Article

Setting Incorporationism Straight: A Reinterpretation of the *Slaughter-House Cases*

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In 1873, in the *Slaughter-House Cases* . . . the Supreme Court said the phrase “privileges and immunities” had nothing to do with applying the Bill of Rights to the states. The vote was a narrow 5-4—one vote switch might have changed the course of history.¹

I. INTRODUCTION

The Supreme Court’s decision last Term in *Saenz v. Roe*² was, at once, both run-of-the-mill and quite remarkable. There is nothing particularly earthshaking about the result the Court reached—specifically, that California could not constitutionally limit welfare payments to a new resident during his first year in California to the amount provided by the state from which he had moved.³ What makes the decision in *Saenz* truly newsworthy—and potentially a watershed—is the way the Court arrived at the result that it did: For the first time in sixty-five years, and only the second time in history, the Court struck down a state statute on the ground that it violated the Fourteenth Amendment’s Privileges or Immunities Clause.

The Privileges or Immunities Clause provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States.”⁴ Prior to *Saenz*, the Supreme Court had relied on the Clause to invalidate a state statute only once, when, in the 1935 case of *Colgate v. Harvey*,⁵ it invoked the Clause to set aside a state income tax charged against in-state residents on interest and dividend income earned outside the state. The Court’s initial foray into the realm of federal “privileges [and] immunities” was short-lived. *Colgate* was overruled in 1940 by *Madden v. Kentucky*,⁶ and the Privileges or Immunities Clause has remained dormant ever since—at least until *Saenz*, that is.

1. Stephen J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 WM. & MARY BILL RTS. J. 121, 124 (1992).

2. 119 S. Ct. 1518 (1999).

3. This is certainly not to say that the outcome in *Saenz* was foreordained. As Laurence Tribe recently pointed out, even the result in *Saenz* is “something of a mystery” in the following sense: In *Shapiro v. Thompson*, 394 U.S. 618 (1969), it took a “far more liberal Court” two rounds of argument to decide ultimately to invalidate a far more extreme California law—one that outright denied new residents access to welfare benefits during their first year in the state—and, even then, it struck down the statute only by a 6-3 margin. Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 113 (1999). In *Saenz*, by contrast, a relatively conservative Court invalidated a less burdensome California program by a comfortable 7-2 vote. See *id.* at 119.

4. U.S. CONST. amend. XIV, § 1.

5. 296 U.S. 404 (1935).

6. 309 U.S. 83 (1940).

So, does *Saenz* signal an out-and-out “Privileges or Immunities Revival”?⁷ Only time will tell. At the very least, however, the decision seems to indicate a willingness on the part of the current Court to reconsider the role, if any, that the Privileges or Immunities Clause ought to play in modern constitutional law. Even Justice Thomas, dissenting in *Saenz*, acknowledged that he “would be open to reevaluating [the] meaning” of the Privileges or Immunities Clause “in an appropriate case.”⁸ But before any meaningful reconsideration of the Privileges or Immunities Clause’s role can occur, the Court will have to grapple with several important issues, two of which Justice Thomas specifically identified. First, the Court should “endeavor to understand what the framers of the Fourteenth Amendment thought [the Clause] meant.”⁹ Second, the Court will need to “consider whether the Clause should displace, rather than augment, portions of [modern] equal protection and substantive due process jurisprudence.”¹⁰ There is, in addition, a third, and ultimately even more important, question the Court must address if it is serious about resuscitating the long-dormant Privileges or Immunities Clause: What about the *Slaughter-House Cases*?¹¹

In contemporary constitutional discourse, *Slaughter-House* stands for one simple truth: that the Privileges or Immunities Clause is utterly incapable of performing any real work in the protection of individual rights against state interference, and that any argument premised on the Clause is therefore a constitutional non-starter. Novice students of constitutional law, upon encountering the Privileges or Immunities Clause for the first time, are told by their professors (pausing ever so briefly in the headlong rush toward the real meat of the Fourteenth Amendment, the Due Process and Equal Protection Clauses): “Privileges or Immunities? Don’t worry about it. Justice Miller and the *Slaughter-House* Court decimated that provision way back in 1873.” Likewise, recent law-school graduates preparing for the bar examination are instructed that “Privileges or Immunities Clause” will *never* be a correct answer and can be eliminated out of hand. The fact is that no one reads the Privileges or Immunities Clause anymore. For that matter, no one reads the *Slaughter-House Cases* anymore. Today, “*Slaughter-House*” is really just shorthand—a codeword of sorts—for something much larger, namely, the complete evisceration of a significant part of Section 1 of the Fourteenth Amendment.

Despite its practical irrelevance, the Privileges or Immunities Clause is today enjoying something of a renaissance among constitutional scholars.

7. Tribe, *supra* note 3.

8. *Saenz v. Roe*, 119 S. Ct. 1518, 1538 (1999) (Thomas, J., dissenting).

9. *Id.*

10. *Id.*

11. 83 U.S. (16 Wall.) 36 (1873).

During the past decade, a number of commentators—most notably, Akhil Amar, Michael Kent Curtis, and Richard Aynes—have scoured the historical materials surrounding the framing of the Fourteenth Amendment and have demonstrated that there was substantial consensus among members of the Thirty-Ninth Congress who crafted the Fourteenth Amendment that the Privileges or Immunities Clause (and *not* the Due Process Clause, as is commonly assumed today) would serve as the primary vehicle for protecting individual rights against state infringement.¹² More specifically, and more importantly for our purposes, these scholars conclude that the Framers of Section 1 intended the Privileges or Immunities Clause to “incorporate” most, if not all, of the protections of the federal Bill of Rights against state governments.¹³

Potent as it may be, however, this argument from original intent only half answers objections to an incorporationist interpretation of the Privileges or Immunities Clause. There remains the thorny issue of *Slaughter-House*. This Article therefore seeks to pick up where Professors Amar, Curtis, and Aynes have left off, and to advance the incorporationist

12. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) [hereinafter Amar, *The Bill of Rights and the Fourteenth Amendment*]; Akhil R. Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, 19 HARV. J.L. & PUB. POL’Y 443 (1996) [hereinafter Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*]; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

Of course, the giants upon whose shoulders Amar, Curtis, and Aynes stood should not be overlooked. For earlier scholarship suggesting an enhanced role for the Privileges or Immunities Clause, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22-30 (1980); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 7-2 to 7-4, at 415-26, and § 11-2, at 567-69 (1st ed. 1978); William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); and Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, 1972 WASH. U. L.Q. 405. Justice Hugo Black’s considerable contribution to the cause of incorporation should also be noted. See, e.g., *Adamson v. California*, 332 U.S. 46, 69-92 & app. (1947) (Black, J., dissenting).

13. See CURTIS, *supra* note 12, at 91 (“John Bingham, the author of the amendment, and Senator Howard, who managed it for the Joint Committee in the Senate, clearly said that the amendment would require the states to obey the Bill of Rights. *Not a single senator or congressman contradicted them.* . . . Today, the idea that the states should obey the Bill of Rights is controversial. It was not controversial for Republicans in the Thirty-ninth Congress.”); Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 12, at 1236 (“[James Wilson and John Bingham] understood that the plain meaning of Section One was that henceforth, the federal government would have explicit power to compel state compliance with all the ‘privileges’ and ‘immunities’ of ‘citizens’ set out in the Bill.”); Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, *supra* note 12, at 447 (“John Bingham, who authored Section 1 of the Fourteenth Amendment . . . made it clear that the Amendment would apply the Bill of Rights against the States. . . . All the leading figures in the House and Senate—Jacob Howard, James Wilson, and Thaddeus Stevens, for example—shared similar concerns.”); Aynes, *supra* note 12, at 103 (“[A] fair examination of the evidence reveals that Bingham held a cogent theory and clearly expressed his intent that the Privileges or Immunities Clause of the Fourteenth Amendment include the Bill of Rights.”).

understanding of the Privileges or Immunities Clause beyond its most formidable nemesis: Justice Samuel Miller's opinion for the Court in the infamous *Slaughter-House Cases*.

A number of prominent incorporationist scholars, including Curtis and Aynes, as well as Laurence Tribe and David Richards, have expressly called on the Supreme Court to overrule *Slaughter-House*.¹⁴ I must admit that the thought of the Supreme Court overruling *Slaughter-House* is enticing. But is it really necessary for the Court to take such a dramatic step? In my view, the Framers' purpose of incorporating Bill of Rights freedoms through the Privileges or Immunities Clause may be accomplished without disturbing the *Slaughter-House* precedent. In this Article, I argue, contrary to the almost crushing weight of conventional wisdom,¹⁵ that Justice Miller's majority opinion in *Slaughter-House* did not

14. See DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 216 (1993); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-6, at 1320-31 (3d ed. 1999); Aynes, *supra* note 12, at 103; Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 102-05 (1996). Recognizing that the Supreme Court has "uniformly deferred for over a century to the interpretation given to the [Privileges or Immunities] Clause in the *Slaughter-House Cases*" and that, therefore, "the most serious objection to any attempt to restore to the Privileges or Immunities Clause its intended role in protecting individual rights would be advanced under the doctrine of stare decisis," Laurence Tribe has mounted an impressive argument why considerations of stare decisis do not require continued allegiance to *Slaughter-House* and why the decision therefore ought to be forthrightly overruled. TRIBE, *supra*, § 7-6, at 1320.

15. See, e.g., Saenz v. Roe, 119 S. Ct. 1518, 1538 (1999) (Thomas, J., dissenting) ("The *Slaughter-House Cases* sapped the [Privileges or Immunities] Clause of any meaning."); AMAR, *supra* note 12, at 176 ("Miller's argument . . . seemed to resist, if not reject, total incorporation of the first eight amendments."); ROBERT H. BORK, THE TEMPTING OF AMERICA 180 (1990) ("[T]he privileges and immunities clause[] has remained the cadaver that it was left by the *Slaughter-House Cases*."); THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 965 (Edward S. Corwin ed., 1953) ("[T]he privileges and immunities clause [was] . . . rendered a 'practical nullity' by a single decision of the Supreme Court rendered within five years after its ratification."); CURTIS, *supra* note 12, at 175 ("[B]y its construction of the Fourteenth Amendment [in *Slaughter-House*,] the Court effectively nullified the intent to apply the Bill of Rights to the states."); 2 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 423 (1907) (placing the discussion of the *Slaughter-House Cases* within a chapter entitled "The Undoing of Reconstruction"); JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 205 (commenting that Justice Miller's "opinion in the *Slaughter House Cases* of 1873 . . . set the pattern of narrow interpretation of the Fourteenth Amendment for a long time"); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1144 (1992) ("Through judicial interpretation, the Court has rendered the Privileges or Immunities Clause a nullity."); Curtis, *supra* note 14, at 76 ("[*Slaughter-House*] left protections of Bill of Rights liberties to the tender mercies of the very states that had so recently made mincemeat of them."); Charles Fairman, *What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870-1892*, in THE BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES: 1940-1950, at 425, 458 (1953) ("Justice Miller, for a bare majority of the Court, construed the Amendment narrowly . . . The privileges and immunities clause was virtually scratched from the Constitution."); Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 84 (1993) ("Justice Miller's opinion . . . virtually emptied the Privileges and Immunities Clause of content . . ."); Kurland, *supra* note 12,

foreclose the possibility of incorporating provisions of the Bill of Rights through the Privileges or Immunities Clause. Not once in the decision did the Court seriously suggest—much less hold—that the Privileges or Immunities Clause did not incorporate Bill of Rights freedoms, as the Fourteenth Amendment's Framers had clearly said the Clause would. In fact, to the extent that the Court's opinion in *Slaughter-House* says anything about incorporation—and I, for one, believe that it does—it suggests that core Bill of Rights freedoms *are* among the "privileges [and] immunities of citizens of the United States" protected by the Fourteenth Amendment.¹⁶ And although a handful of commentators have hinted at a belief that Justice Miller's *Slaughter-House* opinion might be read to leave the door open to incorporation,¹⁷ none has yet provided a sustained defense of an incorporationist interpretation. Articulating such a defense is precisely what this Article aims to do. My alternative, incorporationist reading of Miller's *Slaughter-House* opinion, I hope to show, is not only strongly suggested by both the text and the context of the decision itself, but is also firmly supported by core tenets of Miller's own jurisprudential philosophy.

In Part II, I provide a brief sketch of the orthodox, anti-incorporationist interpretation of the *Slaughter-House* opinion. For obvious reasons, I expect to break no new ground in Part II. In fact, the unoriginality of my Part II illustrates precisely the point I am trying to make about the conventional reading: Part II chronicles an interpretation of *Slaughter-House* upon which, as one scholar has put it, "virtually every modern commentator is in agreement."¹⁸ In Part III, I shift gears and delve deeply

at 408 ("The commencement of the judicial history of privileges or immunities of citizens of the United States lies in the *Slaughter-House Cases*, which provided both a beginning and an end." (citation omitted)); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1241 (1998) (observing that the *Slaughter-House* Court "read the Privileges or Immunities Clause of the Fourteenth Amendment out of the Constitution by construing it into irrelevancy"); J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 43, 45 (1989) ("Hopes for a broad reading of the Privileges or Immunities Clause were dashed by the famous *Slaughter-House Cases* of 1873." (citation omitted)).

16. It is not my purpose in this Article to delineate the precise boundaries of the theory of incorporation contemplated by the Court's opinion in *Slaughter-House*. Rather, my objective is simply to demonstrate that there is nothing in *Slaughter-House* that forecloses incorporation of Bill of Rights freedoms through the Privileges or Immunities Clause and that, in fact, Justice Miller's opinion actually provides support for some not insubstantial theory of incorporation. As to scope, for reasons that will become clear in the remainder of the Article, Miller's opinion probably calls for some version of what Akhil Amar has called "refined incorporation"—that is, a theory of incorporation that means both less and more than a jot-for-jot absorption of the first eight amendments. See AMAR, *supra* note 12, at 218.

17. See ELY, *supra* note 12, at 196 n.59; TRIBE, *supra* note 14, § 7-3, at 1307; Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 12, at 1258; Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 744-48.

18. Thomas B. McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986); see also Richard L. Ayres, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*,

into the circumstances surrounding the *Slaughter-House* litigation and carefully dissect the opinions of Justice Miller and of the dissenting Justices. I hope to show that, contrary to conventional wisdom, there is nothing in Miller's opinion that *negates* a role for the Privileges or Immunities Clause in the incorporation of Bill of Rights freedoms against the states, and that, in fact, a more plausible reading of Miller's opinion specifically *preserves* such a role for the Clause. Miller's opinion suggests—both on its own terms and, even more clearly, in the context of the radical, freewheeling theories of the Fourteenth Amendment offered by counsel for the plaintiffs and endorsed by the dissenting Justices—a “compromise” interpretation of the Privileges or Immunities Clause. Under this compromise interpretation, the Clause serves as a vehicle for the protection, not of *all* personal rights, but of what I will call “uniquely federal” rights, a category that Miller seemed in *Slaughter-House* to suggest included many of the freedoms enumerated in the first eight amendments to the Constitution.

In Part IV, I take a step back to survey the “bigger picture.” I hope to show that my incorporationist interpretation of Miller's *Slaughter-House* opinion is not merely a wrenching of the opinion's text or a manipulation of ambiguous language, but is instead one that is confirmed by convincing evidence relating to Justice Miller's own general jurisprudential philosophy and that accords with Miller's voting patterns in other Reconstruction-era cases. Finally, Part V concludes by tracing the practical implications of my concededly unorthodox—though I believe ultimately correct—understanding of *Slaughter-House*. Most obviously and importantly, my reading would permit courts to lay aside the historically confused and semantically untenable doctrine of “substantive due process,” a doctrine that has for years visited suspicion and disrepute on the judiciary's attempt to protect even textually specified constitutional freedoms, such as those set out in the Bill of Rights, against state interference.

In the end, I believe that by reconceiving the way we read *Slaughter-House*, we might set incorporationism straight.

II. THE *SLAUGHTER-HOUSE* CASES: THE CONVENTIONAL WISDOM

In this Part, I lay out in simple fashion the traditional interpretation of the *Slaughter-House Cases*, relying very heavily, for obvious reasons, on verbatim quotations from Justice Miller's opinion for the Court. This Part seeks to demonstrate how easy it would be (and has been) for casual readers to conclude, as they have for years, that Miller's opinion in *Slaughter-*

70 CHI.-KENT L. REV. 627, 627 (1994) (“‘[E]veryone’ agrees [that] the Court [in *Slaughter-House*] incorrectly interpreted the Privileges or Immunities Clause . . .”).

House rejected any significant role for the Privileges or Immunities Clause in the protection of individual rights generally, and in the incorporation of Bill of Rights freedoms more specifically.

A. *The Facts*

On March 8, 1869, Louisiana's Reconstruction legislature enacted a law entitled "An Act To Protect the Health of the City of New Orleans, To Locate the Stocklandings and Slaughterhouses, and To Incorporate the 'Crescent City LiveStock Landing and SlaughterHouse Company.'" ¹⁹ The statute conferred upon the newly created Crescent City Company "the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business" in and around the city of New Orleans and "order[ed] the closing up of all other stock-landings and slaughter-houses" in the area. ²⁰ Local butchers excluded by the monopoly sued, claiming an "interest, a privilege, [and] a property, in their labor." ²¹ The state-sanctioned monopoly, they contended, denied them their right to work and consequently violated, among other provisions, the Privileges or Immunities Clause. ²² The *Slaughter-House Cases* thus provided the Supreme Court with its first opportunity to construe the Fourteenth Amendment, which the states had ratified five years earlier in 1868.

B. *Justice Miller's Majority Opinion*

Justice Samuel Miller delivered the opinion for a bare 5-4 majority denying the butchers' claims. At the very outset of his opinion, the conventional account goes, Miller made perfectly clear his intention to interpret the Fourteenth Amendment narrowly. Referencing the history of the Civil War, "fresh within the memory of us all," ²³ Miller concluded that each of the Reconstruction Amendments ²⁴—and particularly the

19. Act of Mar. 8, 1869, No. 117, 1869 La. Acts 170.

20. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 59-60 (1873).

21. *Slaughter-House Cases*, 21 L. Ed. 395, 395 (1873) (argument of John A. Campbell on behalf of plaintiffs).

22. *See id.* at 396-99. The butchers also argued that the monopoly created an involuntary servitude in violation of the Thirteenth Amendment and infringed their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See id.* at 396-97. The Court's analysis, however, focused almost exclusively on the interpretation of the Privileges or Immunities Clause. *See infra* note 27.

23. *Slaughter-House*, 83 U.S. (16 Wall.) at 68.

24. In addition to the Fourteenth Amendment, ratified in 1868, were the Thirteenth Amendment, ratified in 1865, *see* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for a crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."), and the Fifteenth Amendment, ratified in 1870, *see* U.S. CONST. amend. XV ("The right of citizens of the United

Fourteenth—was intended primarily as a measure to ensure the freedom of the emancipated slaves:

[O]n the most casual examination of the language of these amendments, no 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.²⁵

And, although Miller acknowledged that blacks were not the only persons entitled to invoke the protection of the Reconstruction Amendments,²⁶ conventional wisdom holds that his pointed reference to slavery clearly suggested his inclination to read those amendments conservatively.

Turning to the substance of the butchers' claims, Miller focused almost exclusively on their argument under the Privileges or Immunities Clause.²⁷ Miller first turned to the opening sentence of the Fourteenth Amendment, which defined for the first time in American constitutional history the concept of national citizenship: "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."²⁸ Miller acknowledged that by this provision the Fourteenth Amendment had overruled the infamous *Dred Scott* case;²⁹ he concluded, however, that the "more

States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

25. *Slaughter-House*, 83 U.S. (16 Wall.) at 71; see also *id.* at 67 ("The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning.").

26. See *id.* at 72 ("We do not say that no one else but the negro can share in [the] protection [of the Reconstruction Amendments].").

27. Miller dismissed both the due process and the equal protection arguments with little more than a wave of the hand. He observed that "[t]he argument ha[d] not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law." *Id.* at 80. As to the Due Process Clause, he simply stated, without elaboration, that

under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

Id. at 81. Turning to the Equal Protection Clause—seemingly the most natural provision under which to attack a state statute that explicitly, and perhaps arbitrarily, discriminated between state citizens—Justice Miller held that "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Id.*

28. U.S. CONST. amend. XIV, § 1.

29. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding, inter alia, that blacks were not, and could not constitutionally become, citizens of the United States).

important" observation regarding the Citizenship Clause was "that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established."³⁰ This distinction, Miller reasoned, had profound significance for the proper interpretation of the Privileges or Immunities Clause, which "speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States."³¹ Consequently, in the wake of the Fourteenth Amendment there existed two distinct citizenships, state and national, each with its own distinct set of concomitant rights.

In fleshing out the distinction between state and national rights, Miller turned to the language of the "original" Privileges and Immunities Clause of Article IV, Section 2: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."³² For interpretive guidance, he referred to *Corfield v. Coryell*,³³ the most noteworthy contemporary construction of the Article IV provision, in which Justice Bushrod Washington had given the original Privileges and Immunities Clause an exceptionally broad construction. Quoting *Corfield*, Miller observed that Article IV protected "those privileges and immunities which are *fundamental*; which belong of right to the citizens of all free governments."³⁴ These included "protection by the government," the "right to acquire and possess property of every kind," and the right "to pursue and obtain happiness and safety."³⁵ With respect to the broadly defined privileges and immunities mentioned by Justice Washington in *Corfield*, Miller concluded that

[t]hroughout his opinion, they are spoken of as rights belonging to the individual *as a citizen of a state*. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the *State* governments were created to establish and secure.³⁶

As commentators who subscribe to the orthodox account of *Slaughter-House* correctly point out, in reaching this conclusion, Justice Miller

30. *Slaughter-House*, 83 U.S. (16 Wall.) at 73.

31. *Id.* at 74.

32. *Id.* at 75 (quoting U.S. CONST. art. IV, § 2, cl. 1). It is important to note that there are two clauses in the Constitution that purport to protect "privileges" and "immunities." The first, found in Article IV, Section 2 and directly at issue in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), is the Privileges and Immunities Clause; and the second, found in Section 1 of the Fourteenth Amendment and more directly at issue in this Article, is the Privileges or Immunities Clause. The confusion is compounded by the fact that many commentators refer inaccurately to the Fourteenth Amendment provision as the "Privileges and Immunities Clause."

33. 6 F. Cas. 546.

34. *Slaughter-House*, 83 U.S. (16 Wall.) at 76 (quoting *Corfield*, 6 F. Cas. at 551-52).

35. *Id.*

36. *Id.* (emphasis added).

actually misquoted both Article IV, Section 2 and Justice Washington's opinion in a way that would certainly appear to aid a state-rights reading. Whereas Miller's quotations from both the constitutional text and Washington's *Corfield* opinion refer to the privileges and immunities of "citizens of the several states"—suggesting that it is by virtue of *state* citizenship that Article IV rights are enjoyed—the original sources actually refer instead to the privileges and immunities of "citizens *in* the several states"—implying that the Article IV provision perhaps protects a uniform set of national rights of *United States* citizens valid within any state.³⁷ Justice Bradley, dissenting in *Slaughter-House*, actually flagged Miller's error;³⁸ nonetheless, the inaccuracy remained in the final version of the opinion, raising the specter that Miller had "deliberately misquote[d]" the provision in order to minimize the Fourteenth Amendment's impact on the state-federal balance of power.³⁹ In any event, Miller went on to hold that his broadly conceived class of *state* privileges and immunities, as distinguished from the *national* privileges and immunities protected by the Fourteenth Amendment, "embraces nearly every civil right for the establishment and protection of which organized government is instituted."⁴⁰

Having concluded that the great mass of civil rights—including the right to ply one's trade invoked by the butchers—depended for recognition and protection on *state* law, Miller asked rhetorically:

Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the

37. See, e.g., Aynes, *supra* note 12, at 98 n.265. Interestingly, there exists persuasive evidence that a number of influential Republican members of the Thirty-Ninth Congress involved in framing the Fourteenth Amendment subscribed to this national-rights reading of the original Privileges and Immunities Clause of Article IV. See *id.* at 69-70 (arguing that John Bingham subscribed to this view); see also CURTIS, *supra* note 12, at 42-48, 60-68 (indicating that national-rights theories of Article IV, Section 2 and *Corfield* enjoyed broad-based support among leading Republicans). John Bingham, the principal draftsman of Section 1 of the Fourteenth Amendment, almost certainly held such a view, which he explained in 1859: "There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens of the United States in the several States' that it guaranties." CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

38. See *Slaughter-House*, 83 U.S. (16 Wall.) at 117 (Bradley, J., dissenting) ("It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens *in* a State; not of citizens *of* a state.").

39. LOUIS LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 194 (1975); see also Aynes, *supra* note 18, at 644 ("Miller's textual argument, distinguishing between the rights of national citizens and the rights of state citizens, was based upon his deliberate misquotation of Article IV and of the *Corfield* case.").

40. *Slaughter-House*, 83 U.S. (16 Wall.) at 76.

entire domain of civil rights heretofore belonging exclusively to the States?⁴¹

For Miller, to ask the question was to answer it: "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."⁴²

If, however, the privileges and immunities of state citizenship included "nearly every civil right," as Miller had held, what, if anything, remained of the "privileges [and] immunities of citizens of the United States" specifically protected by the recently ratified Fourteenth Amendment? Although Miller concluded that the Court was "excused from defining the privileges and immunities of citizens of the United States" because the right claimed by the butchers was among the privileges and immunities "which belong to citizens of the states as such,"⁴³ he nonetheless went on to offer what the traditional interpretation of his opinion tells us was a decidedly cramped explanation of national privileges and immunities. According to Miller, the only privileges and immunities of citizens of the United States safeguarded by the Fourteenth Amendment were those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."⁴⁴ Elaborating on this standard, Miller compiled a rather pitiful list of freedoms. Among those Miller mentioned were the rights of the citizen

to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.⁴⁵

Miller continued:

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances,

41. *Id.* at 77.

42. *Id.* at 78.

43. *Id.* at 78-79.

44. *Id.* at 79.

45. *Id.* (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868) (internal quotation marks omitted)).

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. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the [Due Process and Equal Protection] clause[s] of the fourteenth . . .⁴⁶

Having catalogued a handful of seemingly worthless rights that he was prepared to place within the ambit of the Privileges or Immunities Clause, Miller abruptly halted his investigation. It was "useless to pursue this branch of the inquiry," Miller declared, "since we are of [the] opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration."⁴⁷

C. *The Dissents*

Justices Field, Swayne, and Bradley each authored a keen dissent in *Slaughter-House*. Of the three, the opinion of Justice Bradley, who while riding circuit had ruled in favor of the New Orleans butchers on the privileges-or-immunities issue in the lower federal courts,⁴⁸ addressed most clearly the substantive content of the Privileges or Immunities Clause, particularly as it related to the incorporation of Bill of Rights freedoms. "[W]e are not bound to resort to implication, or to the constitutional history of England to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States," Bradley observed. "It is in the Constitution itself."⁴⁹ Specifically mentioning the rights of habeas corpus, trial by jury, free exercise of religion, free speech, free press, peaceable assembly, and the freedom from unreasonable searches and seizures, Bradley concluded: "These, and still

46. *Id.* at 79-80.

47. *Id.* at 80.

48. See *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8408) ("But so far as relates to the question in hand, we may safely say it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit—not injurious to the community—as he may see fit . . .").

49. *Slaughter-House*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting).

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”⁵⁰ Justice Field, whose opinion focused on the historic and near-unanimous common-law condemnation of state-sanctioned monopolies, emphasized the centralizing character of the Fourteenth Amendment.⁵¹ He argued that the amendment had been adopted in order to “place the common rights of American citizens under the protection of the National government.”⁵² The majority’s unnecessarily narrow construction of the Privileges or Immunities Clause, Field insisted, ignored this fundamental purpose, and rendered that provision “a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.”⁵³ Justice Swayne sounded a similar lament, one often repeated by critics of Justice Miller’s interpretation of the Privileges or Immunities Clause:⁵⁴ “The construction adopted by the majority . . . [is] much too narrow [I]t turns, as it were, what was meant for bread into a stone.”⁵⁵

So what, precisely, is the upshot of the conventional reading of *Slaughter-House*, the account to which we have all grown so accustomed? It seems fairly clear: When one couples Justice Miller’s conclusion that *state* privileges and immunities “embrace[d] nearly every civil right for the establishment and protection of which organized government is instituted”⁵⁶ with the brief list of obscure rights he mentioned as representative of the class of *federal* privileges and immunities, the *Slaughter-House* majority’s opinion does indeed seem, as one conventional commentator remarked, to “make [the] Privileges and Immunities Clause completely nugatory and useless.”⁵⁷ The opinion appears conclusively to deny the Clause any independent role in the incorporation of the Bill of Rights against the states—a denial seemingly made even more stark in light of Justice Bradley’s explicit invocation, *in dissent*, of several Bill of Rights freedoms as among federal privileges and immunities.

