id.* at 120.

¹⁹⁸ *Id.* at 121.

. . . because in their ultimate but finite wisdom, they believed such limitations promoted justice."¹⁹⁹ Even though Siegan believes one can find economic liberties in the abstract without any particular reference in the Constitution, he does hold that the Privileges or Immunities Clause is, in part, a source of economic liberties.²⁰⁰

Although the Supreme Court's jurisprudence since the 1930s has held that economic liberties have no status as fundamental rights, both the district court and appeals court in *Craigmiles* arguably used *Lochner*-style reasoning to reach their respective decisions. Although both courts subjected the FDEA to rational basis review, which courts use to evaluate the constitutionality of rights not considered fundamental, they dismissed Tennessee's justifications for the FDEA.²⁰¹ The courts instead argued that the FDEA was potentially economically harmful and amounted to a bad faith effort by the state of Tennessee to grant economic protection to funeral directors at the expense of other casket retailers.²⁰² Similarly, the decisions of the Court during the era of *Lochner* claimed the economic regulation at issue was a constitutionally improper use of the state's police powers and gave workers an unfair economic advantage at the expense of management.²⁰³ As Dean Douglas Kmiec has put it, "th[e] legislation . . . found invalid [during the era of *Lochner*] often was impregnated with class favoritism, [and] . . . impos[ed] . . . regulatory disabilit[ies] on competitor[s] for economic advantage."²⁰⁴

Were the Court to find the Privileges or Immunities Clause to be a source of economic liberties, one can scarcely doubt that state laws regulating admission to the bar would be extremely vulnerable to a constitutional challenge. If a person has a liberty to contract in any way she chooses, then she certainly has a right to pursue lawful employment in a lawful manner.²⁰⁵ As Justice Peckham recognized in

¹⁹⁹ *Id.* at 112.

²⁰⁰ Harrison, *supra* note 47, at 1394 (citing SIEGAN, *supra* note 151, at 46–71).

²⁰¹ *Craigmiles v. Giles*, 312 F.3d 220, 225–29 (6th Cir. 2002); *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 661–65 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002).

²⁰² *Craigmiles*, 312 F.3d at 224, 228; *Craigmiles*, 110 F. Supp. 2d at 662.

²⁰³ See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating a law forbidding an employer conditioning a grant of employment on a promise to not hold membership in a labor union); *Adair v. United States*, 208 U.S. 161 (1908) (declaring unconstitutional a federal law prohibiting railroad employers from terminating employees who either joined or retained membership in a labor union); *Lochner v. New York*, 198 U.S. 45 (1905) (overturning a law penalizing a requirement for or grant of permission to an employee to work over sixty hours per week); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down a law forbidding the making of marine insurance contracts with companies failing to comply with Louisiana law); see also *supra* notes 98–109 and accompanying text (discussing cases striking down laws aimed at strengthening workers' economic position in relation to management).

²⁰⁴ Kmiec, *supra* note 110, at 740; see also *supra* text accompanying note 110 (discussing the fact that courts found relatively few laws unconstitutional under *Lochner*).

²⁰⁵ See SIEGAN, *supra* note 151, at 61.

Allgeyer:

The liberty mentioned in [the Fourteenth] [A]mendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes mentioned above.²⁰⁶

In this hypothetical situation, a person who wishes to practice law who has not passed the bar or earned a law degree would have a strong argument that such restrictions violate the Privileges or Immunities Clause. The reason is that these laws restrict the right of this person to enter into a contract for her legal services, thereby forbidding her from earning a living in a lawful manner.

