



OF CITIZENS AND PERSONS:  
RECONSTRUCTING  
THE PRIVILEGES OR IMMUNITIES CLAUSE OF  
THE FOURTEENTH AMENDMENT

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I. From *Slaughter-House* to *Lochner*.

The purpose of this Symposium is to examine the decision of the United States Supreme Court in *Lochner v. New York*, on the occasion of its 100-year anniversary.<sup>1</sup> I propose to undertake that inquiry in an indirect fashion, asking how best to interpret the Fourteenth Amendment on the assumption that the Privileges or Immunities Clause, now lost to obscurity, had a central role to play in its operation.<sup>2</sup> Accordingly, this first section of this paper gives a brief statement of the lineal connection between the *Slaughter-House Cases*<sup>3</sup> and the *Lochner* decision. Section two then reinterprets the Fourteenth Amendment on the ground that the distinction between the “citizens” protected by the Privileges or Immunities Clause and the

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<sup>1</sup> 198 U.S. 45 (1905).

<sup>2</sup> Section 1 of the Fourteenth Amendment reads:

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

Note, as it is easy to forget, that Section 1 speaks of privileges *or* immunities. This stands in contrast to the phrase privileges *and* immunities of Article IV, section 2: “The Citizens of each State shall be entitled to all Privileges and Immunities in the several States.” In both clauses the protection afforded runs to both privileges and immunities, so that their scope is the same. The difference between the “and” and “or” is dictated by the grammar of the respective sentences. I shall refer to the Privileges and Immunities Clause of Article IV, and the Privileges or Immunities Clause of the Fourteenth Amendment.

<sup>3</sup> 83 U.S. (16 Wall.) 36 (1872).

“persons” protected by both the Due Process and the Equal Protection Clauses is critical to the entire enterprise. Section three then looks at some critical constitutional areas that might have to be substantially revamped, be it for better or for worse, once the proper structure of the Fourteenth Amendment is elucidated. The last section draws a few general inferences for the difficult task of constitutional interpretation.

This topic is surely a worthy one, for few cases in the constitutional pantheon are so famous, or infamous, as *Lochner*. Any approach that sheds light on its strength and weaknesses is of critical importance today, as its spirit continues to thrive in the modern cases that work so hard to distinguish it, chiefly on matters of personal and marital privacy—issues of so-called “intimate association.”<sup>4</sup> To set the stage for this analysis, recall the two specific dimensions of analysis that drive *Lochner*. The first concerns the scope of the term “liberty” as it appears in the Fourteenth Amendment. The second of these concerns the scope of the police-power limitations on the liberty that the Fourteenth Amendment protects. *Lochner* adopts both a broad conception of liberty and a bounded—narrow is not quite right—conception of the police power that is tied to the protection of the “safety, health, morals, and general welfare” of the public at large.<sup>5</sup> Those four separate headings look in many ways to be capacious, as in a sense they were meant to be. But at least to the Court in *Lochner* they were not infinite in scope, and thus did not cover overtly paternalistic legislation that assumed that workers could not make the occupational choices so necessary to their livelihood.

The modern conception of the Fourteenth Amendment, at least as it relates to economic liberties, adopts a narrow definition of liberty, which is chiefly limited to freedom from arbitrary arrest and incarceration. That definition is then coupled with a broad account of the police power, which includes the ability of the state to redress the supposed inequality of bargaining power that is found in any marketplace that pits large industrial complexes on the one hand against the welfare of ordinary, and often unorganized, individuals on the other.<sup>6</sup> The difference in outcome under the two approaches is palpable. *Lochner* makes it hard to sustain any legislation that imposes either maximum hour or minimum wage limits<sup>7</sup> on the one

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<sup>4</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>5</sup> *Lochner*, 198 U.S. at 53 (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U.S. 578. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.”).

<sup>6</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law for women); *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act).

<sup>7</sup> *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage law for women).

hand, or requires collective bargaining on the other.<sup>8</sup> The desire to enact these two types of laws prompted the continuous Progressive assault on the doctrines of the Court in the *Lochner* era.

As a matter of intellectual temperament, I align myself closely with those who think that the Lochnerian balance between the notion of ordinary liberty and the police power is far more faithful to the constitutional structure than the Progressive and New Deal conception that wholly eviscerates any constitutional protection of economic liberty.<sup>9</sup> But on this occasion I do not wish to defend that version of *Lochner* against its modern critics. Rather, my task is to look at *Lochner* from another vantage point, which is to ask the question of whether *Lochner* can be defended in whole or in part if we revisit the previous decision of the Supreme Court in the *Slaughter-House Cases*, which upheld a twenty-five year statutory monopoly for the butcher trade conferred upon the Crescent City Live-Stock Landing and Slaughter-House Company.<sup>10</sup> By common consent, *Slaughter-House* had sharply narrowed the meaning of the Privileges or Immunities Clause by holding that it only protects that narrow class of rights that individuals hold against the United States.<sup>11</sup> This narrow class of rights included, for example, the ability to petition the United States government for grievances as protected under the First Amendment, such that no state could interfere with travel for that purpose, and the right to use the navigable waters of the United States.<sup>12</sup> Justice Miller defended his decision largely on the structural ground that the Fourteenth Amendment was not intended to make the United States the “perpetual censor” of the states on all matters great and small, including those unrelated to the emancipation of the slaves, which he feared would become the case if the Privileges or Immunities Clause had been read in a broader fashion.<sup>13</sup>

The reason for looking at *Lochner* through the lens of the Privileges or Immunities Clause of the Fourteenth Amendment is twofold. The first is that any comprehensive construction of Section 1 of the Fourteenth Amendment must offer a sensible explanation of the four clauses that it contains: the definition of citizenship; the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause. Yet one consequence of the *Slaughter-House* decision was that this task became no longer necessary once the Privileges or Immunities Clause ef-

<sup>8</sup> See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating state ban on yellow dog contracts); *Adair v. United States*, 208 U.S. 161 (1908) (invalidating federal mandatory collective bargaining scheme).

