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THE PARAMETERS OF CONSTITUTIONAL RECONSTRUCTION: *SLAUGHTER-HOUSE*, *CRUIKSHANK*, AND THE FOURTEENTH AMENDMENT

Robert C. Palmer*

I. INTRODUCTION

Substantive due process is the legacy of allegiance to precedents misunderstood and inadequately analyzed. The 1873 decision in the *Slaughter-House Cases*¹ has always appeared to nullify judicially the privileges or immunities clause of the fourteenth amendment of the United States Constitution.² The Court's reasoning in *Slaughter-*

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1. 83 U.S. (16 Wall.) 36 (1873). This article's analysis of *Slaughter-House* proceeds on the assumption that each opinion is logically consistent within itself until demonstrated otherwise. A traditional or seemingly natural deduction from an isolated passage cannot be probative if it runs contrary to the argument as a whole and if commentators can alternatively interpret the passage as consistent with that argument. Traditional analyses of *Slaughter-House* tend to focus on isolated statements without reference to the whole argument. The danger there is obvious. The danger here is attributing too much rationality and intellectual rigor to a particular Justice. For our legal system, however, the argument is more important than judicial reputation. That latter danger is thus the one that we should accept as a by-product of a legal system that demands reasoned explanations of judgments.

2. See J. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 107 (1983); R. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES* 10 (1981); C. FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1875*, at 184-85 (1939); H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 477-78 (1982); W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 432-33 (5th ed. 1980); L. LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* 193 (1975); R. MYKKELTVEDT, *THE NATIONALIZATION OF THE BILL OF RIGHTS* 15 (1983); 2 B. SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* 763 (1968); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-4, at 423 (1978); Beth, *The Slaughter-House Cases—Revisited*, 23 LA. L. REV. 487, 493, 497 (1963); Conant, *Antimonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined*, 31 EMORY L.J. 785, 789 (1982); McGovney, *Privileges or Immunities Clause—Fourteenth Amendment*, 4 IOWA L. BULL. 219, 230 (1918); Morris, *What are the Privileges and Immunities of Citizens of the*

House, however, demands a substantial role for that clause in adjudicating constitutional rights. In *Slaughter-House* the Supreme Court made its first and broadest consideration of a major new approach to analyzing the relationship between the states and the federal government. The Court also decided on a mode of constitutional interpretation that provided adherence to constitutional original intent even when socially there was no single, definable, original intent. In *United States v. Cruikshank*,³ only three years later, a somewhat differently constituted Supreme Court ignored the problem of original intent and misconstrued *Slaughter-House*. The inferior reasoning in *Cruikshank* thereafter prevented accurate interpretation and acceptance of the careful reasoning of *Slaughter-House*.⁴

This article analyzes both *Slaughter-House* and *Cruikshank* by focusing first on the reasoned construction of the fourteenth amendment suggested in *Slaughter-House*. Under the *Slaughter-House* reasoning, the fourteenth amendment incorporates enumerated liberties as privileges or immunities of United States citizenship which courts may enforce against the states. While adopting a moderate interpretation of the fourteenth amendment privileges or immunities clause, the *Slaughter-House* Court concomitantly adopted a restrictive construction of the due process clause. *Cruikshank's* rejection of the *Slaughter-House* approach led later Courts to construe expansively the due process clause. That process resulted in modern exaggerated constructions of the fourteenth amendment in decisions like *Roe v. Wade*.⁵

This article examines the development of constitutional doctrine from *Slaughter-House* to *Cruikshank* in three sections. The first section is a detailed analysis of Justice Miller's majority opinion in *Slaughter-House*, examining his reasoning and the derivation of his constitutional test. The second section analyzes the dissenting opinions in *Slaughter-House*, showing the radical and unacceptable nature of their arguments. The third section discusses how in *Cruikshank* Chief Justice Waite nullified the privileges or immunities clause without confronting the language or the intent of the fourteenth amendment.⁶ This article

United States?, 28 W. VA. L.Q. 38, 52 (1921); Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S.L. REV. (n.s.) 558, 576 (1878); Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552, 555 (1971). Two minor exceptions to the traditional interpretation are 2 W.W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 1128-30 (1953) and J. ELY, *DEMOCRACY AND DISTRUST* 196-97 (1980). See *infra* note 40. None of the commentators analyze the case as a coherent argument. The approaches run from selective quotation to the formulation of a series of propositions. None go through the entire opinion to ascertain what role each part of the opinion plays in the argument. The willingness to be content with superficial impressions is surprising.

3. 92 U.S. 542 (1876).

4. Tribe was so taken by Justice Waite's analysis that he used *Cruikshank* to explain *Slaughter-House*. See L. TRIBE, *supra* note 2, at 420.

5. 410 U.S. 113 (1973).

6. W. LOCKHART, Y. KAMISAR & J. CHOPER, *supra* note 2, at 433. Only for a brief period of time did the Court ever find that state legislation violated the privileges or immunities clause.

concludes that *Slaughter-House* embodies the Court's most rational handling of the fourteenth amendment. The *Slaughter-House* rationale required that the first eight amendments and much of article I section 9 of the Constitution apply as restrictions on state action through the privileges or immunities clause rather than through the due process clause. If the Supreme Court returned to *Slaughter-House* and restricted state action by using the privileges or immunities clause, the Court would avoid the problems of expansive construction of due process. The Court would once more be applying constitutional provisions of reasonably definite parameters.

II. *SLAUGHTER-HOUSE*: THE MAJORITY OPINION

In *Slaughter-House*, Justice Miller constructed a carefully circumscribed argument that coordinated the fourteenth amendment with the rest of the Constitution while according a proper and substantial meaning to the privileges or immunities clause. Justice Miller's was a middle course, defined and revised in response to vigorous criticism from the dissenting Justices.⁷ Miller intended the privileges or immunities clause to apply the first eight amendments and certain clauses of article I section 9 of the United States Constitution as restrictions on state action. The major problems in understanding the opinion, however, pertain to the derivation of the "existence and protection" test for fourteenth amendment protection and the influence of the comity clause.⁸

A. *Determination of Constitutional Purpose*

In *Slaughter-House* various Louisiana butchers argued that a Louisiana state-granted monopoly violated their thirteenth and fourteenth amendment rights under the United States Constitution. The monopoly granted one corporation the exclusive right to disembark cattle and to provide facilities for cattle slaughter in and around New Orleans. The butchers' thirteenth amendment claim was that the monopoly established an involuntary servitude by restricting the butchers' ability to work.⁹ Their fourteenth amendment claims focused on the infringement of their right to work by the grant of an unreasonably large monopoly. The butchers argued that the state-created monopoly violated

7. For dissenting arguments concerning the status of inhabitants of territories, frustration of the whole amendment, and an African-only approach, see 83 U.S. at 90, 96, 119. The arguments are answered at *id.* at 72, 79, 72 respectively. Furthermore, Field's criticism of Miller's use of *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), is not really pertinent to Miller's actual statements. See 83 U.S. at 76-77. The internal debate, of course, might have allowed Miller to anticipate the arguments in the dissents.

8. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

9. 83 U.S. at 49-51.

their privileges or immunities as United States citizens.¹⁰

None of the Justices doubted the state's right to exercise reasonably its police powers in such matters.¹¹ The majority, however, affirmed the decision of the Supreme Court of Louisiana and ruled that federal courts had no jurisdiction to review the reasonableness of the state action. Therefore the opinion insulated states from federal review, at least regarding grants of monopolies.¹² The subject matter of this case—an economic and unenumerated liberty instead of an enumerated liberty—was a major factor in the later distortion of Justice Miller's careful construction of the fourteenth amendment.

Although Miller determined the original intent of the Reconstruction amendments by a quasi-historical method, he modified this approach in two ways. To Miller, the wording and grammar of the actual amendments were always the best indicators of the amendments' purpose.¹³ He thus believed that interpretational problems presented by ambiguous or conflicting language were important even if the questions thus raised had not been foreseen in the course of adopting the amendment.¹⁴ Moreover, Miller believed that the historical setting derived from the Justices' personal knowledge should be applied only in choosing between two possible interpretations of the wording.¹⁵

Using this analytic approach, Miller dismissed the thirteenth amendment argument. That amendment prohibited slavery and other involuntary *personal* servitudes. The butchers' argument, based on inconvenience, payments to the monopoly slaughterhouse, and deprivation of their own slaughtering facilities, was classified not as a personal servitude, but as a property servitude.¹⁶ Even dissenting Justice Field, although sympathetic, was unable to support the thirteenth amendment claim.¹⁷

In contrast to the thirteenth amendment claim, the Justices were

10. *Id.* at 51-54.

11. *Id.* at 62-66, 87-88, 113-14. W. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900*, at 152 (1982) seems to say that the major dispute between Miller and Field was interpreting the facts. On the contrary, the major issue was the status of state governments.

12. 83 U.S. at 82-83.

13. Miller's careful analysis of the characteristics of citizenship and the consequent need to distinguish between state and federal privileges or immunities prove the priority of the language and grammar in his analysis. This priority is appropriate because the Supreme Court should not interpret the Constitution as emanating from the framers, the Congress, or the majority in the ratifying bodies, but rather from the people as a whole. If one accepts this view, analysis of the language is the only way to ascertain what the people wanted, because of the multitude of ambiguities and compromises embedded in adopting any constitutional provision.