For most, if not all, of us, this account is undoubtedly a familiar one. But let us not forget, as John Hart Ely has remarked in an only slightly

50. *Id.* at 118-19.

51. *See id.* at 101-08 (Field, J., dissenting). Justice Field penned the principal *Slaughter-House* dissent, in which Justices Bradley and Swayne, and Chief Justice Chase concurred.

52. *Id.* at 93.

53. *Id.* at 96.

54. *See, e.g.,* David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland’s First Black Lawyers*, 44 MD. L. REV. 939, 1025 (1985); Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 FLA. L. REV. 219, 223 n.12 (1992); Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 8 (1987).

55. *Slaughter-House*, 83 U.S. (16 Wall.) at 129 (Swayne, J., dissenting).

56. *Id.* at 76.

57. 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1119 (1953).

different context, that “familiarity breeds inattention.”⁵⁸ And it is inattention to the *Slaughter-House Cases*—simple blind-faith acceptance of the traditional, anti-incorporationist interpretation—that has for years plagued the incorporation doctrine. In the remainder of this Article, I hope to refocus our careful attention on *Slaughter-House* and to demonstrate how a better understanding of it might go a long way toward restoring long-lost textual and historical integrity to the incorporation doctrine.

III. THE *SLAUGHTER-HOUSE CASES*: A SECOND LOOK

A. *The Butchers’ Claims and the Dissenters’ Response: A “Radical” View of the Fourteenth Amendment*

Although it is commonly said that the Court in *Slaughter-House* “implicitly rejected . . . the position that all the Bill of Rights guarantees were made applicable to the states by the post-Civil War constitutional changes,”⁵⁹ it is important to remember that none of the rights set forth in the first eight amendments was at issue in the case. Rather, the butchers’ claim, as articulated by their lead counsel, John Campbell (himself a retired U.S. Supreme Court Justice),⁶⁰ was that “their investment of capital, their locations for trade, their hopes and calculations in business ha[d] been frustrated.”⁶¹ And although he made passing reference to the freedoms of speech and of the press, the rights to trial by jury and to counsel, and the privilege of habeas corpus as freedoms “incorporated in the bill of rights,”⁶² Campbell did not rely on explicit textual guarantees in making the butchers’ argument. He knew it would be useless to do so. (There is, of course, no right to pursue lawful employment specified in the text of either the original Constitution or the Bill of Rights.)⁶³ Indeed, Campbell candidly conceded to the Court at oral argument that there was no specific textual

58. ELY, *supra* note 12, at 18 (“Familiarity breeds inattention, and we apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”).

59. GERALD GUNTHER, CONSTITUTIONAL LAW 410 (12th ed. 1991).

60. Campbell had resigned from the Court when his home state of Alabama seceded from the Union. See William Gillette, *John A. Campbell*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 927, 936 (Leon Friedman & Fred L. Israel eds., 1969).

61. Brief for Plaintiffs, *Slaughter-House* (Nos. 475-480), reprinted in 6 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 535, 537-38 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

62. *Id.* at 559.

63. Interestingly, there were attempts to include an anti-monopoly provision in the Bill of Rights; however, those efforts failed. See WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 59-60 (1965) (describing the unsuccessful efforts of the New York, Massachusetts, New Hampshire, and Rhode Island representatives).

basis in the Constitution for the right he claimed on behalf of his clients. "There is not," he admitted, "a grant of this right nor a prohibition of its violation in direct terms."⁶⁴

But Campbell did not see himself as being bound by constitutional text. Instead, he maintained that it was a "general principle of the law" that "every person has individually, and the public have collectively, a right to require that the course of trade should be free from unreasonable obstruction."⁶⁵ Plying one's trade unhindered by government regulation, Campbell insisted, was a "natural right of the person."⁶⁶ From where, though, if not the Constitution's text, did Campbell derive this "general principle," this "natural right," which he sought to read into the Privileges or Immunities Clause? For starters, he acknowledged the writings of a handful of political philosophers, including Alexis de Tocqueville, Sir Walter Scott, Edmund Burke, Thomas Macaulay, Toussaint L'Ouverture, and Adam Smith. Most prominently, however, Campbell staked his constitutional argument on the common law's historical prohibition of monopoly power. Time and again, Campbell referred to the right to pursue an occupation as a "common right."⁶⁷ A "common right," legal dictionaries and judicial decisions of the day confirm, was, as its name implies, a right rooted in the common law. An early edition of *Black's Law Dictionary*, for instance, defined "common right" to mean "[a] term applied to rights, privileges, and immunities appertaining to and enjoyed by all citizens equally and in common, *and which have their foundation in the common law*."⁶⁸ An 1882 California state-court decision that *Black's* cited for its definition of "common right" provided a more comprehensive explanation—an explanation which, significantly, expressly *included* common-law rights and expressly *excluded* constitutional and statutory rights:

[W]hat is the "*common right*" here referred to? Is it not a right which pertains to citizens by the *common law*, the investiture of which is not to be looked for in any special law, whether established by a Constitution or an Act of the Legislature? Coke says: "*De commun droit*—of common right—this is by the common law, because the common law is the best and most common birthright that the subject hath for the safeguard and defense not only of his goods, lands, and revenues, but of his wife

64. Plaintiffs' Oral Argument, *Slaughter-House* (Nos. 475-480) (Feb. 3-4, 1873), in 6 LANDMARK BRIEFS, *supra* note 61, at 733, 757.

65. *Id.*

66. *Id.* at 758.

67. Brief for Plaintiffs, *supra* note 61, at 546-47, 557, 575; Plaintiffs' Brief upon the Re-argument, *Slaughter-House* (Nos. 475-480), reprinted in 6 LANDMARK BRIEFS, *supra* note 61, at 639, 649, 661.

68. BLACK'S LAW DICTIONARY 226 (2d ed. 1910) (emphasis added).

and children This common law of England is sometimes called right, sometimes common right, and sometimes *communis justitia*."

....

We are of [the] opinion that the common right refers to the right of citizens generally at common law.⁶⁹

Campbell's usage of the phrase "common right" was not accidental. His argument makes it clear that he appreciated the term's common-law signification: "[The rights claimed] live in the consciousness of the people," Campbell declared, "and are called the people's rights—the *common right*—the *common law*, and are the product of the common mind of the people, living and working in individuals, and which each individual recognizes to be necessarily law, and conforms his daily practice to it."⁷⁰

Citing among other sources Lord Coke's report of the *Case of Monopolies*,⁷¹ Campbell pointed out that "[t]he common law of England recognized at a very early period as a common right, that of selecting and following a vocation."⁷² The common law of the United States, he insisted, was "in the most important particulars in harmony with that of Great Britain on the subject."⁷³ Under the common law as inherited from England, Campbell argued, "every person ha[d] a right as between him and his fellow-citizen to full freedom in disposing of his labor or capital according to his own will."⁷⁴ By the Louisiana Act, "[t]he common rights of men ha[d] been taken away, and ha[d] become the sole and exclusive privilege of a single corporation."⁷⁵

Standing alone, Campbell's emphasis on the common-law pedigree of the right to work was not particularly novel. What *was* novel was Campbell's understanding of the relationship between the common-law rights of contract and property and the newly ratified Fourteenth Amendment. In essence, what Campbell urged was that the Fourteenth Amendment had federalized—indeed, constitutionalized—the panoply of economic common-law freedoms, including the right to pursue an occupation. The "relations of labor and the rights of laboring men," which had traditionally been protected by the common law, were, Campbell argued, "deserving a place in public law."⁷⁶ In other words, because the common law safeguarded the right to work claimed by the butchers, the Fourteenth Amendment should do likewise. Campbell contended that

69. *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 107 (1882) (citing SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 142a (1628)).

70. Plaintiffs' Brief upon the Re-argument, *supra* note 67, at 660 (emphasis added).

71. 77 Eng. Rep. 1260 (Q.B. 1602).

72. Plaintiffs' Brief upon the Re-argument, *supra* note 67, at 661.

73. Brief for Plaintiffs, *supra* note 61, at 560.

74. *Id.* at 541.

75. *Id.* at 547 (emphasis omitted).

76. *Id.* at 571.

the words [of the Privileges or Immunities Clause] are suitable, and have been employed to describe the personal rights—the civil rights which usage, tradition, habitudes of society, written law, and the common sentiment of the people have recognized as forming the basis of the institutions of the entire country.⁷⁷

Referring to his argument as a mere “exposition of the Constitutions of all the States and of the American common law,” Campbell declared:

It is not a discovery that life, liberty, property, protection, privilege, and immunity are held by individual and personal titles. They were claimed as the sacred inheritance of our people, brought to this continent by the first colonists, and maintained with heroic and magnanimous efforts. . . . *What the 14th amendment was designed to accomplish was to afford a permanent and powerful guarantee to them. This consisted in the recognition of them as the assured estate of the population, and the withdrawal from the States of any power to abridge or to destroy them.*⁷⁸

Put simply, what were at common law “the unchartered prerogatives of every individual man . . . are now the constitutional inviolable rights of an American citizen.”⁷⁹

Campbell’s argument on behalf of the butchers was one of remarkable breadth. What Campbell proposed was, in essence, a wholesale transfer of authority over individual rights—including traditional, common-law rights of contract and property—from the states to the federal government. “The *entire body of the personal rights of men* that State governments ought not to destroy or impair,” Campbell insisted, “have been placed under the guardianship of the government of the United States.”⁸⁰ Charles Fairman, a prominent scholar of Reconstruction-era constitutional history, accurately described Campbell’s proposal as a “tour-de-force.”⁸¹ Fairman summarized Campbell’s argument as follows: “[A]s the courts had shaped the common law in accord with the needs of society, henceforth the Court should find authority in the Fourteenth Amendment to recognize whatever was ‘consequential’ to national citizenship.”⁸² And clearly in Campbell’s mind, the most “consequential” rights were *economic* rights—business freedoms—such as the rights to make and enforce contracts, to own

77. Plaintiffs’ Brief upon the Re-argument, *supra* note 67, at 659.

78. *Id.* at 665 (emphasis added).

79. *Id.* at 683.

80. Brief for Plaintiffs, *supra* note 61, at 552 (emphasis added).

81. Charles Fairman, *Samuel F. Miller, Justice of the Supreme Court, 1862-1890*, 10 VAND. L. REV. 193, 198 (1957).

82. CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88*, at 1345 (Vol. VI of *Oliver Wendell Holmes Devise History of the Supreme Court* (Paul A. Freund ed.)).

property, and to pursue gainful employment. By emphasizing the common law's historical condemnation of monopolies, Campbell had attempted "to persuade the Court that it was part of the 'privileges and immunities,' the 'liberty and property' of the citizen to live under a system of economic *laissez faire*."⁸³

Thomas Durant, who argued the case for the Crescent City Livestock Company, objected that Campbell's emphasis on natural rights and common-law freedoms rendered his construction of the scope of the Privileges or Immunities Clause virtually illimitable. Under Campbell's reading, Durant warned, the Court would have to invalidate *every* law that implicated economic freedom in *any* respect. Government charters of all kinds—including those for canals, bridges, and railroads—would fall. States would also be forbidden from regulating the manufacture and storage of dangerous substances such as gunpowder and petroleum, from prescribing working hours or labor conditions, and from imposing licensing fees and taxes on professions.⁸⁴ Durant also balked at Campbell's "historical and romantic illustrations of the evils of monopolies."⁸⁵ "What is said of them as they figure in Great Britain is not strictly applicable to the case before us," Durant argued.⁸⁶ "The sole question . . . for this court is whether the State of Louisiana in granting this monopoly has deprived the plaintiffs in error of any right, privilege, or title *guaranteed by the Constitution of the United States*."⁸⁷ The right to work claimed by Campbell on behalf of the butchers, Durant insisted, simply did not "touch[] the relation of the individual to the Government in his character of 'citizen' of the United States," as required by the Privileges or Immunities Clause.⁸⁸

Notwithstanding the breadth of his position and the freewheeling nature of the inquiry he proposed, Campbell succeeded in persuading four members of the Supreme Court that his view of the Fourteenth Amendment was the correct one. As had Campbell, Justice Stephen Field, who authored the principal dissent in *Slaughter-House*, expressly disavowed any reliance on explicit constitutional provisions to support his position: "[G]rants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of

83. CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890, at 181 (1939); see also FAIRMAN, *supra* note 82, at 1319 ("[Campbell's] effort made the Amendment seem from the start to face toward economic liberty, '*laissez faire*.'").

84. See Brief for Defendants, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (Nos. 475-480), reprinted in 6 LANDMARK BRIEFS, *supra* note 61, at 731.

85. *Id.* at 722.

86. *Id.*

87. *Id.* at 723 (emphasis added).

88. *Id.* at 731.

rights to render them void.”⁸⁹ Field turned instead to two extratextual sources for an explanation of the meaning of the Privileges or Immunities Clause. First, he invoked the recently enacted Civil Rights Act of 1866. He concluded that the phrase “privileges or immunities” included the freedoms catalogued in section 1 of the Act, namely, the rights “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.”⁹⁰ However, whereas the Civil Rights Act secured only an equality of civil rights between whites and blacks,⁹¹ Justice Field sought to provide absolute protection for those rights by way of the Privileges or Immunities Clause, which (unlike the Civil Rights Act) was framed in categorical terms.

Following Campbell’s lead, Justice Field also made frequent reference to the common law. As had Campbell, Field continually mentioned the right to pursue lawful employment as being one of the “common rights” of citizens.⁹² He invoked the *Case of Monopolies* and a handful of state-court decisions⁹³ in support of the proposition that “[a]ll monopolies in any known trade or manufacture . . . encroach upon the liberty of citizens to acquire property and pursue happiness” and are therefore “void at common law.”⁹⁴ And because they were void at common law, Justice Field posited, they were also contrary to the Privileges or Immunities Clause. Just as Campbell had argued, Justice Field concluded that the Fourteenth Amendment had, in effect, constitutionalized common-law economic rights:

If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.⁹⁵

89. *Slaughter-House*, 83 U.S. (16 Wall.) at 111 (Field, J., dissenting).

90. *Id.* at 96 (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).

91. The Civil Rights Act provided that all United States citizens “*shall have the same right*, in every State and Territory in the United States, 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.*” Civil Rights Act of 1866 § 1 (emphasis added).

92. *Slaughter-House*, 83 U.S. (16 Wall.) at 89, 93, 97, 105 (Field, J., dissenting).

93. *See id.* at 106-09 (citing *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19 (1856); *City of Chicago v. Rumpff*, 45 Ill. 90 (1867); *Mayor of Hudson v. Thome*, 7 Paige Ch. 261 (N.Y. Ch. 1838)).

94. *Id.* at 101-02.

95. *Id.* at 105-06.

Justice Bradley concurred in Justice Field's dissenting opinion, but wrote separately to express his own, slightly different, understanding of the Privileges or Immunities Clause. On the one hand, Justice Bradley's approach to the Fourteenth Amendment was less untethered than Justice Field's.⁹⁶ Bradley specifically referred to several Bill of Rights freedoms as "some of the most important privileges and immunities" of United States citizens:

[Some privileges and immunities] 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.⁹⁷

Justice Bradley did not, however, stop with the Bill of Rights. Like Campbell and Field, he knew that specific constitutional guarantees were of no particular use to the butchers. He concluded, therefore, that

[i]t was not necessary to say in words that the citizens of United States should have and exercise all the privileges of citizens; the privilege of buying, selling and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges . . .⁹⁸

The right to choose and follow one's calling, whether specifically enumerated or not, was "essential and fundamental" and hence, Justice Bradley concluded, constitutional.⁹⁹

96. Cf. FAIRMAN, *supra* note 82, at 1387 ("The 'liberty' and 'property' secured by the Fourteenth Amendment, as the Court came to give them content, were self-regarding rights, serving the individual's material prosperity. Bradley's conception of the privileges of citizenship embraced rights of a more humane order, according to the citizen an effective participation as a member of the national community.").

97. *Slaughter-House*, 83 U.S. (16 Wall.) at 118-19 (Bradley, J., dissenting) (emphasis omitted).

98. *Id.* at 119.

99. *Id.*

Taking their cue from Campbell, the *Slaughter-House* dissenters “would have wielded the [Privileges or Immunities] clause as a powerful weapon against state interference with laissez-faire economics.”¹⁰⁰ They saw the Fourteenth Amendment “as a substantive restraint on state power to regulate the rights of property owners.”¹⁰¹ To the *Slaughter-House* dissenters, the Fourteenth Amendment was not (at least primarily) about Bill of Rights freedoms at all; it was about the common-law rights of contract and property. And although they came up one vote shy in *Slaughter-House*, the dissenters’ view of the Fourteenth Amendment as absolutely protecting common-law economic freedoms would eventually, if only temporarily, win out in practice. In *Slaughter-House*, Justices Field, Bradley, and Swayne laid the intellectual foundation for the protection of economic rights through substantive due process doctrine, an approach that is most commonly associated with *Lochner v. New York*¹⁰² and that dominated Fourteenth Amendment jurisprudence throughout the late nineteenth and early twentieth centuries. As Philip Kurland has remarked, “What Justice Field and his minority failed to secure by way of the privileges or immunities clause in the *Slaughter-House Cases*, Field and his henchmen certainly accomplished by way of due process decisions in the years immediately following the *Slaughter-House* decision.”¹⁰³ Indeed, remarkably, only a quarter century after the book was closed on the *Slaughter-House* controversy, the Supreme Court in *Allgeyer v. Louisiana*¹⁰⁴ recognized, under the guise of the Due Process Clause, a right “of the citizen to be free . . . to earn his livelihood by any lawful calling; to pursue any livelihood or avocation.”¹⁰⁵ By the turn of the century, Campbell’s view of the Privileges or Immunities Clause as constitutionalizing ordinary, common-law rights had prevailed, only under another name: substantive due process.¹⁰⁶

100. Wilkinson, *supra* note 15, at 46.

101. THE OXFORD COMPANION TO THE SUPREME COURT 686 (Kermit L. Hall ed., 1992) [hereinafter OXFORD COMPANION].

102. 198 U.S. 45 (1905).

103. Kurland, *supra* note 12, at 414; *see also* Wilkinson, *supra* note 15, at 49 (“What could not be accomplished through the Privileges or Immunities Clause was soon achieved through the Due Process Clauses of the Fifth and Fourteenth Amendments in the line of cases exemplified by *Lochner*.”).

104. 165 U.S. 578 (1897).

105. *Id.* at 589.

106. Both *Lochner* and the brand of constitutional thinking it has come to represent were repudiated by the Supreme Court in 1937. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For more on the relevance of *Lochner*, *see infra* text accompanying notes 478-481.

B. *Justice Miller's Majority Opinion: A "Compromise" View of the Fourteenth Amendment*

Proponents of the conventional, anti-incorporationist reading of *Slaughter-House* maintain that, in view of Campbell's sweeping argument, "Miller and his four assenting Brothers saw only two alternatives: to restrict the Privileges or Immunities Clause to nearly nothing, or to interpret it as the self-executing source of a full panoply of legal rights (including business freedoms) to be enforced by the Court."¹⁰⁷ Faced with a choice between these two extremes, the argument continues, Miller "felt driven to a construction that made the clause trivial."¹⁰⁸ I disagree. The majority's rejection of the revolutionary view of the Fourteenth Amendment espoused by Campbell and endorsed by the dissenters does not in any way render the Privileges or Immunities Clause "trivial." There is nothing in Miller's opinion, for instance, that forecloses the decidedly nontrivial notion that the Clause incorporated Bill of Rights freedoms. In fact, there is an eminently reasonable reading of Miller's opinion—a reading explored in this Section—that suggests quite the opposite. According to this alternative reading of *Slaughter-House*, Miller steered a middle course between radical and trivializing interpretations of the Privileges or Immunities Clause and opted for a "compromise" interpretation of sorts. As Miller saw things, the Clause did not protect *all* personal rights (including the ordinary common-law interests invoked by the butchers); rather, it protected only "uniquely federal" rights—a class of rights that included many of the freedoms contained in the federal Bill of Rights.

What follows in this Section is a detailed examination of Miller's opinion for the Court. Ordinarily, of course, the views of a single Justice—even one writing for the Court—would not warrant such careful scrutiny. Justice Miller, however, was not just the author of the Court's opinion in *Slaughter-House*; he was also the critical fifth vote in favor of the theory of the Fourteenth Amendment adopted by the Court. Hence, Miller's opinion is doubly significant to the subsequent course of Fourteenth Amendment jurisprudence. The importance of Miller's opinion is captured in the following statement by a commentator who subscribes to the conventional account of *Slaughter-House*: "In 1873, in the *Slaughter-House Cases* . . . the Supreme Court said that the phrase 'privileges and immunities' had nothing to do with applying the Bill of Rights to the states. *The vote was a narrow 5-4—one vote switch might have changed the course of history.*"¹⁰⁹ Clearly, Miller's words—as well as the ideas and

107. LUSKY, *supra* note 39, at 199.

108. FAIRMAN, *supra* note 82, at 1354.

109. Wermiel, *supra* note 1, at 124 (emphasis added).

philosophies behind his words—are vitally important to a proper understanding of the Court’s *Slaughter-House* decision.

In dissecting Miller’s majority opinion, it is important to keep in mind both the identity of the *Slaughter-House* plaintiffs and the nature of their claim. These were *white* butchers (not recently freed slaves) seeking *absolute* protection (not a mere equality of protection) for an *unenumerated economic* freedom (not a right catalogued in the Bill of Rights). There is no doubt that Miller rejected both the butchers’ claim that the monopoly constituted an “invasion of private right”¹¹⁰ and Campbell’s theory of the Fourteenth Amendment on which the butchers’ argument rested. But in so doing, he did not reject the notion that the Privileges or Immunities Clause incorporated the Bill of Rights against state governments. Nothing Miller said gives rise to the inference that he sought to preclude the incorporation of Bill of Rights freedoms. In fact, a more reasonable reading of Miller’s *Slaughter-House* opinion suggests a distinction between the common-law economic rights claimed by the butchers, which the Fourteenth Amendment *did not* safeguard against state interference, and core Bill of Rights freedoms, which it *did*.

Miller’s majority opinion comprises three fairly distinct parts. In the first,¹¹¹ Miller recounted the immediate history of the Reconstruction Amendments—a history “fresh within the memory of us all”¹¹²—and emphasized that, above all else, the amendments were aimed at ensuring the “freedom of the slave race.”¹¹³ In the second,¹¹⁴ he identified the personal rights that remained under the control of state governments, even after the ratification of the Fourteenth Amendment. Finally, in the third,¹¹⁵ Miller offered a brief exposition of the freedoms that did indeed fit within the phrase “privileges or immunities of citizens of the United States” and were therefore protected by the Fourteenth Amendment against state intrusion. In explaining Miller’s opinion, I begin with his discussion of *state* privileges and immunities, then go on to his examination of the *federal* rights protected by Privileges or Immunities Clause, and conclude with his analysis of the “immediate history” of the Reconstruction Amendments. After carefully considering all three parts against the background of the sweeping interpretation of the Fourteenth Amendment advanced by the butchers and adopted by the dissenters, I believe that a sophisticated, nuanced, “compromise” theory of the Fourteenth Amendment will emerge—one that is neither radical nor trivial.

110. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 61 (1873).

111. The first part of Justice Miller’s opinion spans roughly pages 67-72.

112. *Slaughter-House*, 83 U.S. (16 Wall.) at 68.

113. *Id.* at 71.

114. The second part spans pages 72-79.

115. The third part spans pages 79-80.

1. *Which Rights Remained Subject to State Definition and Control?*

Recall that Justice Miller began by observing that in the Fourteenth Amendment, “the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established.”¹¹⁶ The distinction was significant, Miller reasoned, because the Fourteenth Amendment “speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States.”¹¹⁷ Only the former were placed “under the protection of the Federal Constitution”;¹¹⁸ the latter were “not intended to have any additional protection” under the Fourteenth Amendment.¹¹⁹

But what *were* the privileges and immunities of citizens of the several states—those that “belong[ed] to the citizen of the State as such” and that “rest[ed] for their security and protection” on state law?¹²⁰ And, most significantly for our purposes, were the rights set forth in the first eight amendments among them?

Miller initiated his inquiry by quoting the original privileges and immunities provision of the old Articles of Confederation:

[T]hat, 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 the 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.¹²¹

In this provision, Miller remarked, the Articles “specifically mentioned” some of the privileges and immunities of state citizens. By this, Miller must have meant the guarantee of “free ingress and regress” and the “privileges of trade and commerce,” the only two rights expressly enumerated in the Articles’ provision. These, he concluded, “[g]ave some general idea of the class of civil rights” guaranteed to state citizens under the Constitution.¹²²

Miller then turned his attention to the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution, which provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of

116. *Slaughter-House*, 83 U.S. (16 Wall.) at 73.

117. *Id.* at 74.

118. *Id.*

119. *Id.*

120. *Id.* at 75.

121. *Id.*

122. *Id.*

Citizens in the several States.”¹²³ There could be no doubt, Miller maintained, that the Article IV provision and its forbear from the Articles of Confederation covered the same class of rights. To “free ingress and regress” and the “privileges of trade and commerce,” Miller added as state privileges and immunities the categories of rights described by Justice Washington in *Corfield v. Coryell*,¹²⁴ the “first and leading case” interpreting Article IV, Section 2. Miller quoted Washington’s language at length:

“The inquiry,” [Washington] says, “is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *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 be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, 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 prescribe for the general good of the whole.”¹²⁵

Washington’s description in *Corfield*, Miller declared, “when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted.”¹²⁶ And all of these rights, Miller stated, “belong[ed] to the individual as a citizen of a *State*.”¹²⁷ With the exception of the very few restrictions set out in Article I, Section 10 of the Constitution—the prohibitions against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts—“the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government.”¹²⁸ It simply was not the purpose of the Privileges or Immunities Clause, Miller concluded, “to transfer the security and protection of all the civil rights which we have mentioned, from the

123. U.S. CONST. art. IV, § 2.

124. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230); *see also supra* text accompanying notes 33-37 (discussing the emphasis placed by Miller on *Corfield*).

125. *Slaughter-House*, 83 U.S. at 75-76 (quoting *Corfield*, 6 F. Cas. at 551-52).

126. *Id.* at 76.

127. *Id.* (emphasis added).

128. *Id.* at 77.

States to the Federal government.”¹²⁹ Put slightly differently, the Framers of the Fourteenth Amendment did not set out “to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States.”¹³⁰ A contrary conclusion, Miller said, would “constitute [the Supreme Court] a perpetual censor upon all legislation of the States, on the civil rights of their own citizens.”¹³¹ Miller concluded that “no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.”¹³²

a. “*Civil Rights*”

Justice Miller almost invariably referred to the class of rights that remained subject to the control of state governments as “civil rights.” What did he mean? Today, the term “civil rights” might well be used to refer specifically to Bill of Rights freedoms; at the very least, it would be understood to *include* those rights. The current edition of *Black’s Law Dictionary*, for instance, ties the definition of “civil rights” to the definition of “civil liberties,” which, in turn, it defines as “[p]ersonal, natural rights guaranteed and protected by the Constitution; *e.g.* freedom of speech, press, freedom from discrimination, etc.”¹³³ Hence, under most modern definitions, Miller’s statement that “civil rights” were not among the freedoms protected against state interference by the Privileges or Immunities Clause would seem to raise serious questions about any incorporationist reading of his opinion.

Legal historians, however, have uniformly concluded that in the Reconstruction era, the phrase “civil rights” had an altogether different meaning from the one that we attach to it today. Herman Belz, for instance, has noted that whereas nowadays any “interference with a person’s attempt to exercise free speech or to vote is a violation of civil rights,” in the post-Civil War years the term had a decidedly less “political connotation.”¹³⁴ Among the freedoms Belz counted as “civil rights” of the late nineteenth century were the rights to “work and enjoy the rewards of labor,” to “own or rent property,” and to “make contracts and participate in the market place.”¹³⁵ Civil rights, Belz reported, were “basically economic rather than

129. *Id.*

130. *Id.*

131. *Id.* at 78.

132. *Id.*

133. BLACK’S LAW DICTIONARY 246 (6th ed. 1990); *see also* TRIBE, *supra* note 14, § 7-2, at 1299-1300 (counting among “civil rights” those rights “enumerated in the federal Bill of Rights”).

134. HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 109 (1978).

135. *Id.*

political in nature.”¹³⁶ Herbert Hovenkamp has provided a similar explanation of the term: “[I]n 1868 the concept of ‘civil rights’ included two elements: (1) the right to equality of treatment in court trials and of access to the agencies of the state; and (2) a set of distinctly *economic* civil rights, namely, the right to make contracts and the right to own property.”¹³⁷ Civil rights, Hovenkamp concluded, “were fundamentally defined as economic rights.”¹³⁸ Even Charles Fairman, an avid anti-incorporationist, has said, referring specifically to Miller’s *Slaughter-House* opinion:

“Civil rights” has come to have a particular connotation: the rights of members of a racial minority to personal safety, to participation in the political process, to opportunities for advancement. Justice Miller was referring to something quite different—the vast field wherein the State legislated on such matters as family relationships, the acquisition and disposition of property, business associations, and the regulation of occupations.¹³⁹

The language of the Civil Rights Act of 1866 confirms that the term “civil rights” referred, above all else, to a specific set of economic freedoms. The Act provided that, within each state, all United States citizens—black and white alike—should have the same rights “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”¹⁴⁰ As Earl Maltz has observed, “the rights conferred by the Civil Rights Act fall into two classes.”¹⁴¹ A few of these are “essentially elements of the rights to protection by and from government.”¹⁴² Most of the rights set out in the Act, however, are “economic rights, such as the right to contract and to own and dispose of property.”¹⁴³ These are the rights that are “essential to meaningful participation in a free labor-based economy.”¹⁴⁴ During debates on the Act, Senator Willard Saulsbury, an

136. *Id.*; see also *id.* (reporting that civil rights were “largely economic in character”).

137. HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 94 (1991) (footnote omitted).

138. Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 395 (1988) (footnote omitted).

139. FAIRMAN, *supra* note 82, at 1352-53.

140. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

141. Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 Hous. L. REV. 221, 250 (1987).

142. *Id.* (footnote omitted). For a detailed historical explanation of the right to government protection, see Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 507-10 (1985), and Maltz, *supra* note 141, at 250 (suggesting that the right to government protection was included in the Civil Rights Act of 1866).

143. Maltz, *supra* note 141, at 250.

144. *Id.*

opponent of the bill, objected that “civil rights” was a “generic term which in its most comprehensive signification includes *every species of right*.”¹⁴⁵ However, the bill’s Senate sponsor, Lyman Trumbull, advanced a more restrained and more nuanced understanding of the term “civil rights,” one that accords with the explanations offered by modern commentators. Asked for his interpretation of “civil rights,” Trumbull simply pointed to the particulars of the proposed Act:

The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property.¹⁴⁶

There is, therefore, *much* more to Miller’s statement that the “civil rights” of citizens were not among those protected by the Fourteenth Amendment than meets the eye. Contrary to modern understanding, civil rights were not the rights to free speech, free press, and free exercise of religion; nor were they the procedural rights of criminal defendants. Rather, civil rights were, by and large, economic rights that had their foundation in the common law. They were in essence the very same rights that Campbell, in his argument to the *Slaughter-House* Court, had called “common rights”: rights of contract, property, and employment. Moreover, these civil rights were not creatures of national lawmaking bodies; instead, they were traditionally “defined and regulated by state, county, and local law and custom.”¹⁴⁷ Indeed, an 1870 edition of *Webster’s Dictionary* defined the word “civil” to mean “[p]ertaining to a *city or state*, or to a citizen in his relations to his fellow-citizens or to the state; as, *civil* rights; *civil* government.”¹⁴⁸

145. CONG. GLOBE, 39th Cong., 1st Sess. 477 (1866) (emphasis added).

146. *Id.* at 476.

147. BELZ, *supra* note 134, at 109.

148. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 234 (Chauncey A. Goodrich & Noah Porter eds., Springfield, Mass., G. & C. Merriam, 1870) (emphasis on “city or state” added); *see also* WILLIAM C. COCHRAN, THE STUDENTS’ LAW LEXICON 58 (Cincinnati, Robert Clarke & Co., 1888) (defining “civil” to mean “pertaining to a city or state”); 1 JOHN OGILVIE, THE IMPERIAL DICTIONARY OF THE ENGLISH LANGUAGE 480 (Charles Annandale ed., London, Century Co. 1883) (defining “civil” as “[r]elating to the community, or to the policy and government of the citizens and subjects of a state . . . ; as in the phrase[] *civil* rights”); CHARLES RICHARDSON, A NEW DICTIONARY OF THE ENGLISH LANGUAGE 321 (London, William Pickering 1836) (defining “civil” to mean “[o]f, or belonging, or pertaining to a *city*, or state; to the policy or government of a *city* or state”).

Justice Miller was assuredly aware of this ordinary meaning when he used the term “civil rights.” He was fond of invoking dictionary definitions in support of his opinions. *See, e.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884); *United States v. Germane*, 99 U.S. 508, 510 (1878); *Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874). He used language precisely and urged others to do likewise. In an address he delivered in 1879 to the Iowa State Bar Association, Justice Miller said that “[n]o lawyer’s office should be without an

So when Miller wrote that state-based privileges and immunities “embrace[d] nearly every *civil right* for the establishment and protection of which organized government is instituted”¹⁴⁹ and scoffed at the idea that the Framers of the Fourteenth Amendment had intended “to transfer the security and protection of all the *civil rights* which we have mentioned, from the States to the Federal government,”¹⁵⁰ he was not, as is commonly assumed, in any way casting doubt on the notion that the Privileges or Immunities Clause had incorporated Bill of Rights freedoms against the states. He was merely emphasizing that the Fourteenth Amendment had *not* federalized the common-law rules that governed the making of contracts, the disposition of property, and the regulation of employment. In *Slaughter-House*, Miller was faced with butchers claiming a right to pursue a lawful employment, which was at most an ordinary common-law right, a “civil right.” The butchers’ counsel, John Campbell, had invited the Court to hold that the Fourteenth Amendment provided absolute constitutional protection for all such “common rights.” Justice Miller simply refused this invitation.

b. *Corfield Rights*

In describing the rights that remained subject to state definition and control, Justice Miller relied heavily on a passage from *Corfield v. Coryell* in which Justice Washington had, according to Miller, given the Privileges and Immunities Clause of Article IV, Section 2 an expansive state-rights interpretation. What the privileges and immunities of state citizenship were, Miller wrote, “would be more tedious than difficult to enumerate.”¹⁵¹ However, quoting from *Corfield*, he observed that these state privileges and immunities could “be comprehended under the following general heads: protection by the government, 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 prescribe for the general good of the whole.”¹⁵² Significantly, Miller’s list of “general heads” was incomplete. He omitted one of the four heads that Justice Washington had, in 1823, used to describe state privileges and immunities: “the enjoyment of life and liberty.”¹⁵³

unabridged Webster or Worcester dictionary, as well as a good law lexicon.” Justice Samuel Miller, Address Before the Iowa State Bar Association (May 13, 1879), in 20 ALB. L.J. 25, 28 (1879).

149. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1873) (emphasis added).

150. *Id.* at 77 (emphasis added).

151. *Id.* at 76 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230)).

152. *Id.* at 76 (quoting *Corfield*, 6 F. Cas. at 551-52).

153. *Corfield*, 6 F. Cas. at 551.

Miller's omission, I would argue, was neither accidental nor insignificant. The three "heads" that remained in his quotation—the right to government protection, the right to acquire and hold property, and the right to pursue happiness—were all classes of interests that, even after the ratification of the Fourteenth Amendment, citizens possessed vis-à-vis their *state* governments. The fourth head, however—the "liberty" head—was not so easily pigeonholed. As explored in greater detail below, Miller understood that, in the wake of the Fourteenth Amendment, "liberty" simply was no longer the exclusive province of the states. To be sure, pieces of the liberty equation remained subject to state definition and control—common-law contract rights, for instance.¹⁵⁴ However, significant chunks, Bill of Rights freedoms among them, had been placed by the Fourteenth Amendment under the watchful eye of the federal government. Recognizing that he could not accurately claim that "the enjoyment of life and liberty" was, as a wholesale matter, still within the province of state governments, Miller simply omitted from his quotation that component of Washington's definition. He used the parts of *Corfield's* description of state privileges and immunities—government protection, property rights, and the pursuit of happiness—that he thought remained valid.

Miller's careful pruning of *Corfield's* definition is critical because he referred back to it one page later in characterizing the scope of state privileges and immunities: "[T]he entire domain of the privileges and immunities of citizens of the States, *as above defined*, lay within the constitutional and legislative power of the States, and without that of the Federal government."¹⁵⁵ When Miller referred to the "above defin[ition]," he could only have meant his (mis)quotation of *Corfield*, as it is the only real "definition" that he had provided. Consequently, when Miller confirmed that the "entire domain" of pre-Civil War state privileges and immunities remained with the states, he referred only to that domain *insofar as he had explained it*, namely, to exclude an across-the-board vesting of authority over "liberty" with state governments.

Taken together and properly understood, Miller's repeated use of the term "civil rights" and his excision of any reference to "liberty" from *Corfield's* definition present a significantly different—and substantially narrower—picture of *Slaughter-House*-defined state privileges and immunities than the one to which we have grown so accustomed. True, Miller's opinion makes clear that civil rights—ordinary common-law interests—remained subject to state regulation and control. But there is nothing in Miller's opinion to suggest that fundamental Bill of Rights freedoms similarly remained within the jurisdiction of the individual states.

154. See *supra* notes 133-150 and accompanying text.

155. *Slaughter-House*, 83 U.S. (16 Wall.) at 77 (emphasis added).

In fact, one interpretation of Miller's opinion, developed below, indicates just the opposite.

2. *Which Rights Were Transferred by the Fourteenth Amendment to the Federal Government?*

Having catalogued the personal rights that, despite the enactment of the Fourteenth Amendment, remained under the control of state governments (including the rights claimed by the New Orleans butchers), Miller turned his attention to the "privileges and immunities of citizens of the United States."¹⁵⁶ Because the rights "relied on in the [butchers'] argument"—contract rights, property rights, and the like—were "those which belong[ed] to citizens of the States as such," and were not "placed under the special care of the Federal government"¹⁵⁷ by the Fourteenth Amendment, Miller saw neither a need nor a justification for a comprehensive explanation of federal privileges and immunities. He nonetheless "venture[d] to suggest" a few such rights.¹⁵⁸

a. *Generally: Rights That "Owe Their Existence" to the Constitution*

Federal privileges and immunities, Miller wrote, were not the common-law rights and "civil rights" claimed by the butchers. Those rights had their source in *state* law and *local* custom. Rather, *federal* privileges and immunities were uniquely *federal* rights. They were, in Miller's words, those rights that "ow[ed] their existence to the Federal government, its National character, its Constitution, or its laws."¹⁵⁹

As an initial matter, it is eminently sensible to number the freedoms listed in the Bill of Rights as among those that "owe their existence to the . . . Constitution." Certainly, in modern parlance, when we speak of "constitutional" freedoms, we mean to include (perhaps above all others) those rights memorialized in the first eight amendments.¹⁶⁰ Miller

156. *Id.* at 78-79.

157. *Id.* at 78.

158. *Id.* at 79.

159. *Id.* Justice Miller proposed a similar definition in his famous, posthumously published *Lectures on the Constitution of the United States*:

The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are, indeed, protected by this amendment; but those are privileges and immunities arising out of the nature and essential character of the National Government, and granted or secured by the Constitution of the United States.

SAMUEL FREEMAN MILLER, *LECTURES ON THE CONSTITUTION OF THE UNITED STATES* 663 (New York, Banks & Bros. 1891).

160. *Black's*, for instance, defines "constitutional freedom" as a "[g]eneric term to describe the basic freedoms guaranteed by the Constitution such as the First Amendment freedoms of

apparently saw matters no differently. When Miller used the word "Constitution," he used it to mean not only the body of the original document as ratified in 1789, but also the various amendments added to it shortly after ratification. In fact, more than once in *Slaughter-House* itself, Miller indicated that he believed that the Bill of Rights was indeed part of the "Constitution." For instance, toward the beginning of his opinion, he stated: "Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. *Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original . . .*"¹⁶¹ Moreover, referring briefly in his opinion to the Due Process Clause of the Fourteenth Amendment, Miller observed that the identical provision had been "in the Constitution" since the "adoption of the fifth amendment."¹⁶²

We need not rest on Justice Miller's intimations in *Slaughter-House*, however. In other contexts, Miller made unmistakably clear his understanding that the Bill of Rights was actually part of the "Constitution." For instance, in his *Lectures on the Constitution of the United States*, Miller expressly referred to a few of the specific restrictions of the Bill of Rights as arising from the "Constitution" (the bracketed references are Miller's footnotes):

For example, a person's property cannot be taken for public use without due course of law and just compensation; his life or liberty cannot be taken from him without a fair trial before a court of competent jurisdiction [Constitution, Fifth Amendment]; he shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime was committed; he shall be confronted with the witnesses against him, shall have compulsory process for obtaining witnesses in his favor, and shall also have the assistance of counsel for his defence [Constitution, Sixth Amendment].¹⁶³

"These are some of the rights," Miller added, "defined and secured to those who live under the protection of *the Constitution of the United States*."¹⁶⁴ In another part of his *Lectures*, Miller was even more explicit.

religion, speech, press and assembly together with protection under due process clause of the 14th Amendment." The definition of "constitutional freedom" also cross-references the definition of "Bill of Rights." BLACK'S LAW DICTIONARY, *supra* note 133, at 311.

161. *Slaughter-House*, 83 U.S. (16 Wall.) at 67 (emphasis added); *see also id.* at 82 (referring to "the first eleven amendments to the Constitution" as being adopted "so soon after the original instrument was accepted").

162. *Id.* at 80.

163. MILLER, *supra* note 159, at 72.

164. *Id.* (emphasis added).

Referring to the Bill of Rights, Miller observed that “within two years after [the original Constitution] was ratified, Congress passed and referred to the different States twelve amendments, ten of which were ratified finally by the requisite number to make them *a part of the Constitution*.”¹⁶⁵ He made a nearly identical comment in a speech he delivered at a centennial constitutional celebration in Philadelphia in 1887:

[U]pon the recommendation of several of the States, made in the act of ratifying the Constitution, or by legislatures at their first meeting subsequently, twelve amendments were proposed by Congress, ten of which were immediately ratified by the requisite number of States, and became *part of the Constitution* within two or three years of its adoption.¹⁶⁶

Justice Miller’s writings and public comments—and, indeed, his opinion in *Slaughter-House* itself—make it clear that he viewed the Bill of Rights as an integral part of the U.S. “Constitution.” Hence, when he said in *Slaughter-House* that rights that “owe[d] their existence to the . . . Constitution”¹⁶⁷ were federal privileges and immunities, it is most reasonable to conclude that he meant to include freedoms enumerated in the Bill of Rights.

b. *Specifically: Miller’s List of Federal Privileges and Immunities*

The list of rights that Miller invoked as being among the “privileges [and] immunities of citizens of the United States” sheds additional light on the *Slaughter-House* Court’s understanding of the relationship between the Bill of Rights and the Privileges or Immunities Clause. Recall that, as examples of federal privileges and immunities, Miller offered the following litany:

It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, “to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land-offices, and courts of justice in the several States.”

165. *Id.* at 91-92 (emphasis added) (footnotes omitted).

166. Justice Samuel F. Miller, The Formation of the Constitution, Address at the Ceremonies of “Memorial Day” in Independence Square, Philadelphia (Sept. 17, 1887), in CHARLES NOBLE GREGORY, SAMUEL FREEMAN MILLER app. a at 98 (1907) (emphasis added).

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

* * *

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. 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. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the [Due Process and Equal Protection] clause[s] of the fourteenth¹⁶⁸

Admittedly, a number of the freedoms Miller mentioned—such as the rights to access seaports and to use navigable waterways—have little, if anything, to do with the “Constitution”; they are structural rights, rights that “owe their existence to the Federal government [and] its National character.”¹⁶⁹ Several, however, are uniquely constitutional, protected by the text of the Constitution itself. For instance, Miller included in his catalogue the “rights secured by the thirteenth and fifteenth articles of amendment.”¹⁷⁰ Of the three general categories of federal privileges and immunities that Miller had set out—the federal government’s “National character,” its “Constitution,” and its “laws”¹⁷¹—the Thirteenth and Fifteenth Amendments could fit only within the “Constitution” category. Certainly the rights to be free from involuntary servitude and to be free from racial discrimination in voting were not structural rights that inhered in the country’s “National character”; nor were they mere statutory rights dependent upon federal “laws.” They were *constitutional* rights, rights which “owe[d] their existence to the . . . Constitution.”¹⁷² And if the rights protected by the Thirteenth and Fifteenth Amendments—ratified in 1865 and 1870, respectively—were part of the “Constitution,” then it follows a

168. *Id.* at 79-80 (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868)).

169. *Id.* at 79.

170. *Id.* at 80.

171. *Id.* at 79.

172. *Id.*

fortiori that the rights enumerated in the first eight amendments—ratified in 1791, “so soon after[.]” the adoption of the original document as to be “practically contemporaneous” with it¹⁷³—were similarly part of that “Constitution.”

Even more to the point, Miller listed as among the federal privileges and immunities “[t]he right to peaceably assemble and petition for redress of grievances.”¹⁷⁴ This right, Miller expressly added, is a right “guaranteed by the Federal Constitution.”¹⁷⁵ Of course, it is no mystery from what part of “the Federal Constitution” Miller borrowed the right of assembly and petition. The First Amendment specifically protects “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁷⁶ Miller’s list, therefore, seems to indicate that the “privileges [and] immunities of citizens of the United States” include, at the very least, the guarantees set forth in the First Amendment. (Miller also mentioned, as a right “guaranteed by the Federal Constitution,” the “privilege of the writ of *habeas corpus*,” which is set out separately in Article I, Section 9 of the Constitution.¹⁷⁷ Akhil Amar has pointed out that, along with guaranteeing Bill of Rights freedoms against state infringement, “[p]rotecting the self-described ‘privilege’ of *habeas corpus* against wayward states was . . . of central concern to the framers of the Fourteenth Amendment.”¹⁷⁸)

Of course, one might raise the objection that if Miller sought to provide for the incorporation of Bill of Rights freedoms via the Privileges or Immunities Clause, he should not have stopped with the right of assembly; rather, he should have mentioned each and every one of the more than twenty-five freedoms enumerated in the first eight amendments. Richard Aynes, for instance, has argued that “the obvious omission of free speech” renders an incorporationist reading of *Slaughter-House* untenable.¹⁷⁹ Not necessarily. In this respect, Justice Miller’s opinion is perhaps best

173. *Id.* at 67; see also *id.* at 82 (referring to “the first eleven amendments to the Constitution” as being adopted “so soon after the original instrument was accepted”).

174. *Id.* at 79.

175. *Id.*

176. U.S. CONST. amend. I. Richard Aynes has suggested that when Justice Miller referred to the right of assembly and petition, he was invoking a “structural” right of assembly, not the First Amendment right. Aynes, *supra* note 18, at 654. Miller’s explicit insistence that the right to which he referred was “guaranteed by the Federal Constitution,” however, undermines Aynes’s argument. Remember, Miller laid out three distinct categories of federal privileges and immunities: those that arose from the federal government’s “national character,” those that arose from its “Constitution,” and those that arose from its “laws.” In no uncertain terms, Justice Miller placed the rights of assembly and petition among those that arose from the “Constitution,” which, as I have shown, Miller understood to include the Bill of Rights.

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

178. AMAR, *supra* note 12, at 175. On the “incorporation” of the privilege of the writ of *habeas corpus* more generally, see Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994).

179. Aynes, *supra* note 18, at 654.

understood as a response to Justice Bradley's dissent. Recall that Bradley had expressed his belief that the concept of federal privileges and immunities included *both* the common-law rights claimed by the Louisiana butchers *and* the freedoms enumerated in the Bill of Rights.¹⁸⁰ Bradley's list of textual freedoms included

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.¹⁸¹

Miller agreed with Bradley in part and disagreed in part. He agreed insofar as Bradley contended that many of the freedoms enumerated in the Bill of Rights were federal privileges and immunities. He disagreed, however, with Bradley's conclusion that the Fourteenth Amendment absolutely protected the private, common-law rights of contract and property. To signal his partial agreement, Miller referred in his opinion to a couple of the textual rights that Bradley had mentioned, namely, *habeas corpus* and *assembly*. And to mark out the contours of that agreement, Miller reiterated his belief that it was not, as Bradley suggested, *all* personal rights that had been clothed with federal constitutional protection; rather, only uniquely federal rights—such as *assembly* and *habeas corpus*, which were “guaranteed by the Federal Constitution”—enjoyed that distinction.

Having expressly invoked the right of *assembly* and the privilege of the writ of *habeas corpus*, it is hard to imagine why Miller would have thought that other textually specified freedoms (including many of those enumerated in the Bill of Rights) should not follow as well. What logic, for instance, would have justified the inclusion of the First Amendment right of *assembly*, but not its sister rights of *free speech*, *free press*, and *free exercise of religion*? Surely the rights of *assembly* and *habeas corpus* are no more “uniquely federal” than others listed in the Bill of Rights and Article I, Section 9. What's more, Miller's list was, by his own admission, incomplete; he set out only to enumerate “some” of the privileges and immunities that “owe[d] their existence to the . . . Constitution.”¹⁸² Because

180. See *Slaughter-House*, 83 U.S. (16 Wall.) at 118-19 (Bradley, J., dissenting); see also *supra* text accompanying notes 96-99.

181. *Slaughter-House*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting) (emphases added and omitted). Interestingly, although it mentions only six of the more than 25 rights catalogued in the first eight amendments, no one criticizes Justice Bradley's list as being too incomplete to support the inference that *he* was referring generally to the Bill of Rights.

182. *Id.* at 79.

he was “of [the] opinion that the rights claimed by the[] plaintiffs in error, if they ha[d] any existence, [were] not privileges and immunities of citizens of the United States” within the meaning of the Fourteenth Amendment, he thought it “useless to pursue” an extended inquiry into the meaning of the Privileges or Immunities Clause.¹⁸³

Miller’s decision not to provide an exhaustive catalogue of federal privileges and immunities is not surprising. Miller was not fond of reaching out to decide questions not strictly necessary to the resolution of the case at hand. Miller himself described his approach as one of isolating and deciding “the main points, the controlling questions.”¹⁸⁴ Miller biographer Charles Fairman observed that Miller “had an instinct for the essential.”¹⁸⁵ Miller’s opinion in *Bartemeyer v. Iowa*¹⁸⁶ is characteristic. There, writing for the Court, Miller acknowledged the existence of two “grave questions” of constitutional law, but concluded that the Court was not at liberty to pass upon them:

Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration. They are not to be lightly treated, *nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position.*¹⁸⁷

Given Miller’s general inclination to avoid unnecessary pronouncements of constitutional law, it is most reasonable to read his list—and particularly his reference to the right of assembly and the privilege of habeas corpus—as merely *illustrative* of the sorts of rights that he thought the Privileges or Immunities Clause protected, not as exhaustive of those rights. In this respect, it is important to remember that the butchers’ case simply was not about the Bill of Rights; they had not put at issue a single provision of the first eight amendments. Miller saw no reason, therefore, to dwell on the particulars of the incorporation of Bill of Rights freedoms. But what Miller *did* say in his opinion gives the distinct impression that, at the very least, the Privileges or Immunities Clause has a role to play in the incorporation of Bill of Rights freedoms against the States.

Notably, two turn-of-the-century commentators clearly considered Miller’s reference to the rights of assembly and habeas corpus to be a placeholder of sorts that merely represented the larger class of rights

183. *Id.* at 80.

184. Letter from Samuel F. Miller (July 1, 1874), in FAIRMAN, *supra* note 83, at 415.

185. Fairman, *supra* note 81, at 194.

186. 85 U.S. (18 Wall.) 129 (1874).

187. *Id.* at 134 (emphasis added).

outlined in the Bill of Rights and the body of the original Constitution. Explaining Miller's *Slaughter-House* opinion, Horace Stern stated:

He held, in an elaborate opinion which reviewed the history and purpose of the then recent constitutional amendments, that by privileges of citizenship of the United States, as distinguished from citizenship of the state, were meant those only which arise out of the nature and essential character of the National Government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof,—such, for example, as the right to travel to the seat of Government and the ports of the United States, as well as its courts, sub-treasuries and land-offices, the right to protection when on the high seas or within the jurisdiction of a foreign government, *the rights of personal liberty guaranteed by the "Bill of Rights" or original constitutional amendments*, the right to use the navigable waters of the United States, together with such rights as were secured to our citizens by the provisions of treaties with other nations.¹⁸⁸

Stern's paraphrase methodically tracks Miller's list: When Stern mentioned the protected rights that made up federal privileges and immunities, he listed them in precisely the same order as had Miller: (1) traveling to the seat of government, (2) using ports, courts, sub-treasuries, and land-offices, (3) obtaining protection while on the high seas or in foreign lands, and so on. The only difference—and it is a critical difference—is that whereas Miller had referred to the “right to peaceably assemble and petition for redress of grievances”¹⁸⁹ as one of the privileges and immunities of United States citizens, Stern's catalogue referred to “the rights of personal liberty guaranteed by the ‘Bill of Rights’ or original constitutional amendments.”¹⁹⁰ Stern quite clearly understood Miller's assembly-and-petition reference to stand more generally for Bill of Rights freedoms.

Writing in 1891, Charles Pence similarly described Justice Miller's opinion:

The butchers of New Orleans, [Miller] argued, could point to no definite right or privilege secured them by the constitution or laws of the United States which had been invaded by the law they assailed.

188. Horace Stern, *Samuel Freeman Miller*, in 6 GREAT AMERICAN LAWYERS 539, 560-61 (William Draper Lewis ed., 1909) (emphasis added).

189. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

190. Stern, *supra* note 188, at 561.

The constitution has no provision on the subject of monopolies and the majority of the court thought the law was a legitimate exercise of the police power of the State.

But the opinion in those cases does mention the privilege of the writ of *habeas corpus* as among the rights of the citizen guaranteed by the Federal constitution and protected from State abridgment by the fourteenth amendment. Now this privilege is granted in the same way and by the same instrument as the immunity from cruel and unusual punishments: The former is conferred by the original constitution and the latter by one of the amendments.¹⁹¹

Like Stern, Pence believed that Justice Miller's reference to textually specified rights as national privileges and immunities signified Miller's understanding that other similarly specified rights, the Eighth Amendment among them, were also protected by the Fourteenth Amendment against state interference.

To summarize, then, there is nothing in *Slaughter-House* that precludes a reading of the Privileges or Immunities Clause as incorporating the Bill of Rights. In fact, viewed in proper context, Miller's majority opinion in *Slaughter-House* seems quite possibly to contemplate incorporation. A group of New Orleans butchers who felt jilted by the grant of a monopoly to a single slaughtering company had sued and had claimed that the Privileges or Immunities Clause absolutely protected their common-law right to work. But Miller subscribed to a narrower conception of federal privileges and immunities. Only uniquely federal rights, not ordinary common-law interests, were within the meaning of the Fourteenth Amendment. Among those uniquely federal rights were those that "owe[d] their existence to the . . . Constitution."¹⁹² And among those that owed their existence to the Constitution was the right of assembly, which Miller apparently used to represent Bill of Rights freedoms more generally.

3. *Why Did Miller Emphasize the Fourteenth Amendment's Relationship to the Recently Freed Slaves?*

But what about Miller's emphasis in the first part of his opinion on the "pervading purpose" of the Fourteenth Amendment as ensuring "the freedom of the slave race"?¹⁹³ Some have argued that this emphasis suggests an intention to limit the protections of the Fourteenth Amendment

191. Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 AM. L. REV. 536, 548 (1891).

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

193. *Id.* at 71. See generally TRIBE, *supra* note 14, § 7-3, at 1309 (puzzling over the relationship between Justice Miller's construction of the Privileges or Immunities Clause and "his understanding of the function of the Fourteenth Amendment, the protection of the newly freed slaves").

to blacks alone. Surely, the argument goes, if Miller thought that only blacks were entitled to claim the Amendment's protections, he could not have meant to construe the Privileges or Immunities Clause as incorporating the Bill of Rights. Any attempt to derail an incorporationist understanding of Miller's *Slaughter-House* opinion on this basis, I believe, makes far too much of far too little.