<sup>9</sup> For an extended defense of this position, see generally RICHARD A. EPSTEIN, *THE PROGRESSIVE VISION OF AMERICAN CONSTITUTIONAL LAW* (forthcoming 2005).

<sup>10</sup> 83 U.S. (16 Wall.) 36 (1872). For a short critique of the decision, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 342–51 (1985).

<sup>11</sup> 83 U.S. at 74.

<sup>12</sup> *Id.* at 79–80 (“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 by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.”).

<sup>13</sup> *Id.* at 78.

fectively disappeared from view. At this point the Due Process and the Equal Protection Clauses became virtually self-contained, allowing, as I shall argue, for their current broad readings.

A second point also bears emphasis. *Lochner* was not the first Supreme Court case to give a broad meaning to the term liberty as it was found in the Due Process Clause. That honor belongs to the earlier decision in *Allgeyer v. Louisiana*, which, like *Lochner*, was penned by Justice Peckham.<sup>14</sup> Nor did *Lochner* decide that the Due Process Clause was not limited to such procedural issues as notice of charges and an opportunity to be heard. That honor belongs to *Chicago, Burlington & Quincy Railroad v. City of Chicago*, written by the first Justice Harlan.<sup>15</sup> What *Lochner* chiefly did was to read the police power so that it did not swallow up the broad conception of liberty set out in *Allgeyer*.

It is just at this junction that the second connection between the Privileges or Immunities Clause and the Due Process Clause becomes explicit. *Allgeyer* had to make peace with the *Slaughter-House Cases*. Those cases could have been resolved using the same interplay between ordinary liberty and the police power that characterized *Lochner*, given that some restrictions on the butcher business could well have been justified as safety measures to prevent various kinds of nuisances from operating slaughterhouses.

But while Justice Miller discussed these issues at some length, he declined to hold that the right to engage in an ordinary occupation was a protected privilege or immunity under the Fourteenth Amendment.<sup>16</sup> His motivation lay less in the text of the Amendment and more in the massive transformation he feared such a holding would bring to the vexed problem of federal/state relations after the Civil War. He wrote that thus overriding the decision of the Louisiana Court “would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.”<sup>17</sup> The matter raised heightened concern in light of Section 5 of the Fourteenth Amendment that gave Congress the power to enforce the Amendment’s substantive provisions “by appropriate legislation.”<sup>18</sup> The intrusions into the internal affairs of the states would not be solely a judicial matter. The broader the scope of the substantive protections of the Fourteenth Amendment, the greater the potential Congressional oversight role would be. The *Slaughter-House* decision is surely

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<sup>14</sup> 165 U.S. 578 (1897).

<sup>15</sup> 166 U.S. 226, 241 (1897) (“[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States . . .”).

<sup>16</sup> *Slaughter-House Cases*, 83 U.S. at 61–63. Currie rightly describes this analysis as “an apparently gratuitous discussion,” which is in no manner tied to the Due Process Clause. CURRIE, *supra* note 10, at 363.

<sup>17</sup> *Slaughter-House Cases*, 83 U.S. at 78.

<sup>18</sup> U.S. CONST. amend. XIV, § 5.

understandable in light of the enormous confrontation between the federal and state governments under Reconstruction, and the great tension that existed on matters of race, which, as the decision's frequent use of the words "civil rights" indicates, was foremost on the minds of everyone even in this "economic" case.

*Slaughter-House* may have decided the Privileges or Immunities Clause's meaning, but its narrow reading sat most uneasily with the libertarian wing of the Supreme Court, which included Justices Bradley and Field. They secured a modest measure of revenge in *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co.*,<sup>19</sup> the sequel to the *Slaughter-House Cases*, which addressed the provision of the 1879 Louisiana Constitution that repealed the original twenty-five year monopoly conferred upon Crescent City.<sup>20</sup> Crescent City claimed that its twenty-five year deal created a valid contract which was impaired by the legislation. Justice Miller, who wrote the original *Slaughter-House* decision, held that the state, which created the monopoly, had the power to remove it, on the ground that the police power could not in general be bargained away by the states to any private person.<sup>21</sup> The state power that was great enough to create this monopoly was also great enough to end it. Even if statutory contracts might be valid on other subjects, they could not limit the legislature's powers with respect to matters of "the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."<sup>22</sup>

Justice Bradley, who had dissented in the original *Slaughter-House Cases*, concurred in the result, but on quite different grounds. He refused to acknowledge the correctness of the original *Slaughter-House Cases* with their narrow definition of privileges or immunities. Instead he took the position that the initial grant was invalid so that the repeal had only rectified the prior error. His conception of privileges or immunities read as follows:

I then held, and still hold, that the phrase has a broader meaning; that it includes those fundamental privileges and immunities which belong essentially to the citizens of every free government, among which Mr. Justice Washington enumerates the right of protection; the right to pursue and obtain happiness and safety; the right to pass through and reside in any State for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain ac-

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<sup>19</sup> 111 U.S. 746 (1884).

<sup>20</sup> LA. CONST. of 1879, arts. 248 & 258, quoted in *Butcher's Union*, 111 U.S. at 748.

<sup>21</sup> *Butcher's Union*, 111 U.S. at 750.

<sup>22</sup> *Id.* at 751.

tions of any kind in the courts of the State; and to take, hold, and dispose of property, either real or personal.<sup>23</sup>

Working in his rejectionist mode, Justice Bradley then addressed the interaction between liberty under the Fourteenth Amendment and the Privileges or Immunities Clause, in a further effort to undo the defeat suffered in the first round of the *Slaughter-House* matter. He wrote:

But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.<sup>24</sup>

That language in turn was picked up in *Allgeyer*, where Peckham relied exclusively on Justice Bradley's concurring opinion in *Butcher's Union*, which is of course the dissenting position in *Slaughter-House*. After quoting the above sentence, *Allgeyer* continues with this qualification: "It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty,' as contained in the Fourteenth Amendment."<sup>25</sup> The punch line then quickly follows:

The liberty mentioned in that [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>26</sup>

This was then followed by yet another quotation from *Butcher's Union*: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."<sup>27</sup> The use of the police power to limit occupational freedoms, an issue in the *Slaughter-House Cases*, is not

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<sup>23</sup> *Id.* at 764 (citing *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230)).