14. Incorporation of the first eight amendments and article I, § 9 was not the social understanding of the effect of the privileges or immunities clause, even though some still argue that position. See R. MYKKELTVEDT, *supra* note 2, at 7-11. Such incorporation, however, is the only approach that reconciles the varied motivations behind the fourteenth amendment with the ambiguous language of the amendment, in that it places substantial new restrictions on states while retaining them as independent centers of social policy.

15. 83 U.S. at 68.

16. *Id.* at 69.

17. *Id.* at 89-90.

unable to agree on the historical purpose of the fourteenth amendment. The butchers' best argument rested on the privileges or immunities clause. However, this argument conflicted with the majority's historical interpretation of the fourteenth amendment. The majority reasoned that Congress passed the fourteenth and fifteenth amendments to invalidate Southern laws permitting the continued subjection of former slaves. The majority concluded that the purpose of all three amendments was thus the same: to assure the "freedom of the slave race." Miller argued that the amendments would not have been suggested had it not been for the race problem. Freedom of blacks was thus both the cause and the purpose of the Reconstruction amendments.¹⁸

The majority's determination of the purpose of the amendments was crucial to the *Slaughter-House* holding. At the close of his opinion,¹⁹ Miller considered and rejected an alternative interpretation of the purpose of the amendment: to change the entire relationship between federal and state governments. This was the purpose that Justices Field, Bradley, and Swayne perceived.²⁰ Enunciating the purpose as "freedom of the slave race" as opposed to "complete change of the federal system" provided substantial meaning for the amendment but dictated a restrictive reading. The racial freedom purpose, although not pertaining to blacks only,²¹ yielded a high threshold test: the fourteenth amendment would protect only those privileges or immunities that fell "necessarily" and "properly" within the provision's language.²² The protection had to accord with the judicially perceived purpose. Within that context, Miller began his clause-by-clause analysis of the fourteenth amendment.

18. As Miller wrote:

[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Id. at 71.

19. *Id.* at 82.

20. *Id.* at 95, 123, 129; see *infra* notes 64-65 and accompanying text.

21. See *infra* notes 22, 46-48, 57-58 and accompanying text.

22. The opinion states:

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. . . . [He includes explicitly Mexican peonage and Chinese coolie labor systems.] And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. . . . [I]t is necessary to look to the purpose. . . .

83 U.S. at 72. It is the thirteenth amendment context that gives this passage a racial-only tone, but even so the passage is a clear refutation of the "black-only" allegation levelled at Miller. See, e.g., J. BAER, *supra* note 2, at 107.

B. *The Privileges or Immunities Clause*

Miller and the dissenting Justices agreed that the fourteenth amendment citizenship clause determined how they would interpret the privileges or immunities clause. The historical context of the citizenship clause was that Congress added it to overrule the *Dred Scott* decision,²³ which held that a black man could not be a citizen of a state such that he could also be a citizen of the United States or receive the protections mandated by the Constitution.²⁴ The citizenship clause asserted two types of citizenship based on different characteristics. United States citizenship depended on birth or naturalization; state citizenship, on residency.²⁵ To Miller, the duality of citizenship in the first clause meant that the immediately succeeding privileges or immunities clause secured against state action only the privileges or immunities of citizens of the United States. There thus remained another category—privileges or immunities of citizens of a state—that received no additional protection from this part of the fourteenth amendment. Because Miller reasoned that the language and grammar of the amendment were controlling, he found this conclusion irresistible.²⁶

Miller first determined that the privileges or immunities of citizens of the United States did not automatically include every fundamental civil liberty.²⁷ He deduced from the duality of citizenship that each citizenship carried with it a different set of privileges or immunities. However, he did not take the further step and assert that the sets were discrete.²⁸ Miller used the immunities from *ex post facto* laws and bills

23. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

24. 83 U.S. at 73. I use only Miller's and Field's readings of *Dred Scott*. For a modern analysis, see D. FEHRENBACHER, *THE DRED SCOTT CASE* (1978).

25. 83 U.S. at 73 (quoting the Constitution: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside." U.S. CONST. amend. XIV, § 1).

26. Justice Field, for instance, agreed on the grammar but argued that the class of rights left to the states alone included only those rights that were incidental and non-fundamental in nature. 83 U.S. at 95, 98; see *infra* notes 83-87 and accompanying text.

27. In discussing *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), in the *Slaughter-House* opinion, Miller was not trying to define which rights remained to the states. Miller did not state his objective, but one may derive its limited nature from the sequence of the opinion—he did not reach his conclusion immediately after treating *Corfield*. His treatment of *Corfield* is thus very important, but not as crucial as most commentators believe. If there is logical coherence to his case—a necessary presumption—his objective was only to reject the fundamentality test. See *infra* notes 30-33 and accompanying text.

28. Miller made several assertions that have led people to conclude that he thought the sets were discrete. He stated that the *citizenships* are distinct. He characterized the plaintiffs' argument as resting on the assumption that the citizenship and resultant privileges and immunities were the same. He stated that, "If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested" 83 U.S. at 74-75. Lusky asserts, without documentation, that Miller took a further step. "Each type of citizenship, Federal and state, carries with it a distinct set of privileges and immunities and the two sets do not overlap, thus whatever is a privilege or immunity of state citizenship cannot be a privilege or immunity of federal citizenship." See L. LUSKY, *supra* note 2, at 191. This is a completely traditional product of a *Cruikshank* reading of *Slaughter-House*.

of attainder as prominent examples of immunities against governmental action that persons enjoy in the same relationship and character both as state citizens and as United States citizens.²⁹ There was thus necessarily a certain area where state immunities overlapped with federal immunities. His objective at this point, however, was merely to show that some fundamental rights remained solely within the sphere of the states. For Miller, this conclusion elucidated the general character of the nature of federal government. Miller simply argued that the privileges or immunities of state and United States citizenship are not identical.

Miller relied on the comity clause, as interpreted in *Corfield v. Coryell*³⁰ and affirmed in *Ward v. Maryland*,³¹ to establish the importance of rights left to the states. Miller easily turned to *Corfield*, because in both *Corfield* and *Slaughter-House* the right allegedly infringed was an economic right endangered by a state-granted monopoly. In *Corfield*, Judge Washington provided three criteria to identify those privileges and immunities of state citizenship that states had to grant to citizens of another state. The privileges and immunities must be "fundamental," possessed by citizens of all free governments as of right, and possessed continuously by state citizens since the United States's independence from Britain.³² Miller concluded that the privileges and immunities of a state citizen embraced "nearly every civil right for the establishment and protection of which organized government is instituted."³³ Since duality of citizenship dictated that the two sets of privileges or immunities were different, the fourteenth amendment did not automatically protect every civil right merely because it was fundamental.

Having dismissed a test based on the importance of the right concerned, Miller then defined how any privileges or immunities clause would operate. All the Justices felt that the privileges or immunities language of the fourteenth amendment and of the comity clause carried a similar meaning. Likewise, all the Justices agreed that a similar meaning dictated identical operation.³⁴ That identical operation presented Miller with the danger—and the dissenting Justices with the prospect—of an interpretation of the fourteenth amendment that would

29. 83 U.S. at 77.

30. 6 F. Cas. 546.

31. 79 U.S. (12 Wall.) 418, 430 (1871).

32. Judge Washington stated:

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.

6 F. Cas. at 551. For the accuracy of Miller's treatment of *Corfield*, see *infra* notes 69-77 and accompanying text.

33. 83 U.S. at 76. For Miller's misquotation of the comity clause, see *infra* notes 54-56 and accompanying text.

34. For Field's agreement, see *infra* notes 84-87.

transmute all fundamental privileges and immunities of a state citizen into privileges or immunities of United States citizens. Under such an interpretation, the fourteenth amendment alone, by construction and without unambiguous mandate, would then have completely overturned the federal structure established by the rest of the Constitution.

Miller obviated that danger by his construction of the 1869 decision in *Paul v. Virginia*,³⁵ which held that one state need not recognize special privileges conferred by another state. Thus, under the comity clause, while in state *B* a citizen of state *A* in addition to the *Corfield* tripartite test, was entitled only to those privileges and immunities common to citizens of state *B*. State *B* did not need to recognize special privileges granted in state *A*, such as corporate status and the associated rights. By Miller's construction of *Paul v. Virginia*, the comity clause did not create new rights in state *B*; it did not force any state to recognize rights granted by other states. Moreover, the comity clause did not prevent a state from restricting its citizens' rights as long as the state did not treat citizens of other states worse than its own citizens.³⁶ Miller used *Paul v. Virginia* to establish the manner in which the privileges or immunities clause would work: the fourteenth amendment clause would not automatically transmute into federal rights all important rights enjoyed by the citizens of the various states.³⁷

Miller derived from *Paul v. Virginia* an "existence and protection" test for determining the necessary and proper fourteenth amendment privileges or immunities.³⁸ Under this test, any right that owed its existence and protection to the federal government fell within the privileges or immunities clause; otherwise the right remained solely a privilege or immunity of a state citizen.³⁹ Later in the opinion, Miller concentrated solely on "existence" but did not alter the affect of the test.⁴⁰

35. 75 U.S. (8 Wall.) 168 (1869).