The idea that economic liberties receive constitutional protection has received much criticism throughout American history and some serious reflection will bring to mind its many weaknesses. Proponents of this position invariably seem to have difficulty grounding economic liberties in any textual provision of the Constitution.²⁰⁷ This is not to say they have not tried. Marshall advanced the notion that the Contract Clause was a source of economic freedoms.²⁰⁸ The decisions of the *Lochner* Era protected freedom of contract through the Due Process Clause.²⁰⁹ In addition, some have ascribed such a meaning to the Privileges or Immunities Clause.²¹⁰ However, economic liberties lack the explicit textual support that the First Amendment provides freedom of speech, for example.²¹¹ Thus, one encounters more difficulty arguing that unelected judges should overturn legislative acts representing the will of the people. Noting this irony, Justice Holmes commented

²⁰⁶ *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

²⁰⁷ Although Epstein's suggestion that the courts use the Contract Clause to enforce economic liberties avoids this problem to some extent, he concedes that "[t]here is no question that the contract clause bristles with difficult interpretative problems," and yet he is "certain that the Supreme Court's present interpretation is both wrong and indefensible." Epstein, *supra* note 191, at 750.

²⁰⁸ See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

²⁰⁹ See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

²¹⁰ See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 111–12 (1872) (Field, J., dissenting); Harrison, *supra* note 47, at 1394 (citing SIEGAN, *supra* note 151, at 46–71).

²¹¹ See U.S. CONST. amend. 1.

in his famous *Lochner* dissent that "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion."²¹²

Lack of explicit textual support does not necessarily mean economic liberties receive no constitutional protection, for the Court has recognized other rights of which the Constitution makes no mention.²¹³ One possible way to argue this point is to say the Framers intended that a certain constitutional provision protect economic liberties. Some assert that the Framers of the Fourteenth Amendment intended that the Privileges or Immunities Clause perform this function.²¹⁴ Mere consideration of the *Slaughter-House* dissents suggests that some living in the period of the Fourteenth Amendment's ratification viewed the Clause in this way.²¹⁵ When one considers that subsequent decisions on economic freedoms failed to follow the lead of the *Slaughter-House Cases*, the possibility increases that the views expressed in the *Slaughter-House* dissents were more in line with the views of the Fourteenth Amendment's Framers.²¹⁶

However, numerous possibilities exist as to why the Court eventually embraced economic liberties, one of which is that the economic libertarians simply gained control of the Court. Indeed, the way in which the *Slaughter-House Cases* split the Court right down the middle suggests competing views on the breadth of the Fourteenth Amendment and the rights it protected. If the Framers of the Fourteenth Amendment did not generally accept that the Amendment protects economic liberties, then one cannot plausibly argue that such liberties find protection under the Privileges or Immunities Clause or any other provision of the Fourteenth Amendment on account of the Framers' intent.

Perhaps the greatest weakness in the position that the Constitution protects economic liberties is that its proponents seem to inherently distrust the legislative branch to arrive at the best ends.²¹⁷ In their defense, they are not alone in believing

²¹² *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

²¹³ For examples of such decisions, see *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²¹⁴ SIEGAN, *supra* note 151, at 46–71.

²¹⁵ The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 111–12 (1872) (Field, J., dissenting).

²¹⁶ See SIEGAN, *supra* note 151, at 319.

²¹⁷ In advancing his case that the Contract Clause protects economic liberties, Epstein acknowledges that those who disagree with today's consensus have two characteristics. First, they "find fatal substantive flaws in the interventionist legislation and [second, they] deny that any principle of judicial restraint has a proper constitutional pedigree, in economic matters or anything else." Epstein, *supra* note 191, at 705. Siegan, in advancing his own view that the judiciary should actively protect economic liberties, contends that the Framers created judicial review because they possessed a certain amount of distrust in majority rule. SIEGAN, *supra* note 151, at 319. He writes that:

that judges should impose their opinions on others through the judicial process.²¹⁸ But, as Ely points out, "[t]here remains the immense and obvious problem of reconciling the attitude under discussion with the basic democratic theory of our government."²¹⁹

As previously stated, laws restricting admission to the bar would face a strong constitutional challenge should the Privileges or Immunities Clause protect a fundamental right to contract. Even in this circumstance, courts have never held that the Constitution deprives states of all their power to regulate. During *Lochner* era jurisprudence, courts allowed states to issue regulations under their police powers restricting the right to contract. Basically, the Court required states to demonstrate two things: (1) that the exercise of the right involve "the safety, health, morals and general welfare of the public",²²⁰ and (2) that the restriction at issue amounts to a "reasonable exercise of the police power."²²¹ Assuming that courts apply a similar test, states could argue that the exercise of the right to contract for legal services relates to the general welfare of the public as a strong need exists to ensure the overall competence of the legal profession. They could further contend that requiring candidates for admission to the bar to obtain a law degree and pass the bar exam is a reasonable way to accomplish this end.