<sup>24</sup> *Id.* at 765.

<sup>25</sup> *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897).

<sup>26</sup> *Id.* at 589. The Louisiana statute in *Allgeyer* prohibited any out of state firm from entering into a contract for marine insurance unless it was licensed to do business in Louisiana, even when the contract was concluded in New York. *Id.* at 579. That statute would be struck down today under the dormant commerce clause, given the explicit discrimination against out of state businesses.

<sup>27</sup> *Id.* at 590 (quoting *Butcher's Union*, 111 U.S. at 764).

ruled out in this context either.<sup>28</sup> It looks as though all the ground that was lost in *Slaughter-House* was reclaimed through *Allgeyer*, except for one point that is obscured by Justice Peckham's definition of liberty. The privileges or immunities clause only protects "citizens."<sup>29</sup> The guarantees of the Due Process and Equal Protection Clause extend to any "person."<sup>30</sup> The difference in language is not unintended; yet often it receives only scant attention.<sup>31</sup> But it should provoke a structural reexamination of the entire Fourteenth Amendment, which, when done, makes the Amendment both somewhat more coherent and much more ominous than the current law.

## II. The Structural Approach to the Fourteenth Amendment.

One archaic mode of constitutional interpretation begins by laying out the full text of the applicable constitutional provision. That of the Fourteenth Amendment begins as follows:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>32</sup>

It is important to take each of the four sentences in turn.

CITIZENSHIP. The initial sentence states the qualification for citizenship in the United States and in the several states. To the extent that it includes "all persons born or naturalized in the United States and subject to the jurisdiction thereof," it necessarily overturns the decision in *Dred Scott v. Sandford*, which in the course of construing the provision of the Constitution that confers on federal courts jurisdiction in diversity cases, that is, lawsuits between citizens of different states, decided that descendants of black slaves could not be citizens at all.<sup>33</sup> The simple requirement that birth in the United States could establish citizenship therefore acted as a small revolution in political theory, unless it could be said that slaves were not "subject to its jurisdiction," which is manifestly indefensible given that there is no

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<sup>28</sup> *Id.* ("[W]e do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.")

<sup>29</sup> U.S. CONST. amend. XIV, § 1.

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., CURRIE, *supra* note 10, at 350 (making little of the point).

<sup>32</sup> U.S. CONST. amend. XIV, § 1.

<sup>33</sup> 60 U.S. 393, 403-04 (1856). See, e.g., *id.* at 403 (Taney, J.) ("The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States").

other sovereign which could be accountable for them. Justice Miller in effect noted as much in the *Slaughter-House Cases* when he wrote: “The phrase, ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens *or* subjects of foreign States born within the United States.”<sup>34</sup> The former slaves were none of the above.

This provision of the Fourteenth Amendment was penned when citizenship was a far weightier matter than it sometimes seems today. If it is read in its original fashion, it looks as though the clause denies automatic citizenship to all children of aliens, both legal and illegal, and of temporary visitors, even if the children are born in the United States, which is wholly different from the received practice. In this regard the words “subject to its jurisdiction” impose a more restrictive condition than “within its jurisdiction,” which is the phrase used for those people who are entitled to the equal protection of its laws. The former seems to require more than the physical presence needed to receive the equal protection guarantee, whatever it may mean. Physical presence is not enough to confer citizenship on aliens, but it does so for former slaves.

PRIVILEGES OR IMMUNITIES. This change in former slaves’ legal status is telling in light of the Privileges or Immunities Clause, which is inserted right after the citizenship provision and which is limited only to citizens. By definition this language excludes all aliens who may at any time be “within” the jurisdiction of the United States. The clear import of this overall structure is that greater rights are conferred on the narrow class of citizens than on ordinary persons. The great moral achievement of the Fourteenth Amendment is that it moved far beyond the older arguments for the abolition of slavery, which were couched in part on the view that the freeing of the slaves did not mean that they had to be given much by way of either political or civil rights.<sup>35</sup> The more dubious position of the Fourteenth Amendment is that it accepted the preferred position of citizens relative to outsiders, by denying to the latter the privileges and immunities afforded to citizens. Citizens fell into an exclusive class whose members had a more robust set of rights than all persons generally.

This dual level of entitlements is in great tension with the usual claims for universality that are part and parcel of the then-dominant natural law tradition. To the natural-rights lawyer, basic legal rights are conferred on all people, such that the only difference among them lies in the peculiar system of formalities—witnesses, deeds, writings, solemnities, recordation—that each legal system uses to insure the enforcement of the same basic set of rights.<sup>36</sup> Nor is this tension unusual. The great decision in *Johnson v. M’Intosh*, which allowed a formal deed issued by

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<sup>34</sup> *Slaughter-House Cases*, 83 U.S. 36, 73 (1872) (emphasis added).

<sup>35</sup>For a discussion of the importance of literalism in understanding the abolitionist movement, see generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992).

<sup>36</sup> See, for its earliest expression, GIAUS. INST.1.1 (F. de Zulueta trans.).



the United States to prevail over a prior possessory title, was one earlier illustration of the tension between the positivist view that all rights emanate from the state, and the well-established natural law principle that on questions of title to land, prior in time is higher in right.<sup>37</sup>

This general historical framework is not of idle curiosity here, for it clearly discredits any calculated effort to read the Due Process Clause and the Privileges or Immunities Clause to cover the same substantive territory. It may have been a simple slip that led Justice Peckham to use the word “citizen” in his definition of liberty in *Allgeyer*, but that verbal slip is insupportable in this specific context, where the contrast between the Privileges or Immunities Clause and the Due Process Clause is the key structural element of Section 1. No satisfactory interpretation of the Fourteenth Amendment as a whole can elide the distinction between citizens and persons that had just been introduced into the first sentence of Section 1.