36. 83 U.S. at 77. Field's lengthy refutation emphasizes the importance of this part of the argument. See *id.* at 99-101.

37. Field would argue his way to the contrary conclusion. See *infra* note 87 and accompanying text.

38. 83 U.S. at 77. Here Miller is very careful not to exclude incorporation. He talks about the improbability of transferring the protection of "all the civil rights" and "the entire domain of civil rights" (emphasis added). Neither of those formulations would exclude partial transfer. Moreover, he was concerned only about those civil rights that had belonged "exclusively to the states." That would not include liberties expressed in the Constitution, even if there they were only partially protected. See *infra* notes 54-56 and accompanying text.

39. 83 U.S. at 77 (whether the rights of state citizenship "depended on the Federal government for their existence and protection. . .").

40. "But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws." *Id.* at 79. This was mere shorthand; I cannot perceive anything that would have changed had he also stipulated "protection" here. Crosskey maintains that assembly, petition, and habeas corpus rights were buried in the listing so that no one would notice them; the Court could thus ignore the matter at will. See 2 W.W. CROSSKEY, *supra* note 2, at 1128-30. Ely maintains that it is possible to read *Slaughter-*

Miller's "existence and protection" test may have been inappropriate to the factual circumstances of *Slaughter-House*. Rather, the test makes the most sense in the context of *Paul v. Virginia*, which focused on the creation of rights.⁴¹ The existence and protection language was perfectly appropriate for discussing corporate rights. Only state action brings a corporation into existence; a corporation cannot have preexisting or inherent rights. Corporate rights thus derive from governmental action. Both *Paul v. Virginia* and *Slaughter-House* involved a grant; to Miller, that similarity justified using the test. In *Paul v. Virginia*, however, the grant created the right claimed. In *Slaughter-House* the grant was made in violation of the right claimed. The rights claimed in *Slaughter-House*, moreover, were quite different from those in *Paul v. Virginia*. The *Slaughter-House* rights were deemed to be preexisting, either by natural law or by ancient common law. Miller, however, did not elucidate the provenance of his test; the propriety of the analogy never came into question. The "existence and protection" test, whether or not appropriate, determined the scope of the fourteenth amendment.

By applying that test, the Court excluded the rights claimed in *Slaughter-House* from fourteenth amendment protection. Some rights clearly depended on the federal government for their existence and protection. Miller identified several article I, section 10 provisions as privileges or immunities that the federal government assured against state action: security against *ex post facto* laws, bills of attainder, and laws impairing the obligations of contracts. The Constitution, however, provided no protection against states that unreasonably granted monopolies or hindered the pursuit of a common occupation. Such privileges or immunities, regardless of their fundamental nature, did not owe their existence or protection to the federal government. They fell within the exclusive cognizance of the states as a privilege or immunity of a citizen of that state.⁴² Fortuitously, that result coincided with Miller's perceived purpose of the fourteenth amendment: the butchers' claim had no relation to the purpose of "freedom of the slave race."⁴³ Miller thus derived a test based on case law that yielded an answer within his parameters. The right to pursue a common occupation free from unreasonable state-granted monopolies did not fall properly within the protection of the fourteenth amendment.

Miller reached his conclusion only rhetorically, but his point was well-made. At most, *Slaughter-House* concerned gross corruption exercised under the guise of the state's inherent authority to license matters of health and safety. On the face of the claim, there was no racial discrimination. The state courts and the ballot box may have been the

House in a way that would have the whole Court agreed on incorporation of the first eight amendments, but his comment seems based only on the listing. See J. ELY, *supra* note 2, at 196-97.

41. 75 U.S. at 178-81.

42. 83 U.S. at 77-78.

43. *Id.* at 78.

appropriate forum for redress. A holding for the plaintiffs would have subjected the whole range of state legislative activity to federal reasonableness review.⁴⁴ That result would not have merely reshuffled powers, but would have completely restructured the relationship between state and federal governments. State governments would have become incidental. Miller properly asked whether the fourteenth amendment could have been intended to transfer such massive authority to the federal government.

Miller then answered the dissenting Justices' allegation that his test nullified the privileges or immunities clause. He was convinced that the test would be improper if the clause played no role in constitutional adjudication. For Miller, constitutional provisions had to have substantial meaning. He listed three sources from which one might derive the privileges or immunities of United States citizens: the requirements of the national character of the federal government, the Constitution, and federal law. He then set down a list—intentionally incomplete⁴⁵—of the privileges or immunities that would fall within the fourteenth amendment under his test. Significantly, most of the privileges or immunities listed did not relate directly to the purpose of “freedom of the slave race”; the test, not the individuals or the right concerned, was primary.

In 1868, *Crandall v. Nevada*⁴⁶ listed the privileges or immunities that could be derived from the necessities of a national government. In *Crandall* the Court had not been concerned with any particular constitutional provision, but rather with the derivation of privileges or immunities from the general nature of the federal government. In other words, certain state practices would negate a national government. Under *Crandall*, these “national” privileges included the right of access to the federal government and sea ports, the right of a citizen of the United States to protection when abroad, the right to use navigable waters, and the right to enjoy rights secured by American treaties with foreign countries.

Miller did not limit fourteenth amendment privileges and immunities to the context of racial discrimination. Access to the federal government would have been relevant for accomplishing the “freedom of the slave race,” but the other rights were fairly irrelevant to that purpose. Nevertheless, Miller felt that other rights fell necessarily and properly within the scope of the privileges or immunities clause.⁴⁷ But these rights were already protected by the Court after *Crandall* without

44. A review of the reasonableness of state actions would not have retained the state character that the Court felt necessary. In some substantive areas, the states had to retain their position as independent centers of social policy formulation. Reasonableness review was the core of the Radical Republican position.

45. See *supra* note 40.

46. 73 U.S. (6 Wall.) 35 (1868) (majority opinion by Miller, J.).

47. See *supra* note 22.

reference to the fourteenth amendment. Had these rights been the sole content of Miller's version of the privileges or immunities clause, that portion of the fourteenth amendment would have been merely declaratory, a reaffirmation of the supremacy clause.⁴⁸ Miller's listing of national rights shows, at the very least, that Miller would not use the purpose of "freedom of the slave race" to tailor the scope of the amendment only to blacks. The general language of the amendment required that other matters would necessarily and properly fall into the scope of fourteenth amendment protection.

The major new restrictions on state action came from the privileges or immunities Miller derived from the Constitution. He clearly asserted that "the right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed [sic] by the Federal Constitution."⁴⁹ These are clearly not *Crandall* rights, not rights necessitated by the national character of the federal government. In his analysis, Miller listed the *Crandall* rights first in his three sources for determining privileges or immunities. He then considered the privileges or immunities derived from the Constitution, such as access to the federal government. Moreover, he specified that assembly, petition, and habeas corpus rights are drawn from the Constitution: thus, from the first amendment and article I, section 9. Prior to the fourteenth amendment, all three of these rights restricted only the actions of the federal government.⁵⁰ Miller could have listed other privileges or immunities more cautiously, but he did not even bother to repeat those privileges or immunities that prior to the fourteenth amendment the Constitution already assured against state governments: security against *ex post facto* laws, bills of attainder, and laws impairing the obligations of contracts.⁵¹ This listing, then, constitutes the best evidence of how Miller thought judges should apply his test and of the necessary effect of the fourteenth amendment privileges or immunities clause.

The listing of habeas corpus rights in particular renders untenable the traditional view that Miller construed the privileges or immunities clause as merely declaratory.⁵² That interpretation would have Miller positing some state interference with the federal right that the fourteenth amendment then forbade. The kind of interference normally assumed was state interference with access to courts to obtain the writs, but that would have been a *Crandall* right of access to federal government officials, not an article I, section 9 right.⁵³ The only way a state

48. U.S. CONST. art. VI, § 2.

49. 83 U.S. at 79.

50. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 248-49 (1833).

51. U.S. CONST. art. I, § 10, cl. 1; 83 U.S. at 77.

52. See, e.g., L. LUSKY, *supra* note 2, at 191-93.

53. *Crandall* rights are rights that citizens have merely as a correlate to the necessary powers of the federal government. Such rights were already protected against state interference. State obstruction of individuals attempting to obtain habeas corpus was handled not by article I, § 9,

could abridge the article I, section 9 habeas corpus right was to grant the federal government the power to suspend the issuance of habeas corpus writs beyond the named emergencies. Not only had that never been attempted, the suggestion is ludicrous on its face. Therefore, Miller could not have meant that the only effect of the privileges or immunities clause was to forbid states from interfering with already established federal privileges and immunities.