For one thing, Miller did *not* state that only blacks were entitled to claim the protections of the Reconstruction Amendments. In fact, he went out of his way to make it clear that "[w]e do not say that no one else but the negro can share in this protection."¹⁹⁴ Rather, Miller clarified, "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."¹⁹⁵ Indeed, the fact that the Fourteenth Amendment generally, and the Privileges or Immunities Clause specifically, reached across racial lines is demonstrated even by the supposedly pathetic list of rights Miller offered as being among the privileges and immunities of U.S. citizens.¹⁹⁶ Even white citizens, for instance, enjoyed the right of "free access to . . . seaports" and the freedom to "use the navigable waters of the United States" by virtue of the Privileges or Immunities Clause.¹⁹⁷

So why all the fuss in *Slaughter-House* about the Fourteenth Amendment as a vehicle specifically for protecting black citizens? It turns out that, in the context of the case, Miller's emphasis on the protections guaranteed to blacks under the Amendment is not out of place at all. This portion of Miller's opinion, I believe, is best understood as a pointed response to an element of the interpretation of the Privileges or Immunities Clause put forth by Justice Field in his dissent: specifically, that the Clause provides absolute—as opposed to merely equal—protection for ordinary common-law rights. Recall that *Slaughter-House* involved white plaintiffs (not recently freed slaves) claiming absolute constitutional protection (not a mere equality of protection) for an unenumerated common-law right (not a right specified in the text of the Constitution). In his dissent, Justice Field made it clear that he was prepared to extend the protection of the Fourteenth Amendment to just such a situation. In offering his own description of "the privileges and immunities which are secured against abridgement by state legislation," Field quoted the recently enacted Civil Rights Act of 1866 and stated that federal privileges and immunities "include the right 'to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and

194. *Slaughter-House*, 83 U.S. (16 Wall.) at 72.

195. *Id.*

196. See discussion *supra* Subsection III.B.2.b.

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

personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.”¹⁹⁸ In other words, Field equated the rights set out in the Civil Rights Act with the “privileges [and] immunities” of national citizenship protected by the Fourteenth Amendment.

There is, however, a fundamental problem with Justice Field’s reliance on the Civil Rights Act to give substance to the Privileges or Immunities Clause, and Justice Miller recognized it. As Field’s opinion makes clear, he read the Act to provide absolute protection to all citizens, white and black, with respect to the rights to contract, to participate in the judicial process, and to own property; after all, Field said that the Act guaranteed citizens “the right” to do those things.¹⁹⁹ The text of the Act, however, merely provided that citizens “of every race and color, without regard to any previous condition of slavery or involuntary servitude” shall have “the same right” to contract, to participate in the judicial process, and to own property “as is enjoyed by white citizens.”²⁰⁰ Contrary to Field’s suggestion, the Civil Rights Act was exclusively an antidiscrimination provision, placing blacks and whites on equal footing with respect to “civil rights.”

The rights claimed by the white butchers—the right to contract, the right to pursue an occupation, and so on—were not rights enumerated in the Bill of Rights or elsewhere in the Constitution. They were “civil rights,” ordinary common-law rights. In emphasizing that the “pervading purpose” of the Fourteenth Amendment was the freedom of the recently freed slaves, Miller simply sought to point out (most emphatically to Justice Field) that, in the realm of “civil rights,” the Fourteenth Amendment serves but one, relatively narrow, purpose: It provides *equal* protection in civil rights to *black* citizens; it does not provide *absolute* protection in those rights to *all* citizens. Therefore, Miller’s pointed reference to the slavery issue at the outset of his opinion made perfect sense. It showed, in a very concrete way, why the plaintiffs—white butchers claiming absolute constitutional protection for ordinary common-law rights—could not prevail.

Miller was by no means alone in his view that the Fourteenth Amendment guaranteed only equality, and not absolute protection, with respect to civil rights. Indeed, his equality-in-civil-rights interpretation was consistent with the expressed intent of a number of leading Republicans of

198. *Id.* at 96 (Field, J., dissenting) (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).

199. Justice Bradley had suggested a similar interpretation in his opinion for the butchers in the circuit court. *See Live-Stock Dealers’ & Butchers’ Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8408) (“[T]he first section of the [Civil Rights Act] covers the same ground as the fourteenth amendment.”).

200. Civil Rights Act of 1866, § 1.

the Thirty-Ninth Congress.²⁰¹ Miller's understanding of the Amendment's effect on civil rights was also in step with contemporaneous Supreme Court precedent. In *Ex parte Virginia*,²⁰² for instance, the Court (in an opinion joined by Justice Miller) held that "[o]ne great purpose" of the Civil War Amendments was to secure to blacks the "*perfect equality of civil rights* with all other persons within the jurisdiction of the States."²⁰³

Unlike his dissenting brethren, who saw the Privileges or Immunities Clause as absolutely protecting all personal rights—including common-law interests—against state invasion, Miller subscribed to a more restrained view of the Fourteenth Amendment. As to uniquely federal rights, such as those catalogued in the Bill of Rights, the Privileges or Immunities Clause provided absolute protection; as to "civil rights" of the sort claimed by the butchers, however, the Amendment provided only equal protection between whites and blacks.²⁰⁴

4. *Second Look: A Summary*

It is relatively easy to see why for years constitutional lawyers and historians have read Justice Miller's opinion in *Slaughter-House* as reducing the Privileges or Immunities Clause to a virtual nullity. After all, in the first part of his opinion, Miller emphasized the "one pervading purpose" of the Fourteenth Amendment as being the protection of black citizens.²⁰⁵ In the second part, he went on to declare that state privileges and immunities—as opposed to the national privileges and immunities protected by the Fourteenth Amendment—"embrace[d] nearly every civil right for the establishment and protection of which organized government is

201. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1151-55 (1866) (statement of Rep. Thayer); *id.* at 1293-94 (statement of Rep. Shellabarger); *id.* at 1837 (statement of Rep. Lawrence). See generally WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 114-17 (1988) (cataloguing statements of legislators).

202. 100 U.S. 339 (1879).

203. *Id.* at 344-45 (emphasis added); see also *The Civil Rights Cases*, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting) ("Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State.").

204. In addition to what I believe are its other virtues, my reading of Justice Miller's opinion serves to bridge a gap of sorts between Fourteenth Amendment scholars. One group, led by Raoul Berger, argues that the primary purpose of the Privileges or Immunities Clause was to "constitutionalize" the Civil Rights Act of 1866. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 20-51 (1977). Another group, led by Akhil Amar and Michael Kent Curtis, argues that the primary purpose of the Clause was to incorporate the Bill of Rights. See, e.g., CURTIS, *supra* note 12; Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 12. In fact, according to Justice Miller, the Fourteenth Amendment accomplished both purposes. It clothed Bill of Rights freedoms with absolute protection against state interference and guaranteed equality in "civil rights" between whites and blacks, as had the Civil Rights Act.

205. *Slaughter-House*, 83 U.S. (16 Wall.) at 71.

instituted.”²⁰⁶ And finally, in the third part of his opinion, he described the class of rights protected by the Privileges or Immunities Clause by referencing obscure and practically irrelevant rights, such as the right of “free access to . . . seaports” and the freedom “to use the navigable waters of the United States.”²⁰⁷

Hence, the conventional reading of Miller’s *Slaughter-House* opinion as “strangl[ing] the privileges-or-immunities clause in its crib”²⁰⁸ is by no means an unreasonable reading. But it is not, I argue, the best reading. Instead, what I believe emerges from a careful consideration of Miller’s opinion is not an effort to construe the Privileges or Immunities Clause into obsolescence but rather a nuanced, sophisticated, and coherent theory of the Fourteenth Amendment. On the one hand, Miller’s opinion held that the Privileges or Immunities Clause provided absolute protection for a handful of uniquely federal rights—most importantly, many of the rights enumerated in the federal Bill of Rights. On the other hand, with respect to more ordinary “civil rights” like the ones at issue in *Slaughter-House* itself, the Fourteenth Amendment merely served to place blacks on equal footing with whites. The Amendment, according to Miller, was neither radical nor trivial. It was a measured response to the pressing constitutional issues presented by the Civil War and Reconstruction.

IV. THE BIGGER PICTURE

A close reading of *Slaughter-House* reveals that the Court did *not* intend to deny the Privileges or Immunities Clause its incorporationist potential. On the contrary, what emerges from a careful consideration of the majority opinion is a sophisticated, nuanced theory of the Privileges or Immunities Clause, an important element of which appears to have been the incorporation of core Bill of Rights freedoms. In this Part, I seek to show that, when viewed in light of broader considerations, an incorporationist interpretation of Justice Miller’s *Slaughter-House* opinion is not only clever, but also correct. I explore two issues specifically: first, whether an incorporationist interpretation of *Slaughter-House* is supported by Miller’s general jurisprudential philosophy; and second, whether such an interpretation is consistent with Miller’s voting patterns in other Reconstruction-era cases.

Before proceeding, it is important to clarify precisely why it is that evidence relating to Justice Miller’s personal judicial philosophy and voting record is relevant to our inquiry. In examining these issues, it is not

206. *Id.* at 76.

207. *Id.* at 79.

208. AMAR, *supra* note 12, at 305.

necessarily my ultimate purpose to prove that Miller himself actually believed that the Privileges or Immunities Clause incorporated the Bill of Rights or some substantial portion thereof. It is, after all, the written opinion of the Court, not any single Justice's "intention," that is the governing law. Hence, a Justice's intention—even the intention of a Justice writing for the Court—is relevant only insofar as it sheds light on the proper understanding of the text of the Court's opinion. It is in *this* spirit that I offer the following discussion. I have argued that there is nothing in the Court's *Slaughter-House* opinion that forecloses the incorporation of Bill of Rights freedoms through the Privileges or Immunities Clause and that, in fact, a careful reading of the text of the Court's opinion strongly suggests that Bill of Rights freedoms are among the "privileges [and] immunities of citizens of the United States." Would Justice Miller have authored such an opinion? Other scholars seem to say no. I say quite possibly—indeed, very probably. The evidence with respect to these issues is certainly somewhat ambiguous, but, on balance, big-picture considerations seem to confirm, rather than to undermine, the reading of *Slaughter-House* that I have advanced.

A. *Justice Miller's Jurisprudential Philosophy*

In this Section, I show that the interpretation of Justice Miller's *Slaughter-House* opinion that I have put forward—that is, as contemplating the incorporation of Bill of Rights freedoms against the states but refusing the nationalization of all common-law interests—is not simply a clever reading, but rather a reading that is grounded in, and indeed a natural result of, Miller's general judicial philosophy. Of course, defining a judge's "philosophy" is a complex task. However, there are, I believe, four distinct jurisprudential principles to which Miller subscribed, principles that animated his decisionmaking and that counsel a moderate incorporationist understanding of *Slaughter-House*.

1. *Preserving the Federal-State Balance*

Perhaps above all else, Justice Miller was devoted to achieving and preserving an appropriate balance of power between state and federal governments in the wake of the Civil War and Reconstruction. Indeed, in his opinion in *Slaughter-House*, Miller declared that it was the Court's duty to "h[ol]d with a steady and an even hand, the balance between State and Federal power."²⁰⁹

209. *Slaughter-House*, 83 U.S. (16 Wall.) at 82.

Miller was a “staunch” Republican²¹⁰ and, by many accounts, an ardent “nationalist.”²¹¹ But Miller’s nationalism, unlike that of his dissenting brethren in *Slaughter-House*, was tempered. One of Miller’s principal biographers, Charles Noble Gregory, observed that Miller “held the line very steadily and firmly between State and Federal power and competency.”²¹² He was “determined to find for the national government all that was necessary for its adequate maintenance, [but] was equally resolved that the State governments should not be destroyed or unnecessarily crippled.”²¹³ Miller’s view, Gregory concluded, was “an inestimable service if we value our frame of government.”²¹⁴ In a memorial delivered shortly after the death of Justice Miller in 1890, Attorney General William Henry Harrison Miller similarly described Justice Miller’s primary objective during the turbulent Reconstruction years:

To safely guide this, the weakest and most sensitive branch of the Government, amid the shocks and through all the troublous times . . . so that on the one hand, no just power of the General Government should be lost, and, on the other, no just right of a State or of a citizen should be sacrificed²¹⁵

Justice Miller recognized, of course, that the Civil War and Reconstruction Amendments necessitated some centralization. In his *Lectures*, he observed that “the experience of a century under the Government . . . has shown that the danger to its perpetuity and to the people of this country did not lie in the aggrandizement of the central authority, but rather in the power that remained in the several States.”²¹⁶ But Miller believed that the centralizing force of Reconstruction—and particularly the Fourteenth Amendment—was measured, not wholesale. In an address at a bicentennial constitutional celebration in Philadelphia, Miller remarked that, whereas the Reconstruction Amendments did indeed “confer additional powers on the government of the Union, and place additional restraints upon those of the States,” they simultaneously “ke[pt] in view the principles of our complex form of State and Federal

210. FAIRMAN, *supra* note 83, at 185.

211. HOWARD JAY GRAHAM, *EVERYMAN’S CONSTITUTION* 134 (1968); *see also* Charles Fairman, *Justice Samuel F. Miller*, 50 POL. SCI. Q. 15, 22 (1935) (“No one upheld the authority of the nation more . . . than [Miller].”).

212. GREGORY, *supra* note 166, at 20.

213. *Id.* at 28; *see also id.* at 29 (“Justice Miller . . . held the field against all comers for the doctrine that the Federal government should be maintained in vigor and efficiency, but that the State government should neither perish nor sink into insignificance.”).

214. *Id.* at 29.

215. PROCEEDINGS OF THE BENCH AND BAR OF THE SUPREME COURT OF THE UNITED STATES, IN MEMORIAM SAMUEL F. MILLER 34 (Washington, D.C., Government Printing Office 1891) (remarks of Attorney General Miller).

216. MILLER, *supra* note 159, at 93.

government, and s[ought] to disturb the distribution of powers among them as little as was consistent with the wisdom acquired by a sorrowful experience.”²¹⁷ In short, for Miller, the Constitution called for a “just and equal observance of the rights of the States, and of the general government.”²¹⁸

Miller’s opinion for the Court in *Murdock v. Memphis*²¹⁹ epitomizes his approach to federal-state relations. In *Murdock*, the Supreme Court was asked to construe section 2 of the Judiciary Act of 1867. That statute, which was the successor to section 25 of the Judiciary Act of 1789 and the forbear of the present-day 28 U.S.C. § 1257, delineated the Court’s jurisdiction over cases decided by the highest courts of the various states. Section 2 provided for appellate jurisdiction in three discrete instances:

(1) where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or (2) where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or (3) where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission, or authority²²⁰

217. Miller, *supra* note 166, at 111.

218. *Id.*; see also *TRIBE, supra* note 14, §§ 7-3 to 7-4, at 1309-12 (describing Justice Miller’s desire to “safeguard the autonomy of the federal and state governments within their respective spheres of power”).

In walking this fine line between “nationalism” and “federalism,” Justice Miller was simply following in the footsteps of the Framers of the Fourteenth Amendment (of which more is said in the next Part). See generally Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 47 (“Even as they set precedents for modern nationalism . . . Republicans could not shake off their commitment to older notions of federalism.”). Although Congressman John Bingham, the principal draftsman of Section 1 of the Fourteenth Amendment, clearly envisioned that the Privileges or Immunities Clause would incorporate Bill of Rights freedoms against state governments, see *infra* text accompanying notes 259-271, he certainly was no radical. Michael Kent Curtis has classified Bingham as “centrist” and even “conservative.” CURTIS, *supra* note 12, at 59 (referring to MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE 350, 354 (1974)). In fact, immediately following his declaration on the floor of Congress that “the privileges and immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States,” Bingham emphasized that “our dual system of government”—that is, our federalist system of government—is “essential to our national existence.” CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (remarks of Rep. Bingham).

219. 87 U.S. (20 Wall.) 590 (1875).

220. Judiciary Act of 1867, ch. 28, § 2, 14 Stat. 385, 386 (enumeration added) (current version at 28 U.S.C. § 1257 (1994)).

The question put to the Court in *Murdock* was this: Once one of the three statutory conditions is met, does the Supreme Court assume jurisdiction of the entire matter, or is its review instead limited to the “federal” questions presented in the case? The statutory language provided no clear answer. Counsel for the plaintiffs, J.B. Heiskell, contended that the Court “should re-examine all the questions found in the record, though some of them might be questions of general common law or equity, or raised by State statutes, unaffected by any principle of Federal law, constitutional or otherwise.”²²¹ Significantly, Justices Swayne and Bradley, two of the Justices who had staked out radically nationalist positions in *Slaughter-House*, agreed with Heiskell.²²² Writing for the Court, however, Justice Miller endorsed a more restrained view of section 2. In view of the stringent conditions placed on the Supreme Court’s jurisdiction over appeals from state courts—namely, that a federal question must have been raised and finally decided by the highest court of a state in a specific manner—Miller refused to “suppose that Congress intended, when those cases came here, that this court should not only examine [the federal] questions, but all others found in the record[]—questions of common law, of State statutes, of controverted facts, and conflicting evidence.”²²³ The state courts, Miller concluded, were “the appropriate tribunals . . . for the decision of questions arising under local law, whether statutory or otherwise.”²²⁴ The Supreme Court’s jurisdiction over appeals from state-court judgments was “limited to the correction of errors *relating solely to Federal law*.”²²⁵

Miller’s opinion in *Murdock* did not leave the Supreme Court powerless. The Court retained the authority to reverse state-court judgments that misconstrued federal statutes or treaties or that wrongly interpreted federal constitutional provisions. However, the Court’s review of state-court judgments was not plenary (as Heiskell had argued and as Justices Swayne and Bradley had concluded). In Miller’s mind, the business of the federal courts was, in the main, limited to the consideration of “uniquely federal” issues—particularly those that touched upon the interpretation of the federal Constitution, federal laws, and federal treaties. The rest—common-law questions, state statutory questions, and the like—remained the responsibility of individual state courts. It was important to Miller that the federal courts have authority to speak to uniquely federal questions, but

221. *Murdock*, 87 U.S. (20 Wall.) at 615 (argument of John A. Campbell on behalf of plaintiffs).

222. *See id.* at 638–42.

223. *Id.* at 626.

224. *Id.*

225. *Id.* at 630 (emphasis added).

he also saw an important role for state courts in the American scheme of judicial federalism.

The very same concerns that animated Justice Miller's opinion in *Murdock*, I would argue, also underlay his opinion in *Slaughter-House*.²²⁶ Just as in *Murdock* Miller was reacting to the radically nationalist views advanced by Heiskell and endorsed by Justices Swayne and Bradley—views that threatened to “destroy the independence of the State judiciary”²²⁷—so in *Slaughter-House* Miller reacted to the radically nationalist views advanced by John Campbell and endorsed by the same Justices Swayne and Bradley and their dissenting colleagues Justice Field and Chief Justice Chase. And just as Miller had concluded in *Murdock* that the Supreme Court's review of state-court decisions was not plenary, so he concluded in *Slaughter-House* that the transfer of authority over the definition and protection of individual rights was not wholesale. As Charles Warren observed, referring to *Slaughter-House*:

If every *civil right* possessed by a citizen of a State was to receive the protection of the National Judiciary, and if every case involving such a right was to be subject to its review, the States would be placed in a hopelessly subordinate position The boundary lines between the States and the National Government would be practically abolished²²⁸

That result simply did not square with Justice Miller's view of American federalism. Thus, Miller concluded, not *all* personal rights qualified for protection as federal privileges and immunities; only uniquely federal rights, such as those enumerated in the federal Bill of Rights, were “privileges [and] immunities of citizens of the United States” within the meaning of the Fourteenth Amendment.

2. *Observing Judicial Restraint and Honoring Original Intent*

In addition to being what one might call a moderate federalist, Miller was also a strict constructionist. He deplored “[a]ll loose methods of

226. Interestingly, *Slaughter-House* and *Murdock* were related temporally as well as conceptually. As Charles Fairman observed:

Slaughter House and *Murdock* . . . kept company on the [Supreme Court's] docket. The latter had been filed a year after the former, and the first arguments had maintained that separation. But then the reargument of *Slaughter House* came on February 3 to 5, 1873, and that of *Murdock* only two months later. The decision in *Slaughter House* was announced on April 14, just when the long cogitation over *Murdock* began.

CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION: 1864-88*, at 410 (Vol. VII of Oliver Wendell Holmes Devise History of the Supreme Court (Paul A. Freund & Stanley N. Katz eds.)).

227. GREGORY, *supra* note 166, at 28.

228. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 547 (rev. ed. 1926) (emphasis added).

construing authority," which he viewed as "dangerous,"²²⁹ and believed that the task of constitutional interpretation was inextricably bound up with discovering the intentions of the Framers of constitutional provisions. What follows is a consideration, first, of Miller's general commitment to a policy of judicial restraint and, second, of his more specific commitment to original intent.

a. *Judicial Restraint*

Scholars agree that Miller consistently and vigorously pursued a policy of judicial restraint. Howard Graham, for instance, called Miller "the beau ideal of advocates of judicial self restraint."²³⁰ Indeed, several commentators have suggested Miller as a progenitor of James Bradley Thayer, one of America's most famous proponents of judicial restraint.²³¹ Charles Fairman, a Miller biographer, dubbed the Justice "an exemplar of judicial forbearance,"²³² a jurist who "respected the distinction between what is ultra vires and what is only unwise."²³³ Miller, Fairman observed, "thought that the Court ought not to invent constitutional limitations even when it saw that for the moment political power was being exercised recklessly."²³⁴ In his own words, Miller "endeavored to bring to the examination of the grave questions of constitutional law . . . those principles alone which are calculated to assist in determining what the law *is*, rather than what, in [his] private judgment, it *ought* to be."²³⁵

Miller displayed his impatience with airy, justice-driven claims on numerous occasions. In *Davidson v. New Orleans*,²³⁶ for instance, he complained that the Privileges or Immunities Clause's sister provision, the Due Process Clause, had come to be "looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him."²³⁷ He sounded a similar lament in his dissenting opinion in *Hepburn v. Griswold*.²³⁸ There, faced with the contention that a law was "in conflict

229. MILLER, *supra* note 159, at 100.

230. GRAHAM, *supra* note 211, at 296.

231. See Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1201 (1995) (noting that Miller's "opinions may have been among those upon which Thayer built his theory of judicial restraint"); G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 54 (1993) ("Thayer's 'rule of administration' had been articulated by Justice Samuel Miller . . .").

232. FAIRMAN, *supra* note 83, at 209.

233. Fairman, *supra* note 81, at 201.

234. FAIRMAN, *supra* note 83, at 67-68.

235. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 399 (1866) (Miller, J., dissenting) (emphasis added).

236. 96 U.S. 97 (1877).

237. *Id.* at 104.

238. 75 U.S. (8 Wall.) 603 (1869).

with the spirit, if not the letter, of several provisions of the Constitution," Miller responded that "[t]he argument is too vague for my perception."²³⁹ Continuing, Miller objected that

[t]his whole argument of the injustice of the law, an injustice which if it ever existed will be repeated by now holding it wholly void; and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National legislature.²⁴⁰

Quoting Chief Justice Marshall's opinion in *McCulloch v. Maryland*,²⁴¹ Miller concluded that

where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretences to such a power.²⁴²

Justice Miller's general philosophy of judicial restraint was summed up nicely by two lawyers asked to comment on the occasion of Miller's death. William Maury wrote that "[i]t cannot be said of Miller as has been said of Mansfield and others, that they were prone to give law instead of applying the law as they found it."²⁴³ Attorney General Miller likewise observed that

239. *Id.* at 637 (Miller, J., dissenting).

240. *Id.* at 638.

241. 17 U.S. (4 Wheat.) 316 (1819).

242. *Hepburn*, 75 U.S. (8 Wall.) at 639 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 423) (internal quotation marks omitted). To be sure, Miller on occasion departed from his typical "positivist[ic]" approach to judicial review. See Charles Fairman, *Justice Samuel F. Miller*, 50 POL. SCI. Q. 15, 28 (1935). *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875), is the most often cited example of such a departure. See *id.* at 663 (invalidating a Kansas law levying taxes on individuals for non-public purposes and observing that "[t]here are limitations on [government] power which grow out of the essential nature of all free governments"). In Miller's case, however, *Loan Ass'n* is truly the exception that proves the rule.

243. PROCEEDINGS OF THE BENCH AND BAR OF THE SUPREME COURT OF THE UNITED STATES, IN MEMORIAM SAMUEL F. MILLER, *supra* note 215, at 82 (written comments of William A. Maury).

Undiscriminating eulogy has said that Judge Miller was wont to sweep away the law in order that justice might prevail. * * * Such a statement would not have been accepted by him as praise. He loved justice, but he knew, as all men fit for judges know, that justice, humanly speaking, can have its perfect work only through the law; that obedience to law, by the magistrate as well as by the private citizen, is essential to justice, as it is a condition of liberty.²⁴⁴

In view of its open-ended language, the Privileges or Immunities Clause provides a unique test of a judge's commitment to judicial restraint. As D.O. McGovney reported in 1918, "in many . . . cases counsel for the proponent feeling that the State action complained of has invaded a 'right' which he rightly or wrongly believes a constitution *ought* to have made sacred and finding little consolation in the other constitutional limitations [would fall] hopelessly back upon the glittering words 'privileges or immunities of citizens of the United States.'"²⁴⁵ Such, of course, was the case in *Slaughter-House*. But Miller would have none of it. Given his general predisposition toward restraint, he was unmoved when Campbell pleaded that "the relations of labor and the rights of laboring men" were "common rights" and were therefore "deserving [of] a place in public law."²⁴⁶ Miller was uncomfortable with the view of Campbell and the dissenters that the Fourteenth Amendment constitutionalized "common rights," "natural rights," "inalienable" rights, and "general principle[s] of the law." Like the inquiries posed in *Davidson* and *Hepburn*, these standards were "too vague," "too abstract," and "too intangible" to provide courts with any meaningful guidance in divining the import of the phrase "privileges or immunities of citizens of the United States." Miller recognized that inherent in the "natural law approach to interpreting the Fourteenth Amendment was the danger that it was as vague as the language of the amendment itself."²⁴⁷ Miller needed a theory of the Fourteenth Amendment that did not rest on glittering generalities, one that grounded the words "privileges [and] immunities" and thereby "restricted the discretionary powers of the courts."²⁴⁸ Consequently, in *Slaughter-House*, Miller tied the interpretation of the Privileges or Immunities Clause, by and large, to the explicit textual guarantees of the Bill of Rights.

244. *Id.* at 35 (remarks of Attorney General Miller).

245. D.O. McGovney, *Privileges or Immunities Clause—Fourteenth Amendment*, 4 IOWA L. BULL. 219, 223 (1918) (emphasis added).

246. Brief for Plaintiffs, *supra* note 61, at 571.

247. PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 125 (1997).

248. GRAHAM, *supra* note 211, at 134.

b. *Original Intent*

In place of freewheeling, justice-driven inquiries, Miller regularly turned to original intent as the lodestar of constitutional interpretation. Nowhere was Miller's originalist approach to constitutional exegesis made clearer than in *Ex parte Bain*.²⁴⁹ There, he declared that "[i]t is never to be forgotten that, in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."²⁵⁰ Miller expressed similar ideas in his *Lectures*, in which he urged that "[t]he Constitution must be looked at in the light of the ends it was *designed* to accomplish, having in view the evils it was *intended* to remedy and the benefits it was to exert."²⁵¹

Of course, that Miller often looked to original intent for interpretive guidance raises an obvious question: What *was* the intention of the Framers of the Fourteenth Amendment? Specifically, was it that the Privileges or Immunities Clause incorporated freedoms enumerated in the Bill of Rights against state governments? The answer, I think, is clearly yes. As I stated at the outset, a full consideration of the historical evidence supporting the incorporationist interpretation of the Privileges or Immunities Clause is beyond the scope of this Article. For a comprehensive treatment of that subject, I continue to defer to the important and incisive work of Laurence Tribe,²⁵² Akhil Amar,²⁵³ Michael Kent Curtis,²⁵⁴ and Richard Aynes.²⁵⁵ However, in light of the fact that Miller viewed original intent as authoritative, it will be worthwhile to canvass several data on which these incorporationist scholars persuasively rely.

Representative Thaddeus Stevens, acting chairman of the Joint Committee of Fifteen (the committee that debated, framed, and reported the Fourteenth Amendment), introduced Section 1 of the Fourteenth

249. 121 U.S. 1 (1887).

250. *Id.* at 12. Interestingly, Justice Hugo Black approvingly quoted this very language in his dissenting opinion in *Adamson v. California*, 332 U.S. 46, 72 (1947) (Black, J., dissenting), in which he conducted a thorough investigation of the events surrounding the adoption of the Fourteenth Amendment and concluded that "one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights[] applicable to the states." *Id.* at 71-72.

251. MILLER, *supra* note 159, at 100 (emphasis added); *see also id.* at 82 ("A very useful key to the construction of a statute or a constitution is to inquire what was the evil to be removed, and what remedy did the new instrument propose; so that when any question arises requiring a judicial construction of any of its clauses, it is important to go back and ascertain the evil that was intended to be remedied.").

252. *See, e.g.*, TRIBE, *supra* note 14, §§ 7-1 to 7-2, at 1293-1302.

253. *See, e.g.*, AMAR, *supra* note 12; Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 12; Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, *supra* note 12.

254. *See, e.g.*, CURTIS, *supra* note 12.

255. *See, e.g.*, AYNES, *supra* note 12.