This evident contrast then gives rise to a still greater mystery, which is just what rights are encompassed by the phrase “privileges or immunities?” Here again, the clause turns out to be narrower in its application than the Due Process and Equal Protection Clauses, and for two related reasons. First, the conception of ‘liberty’ in the Due Process Clause is not subject to any textual requirement that the claim in question be traditional, although it is certainly possible to read that requirement into the clause.<sup>38</sup> Yet a fair reading of the evolution of privileges and immunities clearly implies that it is only traditional liberties, with equal weight on both terms, that are protected. Second, it seems clear that privileges and immunities cover only what are commonly called negative liberties, or claims of independence from state control. They do not cover the wide variety of claims for positive benefits or services from the state which are covered by standard interpretations of the Due Process and Equal Protection Clause.<sup>39</sup> To round out the picture, it looks as though the police power, however construed, breaks out the same way in both cases. The upshot is that the correct decision in *Slaughter-House* results in a threefold truncation of constitutional protections, none of which is defensible as a matter of first principle under any system of limited government.

How then did this state of affairs come about? No one will get very far in dealing with this question by trying to parse the worlds “privileges” and “immunities” separately, in some Hohfeldian conception. The word “privilege” clearly does not mean that one person is exempt from some general rule of liability that applies to others. The whole tenor of the Privilege and Immunities Clause is to create an equality between citizens, which cannot be done by entrenching some particular group of citizens with rights that others are denied. The same is true with the term

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<sup>37</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>38</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986), with *Lawrence v. Texas*, 539 U.S. 558 (2003).

“immunity,” which in general implies protection from suit that would otherwise lie by virtue of some special status: sovereign immunity, parental immunity, and charitable immunity are the terms that quickly come to mind. But those preferences for some citizens over others is not what the clause is about.

The only way to make sense of the passage is to treat it as a unit, blessed with some historically determined meaning. But here that meaning is hard to extract. The original appearance of the phrase is traced back to the Articles of Confederation, where it surfaces to deal with the rights of traders from one state when they are doing business in another. The key section reads as follows:

Article IV: The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.<sup>40</sup>

The notable feature of this provision is that it is tightly wound up with the question of how the free inhabitants of each state are entitled to the privileges and immunities of “free citizens” in the several states. The provision therefore reads more like a nondiscrimination provision than a basic protection of individual rights, such being the force of the words “subject to the same duties, impositions, and restrictions.” The clear import of any nondiscrimination provision is that the rights of outsiders are no stronger than those of insiders. If the state wanted, therefore, to subject its own citizens to onerous restrictions on trade and commerce, the outsiders would have to accept the same restrictions. The implicit charter of free trade is conditional, not absolute. Second, as befits a provision that involves interactions across several states, its scope seems to be tied to trade and commerce, and could well be read as not embracing the right of ordinary individuals to engage in certain occupations, although it could without difficulty be stretched that far. Read in this fashion, the provision has some teeth, but it is not tantamount to a universal charter of individual freedom.

The Articles of Confederation were of course short-lived, but the commitment to prevent states from upsetting the relative openness of a national common

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<sup>39</sup> The point seems clearly correct for the Equal Protection clause, but is less clear with respect to Due Process. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (applying procedural protections against removal of welfare benefits, even though these are not traditional property rights).

<sup>40</sup> ARTICLES OF CONFEDERATION art. IV (1781).

market persisted through the Constitution, which contained a stripped-down version of the same provision: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>41</sup> Here again the provision looks as though it is a nondiscrimination clause for the benefit of citizens. Aliens, of course, need not apply, since they were not citizens of any state. Yet again the question of content is left unresolved. The only passage of any significance that discusses the meaning of privileges and immunities is the famous decision of Justice Washington in *Corfield v. Coryell*, which expands the meaning beyond the contexts of trade and commerce found in the Articles of Confederation:

The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. 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.<sup>42</sup>

The statement has proved immensely influential, but it hardly should give rise to any confidence. The stress on “fundamental” privileges and immunities means that certain matters of detail and form are out, which is just fine. But to say that the rights may be “all comprehended” by a short list that talks about the right to own property and pursue happiness is to leave matters completely open. Does this include the right to marry, for example? To pursue trades? To leave an inheritance free from taxation? To escape zoning laws? To resist condemnation of property for public purposes? One cannot be sure. But what is clear is that the rights that are created here are not infinite in scope or duration. Indeed, after this broad description of fundamental rights, it was held that an out-of-state fisherman’s claim to have access to New Jersey’s oyster beds was not comprehended in this definition of privileges and immunities. And if an outsider cannot have access to oyster beds, then what about state highways? The provision is noble, and we should shudder to see any court think that these rights are not worth protecting. But as the intellectual

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<sup>41</sup> U.S. CONST. art. IV, § 2, cl. 1. Currie reports that the clause was not discussed at the Constitutional Convention. CURRIE, *supra* note 10, at 239 n.12.

<sup>42</sup> 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230). The precise procedural context in the case was that the plaintiff was suing to recover his vessel, which had been seized for violating the law against dredging for oysters. The passage was quoted in full in the *Slaughter-House Cases*, but then dismissed on the ground that these were only rights for “which the State governments were created to establish and secure.” 83 U.S. (16 Wall.) 36, 76 (1872).

substructure for the Fourteenth Amendment, it leaves, by any account, too much to the imagination.

The two-tiered set of entitlements that is found in the Privileges or Immunities Clause of the Fourteenth Amendment takes a leaf from the provisions in Article IV, as construed in *Corfield*. But the limitation of privileges and immunities protection to the matters of trade and commerce that dominated the Articles of Confederation is no longer explicitly stated, and need not for any obvious reason be implied in this context. The open question is how large the list of protected interests should be. It seems odd that so critical an issue should be left unspoken, but so it was, not only in Article IV, but also in the Fourteenth Amendment.