At this point, one must note that even during *Lochner* era jurisprudence, courts never applied strict scrutiny to laws restricting the right to contract. Rather, the inquiry was whether the law in question related to the safety, health, morals, and general welfare of the public,²²² and whether the state's exercise of its police powers

The Framers' generation viewed the judiciary as another means for achieving libertarian objectives of government The federal judiciary has wandered far from its mission. Persons who should have access to these courts are effectively denied it Such a departure from original design should be of concern to more than strict constructionists. They represent fundamental change in the function of a most powerful institution brought about by that body itself — the very one on which the Framers relied upon most to maintain constitutional integrity. To this extent, the trust originally reposed in the judiciary has been compromised.

Id. at 107–08.

²¹⁸ See ELY, *supra* note 96, at 44 ("[J]udges [are] likely in a variety of legal contexts consciously or unconsciously to slip their personal values into their legal reasonings. From that earth-shattering insight it has seemed to some an easy inference that that is what judges ought to be doing.").

²¹⁹ *Id.* at 45.

²²⁰ *Lochner v. New York*, 198 U.S. 45, 53 (1905).

²²¹ *Adkins v. Children's Hosp.*, 261 U.S. 525, 546 (1923).

²²² *Lochner*, 198 U.S. at 53.

was reasonable.²²³ However, those challenging state laws restricting admission to the bar could counter the states' arguments by saying that bar passage and possession of a law degree are not reasonable exercises of states' police powers because they are not necessary to ensure the competency of the legal profession. The flaw in this contention is that saying a law is not *necessary* to accomplish an end is like saying it is not the least restrictive means, which is part of the strict scrutiny test. A law restricting freedom of contract need not be *necessary* to obtain a desired result, but must merely be a *reasonable way* of accomplishing an end. Thus, laws regulating admission to the bar would appear to be able to withstand a constitutional challenge under a Privileges or Immunities Clause that recognizes a fundamental right to contract.

IV. THE PROPER INTERPRETATION OF THE CLAUSE

Despite numerous possibilities regarding the Clause's meaning, one obtains perhaps the best interpretation when combining one of the previously mentioned interpretations with a hybrid of another previously discussed view. Ample evidence suggests the Privileges or Immunities Clause incorporates against the states the majority of the amendments commonly known as the Bill of Rights.²²⁴ Although the views of most mid-nineteenth century public figures remain unknown, a high probability exists that many of them thought privileges and immunities described the rights referred to in the Bill of Rights.²²⁵ Additionally, nineteenth century private citizens used the words "privileges" and "immunities" when speaking of such rights as freedom of speech and religion.²²⁶

Although the Clause accomplishes more than merely prohibiting states from favoring its own citizens over noncitizens, the possibility still exists that the Privileges or Immunities Clause requires equal application of either state laws or the rights it guarantees all American citizens, or perhaps both. Many accept the

²²³ *Adkins*, 261 U.S. at 546. This is a possible explanation for the Supreme Court's refusal to strike down many economic regulations that faced constitutional challenges during the early twentieth century.

²²⁴ See, e.g., *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting); Curtis, *supra* note 173, at 1132–34; Fairman, *supra* note 160, at 134. But see BERGER, *supra* note 162, at 134–56.