Amendment before the House of Representatives. In so doing, he stated that it “supplied th[e] defect” that, in its pre-Civil War form, “the Constitution limit[ed] only the action of Congress, and [was] not a limitation on the States.”²⁵⁶ Senator Jacob Howard, the amendment’s sponsor in the upper house, was even clearer in announcing his incorporationist intentions for the Privileges or Immunities Clause. He expressly stated that among the “privileges [and] immunities of citizens of the United States” were “the personal rights guarantied and secured by the first eight amendments of the Constitution.”²⁵⁷ Howard then proceeded to catalogue in detail a number of the freedoms set forth in the Bill of Rights. Specifically, Howard mentioned as being among federal privileges and immunities the First Amendment’s rights of free speech and free press and the right to assemble and petition the government, the Second Amendment’s right to bear arms, the Third Amendment’s protection against quartering, the Fourth Amendment’s protection against unreasonable searches and seizures, a defendant’s Sixth Amendment rights to be informed of the nature of the accusation against him and to be tried by an impartial jury, and the Eighth Amendment’s freedom from excessive bail and cruel and unusual punishments.²⁵⁸

The clearest and most forceful statements that the Privileges or Immunities Clause would incorporate Bill of Rights liberties against the states, however, came from Representative John Bingham, the principal draftsman of Section 1. In a speech on the floor of the House on February 28, 1866, for instance, Bingham referred, by name, to *Barron v. Baltimore*²⁵⁹ and *Livingston v. Moore*²⁶⁰ as examples of antebellum cases in which “the power of the Federal Government to enforce in the United States courts the bill of rights . . . had been denied.”²⁶¹ In *Barron*, Bingham observed, the Supreme Court had held that the provisions of the Bill of Rights “must be understood as restraining the power of the General Government, not as applicable to the States.”²⁶² In *Livingston*, the Court had likewise held it “settled” that the provisions of the first eight amendments “do not extend to the States.”²⁶³ His proposed Fourteenth Amendment changed all that, Bingham declared, and gave Congress “the power to enforce the bill of rights as it stands in the Constitution today.”²⁶⁴ According to Akhil Amar’s tally, Bingham, in his February 28 speech

256. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

257. *Id.* at 2765.

258. *See id.*

259. 32 U.S. (7 Pet.) 243 (1833).

260. 32 U.S. (7 Pet.) 469 (1833).

261. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

262. *Id.* at 1090 (quoting *Barron*, 32 U.S. (7 Pet.) at 247).

263. *Id.* (quoting *Livingston*, 32 U.S. (7 Pet.) at 551).

264. *Id.* at 1088.

alone, used the phrase “bill of rights” more than twelve times in referring to the freedoms protected by the proposed Fourteenth Amendment.²⁶⁵

If his February 1866 remarks left any doubt as to his intentions, Bingham removed that doubt in a subsequent speech that he delivered to Congress in 1871. There, he declared:

[T]hat the scope and meaning of the limitations imposed by the first section, Fourteenth Amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined by the first eight amendments to the Constitution of the United States. . . . These eight articles I have shown never were limitations on the power of the States, until made so by the Fourteenth Amendment.²⁶⁶

Bingham emphasized that Bill of Rights freedoms were protected under the Fourteenth Amendment as federal privileges and immunities because they were “guarantied by the amended Constitution and *expressly enumerated* in the Constitution.”²⁶⁷

Responding to a question during the same exchange, Bingham explained his choice of language for the Privileges or Immunities Clause, and in so doing, further confirmed his incorporationist intentions:

In reexamining that case of *Barron* [*v. Baltimore*], I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendment to the Constitution of the United States, the Chief Justice said: “Had the framers of these intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention.” Acting upon this suggestion, I did imitate the framers of the original Constitution. As they said, “No state shall emit bills of credit, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts;” imitating their example and imitating it to the letter, I prepared the first section of the Fourteenth Amendment as it stands in the Constitution, as follows: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”²⁶⁸

265. See AMAR, *supra* note 12, at 182.

266. CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871).

267. *Id.* (emphasis added).

268. *Id.*

Recent scholarship disputes Charles Fairman's contention that Bingham's incorporationist views were "novel."²⁶⁹ In fact, Akhil Amar has reported that "there were about thirty speeches in the House and Senate" expressing an incorporationist understanding of the Privileges or Immunities Clause.²⁷⁰ Moreover, as Michael Kent Curtis has noted, "John Bingham . . . and Senator Howard . . . clearly said that the amendment would require the states to obey the Bill of Rights. *Not a single senator or congressman contradicted them.*"²⁷¹

Thus, it seems clear that the Fourteenth Amendment's Framers thought that the Privileges or Immunities Clause protected core Bill of Rights freedoms against state interference. Equally important for our purposes is the fact that these men apparently agreed that "civil rights"—ordinary common-law freedoms like those claimed by the butchers in *Slaughter-House*—were *not* protected by the Clause. In April 1866, the Joint Committee of Fifteen was prepared to send to the floor of the House a proposal framed and submitted to the Committee by English social reformer and former U.S. Congressman Robert Dale Owen.²⁷² Owen's proposed Section 1 provided that "[n]o discrimination shall be made by any state, nor by the United States, as to the *civil rights* of persons because of race, color, or previous condition of servitude."²⁷³ At the last moment, the Committee scrapped Owen's prototype in favor of Bingham's "privileges or immunities" formulation that remains in the Amendment today. In an exhaustive study of the history of the Fourteenth Amendment inside the Joint Committee, Earl Maltz concluded that there is only one explanation for the near unanimous support among Democrats and moderate and conservative Republicans for Bingham's proposal: "[W]hile extending constitutional protection beyond the problem of racial discrimination, the Bingham substitute must have been aimed at a narrower class of rights than the Owen proposal."²⁷⁴ In other words, notwithstanding the fact that Owen's submission contemplated only an equality of rights between blacks and whites, moderate committee members were frightened off by the

269. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 26 (1949).

270. Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, *supra* note 12, at 447; see also CURTIS, *supra* note 12, at 112 ("I have found over thirty examples of statements by Republicans during the Thirty-eighth and Thirty-ninth Congresses indicating that they believed that at least some Bill of Rights liberties limited the states.").

271. CURTIS, *supra* note 12, at 91; see also AMAR, *supra* note 12, at 187 ("[N]ot a single person in either house spoke up to deny [Bingham and Howard's] interpretation of section I. Surely, if the words of section I meant something different, this was the time to stand up and say so.").

272. See HORACE FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 69-70 (1908).

273. BENJAMIN KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 83 (1914) (emphasis added).

274. Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 964 (1984).

proposal's use of the phrase "civil rights"—which, Maltz correctly pointed out, included "[t]he rights to contract and to own property."²⁷⁵ Hence, whereas the final version of Section 1 did protect the "privileges [and] immunities of citizens of the United States" (which Bingham, Howard, and others had repeatedly said included many of the rights enumerated in the first eight amendments), it expressly and conspicuously made no reference to "civil rights."²⁷⁶

Miller was almost certainly aware of the incorporationist conception of the Privileges or Immunities Clause shared by Bingham, Howard, and their Republican colleagues. Miller and Bingham traveled the Pacific coast together in the summer of 1871, only several months after Bingham had expressly reiterated his incorporationist intentions on the floor of the House (and, incidentally, less than two years before the decision in *Slaughter-House* was announced). During the trip, "Bingham was almost daily expounding his views of the [Fourteenth] Amendment's scope and purpose."²⁷⁷ An entry in the diary of Judge Matthew P. Deady of Oregon recounted: "[In the] evening heard [J.A.] Bingham speak near an hour at the Court House upon the relation and dependence of the States to the Nation. He was logical, eloquent and grand. . . . Mr Justice Miller gave thanks for what he had seen and received."²⁷⁸ The *Morning Oregonian* reported that in his speech Bingham had stated his hope that, as a result of the Civil War and the Thirteenth and Fourteenth Amendments, "no State will attempt to set up an authority in opposition to human rights."²⁷⁹

In addition to the first-hand knowledge of Bingham's views of the Fourteenth Amendment that Justice Miller probably picked up during the west-coast speaking tour of 1871, Miller was, as Richard Aynes has observed, "a man who watched Congress closely."²⁸⁰ Indeed, Miller could

275. *Id.* at 965.

276. It is also significant in this regard that although John Bingham clearly believed that the Privileges or Immunities Clause made at least some Bill of Rights guarantees applicable to the states, he vehemently opposed the passage of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27, which provided that blacks should have the same rights as whites with respect to contracting, holding and conveying real property, and participating in the judicial process. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1291-92 (1866). In addition to believing that Congress lacked the constitutional authority to pass the act, Bingham also objected that the act went too far—well beyond his objective of incorporating Bill of Rights freedoms—and "would actually strip the states of power to govern, centralizing all power in the Federal Government." *Adamson v. California*, 332 U.S. 46 app. at 100 (1947) (Black, J., dissenting) (citing an exchange between Bingham and James Wilson). Bingham's simultaneous endorsement of Bill of Rights incorporation and opposition to the Civil Rights Act is merely one example of his simultaneous commitment—shared by Justice Miller—to principles of both nationalism and federalism. *See supra* note 218.

277. GRAHAM, *supra* note 211, at 134 n.90.

278. PHARISEE AMONG PHILISTINES: THE DIARY OF JUDGE MATTHEW P. DEADY, 1871-1892, at 28 (Malcolm Clark, Jr. ed., 1975) (entry of July 18, 1871) (footnote omitted).

279. *Our Visitors*, MORNING OREGONIAN, July 19, 1871, at 3.

280. Aynes, *supra* note 18, at 660.

barely have avoided knowing the contents of the congressional debates on the Fourteenth Amendment had he wanted to, inasmuch as Washington, D.C., newspapers covered the proceedings during the spring of 1866 in painstaking detail. On February 28, 1866, for instance, the *Evening Star* published a summary of congressional speeches relating to the Fourteenth Amendment. "Mr. Bingham answered objections to the amendment," the paper accurately reported, "contending that it simply armed Congress with the power, with the consent of the people, to enforce the bill of rights, as it stands in the Constitution."²⁸¹ Among the articles run by the *Daily National Intelligencer* was a piece that reported in detail the substance of Senator Howard's speech regarding the meaning of the Privileges or Immunities Clause. Howard, the article read, "promise[d] to present . . . the views and the motives which influenced [the Joint Committee of Fifteen], in so far as he understood those views and motives."²⁸² Turning to the substance of Howard's remarks, the article continued:

Mr. Howard, having read from [*Corfield v. Coryell*,] continued: Such then is the character of the privileges and immunities spoken of in the Constitution in the second section of the fourth article, I believe. To these privileges and immunities may be added the personal rights guaranteed by the first eight amendments of the Constitution of the United States: Such as freedom of speech and of the press; the right of the people peaceably to assemble and petition Government for a redress of grievances, a right pertaining to each and all of the people; the right to keep and bear arms; the right to be exempt from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, & c.²⁸³

Similar pieces describing the incorporationist intentions of the Fourteenth Amendment's Framers appeared both in Washington newspapers²⁸⁴ and in other national publications²⁸⁵ almost daily. Hence, if

281. XXXIXth Congress—First Session, EVENING STAR (Washington, D.C.), Feb. 28, 1866, at 2.

282. Thirty-Ninth Congress—First Session, DAILY NAT'L INTELLIGENCER (Washington, D.C.), May 24, 1866, at 3.

283. *Id.*

284. See, e.g., Thirty-Ninth Congress—First Session, DAILY NAT'L INTELLIGENCER (Washington, D.C.), Mar. 1, 1866, at 2 (noting Bingham's comment that "the proposed amendment simply armed Congress, with the consent of the people, to enforce the Bill of Rights, as now found in the Constitution"); Thirty-Ninth Congress—First Session, DAILY NAT'L INTELLIGENCER (Washington, D.C.), Feb. 27, 1866, at 2 (noting Bingham's comment that "[t]he House and the civilized world knew that all the judicial officers of the South for the last five years have acted in utter disregard of the Constitution" and that the Fourteenth Amendment was "essential to the preservation of unity of the Government and people").

285. See AMAR, *supra* note 12, at 187 (describing news coverage of incorporationist speeches by John Bingham, Thaddeus Stevens, and Jacob Howard).

Miller paid even the slightest attention to original intent—which we know he did—he must have been enlightened by the events that unfolded during the spring of 1866.

Curiously, every commentator who has argued that Miller knew the intentions of the Framers of the Fourteenth Amendment has also concluded that in *Slaughter-House* he simply ignored them. Howard Graham, for instance, noted that “[i]t hardly seems possible . . . that Justice Miller was unfamiliar with the Framers’ views; yet his reading of the Amendment in the *Slaughter-House Cases* was certainly not that assumed by Bingham in 1866.”²⁸⁶ William Nelson similarly concluded that what he viewed as “Miller’s approaches for narrowing the reach of section one were flatly inconsistent with the history of its framing in Congress” and, therefore, “constituted clear instances of judicial lawmaking of which Justice Miller must have been quite aware.”²⁸⁷ Richard Aynes—one of the foremost proponents of an incorporationist interpretation of the Privileges or Immunities Clause—even went so far as to suggest that Miller might have “deliberately attempted to defeat the force of the amendment” simply to spite the Congress that had proposed it.²⁸⁸

But the suggestion that Miller either ignored or, even worse, purposefully flouted, the expressed—and probably widely known—intentions of the Fourteenth Amendment’s Framers runs headlong into Miller’s self-described philosophy of deciding constitutional cases by placing himself “as nearly as possible in the condition of the men who framed that instrument.”²⁸⁹ Hence, *Slaughter-House* must leave critics like Graham, Nelson, and Aynes perplexed. Why would Miller, who regularly looked to original intent as the key to constitutional meaning, simply turn his back on such powerful historical evidence? The answer, I think, is that he did not. The problem with Graham’s, Nelson’s, and Aynes’s critiques is that they all depend on an erroneous premise—namely, that Miller’s construction of the Privileges or Immunities Clause in *Slaughter-House* was cramped and left no meaningful role for the Clause in the protection of individual rights against state interference. In fact, Miller’s opinion reserved a very important role for the Privileges or Immunities Clause in *Slaughter-House*: the protection of uniquely federal rights, including many Bill of Rights freedoms, against state interference. Thus, far from being at odds with the incorporationist intentions of the Fourteenth Amendment’s

286. GRAHAM, *supra* note 211, at 134 n.90.

287. NELSON, *supra* note 201, at 163.

288. Aynes, *supra* note 18, at 686 (“Miller was hostile to the Fourteenth Amendment and the Congress which proposed it. He had the personality to purposely negate an amendment he felt was unwise.”).

289. *Ex parte Bain*, 121 U.S. 1, 12 (1887).

Framers, Justice Miller's *Slaughter-House* opinion is, according to a careful reading, in almost perfect harmony with those intentions.

3. *Resisting the Flooding of the Courts*

As biographer Charles Fairman has noted, "always uppermost in [Justice Miller's] mind" was the dramatic increase in federal-court litigation spawned by the Civil War.²⁹⁰ In an article published in 1872, just a year before the announcement of the decision in *Slaughter-House*, Miller lamented what he called "the delay in administering justice between individuals" in the federal court system.²⁹¹ "[A]n average period of three years," Miller reported, "elapse[d] in cases appealed to the Supreme Court, between the time when the judgment [was] rendered in the court below and the time when it reach[ed] that court again for execution."²⁹² Miller concluded that "the only remedy that can be found for the present delay, and for preventing its certain future increase, must be sought in legislation."²⁹³ He thus suggested a number of reforms that Congress might undertake to stem the tide of post-Civil War litigation and to ease the burden on the already overburdened federal courts. Specifically with respect to the Supreme Court—whose docket in 1872 would reach, according to Miller, an astounding 800 cases²⁹⁴—he proposed, for instance, that the amount-in-controversy requirement for civil appeals be increased from \$2000 to \$5000.²⁹⁵ He also suggested limiting the Supreme Court's admiralty jurisdiction and its jurisdiction over the District of Columbia and the federal territories.²⁹⁶ More generally, Miller suggested that Congress create intermediate courts of appeals in each judicial circuit.²⁹⁷

By and large, however, Congress did *not* step in to alleviate the pressure mounting in the federal court system.²⁹⁸ In fact, Congress seemed to be marching in the opposite direction. In a series of statutes enacted during the decade following the Civil War, Congress extended the jurisdiction of the federal courts to encompass matters previously committed exclusively to the state judiciary.²⁹⁹ Exasperated with Congress's

290. FAIRMAN, *supra* note 226, at 420.

291. Samuel F. Miller, *Judicial Reforms*, 2 U.S. JURIST 1, 1 (1872).

292. *Id.* at 3.

293. *Id.* at 4.

294. See Letter from Samuel F. Miller to William P. Ballinger (Mar. 9, 1872), in FAIRMAN, *supra* note 226, at 423.

295. See Miller, *supra* note 291, at 8.

296. See *id.* at 5-7.

297. See Letter from Samuel F. Miller to William P. Ballinger, *supra* note 294, at 423.

298. Some modest reforms along the lines Miller had proposed were achieved in the Act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 315, 316, and, much later, in the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826.

299. See William Wiecek, *Murdock v. Memphis: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT

“persistent unwillingness to enact legislation to give the federal judiciary, and especially the Supreme Court, relief adequate to the tremendous expansion of judicial business after the Civil War,”³⁰⁰ Miller, in a handful of Reconstruction-era decisions, seemed to take matters into his own hands in an attempt to do what he could to alleviate that pressure himself. In the *State Railroad Tax Cases*,³⁰¹ for instance, Miller authored the opinion of a unanimous Court establishing strict limits on the jurisdiction of federal courts to enjoin ordinary state tax-collection proceedings.³⁰² Similarly, in *Hawes v. Oakland*³⁰³ and *Huntington v. Palmer*,³⁰⁴ Miller—again for unanimous Courts—set out rules limiting the ability of corporate stockholders to bring suits against their own corporations in “the overburdened courts of the United States.”³⁰⁵ *Murdock v. Memphis*,³⁰⁶ discussed above as indicative of Miller’s allegiance to a scheme of moderate judicial federalism, can also be understood as an effort to prevent the federal courts from being overwhelmed with relatively mundane state-law suits. In *Murdock*, Miller warned that if the Supreme Court were authorized by the Judiciary Act in appeals from state supreme courts to pass on matters of purely state law,

there [would be] no conceivable case so insignificant in amount or unimportant in principle that a perverse and obstinate man may not bring it to this court by the aid of a sagacious lawyer raising a Federal question in the record—a point . . . which he may well know will be decided the moment it is stated. But he obtains his object, if this court, when the case is once open to re-examination on account of that question, must decide all the others that are to be found in the record.³⁰⁷

Slaughter-House is cut from the same cloth. Miller appreciated that, unlike an interpretation of the Privileges or Immunities Clause that was limited to the incorporation of Bill of Rights freedoms, one that involved the nationalization of common-law rights would, in the words of James

OF 1789, at 223, 232-33 (Maeva Marcus ed., 1992) (listing numerous jurisdiction-creating and jurisdiction-extending statutes of the Reconstruction era); see also FAIRMAN, *supra* note 226, at 366-99 (detailing the expansion of federal-court jurisdiction in the post-Civil War era).

300. Fairman, *supra* note 81, at 202.

301. 92 U.S. 575 (1876).

302. See *id.* at 612-18.

303. 104 U.S. 450 (1882).

304. 104 U.S. 482 (1882).

305. *Hawes*, 104 U.S. at 453.

306. 87 U.S. (20 Wall.) 590 (1874).

307. *Id.* at 629. Miller recognized that if the argument of the plaintiffs in *Murdock* were accepted, “the Court . . . would take on a staggering work load of issues normally disposed of at the state court level, cases that might involve no important problems of construing the federal Constitution and laws or the protection of federally derived rights.” Wiecek, *supra* note 299, at 235.

Bradley Thayer, “bring up a mass of cases.”³⁰⁸ If Fourteenth Amendment privileges and immunities included “common rights”—the “civil rights” of the nineteenth century—then disputes involving those rights would be among the cases and controversies “arising under [the] Constitution” to which federal judicial power extended under Article III, Section 2. Faced with entertaining jurisdiction over every infringement of contract rights, every property dispute, and every employment controversy, Miller likely feared that the wheels of justice in the federal courts would grind to a halt. The federal judicial power, Miller believed, should extend to uniquely federal subjects—nothing less, nothing more. For Miller, the freedoms enumerated in the federal Bill of Rights were uniquely federal; ordinary common-law rights were not.

Thus, understood in context, Miller’s opinion in *Slaughter-House*—which limited federal privileges and immunities to those rights, like the ones catalogued in the Bill of Rights, that “owe[d] their existence to the . . . Constitution”—was fully consistent with, and indeed an integral part of, his ongoing effort to maintain the jurisdiction of the federal courts within historical, and workable, boundaries.

4. *Opposing Laissez-Faire Constitutionalism*

Unlike Justices Field, Bradley, and Swayne, Justice Miller was not particularly taken with the laissez-faire thinking that dominated late-nineteenth- and early-twentieth-century legal theory. In fact, he was downright hostile to it. A product of his small-town Western upbringing, Miller was “antagonistic toward expansionist Eastern railroads and suspicious of finance capitalists.”³⁰⁹ In an 1878 letter to his brother-in-law, Texas lawyer William P. Ballinger, Miller “opened with [an] indictment of the new capitalism”.³¹⁰

I have met with but few things of a character affecting the public good of the whole country that has shaken my faith in human nature as much as the united, vigorous, and selfish effort of the capitalists,—the class of men who as a distinct class are but recently known in this country—I mean those who live solely by

308. Henry Ware, Student Notes: Constitutional Law I, Prof. James Bradley Thayer, 1895-1896, Box 1 (on file with the Houghton Library, Harvard University); *see also* Clarence Bunker, Student Notes: Constitutional Law, Prof. James Bradley Thayer, 1891-1892, Box 2, at 44 (on file with the Houghton Library, Harvard University) (“One grave reason wh. influenced ct. prob. was the immense no. of cases wh. wld come into U.S. cts if these privil. were to come under protect of U.S.”).

309. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 89 (expanded ed. 1988).

310. FAIRMAN, *supra* note 83, at 300.

interest and dividends. . . . They engage in no commerce, no trade, no manufactures, no agriculture. They *produce nothing*.³¹¹

In legal terms, Miller's antipathy toward the emerging philosophies of laissez-faire capitalism translated into a refusal to tie the Fourteenth Amendment's Privileges or Immunities Clause to business freedoms. John Campbell and the *Slaughter-House* dissenters (particularly Justice Field) would have read into the Constitution a right to choose and follow a profession—a right that “eventually evolved into an even more sweeping theory called liberty of contract.”³¹² Miller likely recognized that, while the New Orleans butchers were not necessarily of the class of “new capitalists” he so despised, the constitutional theory they were advancing would eventually lead to what scholars today call “the Lochnerization of the Fourteenth Amendment.”³¹³ Thus, in *Slaughter-House*, Miller “set his face against making the Fourteenth Amendment the basis for a *Naturrecht*.”³¹⁴ The Fourteenth Amendment was not, in Miller's view, about liberty of contract or a natural right to property; it was about uniquely federal rights, rights that inhere in national citizenship—rights, like the right of assembly and other Bill of Rights freedoms, which “owe their existence to the . . . Constitution.”

5. *Slaughter-House and Justice Miller's Jurisprudence: A Summary*

The considerations of judicial philosophy that I have examined in this Section seem to confirm what the text of Miller's *Slaughter-House* opinion strongly suggests: that while the Privileges or Immunities Clause did not federalize the bulk of ordinary common-law rights, it did incorporate many Bill of Rights freedoms against state governments. Of course, I am not so bold as to claim that, taken together, these philosophical considerations actually *compel* an incorporationist reading of *Slaughter-House*—they are considerations, not iron-clad rules. Nor am I foolish enough to claim that the principles that animated Justice Miller's general judicial philosophy *always* pointed in a single direction.³¹⁵ But it seems to me clear that, as a

311. Letter from Samuel F. Miller to William P. Ballinger (Apr. 28, 1878), *quoted in* FAIRMAN, *supra* note 83, at 67.

312. KENS, *supra* note 247, at 124.

313. Horwitz, *supra* note 15, at 84.

314. FAIRMAN, *supra* note 83, at 425.

315. Some have argued, for instance, that Miller's opinion in *Murdock* actually contravened, rather than followed, the best evidence of Congress's intent with respect to the amended Judiciary Act. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 920-21 & nn.180-181 (1986); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1317-20 (1986). Even assuming that this view of *Murdock* is correct (and it is far from clear that it is), Miller's opinion for the Court in *Murdock* is appropriately understood as a function of his commitment to preserving an appropriate state-

general matter, Miller subscribed to a core set of jurisprudential principles that included (1) respect for the state-federal balance, (2) deference to original intent, (3) concern for the overburdening of the federal courts, and (4) disdain for laissez-faire constitutional theory. And I would argue that, while not decisive, it is certainly not insignificant that in *Slaughter-House* all of these principles *were* pointing in a single direction: namely, toward recognizing a distinction between the sorts of common-law economic rights urged by the butchers, which the Privileges or Immunities Clause did not protect against state interference, and the uniquely federal rights like those specifically enumerated in the Bill of Rights, which it did.

First, Miller appreciated that the Reconstruction Amendments had brought about some centralization of authority; however, he sought to maintain some semblance of a federal-state balance of power. Hence, his opinion in *Slaughter-House* acknowledged the incorporation of the most uniquely federal of individual rights, including many of those enumerated in the first eight amendments, but refused the federalization of common-law rights. Second, Miller detested freewheeling legal inquiries; he preferred to link the interpretation of a constitutional provision to the intentions of its

federal balance of power, *see supra* text accompanying notes 219-225, and his desire to resist the flooding of the federal court system with ordinary state-law claims, *see supra* notes 306-307 and accompanying text.

Most of the arguments claiming that, in *Murdock*, Miller ignored congressional intent in favor of some other policy ultimately rest upon Charles Warren's (with all due respect) conclusory observation that, given "the whole trend of the legislation of the period" it is "highly probable" that Miller misread Congress's intent. 2 WARREN, *supra* note 228, at 682; *see also* Field, *supra*, at 920 n.180 (citing 2 WARREN, *supra* note 228, at 682); Matasar & Bruch, *supra*, at 1319 n.111 (citing Field, *supra*, at 920 & n.180). The most exhaustive study of the 1867 amendment to the Judiciary Act draws altogether different conclusions. *See* Wiecek, *supra* note 299, at 223. Wiecek observes that (1) William Lawrence, the House sponsor of the amendment, never gave any indication that he envisioned plenary Supreme Court review of state-law questions; (2) the House and Senate debates were "unenlightening" and "murk[y]" on the question of legislative intent; (3) the evidence suggests that "none of the bill's Senate sponsors thought they were enacting any major change" in the Judiciary Act that would have allowed plenary Supreme Court review; and (4) President Johnson was "oblivious" to the fact that the amended Judiciary Act might be read to confer such broad Supreme Court authority. Wiecek ultimately concludes that Congress "might well" have approved the 1867 Judiciary Act amendment "without knowing what it was doing." *Id.* at 230-31.

Given this ambiguity, I would think it difficult to say that Miller's opinion in *Murdock* was clearly contrary to Congress's intention. And there is certainly nothing in *Murdock* itself to suggest that Miller had forsaken congressional intent in favor of some other guiding principle. On the contrary, Miller's opinion makes it clear that he did view congressional intent as controlling but that he found "no sufficient reason for holding that Congress . . . intended" to authorize Supreme Court review of state-court decisions on matters of state law. *Murdock*, 87 U.S. (20 Wall.) 590, 619 (1874). Miller used what we today might call a "clear-statement rule": Had "Congress, or the framers of the bill, had a clear purpose" to sanction such broad Supreme Court review, "it is reasonably to be expected that Congress would use plain, unmistakable language in giving expression to such intention." *Id.* Such reliance on clear-statement rules is in no way inconsistent with a commitment to original intent. *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (employing a clear-statement rule in flushing out Congress's true intention). It is of course also not insignificant that Congress never saw fit to amend the Judiciary Act to overturn the *Murdock* Court's construction.

framers. The incorporationist understanding of the Privileges or Immunities Clause that he advanced on behalf of the Court in *Slaughter-House* was a natural outgrowth of his commitment to judicial restraint in general and to originalism in particular. Third, Miller feared that, in the post-Civil War era, the federal courts were in danger of being inundated by litigation. By distinguishing in *Slaughter-House* between Bill of Rights freedoms on the one hand, and ordinary common-law freedoms on the other, he took a step toward stemming the tide. Finally, Miller was suspicious of those, like Campbell and Field, who sought to read into the Fourteenth Amendment a charter of economic freedom. By tying the Privileges or Immunities Clause to the Bill of Rights, Miller avoided (albeit only temporarily) the constitutionalization of laissez-faire economic theory.