It is against this background that one comes to the text of the Fourteenth Amendment, which picks up on the old phrase, but does not do much to examine it. The context, however, is different in critical ways because unlike Article IV, the Privileges or Immunities Clause does *not* read as an antidiscrimination clause, but as a guarantor of substantive rights against all state action.<sup>43</sup> The scope of the protection, moreover, is ambitious, for the words specifying that states may not “make or enforce” laws abridging citizens’ privileges and immunities necessarily imply that this broad, if undefined, prohibition operates against both legislative and administrative behavior. The possible meanings of privileges and immunities were not fully set out, but for that the best available guide was the language in *Corfield v. Coryell*. There is no doubt that the right to practice one’s occupation is so closely tied to entry into commerce, the pursuit of happiness, and the ownership of property that Justices Bradley and Peckham may well have been right, and most certainly did not misbehave, when they collapsed their broad conception of occupational liberty into the Privileges or Immunities Clause.

As was evident from the *Slaughter-House Cases*, moreover, the broad definition of privileges and immunities does not negate the possibility that police power considerations could justify limitations on the various privileges and immunities, just as they do on the liberty that was subsequently found protected under the broad definition of the term adopted both in *Allgeyer* and in *Lochner*. Those considerations, at least to the nineteenth-century mind, would have included the regulation of morals, an issue on which the dominant sentiment was dead set against the

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<sup>43</sup> For the opposite view, see CURRIE, *supra* note 10, at 347–48 (seeing in clause an effort to ground constitutionality of Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27, which, *inter alia*, proceeds to guarantee to all persons born in United States the right “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .”).

The text of the 1866 Act, however, does not support the apparent meaning that was given the Privileges and Immunities by those who favored its adoption. Under the reading that stresses nondiscrimination, any effort to protect the right to contract *simpliciter* is doomed. If the white citizens lose the right, then all others can suffer as well. But the Privileges and Immunities Clause seems to offer protection to all citizens, including whites, which could not be the case if read as an antidiscrimination norm.

libertarian vision that dominated in economic affairs. The upshot is that the best reading of the Privileges or Immunities Clause is that it displayed the same ambivalence toward individual liberty that is found in *Corfield v. Coryell*. The liberties in question had to be “fundamental,” which in this context means “traditional” (that is, rights that “have, at all times, been enjoyed by the citizens”) as well as “individual.” Novel claims for sexual autonomy which modern judges find it easy to accept would not have been accepted then. It is of course possible that the same transformation that took place with liberty under the Due Process Clause could have taken place under the Privileges or Immunities Clause, so that intimate associations receive extensive constitutional protection while economic freedoms recede into the background. But that switch is no more (and no less) legitimate than that under the Due Process Clause. The one enduring structural change wrought by the shift from privileges and immunities to due process, as the primary means of securing individual freedoms, is the one that was not acknowledged in Peckham’s broad definition of liberty: that protection now applies to all persons and not just to citizens, thereby ending the two-tier structure.

The key question thus remains: how would we construe the Due Process and the Equal Protection Clauses if the dissenters had prevailed in the *Slaughter-House Cases*? Here the one certain answer is that the clauses could not have assumed the dominant position that they took either in the heyday of substantive due process or in the revival of civil liberties and civil rights that started in the New Deal and worked its way forward through the Warren Court. Here’s why. The logic of a two-tier system indicates that only a select class of citizens gets the substantive rights protected by the Privileges or Immunities Clause. Any right that falls into that area cannot fall into the others. Rather, the position that one has to take about both due process and equal protection is that they involve certain minimum safeguards to which all people, including outsiders and aliens, are entitled. How then does this play out?

DUE PROCESS. With the Due Process Clause, the first question is whether the broad definition of liberty that was championed by Justice Peckham can still hold sway. On reflection, I see no reason why it cannot. Let us assume, contrary to Justice Peckham, that we have only procedural rights under the Due Process Clause. Is there any reason why an individual should not be entitled to notice and an opportunity to be heard if he stands to lose his franchise or business? Rudimentary procedural protections seem to apply well across the board. But by the same token, it is hard to think that the words “due process” under this setting could be interpreted to mean “without just compensation” so as to have the substantive dimension that they had in both *Allgeyer* and *Lochner*. The foreigners may not be subject to arrest, loss of property, or even loss of trading privileges without a hearing or notice, but there is no reason why they have an independent claim to own property in the United States or to practice any particular trade at all. Those were the rights that were reserved to citizens under the Privileges and Immunities Clause.

And so the ugliest form of prejudice and exclusion is consistent with the view that foreigners have minimum procedural protection but not strong liberty claims. And to this day aliens are always regarded, as it were, as second-class citizens, such that they do not have to be treated as citizens at all. Giving the Privileges or Immunities Clause its broad reading makes it easier to give the Due Process Clause the pure procedural reading that it seems to cover. And note here that the protection against “deprivation” looks like it could be read only to require the continuation of these traditional practices. There is no explicit legislative component to the guarantee that parallels the one found in the words “make or enforce” in the Privileges or Immunities Clause. In the end, I think that this effort to limit the Due Process Clause only to administrative deviations from established laws might not suffice. It is hard to think that legislation could be sustained that denied hearings for criminal charges to either citizens or aliens. But, even when the clause is read to cover legislation and executive orders, it still does not have an expansive meaning. And most certainly it could not in its pure procedural guise support the incorporation of the substantive guarantees of the Bill of Rights against the states. After all, with a strong Privileges or Immunities Clause, all the incorporation that is needed would have taken place through the front door, by the very powerful expansion of federal constitutional guarantees against state action.