Miller's listing demonstrates that those privileges or immunities that prior to 1868 only restricted the federal government would now also restrict state governments. Therefore, in regard to habeas corpus, the fourteenth amendment forbids both federal and state governments from denying issuance of the writs except in the named situations. The rights to assemble peaceably and petition the government undergo the same transformation. Miller's listing of the rights comes clearly from the first amendment, since he says the rights are derived from the Constitution. He would have been quite clear had he been talking of petition and assembly in a *Crandall v. Nevada* fashion, as petitioning or assembling for a national purpose. The proper conclusion is that that kind of privilege or immunity that individuals had had against federal government action they now had against state government action. These privileges or immunities are directly related to the purpose of the fourteenth amendment. As with *Crandall* rights, however, once Miller formulated the test, he did not use the suggested purpose of the fourteenth amendment to select rights within the protected categories. The privileges or immunities enumerated in the Constitution would be incorporated via the privileges or immunities clause.

Miller thought the fourteenth amendment accomplished its purpose by a change in jurisdiction without creating any new rights.⁵⁴ Prior to the fourteenth amendment, individuals had a right to assemble. That right was protected in part by the federal government (against federal action and against all and sundry when the assembly was for a national purpose)⁵⁵ and in part by state governments (in all other cases of infringement). The right to assemble peaceably, by

but by the *Crandall* right of access to federal institutions. Article I, § 9 merely forbade the federal government's denial of habeas corpus; it did not vest in the individual a right against state obstruction, nor did it mandate that the number of federal courts be sufficiently large that citizens would have easy access to federal habeas corpus.

54. In his article, Morris tries to refute precisely this kind of perception. "Apparently the idea is that there is some sort of trans-substantiation of the 'right' into the personality of the beneficiary of it and it thereafter is his and ought to be exercisable in any aspect of his life." See Morris, *supra* note 2, at 46 n.40.

55. Regarding the right to assemble, the Court stated:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed [sic] by, the United States. . . . If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the sovereignty of the United States.

Cruikshank, 92 U.S. at 552-53 (note that the defendants in *Cruikshank* were private individuals).

virtue of the first amendment, owed its existence and protection in part to the federal government and was thus one of the privileges or immunities of United States citizens. The fourteenth amendment now forbade the states from infringing on those specified rights. The amendment completed federal jurisdiction in those matters but created no new rights as such. The difference between these matters and freedom from unreasonable monopolies was that the former were identifiable privileges or immunities of United States citizens.⁵⁶

The language of the amendment requires this conclusion, but so also does Miller's interpretation of the purpose of the fourteenth amendment. He previously had expressed his perception of the racial problem and the problem of post-thirteenth amendment southern legislation.⁵⁷ Part of that problem was that southern legislation also suppressed whites by denying them the ability to assemble, petition, speak, and exercise generally their civil liberties in favor of black freedom. "Freedom of the slave race" for Miller was necessarily *not* a "negro-only" formulation. And so he later affirmed.⁵⁸

In the headnotes to *Slaughter-House*, which he authored,⁵⁹ and in the next case decided by the Supreme Court, *Bradwell v. State*,⁶⁰ Miller confirmed that he approved of the completion of federal jurisdiction even though he disallowed the creation of new rights. The headnotes, for example, indicate the privileges or immunities clause granted new powers to the federal government.

The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the

56. For a treatment of the ninth amendment problem involved in distinguishing between enumerated and unenumerated rights, see *infra* note 74.

57. Miller previously had stated:

Show me a single white man that has been punished in a State court for murdering a negro or a Union man. Show me that any public meeting has been had to express indignation at such conduct. Show me that you or any of the best men of the South have gone ten steps out of their way to bring such men to punishment or to take any steps to prevent a recurrence of such things. Show me the first public address or meeting of Southern men in which the massacres of New Orleans or Memphis have been condemned or any general dissent shown at home at such conduct. You may say that there are two sides to those stories of Memphis and New Orleans. There may be two sides to the stories, but there was but one side in the party that suffered at both places, and the single truth which is undenied that not a rebel or secessionist was hurt in either case, while from thirty to fifty negroes and Union white men were shot down precludes all doubt as to who did it and why it was done.

Samuel Miller, Letter from Samuel Miller (Feb. 6, 1866) reprinted in C. FAIRMAN, *supra* note 2, at 192. His continual juxtaposition of "negroes" and "Union white men" indicates that he perceived the problem of "freedom of the slave race" as necessitating protection of certain civil liberties for whites also.

58. *Oral Argument on behalf of Defendant by S. W. Sanderson (Washington, 1883)*, at 24-25, reprinted in C. FAIRMAN, *supra* note 2, at 187. Fairman notes that after *Slaughter-House*, Miller did not suggest that "only discrimination against Negroes would be found to come within the purview of the Fourteenth Amendment." C. FAIRMAN, *supra* note 2, at 187. In *Slaughter-House*, he did not suggest that limitation either, except in reference to the equal protection clause. See *infra* note 63. It is possible to be misled in this by Miller's headnotes, but when read in full, the headnotes remain completely faithful to the text of the opinion.

59. *Slaughter-House*, 21 L.Ed. at 395. The authorship appears only in the *Lawyers' Edition*.

60. 83 U.S. (16 Wall.) 130 (1873).

National government, the provisions of the Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the fourteenth amendment.⁶¹

By saying that the fourteenth amendment now "placed" the privileges and immunities of national citizenship under the protection of Congress, Miller inferred that previously Congress did not have the power to protect them.

Even more explicit is Miller's majority opinion in *Bradwell v. State*. The Court denied a woman's fourteenth amendment claim to freedom from sexual discrimination in her application to the Illinois state bar. Miller applied his test rigorously, but noted explicitly that the fourteenth amendment had transferred some powers to the federal government:

[T]he right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not *transferred* for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.⁶²

Miller had no doubt whatsoever that the privileges or immunities clause of the fourteenth amendment had increased federal authority.

C. *The Due Process and Equal Protection Clauses*

Miller's interpretation of the privileges or immunities clause in *Bradwell v. State* clarifies his treatment of the due process and equal protection clauses of the fourteenth amendment in the *Slaughter-House* cases. The butchers had claimed that the monopoly deprived them of property without due process of law. Miller noted that neither federal nor state courts had ever considered labor to be property in this context. He then dismissed the butchers' equal protection claim. Miller believed that only a strong case would bring anything except state action against blacks within the reach of the equal protection clause.⁶³

61. *Slaughter-House*, 83 U.S. at 37.

62. *Bradwell*, 83 U.S. at 139 [emphasis added]. This case is usually cited as further evidence of the traditional interpretation of *Slaughter-House*, because Miller writes:

[t]here are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States.

Id. The mention of "relation and character" is appropriate once more because the right to admission to practice in a court really does flow from the government, much as do corporate rights. The mention of rights being "transferred" for their protection is sufficient to make it clear that Miller was not attempting merely to preserve the status quo. The specification that the right here "in no sense" depended on United States citizenship would distinguish it from the first eight amendments.

63. As Miller wrote:

We doubt very much whether any action of a state not directed by way of discrimination against negroes as a class, or on account of their race, will ever be held to come within the

These constructions seem ominously narrow to modern lawyers because expansive treatment of the language of these clauses has been so important in protecting personal liberties. But in Miller's eyes, his interpretation was neither narrow nor antilibertarian. He firmly believed that the burden of the purpose of the fourteenth amendment rested on the privileges or immunities clause.

D. *The Concluding Section*

Miller closed the *Slaughter-House* opinion with a few reiterative comments. Miller concluded that the fourteenth amendment did not contain a legislative purpose to destroy the general features of the federal system. Prominent among these features was state authority to regulate civil rights and to protect the rights of person and property. The broad statement of the fourteenth amendment allowed for some overlap between federal and state authority and also transformed certain rights. The federal system, however, did not maintain that states would control *all* civil rights or personal liberties.⁶⁴ Miller did say explicitly that the fourteenth amendment restricted states' powers, although he was not necessarily referring to the privileges or immunities clause.⁶⁵

E. *Miller's Quotations*

Miller's opinion was a moderate construction of the fourteenth amendment. This perception of his work should mollify the stringent criticism that Louis Lusky levelled at him. Lusky accused Miller of

purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

Slaughter-House, 83 U.S. at 80-81. Regardless of the quotability of this passage, it should not be used to characterize Miller's construction of the whole fourteenth amendment. See, e.g., J. BAER, *supra* note 2, at 107. Miller was here referring only to the equal protection clause; he talked immediately before about laws discriminating against blacks as a class and immediately after about "denial of equal justice."

64. Regarding the federal system, Miller noted:

The second clause protects from the hostile legislation of the States the privileges and immunities of *citizens of the United States* [emphasis in original] as distinguished from the privileges and immunities of citizens of the States.

These latter, as defined by Justice Washington in *Corfield v. Coryell*, and by this court in *Ward v. Maryland*, embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the *Federal Constitution*, under the care of the state governments.

Slaughter-House, 83 U.S. at 37 (emphasis added).

65. Miller stated:

[W]e do not see in those Amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights, the rights of person and of property, was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the Nation.

Id. at 82.

deliberately misquoting sources to nullify the fourteenth amendment.⁶⁶ Miller did misquote, but only to update his sources. Misquoting is not good academic or judicial practice, but neither is it diabolical. Analysis of the misquotations clarifies Miller's opinion.