Thus, the orthodox understanding of Miller's opinion in *Slaughter-House*—specifically, that it “strangled the privileges-or-immunities clause in its crib”³¹⁶ and “nullified the intent to apply the Bill of Rights to the states”³¹⁷—is in tension with important aspects of Miller's judicial philosophy. Miller's philosophy actually supports an alternative reading of *Slaughter-House*, whereby the Privileges or Immunities Clause clothed core Bill of Rights freedoms with constitutional protection but left the definition and regulation of ordinary common-law rights to state control.

B. Justice Miller's Voting Record

The text and context of Justice Miller's *Slaughter-House* opinion confirm that there is nothing in the decision that forecloses the incorporation of Bill of Rights freedoms through the Privileges or Immunities Clause. Indeed, it may be most reasonable to read the opinion as suggesting that the Privileges or Immunities Clause *does* incorporate core Bill of Rights freedoms. Evidence relating to Miller's judicial philosophy certainly supports such a reading. But, can an incorporationist interpretation of *Slaughter-House* be squared with other Reconstruction-era decisions that Miller either wrote or joined? Some have argued that it cannot. Richard Aynes,³¹⁸ for instance, has said that if Miller had really written the opinion in *Slaughter-House* that I claim he wrote (an opinion construing the Privileges and Immunities Clause to incorporate Bill of Rights freedoms), he would have dissented in both *United States v. Cruikshank*³¹⁹ and *Hurtado v. California*.³²⁰ Aynes's objection, I must admit, has superficial appeal. In truth, there are other decisions like

316. AMAR, *supra* note 12, at 305.

317. CURTIS, *supra* note 12, at 175.

318. See Aynes, *supra* note 18, at 654-55.

319. 92 U.S. 542 (1876).

320. 110 U.S. 516 (1884).

Cruikshank and *Hurtado* that, at least at first glance, would appear to raise questions about the reading of *Slaughter-House* that I have advanced. Upon close inspection, however, none of these cases casts serious doubt on what I argue was Miller's general commitment, expressed in *Slaughter-House*, to the incorporation of Bill of Rights freedoms through the Privileges or Immunities Clause.

As an initial matter, it is important to recognize that, during Miller's twenty-eight-year tenure, the Supreme Court was presented with what one might call a "true" incorporation argument only once—not in *Cruikshank* or *Hurtado*, as one might suspect from Aynes's critique, but rather, in *Spies v. Illinois*.³²¹ In *Spies*, J. Randolph Tucker, a Virginia lawyer and congressman representing a group of anarchists convicted and sentenced to death in connection with Chicago's infamous "Haymarket" affair, advanced a forceful and cogent argument that the provisions of the Bill of Rights bound the states by virtue of their incorporation through the Privileges or Immunities Clause. *Spies* is worth pausing over—both for what Tucker said and for what the Supreme Court did not say.

According to Tucker, the "privilege[s] and immunit[ies] of . . . citizen[s] of the United States" were those that "have their recognition in or guaranty from the Constitution of the United States."³²² The resemblance between Tucker's conception of federal privileges and immunities and the formulation that Justice Miller had earlier introduced in *Slaughter-House*—rights that "owe their existence to the . . . Constitution"—is striking. As will become clear, the likeness is not coincidental.

In articulating his incorporation argument, Tucker did not challenge the orthodoxy of *Barron v. Baltimore*,³²³ in which the Supreme Court had held that the protections of the Bill of Rights in and of themselves bound only the federal government. Rather, he said:

The position I take is this: Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the [first] ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth

321. 123 U.S. 131 (1887).

322. *Id.* at 150 (oral argument of J. Randolph Tucker).

323. 32 U.S. (7 Pet.) 243 (1833).

Amendment as to such rights limits state power; as the ten Amendments had limited Federal power.³²⁴

As specific examples of federal privileges or immunities, Tucker cited a handful from what he called “the Declaration of Rights”: “the privilege of freedom of speech and press—of peaceable assemblages of the people—of keeping and bearing arms—of immunity from search and seizure—immunity from self-accusation, from second trial—and privilege of trial by due process of law.”³²⁵ In these provisions, Tucker insisted, “we find the privileges and immunities secured to the citizen by the Constitution.”³²⁶

Even more significant than the logical force of Tucker’s incorporation argument is the case law he called upon for support. With respect to the specific provisions of the Bill of Rights, Tucker declared: “[B]eing secured by the Constitution of the United States to all, when they were not, and were not required to be, secured by every State, they are, *as said in the Slaughter-House Cases*, privileges and immunities of citizens of the United States.”³²⁷ In other words, Bill of Rights freedoms applied to state governments through the Privileges or Immunities Clause *because the Court in Slaughter-House had said they did*. In making what modern scholars deem the most “celebrated”³²⁸ and “powerful”³²⁹ argument for incorporation since 1866, Tucker was not distinguishing *Slaughter-House*—he was *invoking* it! In fact, Tucker cited and relied upon *Slaughter-House* several times in his careful analysis of the incorporation issue.³³⁰

Interestingly, Tucker’s citations show that he premised his incorporation argument on *both* the majority and the dissenting opinions in *Slaughter-House*. From Justice Miller’s opinion, Tucker referred specifically to page 79. At page 79, Miller, writing for the Court, had stated that federal privileges and immunities are those rights that “owe their existence to the . . . Constitution,” and had listed as among those federal privileges and immunities the First Amendment right “to peaceably assemble and petition for redress of grievances.”³³¹ Tucker also referred to page 118 of Justice Bradley’s dissent. There, Bradley, agreeing with Miller

324. *Spies*, 123 U.S. at 150 (oral argument of J. Randolph Tucker). Tucker’s reference to the “common law” does *not* suggest the sort of freewheeling, no-holds-barred argument that John Campbell had made on behalf of the butchers in *Slaughter-House*. Whereas Campbell had asserted that the mere fact that a right was protected at common law was alone a sufficient basis for clothing that right with federal constitutional protection, Tucker simply contended that insofar as common-law privileges were enumerated in and safeguarded by the Constitution, they warranted Fourteenth Amendment protection against state interference.

325. *Id.* at 151 (emphasis omitted).

326. *Id.*

327. *Id.* (emphasis added).

328. AMAR, *supra* note 12, at 213.

329. CURTIS, *supra* note 12, at 185.

330. See, e.g., *Spies*, 123 U.S. at 150, 151, 152.

331. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

(at least in part), had expressly mentioned as federal privileges and immunities the First Amendment rights to free exercise, free speech, and free press, as well as the right of assembly; the Fourth Amendment freedom from unreasonable searches and seizures; and the Fifth Amendment right to due process.³³² Tucker argued that “[t]hese declarations of the court” in *Slaughter-House*—that is, the statements contained in Miller’s and Bradley’s opinions—“show that the rights declared in the first ten Amendments are to be regarded as privileges and immunities of citizens of the United States, which . . . are protected as such by the Fourteenth Amendment.”³³³ Thus, arguing in 1887, Tucker seemed to recognize (as I have argued) that, while they did not agree about everything, the majority and dissenting Justices in *Slaughter-House* did agree that *the Privileges or Immunities Clause incorporated core Bill of Rights freedoms*.

Tucker’s oral argument, delivered to a Court on which Justices Miller, Bradley, and Field still sat, is potent evidence of the way late-nineteenth-century lawyers and judges read and understood *Slaughter-House*—specifically, as confirming that the Privileges or Immunities Clause incorporated core Bill of Rights freedoms. Unfortunately, unlike Tucker’s argument, which tells us a great deal, the Court’s decision in *Spies* is unenlightening with respect to the incorporation issue. In a unanimous decision, the Court disposed of the case on procedural grounds, and thus never had the occasion to address Tucker’s *Slaughter-House*-based incorporation argument.

Spies was the first time that the Supreme Court (and the *only* time that Justice Miller) was squarely faced with what I would call a “true” incorporation argument—and, far from rejecting that argument, the Court simply passed over the issue without comment.³³⁴ What do I mean, then, by a “true” incorporation argument? In *Spies*, Tucker argued that states were forbidden by the Privileges or Immunities Clause to abridge certain freedoms enumerated in the Bill of Rights *for the very reason that those freedoms were enumerated in the Bill of Rights*. In other words, according to Tucker, the Fourth, Fifth, and Sixth Amendments were not “privileges [and] immunities of citizens of the United States” because they were “important” or “fundamental” in some abstract sense; rather, they were

332. See *id.* at 118.

333. *Spies*, 123 U.S. at 152. Significantly, alongside *Slaughter-House*, Tucker also cited *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1874), another Miller opinion, and *United States v. Cruikshank*, 92 U.S. 542 (1875). For an in-depth discussion of *Cruikshank*, see *infra* notes 338–380.

334. See AMAR, *supra* note 12, at 227–28 (“[In *Spies*] for the first time an attorney before the Court clearly argued for incorporation on the basis of the privileges-or-immunities clause.”); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 147 (1949) (“Finally in 1887 we reach the first case in which the incorporation argument seems squarely to have been presented to the Supreme Court. This was *Spies v. Illinois*.”).

privileges and immunities because they were spelled out among the original amendments to the Constitution. Contrast Tucker's "true" incorporation argument with the arguments put forth in several of the cases discussed below (most notably, *Hurtado*, *Edwards v. Elliott*,³³⁵ and *Walker v. Sauviner*³³⁶). In these latter cases, the contention "was not that the Fourteenth Amendment had incorporated the Bill of Rights as such," as Tucker had argued, but rather "that specific items in the Bill of Rights were inherently a part of either due process or of privileges and immunities of citizens of the United States."³³⁷

Thus, the first and most obvious response to those who would question Justice Miller's commitment to incorporation on the basis of his voting record in other Reconstruction-era cases is relatively straightforward: Miller simply never faced, and thus certainly never rejected, a true incorporation argument. But that, I suppose, is too easy. As I mentioned above, there are cases—including the ones Aynes has pointed out—that, while not true incorporation cases, at least seem to be sufficiently within the incorporation ballpark (or, more accurately, the anti-incorporation ballpark) that one might expect Miller to have spoken up. Again, though, upon close inspection, none of these supposedly anti-incorporationist decisions turns out to be very anti-incorporationist at all.

1. Cruikshank: *The Two Rights of Assembly and the Problem of "State Action"*

In 1875, the Supreme Court considered the case of *United States v. Cruikshank*,³³⁸ which arose out of the so-called "Colfax massacre" in Louisiana. William Cruikshank and about a hundred other whites had attacked and killed a group of more than sixty black citizens. Cruikshank and his co-conspirators were arrested, indicted, and convicted under the Civil Rights Enforcement Act of 1870³³⁹ for interfering with the black citizens' rights to assemble and to bear arms. Section 6 of the Enforcement Act made it a felony for two or more persons to

band or conspire together . . . with intent to . . . injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege *granted or*

335. 88 U.S. (21 Wall.) 532 (1874).

336. 92 U.S. 90 (1876).

337. Morrison, *supra* note 334, at 147.

338. 92 U.S. 542 (1876).

339. Ch. 114, 16 Stat. 140.

*secured to him by the Constitution or laws of the United States, or because of his having exercised the same.*³⁴⁰

In an opinion by Chief Justice Waite (which Justice Miller joined), the Court reversed the convictions and ordered the defendants released. As a number of commentators have pointed out, there is language in Waite's opinion that might seem to suggest that neither the First Amendment right of assembly nor the Second Amendment right to bear arms is among the "privileges [and] immunities of citizens of the United States."³⁴¹ A careful reading, however, reveals that Waite's opinion in *Cruikshank*—and, more importantly, Miller's acquiescence in that opinion—is fully consistent with (and, indeed, generally supportive of) an incorporationist understanding of the Privileges or Immunities Clause.

a. *An Overview*

The question before the Court, Waite observed, was "whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States" within the meaning of the Enforcement Act.³⁴² Waite concluded that they were not. The "right of the people peaceably to assemble for lawful purposes," he found, "existed long before the adoption of the Constitution of the United States" and, hence, could not be said to have been "granted or secured" by the Constitution within the meaning of the Act.³⁴³ And because "no direct power over [the right to assemble for lawful purposes] was granted to Congress, it remain[ed] . . . subject to State jurisdiction."³⁴⁴ Thus, for their protection in the enjoyment of the right to assemble for lawful purposes, "the people must look to the States," not the federal government.³⁴⁵

The First Amendment, Waite acknowledged, prohibits Congress from abridging the right of the people to assemble and to petition the government for a redress of grievances. However, citing *Barron v. Baltimore*,³⁴⁶ Waite pointed out that the First Amendment, "like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to

340. *Id.* § 6, 16 Stat. at 141 (emphasis added).

341. See, e.g., CURTIS, *supra* note 12, at 170 ("[T]he [*Cruikshank*] Court held that the right of peaceable assembly and the right to bear arms were not privileges secured by the Fourteenth Amendment.").

342. *Cruikshank*, 92 U.S. at 551.

343. *Id.* at 551, 548.

344. *Id.* at 551-52.

345. *Id.* at 552.

346. 32 U.S. (7 Pet.) 243 (1833).

operate upon the National government alone.”³⁴⁷ In 1876, Waite concluded, it was “too late to question the correctness of this construction.”³⁴⁸

b. *An Analysis*

At first glance, Chief Justice Waite’s analysis would seem to undermine my argument that Miller’s acquiescence in *Cruikshank* does not indicate that he subscribed to an anti-incorporationist interpretation of the Privileges or Immunities Clause. After all, it would certainly appear that Waite had flatly contradicted what I say was Miller’s conclusion, voiced in *Slaughter-House*, that the First Amendment right of assembly was among the federal privileges and immunities subject to federal protection. However, I believe that, for two reasons, Miller’s concurrence in *Cruikshank* is consistent with the incorporationist reading of his opinion for the Court in *Slaughter-House*.

i. *The Two Rights of Assembly*

The indictments at issue in *Cruikshank* charged that the defendants had banded together with the intent of depriving black citizens of their “lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.”³⁴⁹ Although the right alleged in the indictment might look like the First Amendment right of assembly, it is in fact different in two critical respects. For one thing, the First Amendment does not speak generically and broadly of a right to assemble “for lawful purposes”; rather, it speaks more specifically and narrowly of a right “to assemble, and to petition the Government for a redress of grievances.”³⁵⁰ The generic right to assemble for lawful purposes at issue in *Cruikshank*, Chief Justice Waite correctly pointed out, existed at common law, “long before the adoption of the Constitution of the United States.”³⁵¹ The First Amendment simply provided constitutional protection for a particular aspect of the common-law right, specifically, the right to assemble *for the purpose of petitioning the government*. Miller clearly recognized and emphasized this distinction in *Slaughter-House*, where he observed that one of the rights “guaranteed by the Federal Constitution” was “[t]he right to peaceably assemble and

347. *Cruikshank*, 92 U.S. at 552.

348. *Id.*

349. *Id.* at 551 (internal quotation marks omitted).

350. U.S. CONST. amend. I.

351. *Cruikshank*, 92 U.S. at 551.

petition for redress of grievances."³⁵² Significantly, Waite stressed the same distinction in *Cruikshank*:

If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose [that is, the purpose of petitioning the government for a redress of grievances], the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.³⁵³

There is a second important distinction between the right of assembly alleged in *Cruikshank* and the First Amendment right: The First Amendment, by its terms, protects the right of assembly only against *government* infringement ("Congress shall make no law . . .").³⁵⁴ It does not set up a positive right of assembly that is valid against all comers, including individuals. Accordingly, because in *Cruikshank* it was not the state, but rather a group of private persons, that had arguably deprived the black victims of their constitutional rights, the indictment could not, by definition, have alleged a First Amendment right.

Thus, on at least one level, *Cruikshank* was a very easy case. The Enforcement Act required the defendants to have conspired to deny rights "secured . . . by the constitution or laws of the United States." The right to assemble "for lawful purposes," particularly when claimed as against infringement by private persons, simply is not one of those rights.

But, one might reasonably reply, what about Waite's observation that the First Amendment, like the other rights catalogued in the Bill of Rights, "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate on the National government alone"? Surely, had Miller truly envisioned the incorporation of the Bill of Rights by way of the Privileges or Immunities Clause, would he not have balked at that dictum? Not necessarily. Waite's statement that the First Amendment "was not intended" as a limitation on the states is precisely accurate. None of the rights enumerated in the first eight amendments *was, when adopted in 1789, intended by the Founders* to restrict the actions of state governments. Put slightly differently, the Bill of Rights did not *of its own force* apply to the states. *Barron v. Baltimore* (which Waite cited) clinched that issue. In *Barron*, Chief Justice Marshall had said that

352. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (emphasis added).

353. *Cruikshank*, 92 U.S. at 552-53.

354. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[t]he constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. . . . The powers [the people of the United States] conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument.³⁵⁵

No one in *Cruikshank*, however, made the broader argument that the Bill of Rights did not apply to the states *after* the ratification of the Fourteenth Amendment.³⁵⁶ Thus, the Court did not even face—much less reject—the notion that the Privileges or Immunities Clause had incorporated Bill of Rights freedoms. In fact, indications in the Court's opinion are to the contrary. Only one paragraph after observing that the Bill of Rights did not apply of its own force to the states, Waite seemed frankly to acknowledge the “incorporating” character of the Fourteenth Amendment. There, he referred to “the right of the people peaceably to assemble *for the purpose of petitioning Congress for a redress of grievances*.”³⁵⁷ This reference stood in stark contrast to the non-constitutional right to assemble “for lawful purposes” alleged in the indictment and was clearly intended as an allusion to the First Amendment. And, unlike the right alleged in the indictment, this First Amendment right of assembly *was*, according to Waite, “an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.”³⁵⁸ Hence, within what might at first have seemed an anti-incorporationist opinion, we find a rather clear recognition that First Amendment rights are uniquely federal rights and, as such, are among the “privileges [and] immunities of citizens of the United States.” From that, there certainly would have been no reason for Miller to dissent: The *Cruikshank* Court's treatment of the First Amendment issue is in perfect harmony with his conclusion in *Slaughter-House* that the First Amendment “right to peaceably assemble and petition for redress of grievances” is a right “guaranteed by the Federal Constitution.”³⁵⁹

355. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

356. See, e.g., *Morrison*, *supra* note 334, at 145-46 (“[I]t does not seem to have been argued that the Fourteenth Amendment made the Bill of Rights applicable to the states.”).

357. *Cruikshank*, 92 U.S. at 552 (emphasis added).

358. *Id.*

359. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

ii. *The Problem of "State Action"*

Beyond the precise nature of the rights allegedly at issue in *Cruikshank*, there is a second, more fundamental, explanation for Miller's concurrence in Chief Justice Waite's opinion, one hinted at above. At first blush, *Cruikshank* seems on the surface to present an ordinary question of statutory interpretation—namely, whether or not the rights alleged in the indictment were rights "secured . . . by the constitution." But lurking just beneath the surface of Waite's opinion is the distinct undercurrent of a fundamental constitutional issue. Although today we generally view the *Civil Rights Cases*³⁶⁰ as the fountainhead of the so-called "state action" doctrine—the principle that "[n]early all of the Constitution's self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals only from government action," not private action³⁶¹—that distinction actually belongs to *Cruikshank*. In fact, when the Court in the *Civil Rights Cases* held that "[i]t is *State action* of a particular character that is prohibited" by the Fourteenth Amendment and observed that "[i]ndividual invasion of individual rights is not the subject-matter of the amendment," it noted that "[a] quite full discussion of this aspect of the amendment may be found in *United States v. Cruikshank*."³⁶²

In the Enforcement Act, Congress had in essence attempted, under the guise of the authority granted to it in Section 5 of the Fourteenth Amendment, to make it a criminal offense for *private individuals* to band together for the purpose of interfering with another's enjoyment of his constitutional rights. Riding circuit in *Cruikshank*, Justice Bradley (who, recall, had dissented in *Slaughter-House*) acknowledged that, by virtue of Section 5, "congress has power to enforce, by appropriate legislation, every right and privilege given or guaranteed by the constitution."³⁶³ The question was whether the Enforcement Act was an "appropriate" exercise of that power. Bradley concluded that it was not. But Bradley's holding was not based on the fact that the right of assembly was not a privilege or immunity within the meaning of the Fourteenth Amendment; in fact, Bradley expressly "[g]rant[ed]" that the Fourteenth Amendment "prevents the states from interfering with the right to assemble, as being one of such privileges and immunities."³⁶⁴ Rather, Bradley's decision in the circuit court was premised on a lack of state involvement:

360. 109 U.S. 3 (1883).

361. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1, at 1688 (2d ed. 1988).

362. *Civil Rights Cases*, 109 U.S. at 11-12 (emphasis added and citation omitted).

363. *United States v. Cruikshank*, 25 F. Cas. 707, 710 (C.C.D. La. 1874) (No. 14,897).

364. *Id.* at 714.

When . . . rights and privileges are secured in the constitution of the United States *only by a declaration that the state or the United States shall not violate or abridge them*, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guaranties *that they shall not be impaired by the state, or the United States, as the case may be*.³⁶⁵

In other words, it was not within Congress's Section 5 authority to pass the Enforcement Act, because, in modern parlance, the Act did not target "state action." Louisiana had not deprived the black victims of their constitutional rights; an angry mob had. And, the Fourteenth Amendment simply did not protect citizens against the actions of other citizens.

The Supreme Court agreed. In dismissing the indictments, the *Cruikshank* Court echoed Justice Bradley's conclusion and observed (rather unremarkably) that, for "violation[s] by their fellow-citizens," people had to look to their state governments for protection.³⁶⁶ The Fourteenth Amendment—which, as Bradley had pointed out, provides only that "[n]o state shall"³⁶⁷ abridge federal privileges or immunities, deny due process, or refuse equal protection—"adds nothing to the rights of one citizen as against another."³⁶⁸

Interestingly, with a few isolated exceptions,³⁶⁹ today the orthodox view of *Cruikshank* appears to be that it (further) undermined the view that the limitations of the Bill of Rights applied to the States.³⁷⁰ Contemporary commentators saw the case very differently: They almost uniformly understood *Cruikshank* solely as a state-action decision. For instance, William Royall, writing in 1878 on the subject of the Fourteenth Amendment, summed up *Cruikshank* in this way:

Let it be observed that the prohibition is, "no state shall make or enforce any law abridging," etc. It is not, "the privileges and immunities shall not be abridged," but *no state shall make or enforce any law*. Now, unless a state makes or enforces some law abridging the fundamental rights of citizens, no case has arisen in which Congress is authorized to legislate under the amendment. It

365. *Id.* at 710 (emphasis added).

366. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

367. *Cruikshank*, 25 F. Cas. at 714 (emphasis added).

368. *Cruikshank*, 92 U.S. at 554.

369. See BELZ, *supra* note 134, at 132 (1978) ("Declaring the government's indictment of the Colfax assailants invalid, Chief Justice Morrison R. Waite invoked the state action theory of the Fourteenth Amendment."); FAIRMAN, *supra* note 82, at 1371 ("[T]he Fourteenth Amendment . . . proved to be a more profound disappointment to Negroes than it had to butchers. Its protection to the Negro was only that *no State* could deny his rights; it did not 'add anything to the rights which one citizen has under the Constitution against another,' said Chief Justice Waite.").

370. See, e.g., CURTIS, *supra* note 12, at 170; Tribe, *supra* note 3, at 182 n.326.

is not sufficient, to authorize legislation by Congress, that the privileges and immunities of a citizen are being abridged. They must be abridged by reason of a state having made and being actually engaged in enforcing a law, to authorize legislation by Congress; and for that reason I have no criticism to make upon the case of *United States v. Cruikshank*. In that case the parties were not prevented from assembling together by any law of Louisiana, but simply by unlawful and riotous interference of individuals, for which they should have been punished in the courts of the state.³⁷¹

Writing several years later, Charles Pence offered a similar analysis. Discussing *Cruikshank* in an 1891 article for the *American Law Review*, Pence noted that the issue presented “was upon the constitutionality of the Enforcement act. Could it be sustained as appropriate legislation under the fourteenth amendment?”³⁷² Answering that question, Pence observed, “made it necessary to inquire what rights are secured by that amendment.”³⁷³ Pence continued: “The court proceeds then to argue that it was immunity from State action or legislation invading the privileges of a citizen of the United States which was secured by that amendment. It conferred no rights upon one citizen as against another.”³⁷⁴

Shortly after the turn of the century, Charles Wallace Collins, in a book entitled *The Fourteenth Amendment and the States*, likewise identified and explained *Cruikshank* as a state-action decision:

[*Cruikshank*] involved an interpretation of the nature of the Amendment in its relation to wrongs done by individuals to individuals acting in their private and personal capacity. Here again the conservative policy prevailed, the Court holding that the Amendment offered no protection from individual invasion of individual rights and that Congress had no power under the Amendment to make positive and affirmative laws for its enforcement.³⁷⁵

Walter Fleming, an early-twentieth-century historian of the Reconstruction era, took the same position. He interpreted *Cruikshank* as having “declare[d] that national legislation enforcing the Fourteenth Amendment must be directed against violations by states, not by individuals.”³⁷⁶

371. William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S. L. REV. 558, 581-82 (1878).

372. Pence, *supra* note 191, at 544.

373. *Id.*

374. *Id.*

375. CHARLES WALLACE COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 22 (1912).

376. 2 FLEMING, *supra* note 15, at 424. Then-student Zechariah Chafee's class notes indicate that turn-of-the-century Harvard professor Eugene Wambaugh also understood (and taught)

Hence, despite the now-prevailing view of *Cruikshank* as an anti-incorporation decision, there was a substantial consensus among those closer to the action that the case turned exclusively upon the absence of state action. Indeed, *only* the state-action interpretation of *Cruikshank* can account for Justice Bradley's concurrence in the Court's opinion. Recall that, in his *Slaughter-House* dissent, Bradley had explicitly mentioned a number of Bill of Rights freedoms (including the right of peaceable assembly, purportedly at issue in *Cruikshank*) as being "among the privileges and immunities of citizens of the United States."³⁷⁷ Then, only months later, sitting on circuit in *Cruikshank*, Bradley had decided the case exclusively on state-action grounds.³⁷⁸ As discussed above, Bradley had not so much as hinted in his circuit-court opinion that the rights alleged in the government's indictment were not federal "privileges [and] immunities." To the contrary, he had expressly assumed that the Fourteenth Amendment "prevents the states from interfering with the right to assemble, as being one of such privileges and immunities."³⁷⁹ It would be strange indeed if, within such a short time, Justice Bradley had repudiated his view that the Bill of Rights applied to state governments through the Privileges or Immunities Clause and concurred in an opinion in diametric opposition to the position he had expressed both in his *Slaughter-House* dissent and in his opinion in the circuit court.

Perhaps, then, the lesson of *Cruikshank* is not, as some have suggested, that those who advocate an incorporationist reading of *Slaughter-House* must explain Miller's *Cruikshank* concurrence. Perhaps, in view of Miller's statement in *Slaughter-House* that "[t]he right to peaceably assemble and petition for redress of grievances" is a right "guaranteed by the Federal Constitution" and, hence, a "privilege[]" of United States citizenship,³⁸⁰ and Justice Bradley's very explicit defense of incorporation in his *Slaughter-House* dissent, the lesson is that *Cruikshank* is not the anti-incorporationist juggernaut it was once thought to be.

Cruikshank as a state-action case, not as a case that cast doubt on the incorporation of the Bill of Rights: "*U.S. v. Cruikshank* . . . 'No State.' Dft. was individual; not State. Can't attack a Ku. klux Conspiracy under 14th Am. . . . This statute does not apply to State at all or State officials." Zechariah Chafee, Student Notes: Constitutional Law, Prof. Eugene Wambaugh, 1912-1913, at 207 (on file with the Houghton Library, Harvard University).

377. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 118-19 (1873) (Bradley, J., dissenting).

378. See *United States v. Cruikshank*, 25 F. Cas. 707, 710 (C.C.D. La. 1874) (No. 14, 897).

379. *Id.* at 714.

380. *Slaughter-House*, 83 U.S. (16 Wall.) at 79-80.

2. *Twitchell, Eilenbecker, and Hurtado: Cases in Which No Argument Under the Privileges or Immunities Clause Was Raised*

There is a second group of decisions that might conceivably raise questions about Justice Miller's commitment to the incorporation of the Bill of Rights through the Privileges or Immunities Clause and, hence, about my incorporationist reading of *Slaughter-House*. In *Twitchell v. Pennsylvania*,³⁸¹ *Eilenbecker v. District Court*,³⁸² and *Hurtado v. California*,³⁸³ the Supreme Court concluded (apparently with Miller's blessing) that several Bill of Rights freedoms—including rights under the Fifth, Sixth, and Eighth Amendments—did not apply to state governments. There is, however, a common thread running through these three cases that, I believe, explains Miller's complicity: In *none* of the cases did the complaining party invoke the Privileges or Immunities Clause. Indeed, in two of the three cases, the Fourteenth Amendment was never even mentioned; rather, the complainants sought to apply the provisions of the Bill of Rights to the states directly.

a. *Cases Involving the Direct Application of the Bill of Rights to the States*

In both *Twitchell* and *Eilenbecker*, criminal defendants attempted to apply rights enumerated in the Bill of Rights to state governmental action, and in each case the Supreme Court refused to do so in a unanimous opinion. Significantly, though, in neither case was it alleged that Bill of Rights restrictions *as incorporated* bound state governments; rather, in both cases, the defendants sought to apply provisions of the federal Bill of Rights to states directly.