²²⁵ Curtis, *supra* note 173, at 1089. Moreover, many prominent Republicans involved in the Fourteenth Amendment's ratification debate argued that the Privileges or Immunities Clause would prohibit states from denying citizens the rights guaranteed in the Bill of Rights. *Id.* at 1133. Although subsequent court decisions refused to apply the Bill of Rights to the states, *id.* at 1134, many such decisions held that the Clause allowed states to determine the Fourteenth Amendment's meaning. See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1872) ("[W]e may hold ourselves excused from defining . . . privileges and immunities . . .").

²²⁶ See Curtis, *supra* note 173, at 1132.

view that the Fourteenth Amendment's Framers intended that the Amendment constitutionalize the Civil Rights Act of 1866. However, because the Amendment could secure equality in American society through the Equal Protection Clause,²²⁷ one must conduct further exploration in order to find an equal protection component to the Privileges or Immunities Clause.

Additional thought reveals that the scope of the Clause must contain an element of equal protection if it is to guarantee noncitizens any substantive rights.²²⁸ If a state could afford its own citizens a higher degree of protection of any substantive right guaranteed by the Privileges or Immunities Clause, it could at least partially deny noncitizens the opportunity to exercise this right within its borders. For example, should a noncitizen receive from a state lesser protection of her free speech rights, she would lose her "privilege" as a national citizen to speak freely.²²⁹ Similarly, were a state permitted to grant new state residents lesser benefits under its laws, it could effectively dispossess these residents of their right to travel.²³⁰

A proper interpretation of the Privileges or Immunities Clause would not permit the revival of *Lochner*. Although some of the Fourteenth Amendment's Framers undoubtedly intended that the Clause provide freedom of contract stronger protection than it currently receives, the historical evidence casts doubt on any suggestion that a sufficient number of Framers intended that the Clause protect economic liberties.²³¹ Moreover, given their lack of explicit textual support, granting these rights the same status as other fundamental rights seems to undermine the democratic process by shifting the determination of economic policy

²²⁷ Harrison, *supra* note 47, at 1410.

²²⁸ Although no good reason exists to doubt that the Fourteenth Amendment requires equal application of state laws to all citizens, the question is whether the Privileges or Immunities Clause or the Equal Protection Clause is the vehicle by which this occurs. *See id.* at 1433–54 (arguing that the Privileges or Immunities Clause requires equal application of state laws to both citizens and noncitizens, but acknowledging that conventional wisdom holds that the Equal Protection Clause performs this function). This question bears little, if any, importance to the inquiry at hand. The Privileges or Immunities Clause would not present state bar admission requirements a serious constitutional challenge should it require equal application of state laws to all citizens. *See supra* notes 139–55 and accompanying text (discussing the constitutionality of laws restricting bar admission under an antidiscrimination interpretation).

²²⁹ One should note that this equal protection element does not apply to all state restrictions on free speech or other substantive rights. A law equally restricting both citizens' and noncitizens' speech would not offend the Constitution on grounds that it denies equal protection. Nevertheless, it disallows the exercise of a right guaranteed by the Privileges or Immunities Clause.

²³⁰ Justice Stevens' *Saenz* opinion seems to endorse this principle. *See Saenz v. Roe*, 526 U.S. 489, 503–04 (1999) ("A citizen of the United States has a perfect constitutional right to . . . an equality of rights with every other citizen . . .").

²³¹ The differing views expressed in the majority and dissenting opinions of the *Slaughter-House Cases* suggests competing views on the breadth of the Fourteenth Amendment's protection. *See generally* The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

from state legislatures to the courts. Whatever the rights that find protection under the Privileges or Immunities Clause, liberty of contract does not seem to be among them.²³²