The question then arises as to how robust this separation between the rights of citizens and non-citizens is. The answer to this question is unclear. No one doubts that the liberty of contract protected under the Due Process Clause was a relational interest that works for both sides of any relationship, including employers and employees. It would be odd to guarantee me a right to trade with a person who does not have the right to trade with me. The universalization of these various trading guarantees, however, cannot be accomplished through the Privileges or Immunities Clause. Hence, if the *Slaughter-House Cases* had come out the other way, someone would have had to decide whether the state could limit the right of a citizen to contract with an alien when the alien could not claim that right to contract with him. Matters get only more complex when the issue moves from the contracting rights of individuals to the rights of various kinds of groups or entities. A partnership that is composed only of citizens looks as though it should be protected under the Privileges or Immunities Clause, at least if we treat the partnership as an aggregation and not as a separate entity, which, by virtue of its abstract status, could not qualify for citizenship at all. But what then is to become of a partnership that admits a foreign partner into its ranks? Or of a corporation, which could not be a natural person and which, thus, did not qualify for protection under the Privileges or Immunities Clause of Article IV when subject to explicit discrimination in its business in other states,<sup>44</sup> a decision that has little to commend itself in light of the general free trade objectives of the Constitution? No one could say for sure how this limitation would have played out. After all, the word “citizen” appears also in

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<sup>44</sup> See *Paul v. Virginia*, 75 U.S. 168, 177–78 (1868).

Article III, which confers jurisdiction on federal courts in cases between citizens of different states.<sup>45</sup> Taken with the same degree of strictness that has been brought to the term “citizen” in Article IV, it follows that there should be no diversity jurisdiction for corporations in the United States, even if all their shareholders are American citizens, which for large public corporations is manifestly not the case. Instead of adopting this strict approach, we engage in a set of stipulative definitions that locate the corporation in the place of its incorporation and principal place of business, so that corporations are treated as a species of citizen, at least for diversity purposes. But what about the definition of citizen limits it to this context but not any other. The same extension of citizenship to corporations could have happened with the Privileges and Immunities Clause, but that result is far from inevitable.

EQUAL PROTECTION. A similar tale of contraction dominates any interpretation of the Equal Protection Clause once the Privileges or Immunities Clause is given a robust meaning for the citizens whom it protects. In many modern discussions, the phrase “equal protection” is treated as a rough synonym for the proposition that all individuals are entitled to equality under law or equal treatment under law. But these efforts to broaden the language move the Equal Protection Clause into areas that look as though they are already covered by the Privileges or Immunities Clause. Thus, if ordinary citizens have the right to own property, then it is not too difficult to infer that they are entitled to just compensation for their property under the Privileges or Immunities Clause. In many cases of comprehensive regulation, the restrictions in question fall short of general dispossession of property, but nonetheless may have a disparate impact on the various citizens who are subject to its scope. A similar equal protection component of the Privileges and Immunities Clause could be read—no one can be sure—to cover the ground that the Equal Protection Clause covers today, subject to the usual caveat about the protection of aliens.

Nonetheless, once the Privileges or Immunities Clause grows, then the Equal Protection Clause must shrink, for again it makes no sense to give aliens protections under Equal Protection that are denied to them under the Privileges or Immunities Clause. Hence the scope of the equal protection guarantee is kept minimal along the lines of the Due Process Clause. The state cannot use one set of procedures against one class of persons and another set against another class of persons when both are being investigated or tried for the same offense. The foreigner cannot be subject to heavier penalties for a given offense than ordinary citizens. But the thought that foreigners could be entitled to have an education on the same terms as citizens seems to be beyond the pale, for it treats as suspect under the Equal Protection Clause the very distinction between citizens and aliens that is built into the first two sentences of Section 1 of the Fourteenth Amendment. “Equal protection,” like “due process of law,” starts to signal that the legal protection that

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<sup>45</sup> U.S. CONST. art. III, § 2, cl. 1.

the law throws around for property and liberty has to be the same for all persons, citizens or not, who are subject to punishment for various kinds of criminal offenses. But it does not suggest that foreigners must be allowed to drive an automobile in the United States if they meet the same requirements as a citizen (except of course for citizenship). There is no doubt that the guarantee of procedural regularity that is found here is an important guarantee. But it covers only a tiny portion of the terrain of the modern equal protection law.

### III. What if *Slaughter-House* had been rightly decided?

I pose this simple question to stress that any limitation of strong substantive protections only to citizens would have had profound effects on the subsequent development of our law. I do so with a kind of grim horror because the universalist within me wants to limit the differences between citizens and aliens to the narrowest possible class of settings, namely those that require undivided loyalty to the state: perhaps service in the military; selection to public office; or even the ability to vote. That cannot be said of the Privileges or Immunities Clause. The legislature may or may not extend—dare we use the word—the privilege to find gainful employment to aliens, but it remains free not to do so.

So what, then, disappears? I shall briefly discuss five areas: aliens, race, intimate association, welfare, and voting.

*Aliens.* Without question aliens lose the protection of the various economic and civil liberties that go to other individuals. They can keep their property and resist criminal prosecution, but can be told not only to go home, but also not to work. Obviously, even today aliens are at risk from the federal government's immigration power, but if the *Slaughter-House Cases* had been decided differently, decisions like *Yick Wo v. Hopkins*, which struck down the differential enforcement of fire ordinances against aliens, must go the other way.<sup>46</sup> For there is no way that anyone could say of the Privileges or Immunities Clause what the Supreme Court said of both the Due Process and Equal Protection Clauses: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."<sup>47</sup> Likewise, the Privileges or Immunities Clause would have proved cold comfort to the plaintiffs in *Truax v. Raich*, which struck down under the Due Process Clause an Arizona statute that required all private employers to make sure that at least 80 percent of their workforces were American citizens.<sup>48</sup> One sentence from Justice Hughes is telling: "The description 'any person within its jurisdiction,' as it has frequently been held,

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<sup>46</sup> 118 U.S. 356 (1886).

<sup>47</sup> *Id.* at 369.