In *Twitchell*, a capital defendant challenged a state statute that provided, in relevant part, that "in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused."³⁸⁴ The defendant argued that the statute contravened the Fifth and Sixth Amendments—particularly the latter, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."³⁸⁵ Counsel for the defendant, however, never once mentioned the Fourteenth Amendment; he apparently staked his client's entire case on the notion that the provisions of the Bill of Rights

381. 74 U.S. (7 Wall.) 321 (1869).

382. 134 U.S. 31 (1890).

383. 110 U.S. 516 (1884).

384. *Twitchell*, 74 U.S. (7 Wall.) at 325.

385. U.S. CONST. amend. VI.

applied to the states of their own force. Unfortunately for Mr. Twitchell, his lawyer's argument was a clear loser. With little more than a wave of the hand and a citation to *Barron v. Baltimore*,³⁸⁶ the Court unanimously concluded (in less than three and a half pages) that, in and of themselves, the Fifth and Sixth Amendments applied only to actions of the federal government.

Eilenbecker is in all material respects identical. There, several Iowans had been arrested for violating an injunction prohibiting the sale of alcohol. The defendants were tried by a judge, not a jury; the evidence against them was in the form of affidavits, not live-witness testimony; and upon conviction, they were ordered to pay fines of \$500 apiece and sentenced to thirty days' imprisonment.³⁸⁷ The defendants contended that the procedures afforded them in the state courts violated the Fifth Amendment's guarantee of indictment by grand jury,³⁸⁸ the Sixth Amendment's provisions for jury trial and for confrontation of witnesses,³⁸⁹ and the Eighth Amendment's prohibition of excessive fines and cruel and unusual punishments.³⁹⁰ As it had done in *Twitchell*, the Court (in an opinion written by Justice Miller) rejected the defendants' claims on the basis that "the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States."³⁹¹ Significantly, however, as in *Twitchell*, the defendants did *not* argue that the Fourteenth Amendment incorporated Bill of Rights freedoms—only that the Fifth, Sixth, and Eighth Amendments applied, of their own force, to state governments.³⁹²

As nineteenth-century commentator Charles Pence observed, in *Twitchell* and similar cases, "rights were asserted under the first [eight] amendments only and without reference to the fourteenth."³⁹³ For that reason alone, the cases may be "pass[ed] over without comment."³⁹⁴ They simply do not bear on the question at hand, namely, whether Miller's silence (or, in the case of *Eilenbecker*, his authorship) undermines what I claim to be his incorporationist understanding of the Privileges or

386. 32 U.S. (7 Pet.) 243 (1833).

387. See *Eilenbecker*, 134 U.S. at 32.

388. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

389. See *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and . . . to be confronted with the witnesses against him . . .").

390. See *id.* amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

391. *Eilenbecker*, 134 U.S. at 34.

392. The *Eilenbecker* defendants did contend in a separate assignment of error that their Fourteenth Amendment due process rights had been violated. See *id.* at 35-36. However, their Bill of Rights and due process arguments were wholly distinct.

393. Pence, *supra* note 191, at 542.

394. *Id.*

Immunities Clause. Indeed, the votes of several of the other Justices confirm that there was nothing particularly anti-incorporationist going on in either *Twitchell* or *Eilenbecker*. Chief Justice Chase authored the opinion for a unanimous Court in *Twitchell*, and, in addition to Miller, Justices Field and Swayne joined Chase's opinion. Chase, Field, and Swayne, of course, would all dissent in *Slaughter-House* only four years later. Even more significantly, among those joining Miller's unanimous opinion in *Eilenbecker* were Justices Bradley and Harlan, both of whom quite clearly believed that Bill of Rights freedoms were among the "privileges [and] immunities of citizens of the United States." (Bradley had clearly said so in *Slaughter-House*, and Harlan would later clearly say so in *Maxwell v. Dow*.³⁹⁵)

b. *Cases Involving the Due Process Clause Alone*

Hurtado is another decision to which naysayers of an incorporationist reading of *Slaughter-House* often point. In the end, however, *Hurtado* is really no different from *Twitchell* and *Eilenbecker*. In *Hurtado*, a man who had discovered that his wife was having an affair and had killed her lover was indicted for and convicted of murder. The California Constitution provided for indictment of criminal defendants by information rather than by grand jury. In the Supreme Court, *Hurtado* did not make what I have called a true incorporation argument; that is, he did not contend that the Fifth Amendment applied in state proceedings by dint of the Fourteenth Amendment. Rather, referencing English common-law sources—Magna Carta, Coke, and the like—*Hurtado* insisted, as a more abstract matter, that grand jury indictment was "an essential part of due process of law."³⁹⁶ The fact that the Fifth Amendment expressly protected the right to grand jury indictment was perhaps relevant to *Hurtado*'s argument—as evidence of "essentiality," for instance—but it was not decisive.

The Court rejected *Hurtado*'s common-law-based argument. Justice Matthews, who authored the opinion for a seven-member majority, first concluded that, contrary to *Hurtado*'s assertions, the English common law did not treat grand jury indictment as an "essential" element of due process, but, rather, as only one particular form of due process.³⁹⁷ Matthews next pointed out that, if the Fourteenth Amendment's Due Process Clause

395. 176 U.S. 581, 612 (1900) (Harlan, J., dissenting) ("[I]f prior to the adoption of the Fourteenth Amendment it was one of the privileges or immunities of citizens of the United States that they should not be tried for crime . . . except by a jury composed of twelve persons, how can it be that a citizen of the United States may be now tried in a state court for crime . . . by eight jurors, when that amendment expressly declares that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'?").

396. *Hurtado v. California*, 110 U.S. 516, 521 (1884).

397. *See id.* at 521-28.

truly comprehended a grand jury guarantee, as *Hurtado* maintained, then the Fifth Amendment's Grand Jury Clause would be rendered superfluous because the Fifth Amendment also provided a generic right to due process.³⁹⁸ In other words, according to Matthews, if grand jury indictment was indeed an "essential" component of due process, then the Due Process Clause of the Fifth Amendment would by definition include that right, making the Fifth Amendment's express reference to grand jury indictment unnecessary. "The natural and obvious inference," Matthews concluded, was "that in the sense of the Constitution, 'due process of law' was not meant or intended to include . . . the institution and procedure of a grand jury in any case."³⁹⁹

Only Justice Harlan dissented in *Hurtado*.⁴⁰⁰ In rejecting an incorporationist reading of *Slaughter-House*, Richard Aynes has complained that "Harlan's powerful dissent provided a unique opportunity for Miller to explain *Slaughter-House*, but he did not do so."⁴⁰¹ In other words, had Miller truly embraced incorporation in *Slaughter-House*, he would have dissented alongside Harlan in *Hurtado*. But that is not necessarily true. First, as demonstrated above, *Hurtado* had not really made an incorporation argument at all. He had not claimed that the Fifth Amendment applied to the states *as such* by virtue of the Fourteenth Amendment. Rather, he had simply argued that grand jury indictment was inherent in the concept of due process as that concept was understood at common law. Second, to the extent that *Hurtado*'s argument might have *looked like* an incorporation argument, his position rested exclusively on the Fourteenth Amendment's Due Process Clause. He had *not*, as contemporary legal commentator Charles Pence correctly observed, so much as suggested that the Privileges or Immunities Clause guaranteed the right to grand jury indictment:

[I]t plainly appears that the immunity of the prisoner from answering to the charge of murder unless on a presentment or indictment of a grand jury was not asserted in his behalf as a privilege of a citizen of the United States which is now by the fourteenth amendment put beyond the power of any State to abridge.⁴⁰²

Nor, interestingly, did Justice Harlan rely on the Privileges or Immunities Clause in his dissent;⁴⁰³ like Matthews, Harlan focused exclusively on the

398. See *id.* at 534-35.

399. *Id.*

400. Justice Field did not take part in *Hurtado*. See *id.* at 558.

401. Aynes, *supra* note 18, at 655.

402. Pence, *supra* note 191, at 545.

403. See *Hurtado*, 110 U.S. at 538 (Harlan, J., dissenting).

common-law heritage of the grand jury and on the Due Process Clause. Harlan's decision not to mention the Privileges or Immunities Clause is significant because we know from his dissenting opinion in *Maxwell v. Dow* that he *did* embrace the notion that the Clause incorporated the Bill of Rights.⁴⁰⁴ His choice not to invoke the Clause in *Hurtado* reflected his recognition of the fact that, because the argument had not been raised and fully considered, *Hurtado* simply was not the appropriate forum in which to debate a privileges-or-immunities-based theory of incorporation.

All things considered, it is not at all surprising that Justice Miller opted not to join Justice Harlan's due-process-based dissent. For one thing, unlike what *Slaughter-House* tells us about Miller's view of the Privileges or Immunities Clause (namely, that he likely understood the phrase "privileges or immunities" to include many of the freedoms enumerated in the Bill of Rights), it reveals very little about Miller's understanding of the Due Process Clause. All Miller said in *Slaughter-House* regarding the Due Process Clause was that "under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana . . . be held to be a deprivation of property within the meaning of that provision."⁴⁰⁵ It might well be that Miller thought that the Privileges or Immunities Clause, *but not the Due Process Clause*, played a role in the incorporation of Bill of Rights freedoms. Such a view, after all, would have accorded with the views expressed by many of the Fourteenth Amendment's Framers.⁴⁰⁶ Moreover, the "nonsuperfluousness" line of argument endorsed by Justice Matthews in *Hurtado* is a powerful objection to any due-process-based theory of incorporation. According to Matthews's critique (taken to its logical conclusion), the incorporation of any Bill of Rights guarantee into the Fourteenth Amendment's Due Process Clause would suggest the implicit inclusion of that guarantee in the Fifth

404. See *Maxwell v. Dow*, 176 U.S. 581, 612 (1900) (Harlan, J., dissenting); see also *supra* note 395.

405. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

406. See, e.g., CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871) (statement of Rep. Bingham) (declaring that "the privileges and immunities of citizens of the United States . . . are chiefly defined by the first eight amendments to the Constitution of the United States"); CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard) (elaborating upon the meaning of the Privileges or Immunities Clause and affirming that "the personal rights guaranteed and secured by the first eight amendments of the Constitution" were among the privileges and immunities of United States citizens, and only later noting that "[t]he last two clauses of the first section of the Amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State"). See generally AMAR, *supra* note 12, at 181-214 (discussing the framing of the Fourteenth Amendment); CURTIS, *supra* note 12, at 57-91 (same); TRIBE, *supra* note 14, § 8-1, at 1334 ("Reconstruction Republicans intended the Privileges or Immunities Clause, not the Due Process Clause, to be the centerpiece of their civil rights revolution."); *supra* notes 256-271.

Amendment's Due Process Clause and, hence, the superfluosity of that specific guarantee wherever found in the Bill of Rights.

Finally and importantly, neither Justice Bradley nor Justice Woods joined Harlan's dissent in *Hurtado*; like Miller, they both joined Matthews's opinion for the Court. Given his recitation in *Slaughter-House* of a number of Bill of Rights freedoms as being "among the privileges and immunities of citizens of the United States," the significance of Bradley's concurrence is immediately apparent. Justice Woods's agreement with Matthews is, for similar reasons, also very telling. In 1871, in what was perhaps the first federal-court decision interpreting the Fourteenth Amendment, then-Judge Woods had declared in no uncertain terms that the "rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States."⁴⁰⁷ Hence, both Bradley and Woods clearly subscribed to an incorporationist interpretation of the Privileges or Immunities Clause; yet, like Miller, they elected not to join Justice Harlan's dissent. Apparently, in addition to Miller, neither Bradley nor Woods believed that *Hurtado* was the "unique opportunity" that Aynes has argued.

Thus, in neither *Twitchell*, *Eilenbecker*, nor *Hurtado* did the Court face an argument that the protections of the Bill of Rights applied to the states by virtue of the Privileges or Immunities Clause. Of course, it would have been easy for Miller to dissent in any of those cases and to proclaim that the Fifth Amendment—or the Sixth or the Eighth, as the case may have been—was indeed among the "privileges [and] immunities of citizens of the United States" protected by the Fourteenth Amendment. Less discriminating jurists might have done just that. But that is not how Miller operated; recall that Miller's philosophy was, in his own words, one of deciding only "the main points, the controlling questions."⁴⁰⁸ He believed that judges were not "authorized to make any advances to meet" important constitutional questions until they were "required to do so by duties of [their] position."⁴⁰⁹ Until the argument was put to him directly, Miller simply was of no mind to speak up.⁴¹⁰

407. *United States v. Hall*, 26 F. Cas. 79, 82 (S.D. Ala. 1871) (No. 15,282).

408. Letter from Samuel F. Miller, *supra* note 184, at 415.

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

410. To the inevitable objection of the modern reader that Miller's decision to abstain from addressing a constitutional issue that neither party had raised or argued is wooden and legalistic, there are two responses. First, it is worth noting that Miller was operating in an altogether different era—the era of common-law pleading, the forms of action, the (in)famous Field Code, and, in the Supreme Court, the writ of error. See generally JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 315-49 (2d ed. 1974); OXFORD COMPANION, *supra* note 101, at 260. Nineteenth-century pleading was "rigid and rarefied," Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 917 (1987), and "littered with arcana," and "often . . . produce[d] decisions entirely unrelated to the merits," Richard Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1753 (1998).

3. *Edwards and Sauvinet: Cases Involving the Right to Civil Jury Trial*

There is a third set of cases upon which doubters of an incorporationist reading of *Slaughter-House* might rely. This third set includes *Edwards v. Elliott*⁴¹¹ and *Walker v. Sauvinet*.⁴¹² In each case, a petitioner contended that the right to trial by jury in civil cases (which the Seventh Amendment

Second, it is important to recognize that, in refusing to speculate about answers to questions that had not been raised, Miller was, in fact, following established Supreme Court practice. From Miller's day to present, the Court has consistently adhered to a policy of refusing to consider issues that have not been specifically briefed or argued—even if such issues clearly arise on the face of the record. *See, e.g.,* *Phillips v. Washington Legal Found.*, 118 S. Ct. 1925, 1930 n.4 (1998) (noting that “it would be improper for us sua sponte to raise and address [a] question” not raised by the parties); *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 168 (1934); *Southeastern Express Co. v. Robertson*, 264 U.S. 541, 542 (1924); *Home Benefit Ass'n v. Sargent*, 142 U.S. 691, 694-95 (1892); *Talty v. Freedman's Sav. & Trust*, 93 U.S. 321, 326 (1876). The Court's tendency not to “reach out” is particularly pronounced when important constitutional questions are potentially at issue, as they were in *Twitchell*, *Eilenbecker*, and *Hurtado*. *See Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954) (“We do not reach for constitutional questions not raised by the parties.”).

Even today—when courts are, if anything, too eager to reach out to decide questions not squarely presented—Justice Miller's prudent approach to engaging and deciding constitutional questions finds ample support in Supreme Court practice. Take *Yee v. City of Escondido*, 503 U.S. 519 (1992), for instance. There, the Supreme Court rejected the claims of a group of California mobile-home-park owners that local housing laws effected a “physical taking” of property in violation of the Fifth and Fourteenth Amendments. *See id.* at 523-32. The Court candidly acknowledged that the park owners' contention that the laws violated the Takings Clause because they deprived the owners of the “ability to choose their incoming tenants” might well “be relevant to a regulatory taking argument.” *Id.* at 530-31 (emphasis added). Nonetheless, the Court declined to consider the park owners' “regulatory taking” argument because it was not “fairly included” in the question the park owners had presented in their petition for certiorari. *See id.* at 537-38 (applying SUP. CT. R. 14.1(a)).

The Court in *Yee* observed that the park owners' “physical taking” and “regulatory taking” arguments were not separate *claims*, but rather separate *arguments* in support of a single Takings Clause claim. *See id.* at 534-35. The park owners, the Court noted, “could have formulated any argument they liked in support of [their Takings Clause] claim” because, on Supreme Court review, “it is the petitioner . . . who controls the scope of the question presented.” *Id.* at 535. The park owners' failure to include their regulatory taking argument in the “question presented” was fatal, the Court held, because the Court “ordinarily will not consider questions outside those presented in the petition for certiorari.” *Id.*

The *Yee* Court's explanation for refusing to consider the regulatory taking argument precisely parallels Justice Miller's decision to abstain in *Twitchell*, *Eilenbecker*, and *Hurtado*. Just as the park owners in *Yee* could have raised a regulatory taking argument in support of their effort to invalidate the rent-control provisions, *Twitchell*, *Eilenbecker*, and *Hurtado* could have made incorporation arguments under the Privileges or Immunities Clause. And just as the *Yee* Court upheld the challenged ordinance notwithstanding the fact that the park owners had a colorable regulatory-taking argument, Justice Miller concurred in or wrote *Twitchell*, *Eilenbecker*, and *Hurtado* notwithstanding the availability of a potentially valid argument under the Privileges or Immunities Clause. The Supreme Court was not in the late 1800s and is not now in the business of making parties' legal arguments for them. *See generally* *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (“The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”), *cited in* *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 224 (1997).

411. 88 U.S. (21 Wall.) 532 (1874).

412. 92 U.S. 90 (1876).

protects against deprivation by the federal government) was a “privilege[] or immunit[y]” of United States citizens within the meaning of the Fourteenth Amendment. Although, technically speaking, in neither case was the Court faced with what I have called a true incorporation argument, there really is no doubt that something very much resembling a privileges-or-immunities-based incorporation argument was before the Court. And in both cases, the Court concluded (with Miller concurring) that the right to a jury trial in civil cases was *not* among the rights protected by the Privileges or Immunities Clause. Of all the Reconstruction-era decisions either authored or joined by Miller, *Edwards* and *Sauvinet* are, for obvious reasons, the most difficult to explain. Ultimately, however, neither substantially undermines what I argue was Miller’s basic commitment to the notion that the Privileges or Immunities Clause incorporated core Bill of Rights freedoms.

Edwards is at least partially explained by the fact that the complaining party there had failed to raise his civil-jury argument properly before the state appellate court. The notion that the state had infringed anyone’s right to a jury trial was a mere “afterthought.”⁴¹³ As even a cursory review of the Court’s opinion reveals, *Edwards* was about shipbuilding, maritime contracts, and the admiralty jurisdiction of the federal courts—not civil juries, and certainly not incorporation. Nonetheless, there is language in *Edwards* that cannot be completely ignored. Specifically, although the Supreme Court concluded that the petitioner’s procedural default was “decisive” and that it did not need to address the civil-jury issue because the claim had not been properly preserved,⁴¹⁴ the Court found equally “decisive” the fact that the Seventh Amendment “does not apply to trials in the State courts.”⁴¹⁵

The Court’s decision in *Sauvinet* is more categorical. There, the Court, in an opinion by Chief Justice Waite, acknowledged that “[b]y art[icle] 7 of the amendments, it is provided, that ‘in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,’” but held, in no uncertain terms, that “trial by jury in suits at common law pending in the State courts is not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge.”⁴¹⁶ Miller joined Waite’s opinion.

Miller’s silence in the face of the Court’s seemingly anti-incorporationist rhetoric in *Sauvinet* (and, to a slightly lesser degree, in *Edwards*) would appear to raise questions about my alternative, incorporationist reading of *Slaughter-House*. And while “the broad

413. *Edwards*, 88 U.S. (21 Wall.) at 548 (argument of A.Q. Keasbey).

414. *Id.* at 557-58.

415. *Id.* at 557.

416. *Sauvinet*, 92 U.S. at 92.

proposition that the Fourteenth Amendment incorporates the Bill of Rights as such was not suggested in the case,”⁴¹⁷ the question of the incorporation of the Seventh Amendment through the Privileges or Immunities Clause was lurking just beneath the surface. Why, then, did Miller join? There are two considerations that I believe help to explain Miller’s vote.

First and foremost, it is entirely possible that Miller felt precluded by his commitment to originalism from voting to incorporate the Seventh Amendment. This “originalist bar” could have taken either of two slightly different forms. First, Miller might have recognized that, given the original understanding of the Seventh Amendment, the right to a civil jury simply does not lend itself to mechanical incorporation against state governments. Akhil Amar has recently pointed out that, as originally conceived by the Framers, the Seventh Amendment was as much about federalism as individual rights. In essence, the amendment required that “if a state court entertaining a given common-law case would use a civil jury, a federal-court hearing the same case (because, say, it involves diverse citizens or raises a federal question) must follow—must ‘preserve’—that state-law jury right.”⁴¹⁸ Put differently, “federal courts were obliged to provide a civil jury whenever the state court across the street would do so.”⁴¹⁹ Read in this “most sensible” way, the Seventh Amendment “becomes somewhat awkward to incorporate against states”⁴²⁰ because to incorporate “would be to redundantly insist that state courts provide civil juries whenever state law said so.”⁴²¹

In addition, an originalist conception of the Fourteenth Amendment might also have led Miller to resist the incorporation of the right to a civil jury. There is evidence to suggest that those who framed and ratified the Fourteenth Amendment might not have envisioned the incorporation of the Seventh Amendment. For instance, as we have seen, during the debates on the Fourteenth Amendment, Jacob Howard, the Amendment’s Senate sponsor, delivered a speech on the Senate floor in which he expressly stated that among the privileges and immunities of U.S. citizens were “the personal rights guarantied and secured by the first eight amendments of the Constitution.”⁴²² But, when Howard went on to specify those rights, he conspicuously omitted any reference to the right to a civil jury.⁴²³ Miller

417. Morrison, *supra* note 334, at 145.

418. AMAR, *supra* note 12, at 89.

419. *Id.* at 276.

420. *Id.* at 92.

421. *Id.* at 276.

422. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

423. See *id.* (specifically mentioning the rights to free speech, free press, assembly and petition, the right to bear arms, the right against the quartering of soldiers, the freedom from unreasonable searches and seizures, the right of an accused to be informed of the nature of the accusation against him and to a criminal jury trial, and the freedom from excessive bail and cruel and unusual punishment).

might also have thought it indicative of an original intention not to incorporate the Seventh Amendment that at least a handful of states voting to ratify the Fourteenth Amendment had procedures in place that would not have complied with an incorporated Seventh Amendment.⁴²⁴ In any event, because Miller was a Justice who took originalist arguments seriously, the incorporation of the Seventh Amendment would have given him pause.

These originalism considerations might well have settled the matter for Justice Miller. But Miller had another reason for resisting the incorporation of the Seventh Amendment. In addition to the difficult jurisprudential issues that would have attended the incorporation of the Seventh Amendment, Miller had a somewhat idiosyncratic, but very firmly held, belief that trial by jury in civil cases was simply a bad idea—and that trial by jury in *state* civil cases was an even worse idea. Miller made no secret of his aversion to the institution of the civil jury. Indeed, he devoted an entire *American Law Review* article to the subject.⁴²⁵ Although he acknowledged that the institution of trial by jury in criminal cases was “probably wise,”⁴²⁶ he candidly “confess[ed] that [his] practice in the courts, before [he] came to the bench, had left upon [his] mind the impression that as regards contests in the courts in civil suits, the jury system was one of doubtful utility.”⁴²⁷ Miller complained that the civil jury system

depends upon jurors who are not trained in the art of weighing evidence, of discerning the truth or falsity of the testimony produced before them as it comes from the mouths of witnesses, and still less in the knowledge of the principles of law which must be applied to the evidence in order to decide the case.⁴²⁸

As a result, Miller warned, “the jury is but too often the mere reflection of popular impulse.”⁴²⁹ Taking into account the “many motives [that] may influence men to inconsiderate action,” the “many prejudices [that] enter the jury box,” and how often “stupidity may prevail over clear sense and sound judgment,” jury trial was simply not a preferred method of deciding complex cases.⁴³⁰ Perhaps above all else, Miller feared what we in the post-O.J. Simpson era call “jury nullification.” As an empirical matter, Miller

424. See Fairman, *supra* note 269, at 81-132. There is, in fairness, some indication that at least one Republican congressman, William Lawrence, thought that the Fourteenth Amendment did incorporate the Seventh Amendment—although Lawrence seemed to rely on the Due Process Clause, not the Privileges or Immunities Clause, for that conclusion. See CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871) (statement of Rep. Lawrence).

425. Justice Samuel F. Miller, *The System of Trial by Jury*, 21 AM. L. REV. 859 (1887).

426. Justice Samuel F. Miller, Address to the Annual Meeting of the Bar Association of the State of New York (Nov. 1878), in 18 ALB. L.J. 405, 409 (1878).

427. Miller, *supra* note 425, at 861.

428. *Id.* at 862.

429. Miller, *supra* note 426, at 409.

430. Miller, *supra* note 425, at 864.

contended, litigants who felt that they were legally in the right were generally content to submit their cases to a judge for decision. Those whose legal cases were shaky were the ones who sought a jury trial:

[T]he party who fancies that, in appeals to the prejudices and feelings of the tribunal which tries his case he may find something which will induce them to depart from the strict law pertaining to it, or to construe the evidence more favorably to his side of the case, is generally the one who demands a jury.⁴³¹

Significantly, Miller harbored particular suspicion of civil-jury trial in state courts. In addition to the problems he saw with turning over complex legal issues to those untrained in the law, Miller was convinced that state judges were simply not up to the task of properly supervising civil jury trials in their courts:

[O]wing to popular and frequent elections of the State judges, and insufficient salaries, the judges of those courts in which I mainly practiced were neither very competent as to their learning, nor sufficiently assured of their position, to exercise that control over the proceedings in a jury case, and especially in instructing the jury upon the law applicable to it, which is essential to a right result in a jury trial.⁴³²

Given Miller's distrust, it is not surprising that he might have sought to avoid imposing on state courts a system that he genuinely believed they were woefully ill-equipped to handle.

Miller was by no means alone in his resistance to the incorporation of the Seventh Amendment. Of course, it is not insignificant that, despite the modern Supreme Court's incorporation of virtually every other provision of the Bill of Rights against state governments since the turn of the twentieth century, the Seventh Amendment remains to this day a restraint only on the federal government. More telling, however, is the fact that—for whatever reason—many of Miller's most avidly incorporationist contemporaries apparently agreed that the Seventh Amendment either *could* not or *should* not be incorporated. For instance, even before the Civil War and the passage of the Fourteenth Amendment, Georgia's Chief Justice Joseph Henry Lumpkin had held that the federal Bill of Rights applied to the states—not of its own force (the Supreme Court's earlier decision in *Barron v. Baltimore* would have precluded such a holding), but as declaratory of “great principles of civil liberty” that no republican government, state or

431. *Id.* at 862.

432. *Id.*

federal, could infringe.⁴³³ Significantly, however, in cataloguing the rights that state governments were obliged to respect, Lumpkin mentioned—in proper order—each and every freedom set forth in the first eight Amendments *except the right to a civil jury*.⁴³⁴ Likewise, as I mentioned above, in introducing the Fourteenth Amendment on the floor of the Senate, Jacob Howard omitted any reference to the Seventh Amendment in his otherwise ardently incorporationist explanation of the Privileges or Immunities Clause. Perhaps most significantly, Justice Bradley—who had very expressly advocated the incorporation of a handful of Bill of Rights freedoms in his *Slaughter-House* dissent—also concurred in both *Edwards* and *Sauvinet*, rejecting the incorporation of the Seventh Amendment.⁴³⁵

In any event, Miller's belief that the Seventh Amendment either *could* not for jurisprudential reasons or *should* not for practical reasons be incorporated against the states appears to be *sui generis*. It does not cast doubt on his broader commitment, manifested in *Slaughter-House*, to the idea that many of the provisions of the Bill of Rights should apply to state governments through the Privileges or Immunities Clause.

4. *Miller's Voting Record: A Summary*

The text and context of Justice Miller's opinion in *Slaughter-House* certainly suggest that the core provisions of the Bill of Rights applied to the states by virtue of the Privileges or Immunities Clause. Miller's general judicial philosophy appears to support that reading. Doubters of my interpretation will no doubt point out that Miller failed to dissent in *Cruikshank*, *Twitchell*, *Eilenbecker*, *Hurtado*, *Edwards*, and *Sauvinet*. As I have shown, however, objections based on these cases fall short for several reasons. First and most decisively, in none of these decisions did the Court ever face a true incorporation argument; that is, in none did a party claim that one of the original amendments actually applied to the states by virtue of its absorption into the Fourteenth Amendment. Second, even putting to one side the fact that none of these cases presented the Court with a true incorporation argument, none of the decisions from which Miller supposedly *should* have dissented squarely contradicts what I contend was Miller's specifically expressed incorporationist understanding of the Privileges or Immunities Clause. Third, and relatedly, just as Miller did not speak up in any of the aforementioned cases, neither did Justice Bradley; in

433. *Campbell v. State*, 11 Ga. 353, 368 (1852).