The Privileges or Immunities Clause covers those rights in the Bill of Rights,²³³ and also contains an equal protection element prohibiting states from granting its own citizens greater use of these rights. Accordingly, most state laws restricting admission to the bar would survive a constitutional challenge under the Privileges or Immunities Clause.²³⁴ However, a state's laws prohibiting out-of-state lawyers from practicing in that particular state appear unconstitutional under the right to travel as defined in *Saenz*. Although the elements identified in *Saenz* do not explicitly rule out the possibility that a state may prohibit noncitizens from working within its borders,²³⁵ the logical extension of the *Saenz* principle seems to render such laws unconstitutional.²³⁶ If a state bans lawyers who reside and hold bar membership in another state from performing legal work within its borders solely on account of citizenship, it denies them their right to travel. Such laws bestow upon out-of-state lawyers no opportunity to perform work in which state citizens can engage upon the fulfillment of bar admission requirements. Although states undoubtedly have an interest in ensuring the quality of legal work provided by out-of-state lawyers, this interest is not strong enough to deny a lawyer holding out-of-state bar membership the right to travel. Thus, the Privileges or Immunities Clause provides transactional lawyers the opportunity to serve their clients' legal interests in more than one state.

CONCLUSION

The Supreme Court's decision in *Saenz v. Roe* has caused many to speculate that the Privileges or Immunities Clause might play a future role in constitutional jurisprudence. Although some difficulty exists in determining the Clause's scope

²³² One must mention that the Clause's failure to guarantee economic liberties does not mean that it grants no protection to other unenumerated substantive rights, such as the right to travel.

²³³ The historical evidence behind the adoption of the Clause also suggests that it protects other substantive rights. See ELY, *supra* note 96, at 22–30; see also *Saenz*, 526 U.S. at 501 (holding that the Privileges or Immunities Clause “expressly protect[s]” the right to travel).

²³⁴ See *supra* notes 139–55, 162–84 and accompanying text (discussing the constitutionality of laws restricting bar admission under an antidiscrimination interpretation of the Privileges or Immunities Clause and the doctrine of incorporation).

²³⁵ Justice Stevens listed three ways in which a state could abridge a noncitizen's right to travel: (1) deny the right to “enter and to leave” that state; (2) treat her as an “unfriendly alien when temporarily present in the . . . State”; and (3) deny her “the right to be treated like other citizens of that State” should she take up permanent residence there. *Saenz*, 526 U.S. at 500.

²³⁶ Justice Stevens appeared to allow for the possibility that the right to travel includes other components in addition to the ones he identified. *Id.*

and the rights it might protect, prominent interpretations of the Clause provide little basis for striking down most state laws regulating admission to the bar. An antidiscrimination interpretation of the Clause requires that a state grant noncitizens the same rights under its laws that its citizens hold; accordingly, the only laws that would seem to face a serious constitutional challenge are ones allowing only state bar members the right to practice law in that state. Additionally, no good argument exists that state bar restrictions are unconstitutional under any of the Constitution's first eight amendments. Therefore, the doctrine of incorporation gives these laws no constitutional difficulties. Although an interpretation of the Privileges or Immunities Clause that mirrors *Lochner* presents these laws their strongest challenge, state laws regulating admission to the bar would likely survive, as they relate to the public's general welfare and are a reasonable exercise of a state's police powers.

The proper interpretation of the Privileges or Immunities Clause is that the Clause, in addition to protecting other rights, incorporates at least part of the Bill of Rights against the states and contains an element of equal protection requiring states to accord both citizens and noncitizens equal opportunity to exercise these rights. Under this interpretation, a state's laws allowing only state bar members the right to practice within that state's borders are unconstitutional under *Saenz* because they deny out-of-state lawyers the right to travel. Therefore, the Clause will allow transactional lawyers to provide legal representation in a state other than the one in which they hold bar membership.

Because of the many questions currently surrounding state laws regulating the bar and the possibility of the Privileges or Immunities Clause making an entrance onto the constitutional stage, a future constitutional challenge to these laws is a distinct possibility. Although this dilemma might present some judges with a temptation to attempt a judicial resolution of these issues, the desirability of such laws involves questions of the economic appropriateness of heavily regulating professions. Consequently, courts should, as much as the Constitution permits, leave the resolution of this issue to the institution where both the legal profession and consumers can voice their concerns — the legislature.

Wilson Pasley