<sup>48</sup> 239 U.S. 33 (1915).



includes aliens.”<sup>49</sup> Under the Privileges or Immunities Clause all is lost: how could this statute have discriminated against citizens, some of whom might have profited from its passage? No doubt the federal government, which controlled immigration and naturalization, was not bound by the Fourteenth Amendment and could impose whatever distinctions it chooses between citizens and aliens, but the states could not. Even *Lochner* becomes suspect under a privileges or immunities approach to the extent that it involves the potential conflict between recent German immigrants and more established portions of the labor force that had union protection. If the workers and the employer were all citizens, then the case would come out the same way, and be subject to the same criticism from Progressive quarters. But if some workers and some owners were aliens, then all bets are off as to the way in which the constitutional protections would play out for the citizens who dealt with them, as noted above.

*Race and Civil Rights.* It is also worth asking how the Privileges or Immunities Clause would have worked in cases of race. Here the contemporary understanding of the Clause seems to indicate that the only rights that it protected were those that private citizens had in their dealings with each other. The protected rights found in the various formulations of privileges and immunities, or for that matter, in the Civil Rights Act of 1866, are all of this character. None refer to specific claims against the government for particular benefits or services that it typically provides, whether in the form of employment, welfare programs, education, or the like. The clause is, in a word, geared to preservation of negative rights against public interference, not positive rights of public support. The program to give various former slaves forty acres and a mule is a form of state largesse that would offend neither the Privileges or Immunities Clause nor the narrower interpretation of both the Due Process Clause and the Equal Protection Clause set out above. Nor would a requirement that blacks and whites sit in separate sections in public buildings, which happened during the debates over the Fourteenth Amendment, violate the Fourteenth Amendment. The pairing of these two examples is not an accident, for the meaning of the Privileges and Immunities Clause was not that affirmative action was protected when other forms of race discrimination in the provision of public benefits were not. Rather, the meaning seems to have been that all forms of state largesse can take place, free of any constitutional limitation.

In this connection, note that the state monopoly in the *Slaughter-House Cases* was attacked because it interfered with the rights of other butchers to ply their ordinary trade. But if all that were at stake was a large subsidy to one butcher’s cooperative that was denied to another, then it is far from clear that the Privileges and Immunities Clause would have applied. It is anyone’s guess whether that next step would have been taken, as it was, for example, in the Contracts Clause context, when the guarantee against “impairment of the obligation of contracts,” contained

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<sup>49</sup> *Id.* at 39.

in Article I, section 10,<sup>50</sup> was held in *Fletcher v. Peck* to apply to state contracts as well as private ones.<sup>51</sup> The tools of interpretation are such that the Privileges or Immunities Clause might have limited the ability of the states to dispose of their property, even if that deviated from the original understanding of that Clause. The political pressures for that extension would have been enormous.

This structural uncertainty has clear implications for the race cases of which the most notorious is *Plessy v. Ferguson*, which announced and applied the principle of separate but equal in three separate contexts: common carriers, anti-miscegenation laws, and public education.<sup>52</sup> The question is how these cases would have been decided under the Privileges or Immunities Clause if the dissents had carried the day. The scorecard appears to look as follows.

1. Common Carriers. The requirement of forced separation in common carriers and other public accommodations looks as though it is forbidden by the Clause. The right to travel with private carriers is a part of trade and commerce, so the Clause appears to apply without much ado. The second half of the issue, whether there is a police power justification for the law, still remains. On this score, there is no reason to believe that the Court would give the police power a different reading under the Privileges or Immunities Clause than it does under the Equal Protection Clause, so the ultimate outcome would be the same subject to only one difference: only black citizens could mount the challenge.

2. Antimiscegenation Laws. The antimiscegenation laws appear to suffer more or less the same fate. The liberty to marry a person (at least of the opposite sex) would have counted as a fundamental and longstanding right, so the Clause would also apply. The broad police power justifications invoked in *Plessy* are no better, but no worse, under the Privileges or Immunities Clause. The outcome would again be unchanged, at least until the police power arguments were eventually undone in *Loving v. Virginia*, some seventy years later.<sup>53</sup>

3. Public Education. As noted, the original thrust of the privileges and immunities language is not directed toward the state provision of any kinds of services, whether schools, parks, or hospitals. I have no doubt that once the police power justification for racial separation was overcome, any limitations upon equal access to state services based on this narrow reading of privileges and immunities would fall as well. That is because the same powerful dynamic that led to *Brown v. Board of Education*<sup>54</sup> was so important that no textual or structural argument could be allowed to stand in its way. But if the question is whether that result was required by the Privileges or Immunities Clause, the answer is no. All of Section 1 of

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<sup>50</sup> U.S. CONST. art. I, § 10.

<sup>51</sup> 10 U.S. (6 Cranch) 87, 135–37 (1810).

<sup>52</sup> 163 U.S. 537 (1896)

<sup>53</sup> 388 U.S. 1 (1967).

<sup>54</sup> 347 U.S. 483 (1954).

the Fourteenth Amendment seems directed to the prevention of interference in private affairs only.

*Intimate Associations.* The various questions of intimate association, which cover marriage, abortion, prostitution, and same-sex relationships, follow the pattern already established. In most of these cases the individual claim is to keep the government out of personal affairs, and that claim for negative rights fits in well with the overall structure of privileges and immunities, but only with respect to citizens. In these cases, there is still the question of whether the conduct in question is subject to regulation under the police power, and on these issues, the nineteenth-century judges were most decidedly not libertarian in their broad interpretation of the morals powers. To be sure, some restrictions on sexual conduct, for example, could be justified as a means to prevent the spread of disease, and, thus, be treated as matters of health and safety, but the attacks on various forms of intimate relationships went beyond those contours. The great transformation of the twentieth century is to convert a broad class of immoral relationships (fornication, homosexual conduct) into intimate personal associations that now receive protection against state action, in a line of cases that runs from *Griswold* to *Lawrence*. But that transformation could have taken place within the narrower confines of the Privileges and Immunities Clause just as it took place in connection with due process and equal protection. The only real difference is on the use of government money to promote certain sexual activities. Efforts to fund alternatives to abortion that so many find troublesome in connection with either due process or equal protection (or any other grounds) would fall on deaf ears if the original structure of privileges and immunities continued to protect only negative rights, for the same reasons set out above.<sup>55</sup>

*Welfare.* As indicated earlier, the Privileges or Immunities Clause stresses negative rights that the individual has against the state. One of these rights, which was included on the short list prepared by Justice Miller in the *Slaughter-House Cases*, was the right to travel. Conceived of in its negative form, what the right to travel includes is the ability to pass unmolested from one state to another. As such, it was included on the early list of Justice Washington in *Corfield v. Coryell*, who wrote that the Privileges and Immunities Clause of Article IV protected “[t]he 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.”<sup>56</sup> The government of one state cannot erect toll barriers that prevent people from coming to a state or going through it to some other destination. The right here is in a sense the public analogue to the private right that individuals have to pass along public highways free from the molestation of others.