434. *See id.* at 366-67.

435. As further evidence that the Supreme Court was not, in *Edwards* and *Sauvinet*, pursuing anything approaching a coherent, generally applicable anti-incorporation agenda, it is noteworthy that Justice Clifford, one of only two Justices to dissent in *Sauvinet*, authored the unanimous opinion for the Court in *Edwards*.

fact, Justices Swayne, Harlan, Woods, and Bradley all failed to break from the Court in key decisions. Yet no one doubts that these four Justices believed that the Privileges or Immunities Clause incorporated Bill of Rights freedoms. Their silence, and particularly Bradley's, thus confirms that there was nothing particularly anti-incorporationist about any of these decisions. Finally, it is not insignificant that, by his own admission, Miller was not particularly fond of dissenting, even to decisions he thought incorrect as a matter of law. Indeed, by 1871, Miller acknowledged that he had grown "averse to dissents."⁴³⁶

Hence, in the end, it is much less clear than many would have us believe that Miller's pre- and post-*Slaughter-House* voting patterns undermine the view—suggested by the text of the *Slaughter-House* opinion and supported by broader considerations of judicial philosophy—that Miller envisioned the incorporation of the Bill of Rights as one of the primary purposes of the Privileges or Immunities Clause.

V. GOING FORWARD: THE IMPLICATIONS OF REINTERPRETING *SLAUGHTER-HOUSE*

For years, we have misunderstood Justice Miller's opinion in *Slaughter-House* and have wrongly assumed that the Court in that case meant to foreclose future reliance on the Privileges or Immunities Clause as a basis for incorporating the Bill of Rights against the states. So what? Why should anyone care? After all, the Supreme Court has, over the course of the last century, incorporated virtually all of the freedoms enumerated in the Bill of Rights by way of the Fourteenth Amendment's Due Process Clause. Does it really matter whether the vehicle for incorporation is the Due Process Clause or the Privileges or Immunities Clause? As it turns out, it does.

It matters, as elegantly put by Justice Thomas in his dissent last Term in *Saenz v. Roe*,⁴³⁷ because "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of [the Supreme Court's] Fourteenth Amendment jurisprudence."⁴³⁸ The orthodox understanding of Miller's opinion in *Slaughter-House*—as interpreting the Privileges or Immunities Clause in such a way as to "nullif[y] the intent to apply the Bill of Rights to the states"⁴³⁹—has caused courts to rely on other constitutional provisions, most notably the Due Process Clause, to safeguard individual rights against state interference. As Justice Souter remarked several years ago, "The *Slaughter-House Cases* are

436. Letter from Samuel F. Miller (May 1, 1871), quoted in FAIRMAN, *supra* note 83, at 61.

437. 119 S. Ct. 1518 (1999).

438. *Id.* at 1538 (Thomas, J., dissenting).

439. CURTIS, *supra* note 12, at 175.

important . . . for their holding that the Privileges and Immunities Clause was no source of any but a specific handful of substantive rights. To a degree, then, that decision may have led the Court to look to the Due Process Clause as a source of substantive rights.”⁴⁴⁰ In other words, according to conventional wisdom, we have Miller to thank for the much and rightly maligned doctrine of “substantive due process.”⁴⁴¹

Before exploring the implications of my reinterpretation of *Slaughter-House* for substantive due process, let me clarify precisely what I mean by the phrase “substantive due process.” The modern doctrine of substantive due process, of course, has more than one incarnation. On the one hand, “necessarily . . . it is a variety of substantive due process through which rights like freedom of speech”—and other substantive rights laid out in the Bill of Rights—“are applied to the states whenever the textual vehicle chosen for the purpose is the Due Process Clause.”⁴⁴² On the other hand, substantive due process is also the name given to the isolation and protection of supposedly “fundamental” rights—the right to privacy being the most obvious example—that are not explicitly grounded in the text of the Constitution.⁴⁴³ As everything I have said up to this point should make clear, I am concerned primarily with the former—that is, the protection of substantive Bill of Rights freedoms by way of the Due Process Clause—and not so much with the latter. Precisely what my reinterpretation of *Slaughter-House* portends for the other, more controversial branch of substantive due process jurisprudence—the protection of unenumerated rights against state interference—is an issue for another day.

As an aside, however, it is worth noting that by reinterpreting *Slaughter-House* along the lines suggested in this Article, the Supreme

440. *Washington v. Glucksburg*, 521 U.S. 702, 759 n.6 (1997) (Souter, J., concurring) (citation omitted).

441. See *TRIBE*, *supra* note 14, § 7-5, at 1316 (“Ironically, in his opinion in *Slaughter-House*, Justice Miller may have unwittingly taken the first step toward the recognition—and subsequent perpetuation—of the doctrine of substantive due process.”). In the post-*Slaughter-House* years, the shift in emphasis in the “incorporation” cases from the Privileges or Immunities Clause to the Due Process Clause was, in many respects, self-perpetuating. As courts rejected Privileges-or-Immunities-Clause-based incorporation arguments, litigants began more and more to assert their claims under the Due Process Clause; and when courts slowly but surely began to credit due-process-based arguments, parties lost the incentive to pursue the privileges-or-immunities issue. See LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 209 (1992) (“This idea [that the Privileges or Immunities Clause limited legislative power] received such rough handling by the majority in the *Slaughterhouse Cases* . . . that lawyers in general dropped it, only to return to court with the argument that the limits [on the police power] resided in the due process clause instead.”).

442. *TRIBE*, *supra* note 14, § 8-8, at 1363; John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 499 (1997) (“One [subcategory of substantive due process] is the rule that certain nonprocedural aspects of the first eight amendments apply to the states as well as the federal government.”).

443. See Harrison, *supra* note 442, at 500-01 (calling this “pure substantive due process” and recognizing that “the most important fundamental right is the right to privacy, and [that] the most important application of that right involves abortion”).

Court could avoid many of the pitfalls that might come with overruling *Slaughter-House* outright and approaching the privileges-or-immunities issue anew. Invoked in its “virgin state,” there is the very real danger that the Privileges or Immunities Clause “could invite judicial lawmaking untethered by precedent and untamed by tested principle and might thereby undermine the legitimacy both of the decisions relying upon it and of the courts invoking it.”⁴⁴⁴ Dissenting in *Saenz*, Justice Thomas expressed his very legitimate fear that the Clause—if not handled with sufficient care—might “become yet another convenient tool for inventing new rights, limited solely by the ‘predilections of those who happen at the time to be Members of [the Supreme] Court.’”⁴⁴⁵ These are grave concerns. But they are somewhat less grave if, rather than simply tossing Miller’s *Slaughter-House* opinion aside, we take Miller’s opinion seriously and use it as the lens through which we view and interpret the Privileges or Immunities Clause.

In *Slaughter-House*, as I have said, the Court articulated a fairly comprehensive general theory of the Privileges or Immunities Clause. On the one hand, the Court made it clear that the Clause does not protect ordinary common-law interests against state deprivation. On the other hand, the Clause does protect rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws.”⁴⁴⁶ At the heart of this class of rights, I have argued, are many of the freedoms enumerated in the Bill of Rights—rights, according to Miller, that are “guaranteed by the Federal Constitution.”⁴⁴⁷ But the *Slaughter-House* Court also made it clear that the protection of the Privileges or Immunities Clause does not necessarily end with the first eight amendments and the other rights specified in the text of the Constitution. Rather, the Clause also safeguards rights proceeding, for instance, from the “National character” of the federal government, such as the right to travel to Washington, D.C., the rights to assert claims against and to transact business with the federal government, and the rights to use seaports and to file suits in federal courts. For confirmation that the Privileges or Immunities Clause as interpreted in *Slaughter-House* protects such extratextual, “National character”-based rights, one need look no further than the Court’s decision last Term in *Saenz*. There, the Court forthrightly acknowledged that the right to travel “is not found in the text of the Constitution”⁴⁴⁸ but nonetheless held, expressly relying on Miller’s opinion, that “one of the privileges conferred

444. *TRIBE*, *supra* note 14, § 7-6, at 1329.

445. *Saenz v. Roe*, 119 S. Ct. 1518, 1538 (1999) (Thomas, J., dissenting) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

446. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

447. *Id.* at 79-80.

448. *Saenz*, 119 S. Ct. at 1524.

by [the Privileges or Immunities] Clause 'is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.'" ⁴⁴⁹

The point here is that by engaging *Slaughter-House* rather than overruling it, we gain valuable insight into the extent to which the Privileges or Immunities Clause might replace substantive due process, not only as a means for incorporating substantive Bill of Rights freedoms, but also as a means for protecting rights not explicitly specified in the constitutional text. With respect to the latter category, courts are by no means given carte blanche to invent new individual rights and foist them upon the states, as Justice Thomas feared; rather, the relevant question, using Miller's terminology, becomes whether or not a given right "owe[s] [its] existence" to "the Federal government, its National character . . . or its laws." ⁴⁵⁰

Having said all that, I reiterate that I am concerned here with the use of substantive due process analysis to incorporate into the Due Process Clause certain substantive Bill of Rights freedoms. The problems with substantive due process even in this relatively limited incarnation are legion. Of course, they are also well documented, so I need not provide anything more than a brief sketch here. First, and most obviously, there is the pesky issue of constitutional text: The Court's present policy of relying exclusively on the Due Process Clause to protect substantive Bill of Rights freedoms confounds the ordinary meaning of the term "due process." Indeed, through the years, various members of the Supreme Court have explicitly acknowledged the textual difficulties inherent in substantive due process, only to overlook them. Justice Brandeis, for instance, concurring in *Whitney v. California*,⁴⁵¹ remarked that "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."⁴⁵² Justice White, writing for a majority in *Bowers v. Hardwick*,⁴⁵³ made a similar observation: "It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth

449. *Id.* at 1526 (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 80). In *Shapiro v. Thompson*, 394 U.S. 618 (1969)—a forebear of sorts to *Saenz*—the Court had observed that the right to travel proceeded, among other sources, from "the nature of our Federal Union." *Id.* at 629.

450. Given that this Article is addressed only to a single aspect of the Supreme Court's substantive due process jurisprudence—the incorporation of Bill of Rights freedoms against state governments—I leave for another day the question whether the Court's privacy decisions (including, most infamously, *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny) might find support in a resurrected Privileges or Immunities Clause.

451. 274 U.S. 357 (1927).

452. *Id.* at 373 (Brandeis, J., concurring).

453. 478 U.S. 186 (1986).

Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content"⁴⁵⁴ More recently still, in their joint opinion in *Planned Parenthood v. Casey*,⁴⁵⁵ Justices O'Connor, Kennedy, and Souter stated that "[a]lthough a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty . . . the Clause has been understood to contain a substantive component as well."⁴⁵⁶

Nonetheless, as John Hart Ely has colorfully stated, "[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' . . . [W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"⁴⁵⁷ Charles Black has likewise argued that although substantive due process "now and then works a little bit in practice," it "*does not work intellectually*."⁴⁵⁸ Referring primarily to Ely and Black, Laurence Tribe has recognized that "[f]or some distinguished students of the Constitution," the semantic problems associated with substantive due process—"in particular, the textual gymnastics arguably necessary to find protection of *substantive* rights in a provision whose words seem most apparently concerned with *process*—have become insuperable."⁴⁵⁹ I must admit that I, too, find the textual objection to substantive due process overwhelming, if not positively conclusive. (Above all else, it seems to me, a legal doctrine that emerges from a constitutional provision should not, at least absent the most compelling historical evidence, patently contradict the plain meaning of the text from which it emerges.)⁴⁶⁰ What "process," for instance, is violated when a state legislature duly enacts a law that, say, broadly prohibits people from picketing on a downtown sidewalk? Presumably, the substance of such a law would run afoul of the First Amendment's free speech guarantee, but the law would in no way contravene the express mandate of

454. *Id.* at 191.

455. 505 U.S. 833 (1992).

456. *Id.* at 846.

457. ELY, *supra* note 12, at 18.

458. CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* 106 (1997).

459. TRIBE, *supra* note 14, § 7-5, at 1317.

460. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1196 (1987) ("More commonly, arguments from the text achieve the . . . result of excluding one or more positions that might be argued for on nontextual grounds."); Frederick Shauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 828 (1982) ("Constitutional language can tell us when we have gone too far without telling us anything else."). Professor Fallon points out, for instance, that "although the text of the eighth amendment may not tell us precisely what 'cruel and unusual punishments' are, the language does require that the amendment's prohibition apply only to actions that can plausibly be described as 'punishments.'" Fallon, *supra*, at 1196. (footnotes omitted). Likewise, whereas we may not learn from the text of the Fourteenth Amendment what, if anything, the term "due process" really means, the text does teach that it may only apply to government action that can plausibly be described as "process."

the Due Process Clause that no state may “deprive any person of life, liberty, or property without due process of law.” The legislature might have deprived individuals of their “liberty”—the right to speak freely—but it would have done so *with* due process of law; hence, no constitutional violation. Indeed, given its equivocal, process-based language, the Due Process Clause is positively incapable of providing absolute protection for the substantive rights set out in the Bill of Rights—among them, freedom of speech, freedom of the press, free exercise of religion, the right to bear arms, the right not to have soldiers quartered in one’s home, the right to be free from unreasonable searches and seizures, the right to receive just compensation for private property taken by the government, and the right not to be subjected to cruel and unusual punishment. The Due Process Clause therefore cannot—at least as a matter of constitutional text—legitimately account for a number of the Supreme Court’s most significant incorporation decisions, including *Gitlow v. New York*,⁴⁶¹ *Near v. Minnesota*,⁴⁶² *De Jonge v. Oregon*,⁴⁶³ *Cantwell v. Connecticut*,⁴⁶⁴ *Wolf v. Colorado*,⁴⁶⁵ *Chicago, Burlington & Quincy Railway Co. v. Chicago*,⁴⁶⁶ and *Robinson v. California*.⁴⁶⁷

Second, not only is the Court’s due-process-based theory of incorporation inconsistent with the Fourteenth Amendment’s plain language, it is also at loggerheads with the intentions of those who framed the Amendment. There is every indication that John Bingham—the principal draftsman of Section 1—understood the Due Process Clause to be concerned exclusively with *procedural* fairness. Responding during the floor debates on the Fourteenth Amendment to a question put to him by fellow congressman Andrew Jackson Rogers regarding the meaning of the Due Process Clause, Bingham answered: “[T]he courts have settled that long ago, and the gentleman can go and read their decisions.”⁴⁶⁸ Above all others, the “decision[]” to which Bingham must have been referring was *Murray’s Lessee v. Hoboken Land & Improvement Co.*,⁴⁶⁹ which had been decided by the Supreme Court in 1856 and which was, in 1866, the definitive statement on the issue of “due process of law.” *Murray’s Lessee*

461. 268 U.S. 652 (1925) (incorporating the First Amendment’s free speech guarantee).

462. 283 U.S. 697 (1931) (incorporating the First Amendment’s free press guarantee).

463. 299 U.S. 353 (1937) (incorporating the First Amendment’s freedom-of-assembly guarantee).

464. 310 U.S. 296 (1940) (incorporating the First Amendment’s free exercise guarantee).

465. 338 U.S. 25 (1949) (incorporating the Fourth Amendment’s prohibition of unreasonable searches and seizures).

466. 166 U.S. 226 (1897) (incorporating the Fifth Amendment’s just compensation guarantee).

467. 370 U.S. 660 (1962) (incorporating the Eighth Amendment’s prohibition of cruel and unusual punishments).

468. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

469. 59 U.S. (18 How.) 272 (1856).

involved a challenge to an act of Congress that established a summary procedure for collecting public debts from federal customs officers. In sustaining the act against constitutional challenge, a unanimous Supreme Court interpreted the Due Process Clause of the Fifth Amendment—which is, of course, in all material respects identical to the Fourteenth Amendment provision—as a guarantee of fair procedures. Specifically, the Court stated:

To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether the process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors⁴⁷⁰

Clearly, then, any interpretation of the Due Process Clause that reaches beyond matters of procedure to embrace matters of substance contradicts not only the text of the Fourteenth Amendment but also the expressed intentions of the Due Process Clause's principal framer, John Bingham. The

470. *Id.* at 276-77. In a 1995 article, Laurence Tribe argued that, by 1868, "any state legislature voting to ratify a constitutional rule banning government deprivations of 'life, liberty, or property, without due process of law' would have understood that ban as having substantive as well as procedural content." Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297-98 n.247 (1995). Interestingly, Tribe pointed to *Murray's Lessee* for support. In the Court's observation that due process "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will," *Murray's Lessee*, 59 U.S. (18 How.) at 276, Tribe found support for the proposition that legal thinkers of the mid-1850s would have viewed the concept of "due process" as entailing a substantive component.

Tribe's argument (from which, in fairness, he has since backed away somewhat, *see infra*) seems to me to make too much of too little. The issue before the Court in *Murray's Lessee* was *not* whether Congress could—as a matter of substantive law—provide for the return of property lawfully belonging to the United States; rather, the question was whether or not the method—the process—Congress had chosen to accomplish that end comported with the Constitution. Not surprisingly, therefore, the Court's opinion is replete with language (including, notably, the language quoted by Tribe) addressed to the procedural fairness of Congress's action. *See, e.g., id.* at 275-77 (testing the "proceedings" authorized by Congress against the "processes" permitted by the Constitution and the "modes of proceeding" existing at common law). *Murray's Lessee* was, in short, the quintessential procedural due process case. *See generally* *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 293-94 (1990) (Scalia, J., concurring) (contrasting *Murray's Lessee*, as a procedural due process case, with *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), as a substantive due process case); AMAR, *supra* note 12, at 173 (describing *Murray's Lessee* as a "procedural due process" case); Harrison, *supra* note 442, at 554 (same).

While continuing to cite the above-quoted language from *Murray's Lessee* as evidence of a "reasonable historical argument" that the term "due process" might entail substantive limitations, Professor Tribe has backed off his more strident claim that legal actors in the Reconstruction era would necessarily have understood it that way. In fact, Tribe has acknowledged that such a construction "may not have been widely enough accepted in the late 1860s to render it the most natural reading of the phrase for those who included it in the Fourteenth Amendment." TRIBE, *supra* note 14, § 8-1, at 1334.

Due Process Clause simply cannot, consistent with its history, be construed to incorporate the substantive freedoms catalogued in the First, Second, Third, Fourth, Fifth, and Eighth Amendments.

Third, there is the risk that the Supreme Court's stubborn adherence to a doctrine that comports with neither text nor history will ultimately undermine the integrity of both the Court and the institution of judicial review. As Richard Aynes has written, "[I]t distorts our understanding of the Constitution to reach a 'correct' result through a forced reading of the Due Process Clause. It makes the Court engage in a decision-making process it knows is wrong, and, thereby, teaches everyone disrespect for the Court and the rule of law."⁴⁷¹ Ultimately, as David Richards has likewise warned in detail, people come to suspect the whole enterprise of protecting constitutional rights against state interference:

There is . . . an interpretive integrity in the history, text, and political theory associated with all the great normative clauses . . . of the fourteenth amendment . . . Clear interpretive mistake in one of these areas is not adequately remedied by transporting the correct interpretive analysis under one of these clauses (privileges and immunities) to another (due process). The due process analysis may be strained and for this reason muddy and even subvert public understanding of the bases for the result in question.⁴⁷²

Continuing, Richards argues that "the cavalier transportation from [the Privileges or Immunities Clause] to the due process clause of the nationalization of human rights has discredited the very idea of the nationalization of human rights."⁴⁷³ The idea of incorporating substantive Bill of Rights freedoms against the states, for instance, begins to look, like substantive due process itself, "implausible and even bizarre."⁴⁷⁴ In the end, because "[t]he very vagueness of substantive due process analysis may so invite . . . ideological distortion of constitutional interpretation," there is a very real risk that the courts, "like a cured drunk, [will] seek[] salvation in total interpretive abstinence."⁴⁷⁵

Fourth and finally, there is the very thorny issue of pedigree. At least in the Supreme Court, the doctrine of substantive due process traces its roots to 1857—before the adoption of the Fourteenth Amendment—and the Court's fateful *Dred Scott* decision.⁴⁷⁶ In striking down the Missouri

471. Aynes, *supra* note 18, at 687.

472. RICHARDS, *supra* note 14, at 199.

473. *Id.* at 201. While I am somewhat uncomfortable with Richards's framing of the issue as the nationalization of "human rights," I believe that his basic interpretive point remains valid.

474. *Id.*

475. *Id.* at 203.

476. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). See generally BORK, *supra* note 15, at 31 ("[*Dred Scott*] was the first appearance in American constitutional law of the concept of

Compromise as violative of the Due Process Clause of the Fifth Amendment, Chief Justice Taney observed that

an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.⁴⁷⁷

Taney voiced no particular objection to the procedures Congress had employed in enacting the Missouri Compromise; rather, he was convinced that, somehow or other, the substance of the act must have infringed the "right" to own slaves.

Of course, in the post-Fourteenth-Amendment era, the doctrine of substantive due process is most commonly associated with two other oft-criticized decisions: *Lochner v. New York*⁴⁷⁸ and *Roe v. Wade*.⁴⁷⁹ In *Lochner*, the Court struck down a New York statute establishing maximum ten-hour workdays and sixty-hour workweeks for bakers as violating the "general right to make a contract in relation to . . . business."⁴⁸⁰ The Court observed that, under the Due Process Clause, "no State can deprive any person of life, liberty, or property without due process of law," and went on to hold that the "right to purchase or to sell labor is part of the liberty protected" by the Clause.⁴⁸¹ Significantly, though, the Court never questioned the process undertaken by the New York state legislature in enacting the law; instead, the Court simply concluded that the law was substantively unreasonable, and, therefore, that it was unconstitutional.

Similarly, in *Roe*, the Court premised its decision to invalidate state laws criminalizing abortion on the Due Process Clause:

Th[e] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁴⁸²

'substantive due process,' and that concept has been used countless times since . . ."); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 271 (1985) ("[*Dred Scott*] was at least very possibly the first application of substantive due process in the Supreme Court."); Harrison, *supra* note 442, at 499 (describing *Dred Scott* as the "most fateful substantive due process decision of all").

477. *Dred Scott*, 60 U.S. at 450.

478. 198 U.S. 45 (1905).

479. 410 U.S. 113 (1973).

480. *Lochner*, 198 U.S. at 53.

481. *Id.*

482. *Roe*, 410 U.S. at 153.

Although the majority in *Roe* was careful to avoid (or at least to minimize) direct references to the language of “due process”—emphasizing instead the Fourteenth Amendment’s use of the word “liberty”—both Justice Stewart in a concurring opinion⁴⁸³ and then-Justice Rehnquist in dissent⁴⁸⁴ correctly identified the Court’s opinion as resting on substantive due process grounds. Rehnquist stressed that although he agreed that the term “liberty” embraces “more than the rights found in the Bill of Rights,” “liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law.”⁴⁸⁵ Constitutional scholars of widely divergent jurisprudential persuasions have likewise lumped *Roe* in with *Dred Scott* and *Lochner* as a cornerstone of substantive due process doctrine. Robert Bork, for instance, has observed that, as substantive due process cases, *Lochner* and *Roe* share “a very ugly common ancestor” in *Dred Scott*. “Who says *Roe*,” Bork argues, “must say *Lochner* and *Scott*.”⁴⁸⁶ Laurence Tribe has made what is in essence the same point, albeit with greater caution. Responding to John Hart Ely’s charge that “it is impossible candidly to regard *Roe* as the product of anything” but *Lochner*,⁴⁸⁷ Tribe acknowledges that “[e]ven if one disagrees with Professor Ely about the constitutional indefensibility of *Roe v. Wade* . . . one cannot lightly dismiss his interpretive concern that, in *Roe* as in *Lochner*”—and, I would add, in *Dred Scott*—“the Supreme Court identified a purely substantive right in a provision that appears, to the naked eye, to speak solely to matters of procedure.”⁴⁸⁸

The fact that neither *Dred Scott* nor *Lochner* nor *Roe* concerned a specific provision of the Bill of Rights might mitigate the “pedigree” problem somewhat (at least with respect to the relatively uncontroversial use of substantive due process to incorporate textually specified rights). Nonetheless, courts invoking substantive due process—the idea of grounding protection for a substantive right in what is, by all accounts, a purely procedural provision—would do well to remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately to *Dred Scott*.

* * *

Which, in a way, brings us back to *Slaughter-House*. When it comes to the constitutional irrelevance of the Privileges or Immunities Clause, and the consequent infusion of substantive constitutional guarantees into the Due Process Clause, all roads inevitably lead to Justice Miller’s opinion in

483. See *id.* at 167-71 (Stewart, J., concurring).

484. See *id.* at 171-74 (Rehnquist, J., dissenting).

485. *Id.* at 172-73.

486. BORK, *supra* note 15, at 32.

487. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939 (1973).

488. TRIBE, *supra* note 14, § 7-5, at 1318.

Slaughter-House. As Laurence Tribe recently put it, “Perhaps even more devastating to the Privileges or Immunities Clause than Justice Miller’s restrictive reading itself has been the spell that the *Slaughter-House* construction consistently cast . . . over subsequent courts addressing the privileges or immunities issue.”⁴⁸⁹

In the turn-of-the-century case of *Maxwell v. Dow*,⁴⁹⁰ for instance, the Court addressed the argument that the Fifth Amendment’s grand jury indictment requirement and the Sixth Amendment’s twelve-person petit jury requirement were among the “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment. In rejecting the claim, the Court relied principally—indeed, overwhelmingly—on Miller’s opinion in *Slaughter-House*. The *Maxwell* Court justified its “extended reference to the case”—which consisted of huge chunks of verbatim quotation and occupied the better part of five pages of the *United States Reports*—on the basis of the *Slaughter-House Cases*’ “great importance, the thoroughness of the treatment of the subject [of federal privileges and immunities], and the great ability displayed by the author of the opinion.”⁴⁹¹

Slaughter-House’s “spell” was even more evident in *Twining v. New Jersey*.⁴⁹² There, the Court was asked to decide whether the Fifth Amendment freedom from self-incrimination was protected against state interference by virtue of the Privileges or Immunities Clause. In concluding that it was not, Justice Moody relied both on *Slaughter-House* directly and on the *Maxwell* Court’s treatment of *Slaughter-House* eight years earlier. Moody acknowledged the controversy surrounding the Court’s construction of the Privileges or Immunities Clause in *Slaughter-House* and, after quoting from the opinions of Justices Miller and Field, admitted that “criticism of [*Slaughter-House*] has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the 14th Amendment than some of the public men active in framing it intended, and disappointed many others.”⁴⁹³

Continuing, Justice Moody acknowledged that the view that the safeguards of the Bill of Rights “are among the privileges and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against state action,” had been, at various times, “expressed by justices of this court, and was undoubtedly . . . entertained by some of those who framed the Amendment.”⁴⁹⁴ However, Moody

489. *Id.* § 7-5, at 1312.

490. 176 U.S. 581 (1900).

491. *Id.* at 591.

492. 211 U.S. 78 (1908).

493. *Id.* at 96.

494. *Id.* at 98 (citations omitted).

concluded, “[i]t is . . . not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court.”⁴⁹⁵

The point here is that the modern-day assumption that the Privileges or Immunities Clause *does not* incorporate the Bill of Rights—and, significantly, that the Due Process Clause must therefore do so—is held together by a single thread. That single thread—as *Maxwell* and *Twining* plainly demonstrate—is Justice Miller’s opinion for the Court in *Slaughter-House*. Miller’s opinion, however, simply cannot bear the weight of the extreme anti-incorporationist interpretation with which courts and commentators have almost uniformly saddled it. In fact, the best reading of *Slaughter-House*, the reading that emerges from a careful consideration of the opinion’s text and context and is confirmed by larger jurisprudential considerations, suggests that in 1873 the Court concluded that the Privileges or Immunities Clause *did* incorporate many Bill of Rights freedoms against the states.

The Supreme Court’s decision last Term in *Saenz v. Roe* indicates that the Court might be poised to reevaluate the role of the Privileges or Immunities Clause in our constitutional system. I, for one, hope that it does. I also hope that, if and when it does, it will not simply accept the conventional wisdom about *Slaughter-House*, but will instead give Justice Miller’s opinion a close read. In that opinion lies the key to setting incorporationism straight.

495. *Id.*