Miller purposely misquoted the comity clause by substituting "of" for "in" in the phrase "Privileges and Immunities of Citizens in the several States."⁶⁷ Neither the parties nor the dissenting Justices made the same mistake; Justice Bradley even noted Miller's error.⁶⁸ Lusky asserted that the change allowed Miller to formulate his dual citizenship theory and to avoid any implication of article IV, section 2 fundamental rights held by individuals precisely as citizens of the United States prior to the fourteenth amendment.⁶⁹ In fact, this change only helped Miller to assimilate *Corfield* to the analysis. He could have assimilated *Corfield* in other ways. Nor was *Corfield* as crucial to Miller's argument as Lusky thought. Even Bradley noted that the mistake merely encapsulated the Court's traditional interpretation.⁷⁰ Had Miller quoted correctly, his opinion might have been modestly longer, but the misquotation was not necessary to his analysis. He was merely engaging in the admittedly reprehensible practice of updating constitutional language to convey better the traditional interpretation.

In addition to misquoting the Constitution, Miller did not quote *Corfield* completely. He closed the quotation before Justice Washington's mention of "the right of a citizen of one State to pass through, or to reside in, any other state" as a fundamental right.⁷¹ Lusky argued that, since the right to travel is a federal right, inclusion of the right to travel in the *Corfield* quotation would have rendered nonsensical Miller's use of that case.⁷² Miller's concern, however, was different. His own opinion in *Crandall v. Nevada* had already made travel for a national purpose a federal right. The *Corfield* language listing article IV section, 2 privileges and immunities was thus outdated. Other aspects of the right to travel, including the general *Corfield* right, would have presented a problem on which Miller was not inclined to rule.⁷³

66. Lusky stated:

The Miller interpretation limited almost to zero the power of Congress, under the three Civil War Amendments, to intervene in the relations of a state with its citizens in order to prevent a national interest from being subverted as a result of hostility or indifference on the part of state and local officials.

See L. LUSKY, *supra* note 2, at 193. Lusky disclaims the *ad hominem* argument, but that is difficult to believe after he accused Miller of intellectual dishonesty. *Id.* at 197. Lusky produced seven propositions summarizing *Slaughter-House*; of these seven, propositions two, three, and seven are stated incorrectly. See *id.* at 191-92.

67. U.S. CONST. art. IV, § 2.

68. 83 U.S. at 117.

69. L. LUSKY, *supra* note 2, at 194-95.

70. *Slaughter-House*, 83 U.S. at 117-18.

71. 6 F. Cas. at 552.

72. See L. LUSKY, *supra* note 2, at 195-96.

73. Regarding his disinclination to rule, Miller wrote:

We have given every opportunity for a full hearing at the bar; we have discussed freely and

By considering the right to travel, the Court would have widened the scope of the case and possibly would have raised the issue of the unenumerated rights of the ninth amendment.⁷⁴ Giving a wider scope to the fourteenth amendment would have overturned the character of the federal system, a decision Miller would not make without explicit constitutional mandate. For Miller, *Corfield* only demonstrated that states had significant independent duties regarding some fundamental rights. He limited the quotation to avoid complications that would have involved wider determinations, not to avoid matters that would have invalidated his use of *Corfield*.

Lusky conveniently neglected to note a further omission in the *Corfield* language that reinforces this relatively benign theory about Miller's handling of sources. Miller quoted *Corfield's* general definition of fundamental rights of state citizenship but omitted "the enjoyment of life and liberty" as a fundamental privilege.⁷⁵ Had Miller used *Corfield* to reach the conclusions asserted by Lusky, Miller would have included that phrase in the quotation as a privilege of state citizenship. But the life and liberty protections embodied in the first eight amendments and in article I, section 9 were now protected—so Miller thought—against state action. Miller thus omitted that clause from the middle of the quotation because protection of those fundamental privileges and immunities no longer depended on the states. Only a desire

compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed on the construction of these articles, so far as we have found them necessary to the decision before us, and beyond that we have neither the inclination nor the right to go.

83 U.S. at 67.

74. Miller did not address the question of whether the fourteenth amendment would affect the ninth amendment. The argument for incorporating ninth amendment rights is that unenumerated rights were being denied or disparaged precisely because they were unenumerated. Miller argued that fundamentality was not the test, and that the states still protected some rights that were every bit as fundamental as those the federal government protected. The enumeration determined only a jurisdictional question, and there was no reason to suspect—given equal protection of the laws—that states would be any more oppressive in the future regarding unenumerated rights than they had been at the time the Bill of Rights was adopted. The incorporation of the ninth amendment would have defeated the general nature of the federal government as one of delegated powers. Rejection of the test of fundamentality and preservation of the ninth amendment and the character of the federal government as a government of delegated powers are essential to preserve the stringent character of individual liberties, if constitutional law is to proceed logically.

75. *Slaughter-House*, 83 U.S. at 76. The relevant portion of *Corfield* with omissions indicated in brackets is as follows:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government[; the enjoyment of life and liberty], with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. [The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state.]

6 F. Cas. at 551-52.

to update rather than a dishonest urge to conceal can be consistent with this omission. Miller regarded *Corfield* not as an authority that validated his argument, but as a source of good language and a point of common understanding.

Miller likewise studiously avoided using the Civil Rights Act of 1866 to interpret the fourteenth amendment.⁷⁶ Miller did incorrectly state that Congress had never attempted to define the rights of United States citizens even though the 1866 Act was undeniably such an attempt. Miller's exclusion of the 1866 Act, however, is bothersome only if one assumes he was dishonest. Two other perhaps nonexclusive possibilities are conceivable. Miller may have viewed the movement resulting in the 1866 Act as culminating in the fourteenth amendment, so that the 1866 Act was not an independent effort to define the rights of citizenship. More likely, however, Miller perceived that the widespread conviction that the 1866 Act was unconstitutional necessitated the fourteenth amendment.⁷⁷ The enactment of the fourteenth amendment could be taken—properly or improperly—as affirming the view that the Act was unconstitutional and should be ignored. The allegations of dishonesty, then, come to nothing, because Miller's argument gained nothing from the misquotations. If anything, the *Corfield* misquotation supports a more favorable interpretation of Miller's intentions.

Miller rested his analysis of *Slaughter-House* primarily on the privileges or immunities clause. His historical perceptions defined the general direction the Court would follow with these amendments. Searching analysis of the wording of the fourteenth amendment focused attention on the close definition of "privileges or immunities of citizens of the United States" as distinct from those of a citizen of a state. He rejected fundamentality as the basic test for fourteenth amendment protection and chose instead the "existence and protection" test. That choice allowed Miller to preserve exclusive state jurisdiction over a substantial range of civil rights matters while still accomplishing the purpose of the fourteenth amendment. He nevertheless shaped his opinion to the individual case. The transformation of the first eight amendments and article I, section 9 into restrictions against the states awaited a relevant case. When such a case, *Cruikshank*, came before the Court, however, Waite abandoned Miller's reasoning. But the *Slaughter-House* opinion remains as an argument that must be taken seriously. *Slaughter-House*, while not a monumental achievement of judicial clarity, is a persuasive interpretation of the fourteenth amendment.

76. See L. LUSKY, *supra* note 2, at 196.

77. *Id.* at 197.

III. *SLAUGHTER-HOUSE*: THE DISSENTS

In *Slaughter-House*, Justices Field and Bradley argued for a revolution in the relationship between state and federal governments. Prior to the fourteenth amendment, state governments possessed inherent authority, whereas the federal government exercised only delegated powers. It is only minor exaggeration to say that the Field-Bradley interpretation of the fourteenth amendment would have made the federal government a government of inherent authority. Their dissents explicitly relegated states to incidental status. Unlike Miller, Field and Bradley had no qualms about using one amendment to change the whole structure of American government. They are called Radical Republicans for a reason.

A. *Justice Field's Dissent*

Field agreed with much of Miller's method, even in some areas where modern commentators would disagree with Miller. He agreed on the importance of *Corfield*⁷⁸ and of the citizenship clause of the fourteenth amendment.⁷⁹ Likewise, he agreed that the fourteenth amendment created no new rights.⁸⁰ He also agreed that the privileges or immunities language of the fourteenth amendment and of the comity clause must have similar meanings and similar effects. Justice Field even settled for an "existence and protection" test. Given such agreement on the factors shaping his dissent, Field's almost total opposition to Miller may seem surprising. Unlike Miller, Field believed that through the fourteenth amendment the federal government assumed ultimate responsibility for all civil and personal rights of its citizens.

Field, like Miller, said that the outcome of the case depended on the recent constitutional amendments, and particularly on the fourteenth amendment. Because Field ultimately concluded that the federal government could right any infringement whatsoever of a citizen's fundamental privileges or immunities, he first demonstrated that the butchers had suffered a legal wrong. He acknowledged states' inherent police powers but maintained that the state exhausted its powers by providing for the inspection of meat and prohibiting the slaughtering of animals except below the city of New Orleans. To Field, any further legislative grant was unnecessary and unreasonable.⁸¹ Nor could the state rely on any alleged similarity to grants of monopolies for bridges, ferries, and similar services. These latter grants had a public character; slaughtering animals, on the other hand, was merely an ordinary private economic calling. Rhetorically, Field opined that, if the *Slaughter-*

78. *Slaughter-House*, 83 U.S. at 97; see *infra* note 86 and accompanying text.