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<sup>55</sup> See, e.g., *Harris v. McRae*, 448 U.S. 297, 317–18 (1980) (upholding restrictions on use of federal funds for abortions).

<sup>56</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

This version of the right to travel is sufficiently non-controversial that there is no need to locate it in the Privileges and Immunities Clause when it could find an equal home, say, in dormant Commerce Clause jurisprudence. But the more modern cases that deal with this issue take the right to travel under the Privileges or Immunities Clause of the Fourteenth Amendment to places where it never was meant to go, largely because they do not bother to distinguish between protection from government interference and creation of government support. One early case in this line, *Shapiro v. Thompson*,<sup>57</sup> held that a state interfered with the right of travel when it refused to allow citizens of other states to receive welfare benefits on the same level as its own citizens. *Shapiro* did not indicate whether it relied on Article IV or on the Fourteenth Amendment, and it really does not much matter, for the comprehensive list of privileges and immunities is the same under both provisions. But no matter where the case finds a home, the critical point was that the decision switches the entire understanding of the privileges and immunities into a claim for positive rights that was, without question, inconsistent with the original tenor of both provisions. That decision was, more recently, extended in *Saenz v. Roe*,<sup>58</sup> an Article IV case, to cover not just an exclusion from welfare benefits, but also any short-term reduction in the levels received. Justice Stevens's decision did not acknowledge the seismic shift from the earlier explicit reading of the clause, but it is clear from his artful redaction of Justice Washington's quotation in *Corfield* that he was aware that the modern case law was being turned upside down. Now Justice Washington's formulation of the Privileges and Immunities Clause covers simply "the right of a citizen of one state to pass through, or to reside in any other state."<sup>59</sup> There are no three dots at the end of the sentence that even hint at the elimination of the words "for purposes of trade, agriculture, professional pursuits, or otherwise" that concluded the original sentence. The word "otherwise" at the end of a list that talks about rights to enter certain businesses offers no support for the extended reading of the clause. Rather, the entire episode shows just how easy it is to transform, without real argument, a protection of negative liberties into a right to state support.<sup>60</sup> A simple period in the right place will do the job.

*Voting.* Last, it is worth noting that all voting rights cases would die still-born under the traditional reading of the Privileges and Immunities Clause. Here we deal with the issue of participation in public affairs, and that too does not seem to be covered by this Amendment at all, but is left to the Fifteenth Amendment,

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<sup>57</sup> 394 U.S. 618 (1969).

<sup>58</sup> 526 U.S. 489 (1999).

<sup>59</sup> *Id.* at 502 n.14.

<sup>60</sup> Nor is this an isolated instance. In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), another Article IV case, the Court invalidated an Alaska statute which gave local citizens preferences under the Alaska Hire Act, ALASKA STAT. §§ 38.40.010-090 (Michie 1977), in working on the Alaska pipelines. That would have made sense if the statute interfered with the rights of private firms to hire out-of-state individuals. But in this instance the Court held that "the mere fact" that Alaska owned the fields and thus acted as a proprietor, not a regulator, made no difference to whether the statute violated the Privileges and Immunities Clause. *Id.* at 525. Under the original conception of privileges and immunities, it made all the difference in the world.

which is not an apt vehicle for the reapportionment cases. Hence it looks like *Baker v. Carr*<sup>61</sup> and its progeny would have to be decided the other way as well, even if there is no means whereby a popular majority can undo the stranglehold that mal-districting has on political choice.

*Lochner at Last.* We are now in a position to state how *Lochner* would have fared under a privileges and immunities-centered interpretation of the Fourteenth Amendment. Of our two limitations, we need not worry about the apparent inability to reach the state provision of public benefits, for that was just not at stake there. *Lochner* is a negative liberties case. But the decision striking down the maximum hours law would now apply only to citizens as the Clause requires. The police power issue is easily transferable from the modern Due Process Clause into the Privileges and Immunities Clause, so Justice Peckham would not have budged on his view that the police power could not justify maximum hours legislation. Nor would the Progressives have backed down in their attack. So the decision would survive in a narrowed scope. But of this result we should have mixed emotions. The outcome would have a stronger textual pedigree than arguments under due process and equal protection offer, but the political opposition to the decision would have remained just as severe. What drove the criticism of *Lochner* was its apparent acceptance of the view that ordinary people can protect their own interests in voluntary transactions. The Progressives did not accept that view. Moving from the Due Process Clause to the Privileges and Immunities Clause would have changed the textual debate, but not the political debate. In the long run, I think that virtually all of the three limitations found in the original Privileges and Immunities Clause would wither away through one device or another, so that we would end up in the same place that we are today, although by a somewhat different route. And therein lies both the beauty and frustration of constitutional law. It seems to be driven by some internal gyroscope that shapes the raw text into a comprehensive scheme that bears only imperfect resemblance to its textual starting place. We can argue endlessly about the legitimacy of these various moves, but it is hard to deny that they took place. In the end, I think that we should largely welcome the wrong turn that was taken in the *Slaughter-House Cases* on the ground that it opened the door to a more consistent and comprehensive protection of individual liberties. Yet, by the same token, we should never forget our tenuous hold on basic constitutional protections.

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<sup>61</sup> 369 U.S. 186 (1962).