79. 83 U.S. at 95; see *infra* note 83 and accompanying text.

80. 83 U.S. at 96 ("The Amendment does not attempt to confer any new privileges or immunities upon citizens. . . .").

81. 83 U.S. at 87. See also W. NELSON, *supra* note 12, at 151.

House grant was allowed to stand, states could ban in perpetuity any ordinary calling. Having thus faced Armageddon, he tried to erect a fourteenth amendment protection against deprivation of such rights.⁸²

Field's analysis of the citizenship clause departed significantly from Miller's. *Dred Scott* was indeed part of the essential background to understanding the clause by declaring that "people" in the Constitution did not mean "people" but "citizens," with the result that blacks could not be citizens in the sense used in the Constitution. Field was unwilling to abide by that result. He said that the fourteenth amendment recognized, rather than created, a United States citizenship distinct from state citizenship. That recognition accorded priority to United States citizenship and relegated state citizenship to incidental status. A citizen of a state was merely a United States citizen who happened to reside in a particular area.⁸³

By relegating state citizenship to incidental status, Field achieved a far-reaching effect for the privileges or immunities clause. All fundamental privileges or immunities of a free man or citizen were transformed and now derived from a person's status as a United States citizen. The states, being only incidental in nature, could in no way impair any of those rights. Residence in a given state would have as little relevance to important rights as residence in any given town. Since the rights no longer depended on the state, no longer owed their existence and protection to the state, the rights were no longer within the exclusive control of the state.⁸⁴ Field thus turned the "existence and protection" test against state control after putting a different and revolutionary emphasis on the citizenship clause. Field next used rhetoric to justify his far-reaching conclusion. What had occasioned, he asked, all the commotion surrounding the amendment if such a change had not been intended? And for what other purpose could it have

82. 83 U.S. at 88-89.

83. Field stated:

The first clause of the fourteenth Amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any state or the condition of their ancestry. A citizen of a state is now only a citizen of the United States residing in that state. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any state. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the state, or city, or town where he resides. They are thus affected in a state by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the state, or by the residence of the citizen therein. They do not derive their existence from its legislation, and cannot be destroyed by its power.

Id. at 95-96. This passage is quite explicit in maintaining that state governments are no more relevant to essential rights than are town governments. Field would thereby demolish the federal structure in favor of a purely national government.

84. *Id.*

been drafted?⁸⁵

Field then discussed the definitional and operational continuity between the comity clause and the fourteenth amendment. He applied the *Corfield* list of fundamental rights directly to the privileges or immunities clause of the fourteenth amendment. Since civil and personal rights no longer depended on the states, the *Corfield* list of the rights of state citizenship was no longer relevant for article IV, section 2 determinations. Rather, *Corfield* was a guide to defining the privileges or immunities of United States citizens. Field reinforced this conclusion by referring to the rights listed in the Civil Rights Act of 1866—the forerunner of the fourteenth amendment—and by the traditional *Corfield* interpretation of the comity clause.⁸⁶

The operational continuity between the comity clause and the fourteenth amendment mandated an extensive federal jurisdiction. The comity clause had protected citizens of state *A* from the hostile and discriminatory legislation of state *B*. For Field, the fourteenth amendment operated in the same way. Since state citizenship was incidental, the fourteenth amendment would forbid discrimination between any two United States citizens regardless of any consideration of state citizenship. Field's analysis dictated that no state could create a monopoly that unreasonably excluded citizens from an ordinary calling.

Field thus almost reversed the roles of state and federal governments. Under his view, all state legislation would be open to federal review; no state could impair the liberties of its citizens, regardless of motivation or equal treatment. Field's view would have revolutionized the entire structure of the federal system. The privileges or immunities clause of the fourteenth amendment would transform and universalize the comity clause and thereby eliminate states as centers of social policy.⁸⁷

Field's deductions followed quickly from his interpretation of the

85. Field wrote:

If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage.

Id. at 96. By rights that were "specially designated in the Constitution" Field may have been thinking of those rights specified in article I, § 10. Miller's mention of the rights he derived from the Constitution indicates that Field was wrong in this interpretation of the majority opinion.

86. *See id.* at 97-98.

87. In the *Slaughter-House* case, Field stated:

What the clause in question did for the protection of the citizens of one state against hostile and discriminating legislation of other states, the 14th Amendment does for the protection of every citizen of the United States against hostile and discriminating legislation, against him in favor of others whether they reside in the same or in different states. If under the 4th article of the Constitution, equality of privileges and immunities is secured between citizens of different states, under the 14th Amendment the same equality is secured between citizens of the United States.

Id. at 100-01. Here again it is apparent that Field was eliminating state borders as relevant to fundamental rights.

fourteenth amendment clauses. English common law and the civil law—this was a Louisiana case—both classified freedom from unreasonable monopolies as a civil right. The federal government had the authority under the fourteenth amendment to right all state-committed wrongs that affected important civil rights. The *Slaughter-House* monopoly thus violated the fourteenth amendment.⁸⁸ Field closed with a ringing assertion of the character of United States citizenship: "This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States."⁸⁹ The idealism is attractive, but its value as constitutional interpretation is questionable. Field intended to transform into a federal right every important right, privilege, and immunity held by an individual against state activities. The Supreme Court would have become a perpetual censor of all state acts; Congress would have had legislative competence in every sphere but the trivial.

B. Justice Bradley's Dissent

Bradley's dissent reinforced Field's, but his treatment of the enumerated rights, of the rights of inhabitants of territories, and of the effects of the radical position deserve separate comment. His exhaustive list of the privileges and immunities of the Bill of Rights and the right to habeas corpus procedure provided clear support for a theory of incorporation.⁹⁰ But Bradley was no precursor of Justice Black; he did not believe in incorporation. The enumeration of the rights was inconsequential. For Bradley, the privileges or immunities clause protected all civil and personal liberties equally.⁹¹ Bradley wanted to use the fourteenth amendment to restructure completely governmental relations.⁹²

Bradley's most intriguing argument concerns the nature of the rights of inhabitants of federal territories and those made citizens by naturalization or annexation of territory before they became citizens of a state. Like angels for medieval philosophers, territorial inhabitants

88. *Id.* at 101-09.

89. *Id.* at 109-10.

90. Bradley stated:

But others of the greatest consequence were enumerated, although they were only secured, in express terms, 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*. These, and still others are specified in the original Constitution or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.

Id. at 118-19.

91. *Id.* at 119. ("But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are.")

92. See *id.* at 123. See also W. NELSON, *supra* note 11, at 71.

presented the crucial problem in a pure form. In the majority opinion, Miller considered the issue and settled it only as far as it impinged on his own argument. For Miller, the fourteenth amendment overturned the prior doctrine that individuals had federal rights only by virtue of state citizenship. Under the prior doctrine, if territorial inhabitants were not state citizens, they had none of the enumerated rights.⁹³ In his dissent, Bradley maintained otherwise and agreed with Field that there had always been a distinct citizenship of the United States. The privileges or immunities of United States citizens could be ascertained by examining the acknowledged privileges or immunities of inhabitants of territories who were United States citizens but not citizens of a state.⁹⁴

Miller did not argue that the status of the rights of territorial inhabitants after the fourteenth amendment was relevant to *Slaughter-House*, which concerned a right not enumerated in the Constitution. But as an index for post-fourteenth amendment privileges and immunities of United States citizens, the status of territorial inhabitants would seem a determinative argument. The privileges or immunities necessarily enjoyed by such citizens include habeas corpus and the first eight amendments as privileges or immunities of United States citizens. Although Bradley's argument was not determinative in *Slaughter-House*, he made Miller confront the problem squarely. This argument is a further reason for believing that at the time of *Slaughter-House* Miller would have included the first eight amendments and the various relevant portions of article I, section 9 within the protection of the privileges or immunities clause of the fourteenth amendment.

Bradley, despite his superficial agreement with Miller on this point, was a radical. He supported the butchers on the basis of the privileges or immunities clause, the due process clause, and the equal protection clause. He castigated Miller for a restrictive reading of the due process clause⁹⁵ and implied that Miller wanted to nullify the amendment. That implication served as a counterpoise to Bradley's defense of the radical position. He admitted that some feared that the radical interpretation would lead to massive congressional intervention in the internal affairs of the states. He dismissed those fears by asserting that the courts, not Congress, would normally handle the relevant matters. The fundamental rights, in his view, would soon become so well known that little litigation would arise. The fourteenth amendment would largely be self-executing.⁹⁶

Bradley's capacity for optimism was extraordinary. Modern lawyers will see Miller's caution about federal power to review state legislation on the grounds of reasonableness as a much more realistic

93. 83 U.S. at 72-73.

94. *Id.* at 119.

95. *Id.* at 122-23.

96. *Id.* at 123-24.

evaluation of the probable effects of Bradley's construction. But Bradley's portrayal of Miller's opinion made it easier for later courts to read Miller's opinion very superficially. Bradley—and more so, Justice Swayne⁹⁷—clarified the radical nature of the dissents.

C. *The Majority-Dissent Differences*

The difference between the majority and the dissenting opinions in *Slaughter-House* is not the difference between a complete nullification of the amendment and a reasoned implementation. Miller's interpretation was moderate. His construction flows from the language of the amendment itself and from certain assumptions shared with the dissenters. It reflects a realistic purpose for the fourteenth amendment and uses the privileges or immunities clause in an expansive role to secure liberties that attach to United States citizenship. But without explicit language authorizing so radical a change, Miller refused to use the fourteenth amendment to restructure completely the federal system. The dissenters would have used the fourteenth amendment as a lever for exactly that purpose. State governments would no longer have served as a check on federal authority. Even Justice Bradley did not really deny that far-reaching consequences *could* occur as a result of the radical construction. He only said that such things *would* not happen, not that they could not. Miller's realism was far more sensible.

IV. *CRUIKSHANK*

A. *Background*

*United States v. Cruikshank*⁹⁸ accomplished the nullification of the fourteenth amendment that scholars traditionally attribute to *Slaughter-House*. Chief Justice Waite, not a member of the *Slaughter-House* Court, wrote the opinion. He misread *Slaughter-House* and began his analysis on the principle that state and federal privileges and immunities were absolutely distinct. Without directly analyzing the fourteenth amendment, he derived a multiplicity of jurisdictionally defined rights. This approach was suggested by and was appropriate to corporate rights, but was not appropriate for those rights contained in the Bill of Rights. Waite thereby deviated from the traditional approach that insisted that individuals had inherent liberties which did not derive from governmental grants. *Cruikshank* has neither the moderation nor the modest respectability of *Slaughter-House*.

97. See *id.* at 124-30. Swayne's dissent adds little to the argument. He would have placed the analytic burden on the due process clause, particularly on the meaning of "liberty" and "property." He forthrightly acknowledged the revolutionary effect of his construction. *Id.* at 129. ("It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused.")

98. 92 U.S. 542 (1876).

Cruikshank, another Louisiana case, concerned a sixteen-count indictment under the Civil Rights Enforcement Act of 1870. The prosecution alleged that the defendants banded together and conspired to deprive black citizens of their constitutional rights. The only rights specifically named in the indictment were assembly, petition, and the bearing of arms.⁹⁹ The rights of assembly and petition were precisely those rights listed in *Slaughter-House* as privileges or immunities of United States citizens. The Supreme Court quashed the indictment for insufficient specificity, and the analysis correctly focused on whether the fourteenth amendment guaranteed the rights listed in the indictment.

Waite wanted to demonstrate the distinction between state and federal governments. Accordingly, he wrote in terms of powers, arguing that there was absolutely no overlap between state and federal powers.¹⁰⁰ He concluded that the duty to protect was strictly limited by the power possessed.¹⁰¹ Waite's stress on the duty to protect indicates the more restrictive interpretation he followed. Justice Waite used the analogy of the situation in which a single act made a person amenable to both federal and state jurisdictions, such as a breach of the peace by resisting a federal officer serving process within a state jurisdiction. That dual liability, he explained, did not indicate any overlap of powers; it derived solely from different aspects of that act. To Waite, the aspects of the act were completely different in character.¹⁰² Thus, he concluded that there was a necessary and absolute divergence between the rights of a state citizen and those of a United States citizen.

B. Aspect Analysis

Waite analyzed the subject matter of the indictments by dividing

99. *Id.* at 548.

100. In *Bradwell*, the court uses power terminology. See 83 U.S. at 139. See *supra* note 62 and accompanying text.

101. As Waite concluded:

The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. . . . The duty of a government to afford protection is limited always by the power it possesses for that purpose.

92 U.S. at 549. He added: "The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not." *Id.* at 550.

102. Waite noted:

True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a Marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. . . . This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. . . . No rights can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

Id. at 550-51.

each right into its component aspects. He identified, for example, three different rights of peaceable assembly (or petition or bearing arms). There was the first amendment right: the privilege or immunity of a United States citizen to assemble peaceably without interference from the United States government or its officials. As explained previously,¹⁰³ the only way a state could interfere with this right which was directed only against the federal government, was to grant the federal government the power to interfere with individuals attempting to assemble peaceably. Since the adoption of the first amendment, of course, this aspect of the right to assemble peaceably was secure against state action.

The second right of assembly was assembly for a national purpose.¹⁰⁴ This right did not come from any provision in the Constitution, the Bill of Rights, or the fourteenth amendment. It came from the necessities of the national government, as in *Crandall*.¹⁰⁵ This variety of assembly was only a relatively small proportion of all possible assemblies: the purpose of the assembly had to be related to the national government, such as an assembly to petition the national government about a grievance. The second right of assembly, however, was protected both against state action (as it would be through the fourteenth amendment) and against all and sundry.¹⁰⁶ This additional scope of protection reinforced its distinction from the first amendment right. This right, closely related to the analysis in *Crandall*, did not need fourteenth amendment protection, although the fourteenth amendment might provide a convenient source for further protection. These first two rights of assembly antedated the fourteenth amendment, but were the only rights of assembly Waite acknowledged as being held by citizens of the United States. Therefore, under Waite's analysis, the fourteenth amendment had been only declaratory in this regard.

The third right of assembly was the general right, that is, assembly for all purposes other than federal, and protection against interference by both fellow citizens and state governments.¹⁰⁷ Waite maintained that this aspect of the right of assembly was not a privilege or immunity of a United States citizen, because, utilizing the *Slaughter-House*

103. See *supra* note 53 and accompanying text.

104. 92 U.S. at 552-53.

105. See *supra* notes 46, 53 and accompanying text.

106. Regarding the right to assemble, the opinion stated:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed [sic] by, the United States. . . . If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States.

92 U.S. at 552-53. This means that by a *Cruikshank* interpretation, such an assembly is under the protection of the federal government against all and sundry, not just against state action. The protection, however, does not originally derive from the fourteenth amendment.

107. *Id.* at 552.

"existence and protection" test, the right fell under the protective powers of the states. Waite fortified this conclusion by referring to the rule in *Gibbons v. Ogden*: if the power had not been delegated to the federal government, it remained with the states.¹⁰⁸ Waite therefore concluded that the general right of peaceable assembly remained a right of state citizenship, outside the protective scope of the fourteenth amendment.

After dividing the rights according to their different jurisdictional aspects, Waite subjected each of these "mini-rights" to the *Slaughter-House* test. But here, Waite refrained completely from quoting the fourteenth amendment. He did not base his argument on the language of the privileges or immunities clause. He made no attempt to explain the privileges or immunities clause or the comity clause. Waite quoted the fourteenth amendment only when considering equal protection and due process rights.¹⁰⁹

Justice Waite chose to ignore the careful analysis in *Slaughter-House*. He only cited *Slaughter-House*, inaccurately, to support his assertion that the rights of state and United States citizens necessarily diverged absolutely.¹¹⁰ As a result, he based *Cruikshank* on a mere impression derived from *Slaughter-House*. Because aspect analysis would leave the privileges and immunities of United States citizens unchanged from what they were prior to the fourteenth amendment, Waite managed to deprive the clause of all significance. He thus rejected the force *Slaughter-House* had found in the fourteenth amendment and adopted the conservative portion of the *Slaughter-House* analysis that only made sense with a powerful privileges or immunities clause. Under Waite's aspect analysis, the conclusion of the case was inevitable. The Court held that the indictments in *Cruikshank* did not allege interference with any right of United States citizenship.

C. *The Character of Rights*

Waite's characterization of rights and the conclusions he drew from that characterization were severely flawed. His use of aspect analysis yielded an inadequate perception of American rights. Jurisdictionally defined rights—the mini-rights of his opinion—were the equivalent of government-granted rights, a conceptualization completely contrary to the perception of rights in late eighteenth-century America. Moreover, even on its own terms, Waite's argument was carelessly drawn and lacking in insight. But the opinion did correspond to the lawyer's instinct to regard rights in relation to the jurisdiction and thus to ignore rights when jurisdiction is absent. The sole virtue of that approach, however, is the restraint it puts on lawyers, who must function within a given jurisdictional system; the pragmatism

108. *Id.* at 551-52.

109. *See id.* at 549.

110. *See id.* at 554.

of the approach prevents wasteful expenditure of client's resources. Convenience and pragmatism, nevertheless, do not always yield correct constitutional interpretation. They certainly did not here.

Rights can either be conceptualized as inherent or as granted by government; Waite's choice of jurisdictionally defined rights opted for the latter. But late eighteenth-century Americans would have rejected vehemently any formulation that made rights derivative of governmental provisions. To the significant extent that the colonists fought the Revolutionary War to secure liberty, they were fighting to maintain rights that the British government did not protect, that the government had not granted the colonies. Americans decisively rejected the idea that rights only derived from governmental grants. That rejection entailed the acceptance of a view of rights based on natural law and thus inherent in individuals. The acceptance of this conceptualization was the major and probably the sole contribution of natural law to the Constitution.

For Americans' personal rights inhered in individuals and were thus decisively different from corporate rights. Rights to assemble peaceably, to petition, and to bear arms were unitary, not fragmented rights. They were merely protected in different ways by different governmental bodies. Even today that perception remains; it appears regularly when Americans evaluate foreign governments as oppressive. If rights are inherent, aspect analysis is intrinsically improper.

Cruikshank's success derives at least in part from the way in which Waite used classical theory in his analysis. That the Bill of Rights acted as a restraint only on the federal government was venerable doctrine. Waite reasoned that, because the federal government was a government of delegated powers and not a government of inherent authority, the designed rights eliminated any authority. The rights enumerated in the Bill of Rights were merely exceptions to powers.¹¹¹ If the Bill of Rights worked merely to cut powers short, to eradicate completely federal power in certain areas, and to put an absolute limit on the extent of national power, then the Bill of Rights could not act as a grant of power.¹¹² It could not act as an authorization to the federal government to protect the various enumerated rights. Thus far, Waite's argument could not be faulted. It is in fact improper to talk of rights as trumps to powers except in regard to a government of inherent authority. Trumping implies that the government has the power to act in an area unless an adversely affected party objects. There are, however, areas in which the federal government simply has no power to act, regardless of the quiescence of those affected.¹¹³ Treatment of the

111. 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 912 (1971) (amendments proposed by New York), 1029-31 (Madison proposing the amendments to Congress).

112. 92 U.S. at 551-52.

113. P. BOBBIT, *CONSTITUTIONAL FATE* 146 (1982).

liberties in the Bill of Rights as exceptions to powers had an impeccable ancestry.

Waite based his test for fourteenth amendment protection directly on that analysis, without considering the purpose of the fourteenth amendment, the analogy to article 4, section 2, or the analysis of *Slaughter-House*. Waite demanded that a right be created, be protected, and receive guaranteed, continuous protection from the federal government to be accorded fourteenth amendment privileges or immunities status.¹¹⁴ That test was functionally equivalent to the *Slaughter-House* test, although it reflected the *Paul v. Virginia* origins of the *Slaughter-House* test;¹¹⁵ now amplified by Waite's preference for jurisdictionally defined rights, it adhered slightly more to a corporate formulation. Classical theory, then, forbade thinking about the Bill of Rights as a grant of powers. The classical approach reinforced aspect analysis which distinguished between the general right and the right as against the federal government. Application of the test yielded the plausible conclusion that the general rights—of assembly, petition, or bearing of arms—gained no further security from the Bill of Rights. Therefore, the general right remained unaffected by the fourteenth amendment.

Waite discussed the matter of general rights only in an easy context: an individual whose rights had been violated. Any affected individual had to sort through the various jurisdictions for the appropriate forum. He would find no help in federal courts for infringements of the general right (at least under aspect analysis or before the fourteenth amendment). Waite admitted willingly that a single act could render a person amenable to both state and federal jurisdictions. Thus, a federal officer could breach the peace, a state offense, while interfering with a peaceable assembly, a federal offense. That different aspects of a single act could constitute different offenses in different jurisdictions seemed compatible with legal practice and was thus acceptable to lawyers.

Even granting his theoretical assumptions, however, Waite's analysis was incorrect. The general rights received additional protection from having been enumerated in the Bill of Rights. The federal government acts on states as well as on individuals. One of the problems

114. Waite stated:

[We must] ascertain whether the several rights . . . are such as had been in law and in fact granted or secured by the Constitution or laws of the United States. . . . It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection. . . . The right was not created by the Amendment; neither was its continuance guarantied [sic], except as against congressional interference. This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.

Id. at 551-53. Waite then defined the claimed rights as arising under internal police powers.

115. See *supra* notes 35-36 and accompanying text.

that necessitated the Bill of Rights was the possibility that federal oppression of individuals could nullify states as independent centers of social policy. Such action was possible through any of the delegated powers; James Madison utilized the examples of the powers to tax and to make treaties. Under the former, prior to the adoption of the Bill of Rights, Congress might have authorized the use of general warrants.¹¹⁶ Under the latter, the federal government might have abolished the right to bear arms or might have established a religion to appease an enemy.¹¹⁷ Such federal action would have abolished the general rights. The first and second amendments, however, precluded any such federal action. The Bill of Rights thus provided additional protection for the general rights. This additional protection would not have made the federal government the primary protector of these rights. Under Waite's analysis, until the fourteenth amendment, states still could have restricted such rights of their own citizens. Nevertheless, Waite was clearly wrong when he asserted that these rights gained no additional security from the federal constitution.¹¹⁸ Even under Waite's analysis, then, the enumerated rights in the Constitution should have been privileges and immunities of United States citizens in the sense required for fourteenth amendment protection.

The argument for incorporating the enumerated liberties is even stronger if the right is an inherent unitary right. A test that requires determining which entity created the right causes problems, but only because it is an inappropriate test for inherent rights. The first and second amendments certainly protected and guaranteed the rights alleged in *Cruikshank*. As long as those amendments survived, at least one portion of the rights would be enforced and would constitute a part of the political heritage. People would be immune from interference by the federal government and undoubtedly would feel wronged when treated more oppressively by state governments than by the federal government. Even without the fourteenth amendment, jurisdictional differences in standards would inevitably create discontent; state governments would have difficulty eradicating those liberties. And if the right is unitary, protection of the right in certain situations must be construed as protection of the right generally. The problem becomes tautological. Waite, however, discarded the notion of inherent rights and did not consider the crucial situations. As a result, *Cruikshank* is a decision of little intellectual merit.

D. *The Holding*

Waite concluded the decision by quashing all sixteen indictments. The decision was not controversial within the Court: the sole dissent

116. 2 B. SCHWARTZ, *supra* note 111, at 1030-31.

117. *Id.* at 1088.

118. *See* 92 U.S. at 552.

was a concurrence. Field, Bradley, and Swayne were all still Justices and chose not to dissent. Perhaps the lack of specificity in the indictments seemed a good reason to quash them.¹¹⁹ The unanimity on the ultimate conclusion, however, created a deficient analysis. Only a superficial interpretation of *Slaughter-House*, followed by poor analysis, could result in excluding the enumerated liberties from fourteenth amendment protection. Ironically, Waite managed, under the banner of *Slaughter-House*, to exclude the examples that Miller had named in dictum as appropriate privileges or immunities of citizens of the United States.

One might think that Miller's silence in *Cruikshank* amounted to tacit consent. It is more likely, given the lack of dissenting opinions from Field, Bradley, and Swayne, that the case simply did not seem an appropriate field of battle. Unfortunately, Waite's opinion determined the subsequent direction of the Court. The *Cruikshank* analysis survived as the authoritative interpretation of *Slaughter-House*.¹²⁰

V. CONCLUSION

Legal analysis grafts new conclusions onto existing lines of construction, often inappropriately. In *Cruikshank*, Waite was unusually successful in that endeavor. Both the obscurity of Miller's *Slaughter-House* opinion and the dissent's characterization of Miller's approach reinforced Waite's analysis. After *Cruikshank*, of course, the crucial question for practicing lawyers was not what *Slaughter-House* actually said, but which construction of *Slaughter-House* the Court was actually following. That pragmatic feature of legal analysis leads away from constitutional meaning. Court-established tests assume a decided superiority to constitutional language. Waite did not reexamine the privileges or immunities clause. *Slaughter-House* had done that. The first case, misunderstood and unexamined, shielded subsequent cases from the force of the fourteenth amendment's language. Waite avoided the fourteenth amendment language and concentrated instead on the established test and general governmental theory.

In *Slaughter-House*, Miller had no such shield. He felt bound to give the privileges or immunities clause a substantial meaning related to the purpose for which it was adopted. He believed that judicial action could not properly nullify constitutional provisions. Such provisions must either be changed by the people or be given a sensible, fair, and substantial role by the Court. Miller opted for a great but still limited increase in federal power. His construction left little room for judicial imperialism, whereas the dissenters' test of fundamentality would have left the Court with vast discretionary authority to deny, disparage, or create rights. Of course, incorporation of the enumerated

119. See 23 L.Ed. 588, 589 (where such concerns were brought before the Court).

120. See *supra* notes 4, 7.

rights via the privileges or immunities clause was not the historical original intent. The historical intent encompassed numerous different understandings.¹²¹ However, the appropriate point is that incorporating enumerated rights through the privileges or immunities clause is the only construction that responds both to the varied motivations behind the amendment and to the constitutional language.

The Miller opinion in *Slaughter-House* was thus one of substantial integrity that balanced the need for new federal protection of rights with the continued survival of states as independent centers of social policy. He began his analysis of constitutional meaning by rigorously examining the language and grammar of the fourteenth amendment. If that first step revealed ambiguity, the correct meaning was the one that fell within the parameters of the historical purpose of the provision, broadly considered. If various constructions suited the purpose, the Court would choose that construction most consonant with the rest of the Constitution. But in all this, Miller believed that every part of a constitutional provision had to be accorded substantial meaning. Whatever the Court's reasons for not overruling this portion of *Slaughter-House*, that element of constitutional wisdom is a good reason for maintaining it. If the current Supreme Court would follow Miller's approach, the Court could enliven the privileges or immunities clause by incorporating the enumerated privileges or immunities. This approach could also eliminate substantive due process analysis with relatively little loss and could reestablish the federal government as an institution of only delegated powers. Whatever approach the Court takes, however, the Court cannot use *Slaughter-House* to justify the nullification of the privileges or immunities clause.

121. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). See also Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).