

# REVIVING THE PRIVILEGES OR IMMUNITIES CLAUSE

*If four, or nearly five, million people have been lifted from the thralldom of slavery and made free; if the Government by its amendments to the Constitution has guaranteed to them all rights and immunities, as to other citizens, they must necessarily therefore carry along with them all the privileges enjoyed by all other citizens of the Republic.*

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## I. INTRODUCTION

The fourteenth amendment provides a trilogy of protections against state infringement of personal rights and freedoms.<sup>1</sup> Civil rights litigants often rely upon the due process and equal protection clauses of the fourteenth amendment for constitutional safeguards against the abuse of state police powers. On the other hand, the fourteenth amendment's privileges or immunities clause<sup>2</sup> has practically no significance in present day civil rights litigation.<sup>3</sup> The relative subordination of the privileges or immunities clause has been attributed to the restrictive judicial interpretation of that clause in the *Slaughter-House Cases*.<sup>4</sup> More importantly, the prevalent judicial construction of the privileges or immunities clause, promulgated in *Slaughter-House*, appears to be contrary to the expressed intent of the framers of the fourteenth amendment.

Despite the specific phraseology of the fourteenth amendment, its central purpose was to secure the freedom and equality of Blacks after the Civil War.<sup>5</sup> Each clause in the amendment had a definite function in securing a

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\* Remarks of Cong. Richard H. Cain (R.S.C.) on the Civil Rights Bill, 43rd Cong. 1st Sess., (Jan. 10, 1874), reprinted in A. MCFARLIN, BLACK CONGRESSIONAL RECONSTRUCTION ORATORS AND THEIR ORATIONS 1869 - 1879, 35 (1976).

1. U.S. CONST. amend. XIV, §1 (No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws).

2. This clause should not be confused with similar language in Art. IV, § 2 of the Constitution, which reads "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. . . ." As will be discussed later there is some controversy as to the relationship between these two constitutional provisions, but the latter is usually interpreted as prohibiting discrimination by the states against citizens of another state. It does not, however, prevent a state from infringing upon fundamental rights of persons as long as it treats its own citizens and those of another state alike. See *Doe v. Bolton*, 410 U.S. 179, 200 (1973); *Toomer v. Witsell*, 334 U.S. 386, 403 (1948); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183-85 (1869); *Rios v. Jones*, 63 Ill. 2d 488, 498, 348 N.E.2d 825, 830 (1976); Antieau, *Paul's Perverted Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967).

3. Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?*, 11 SUFFOLK L. REV. 61, 61-62, 99 (1976); Cf. Lomen, *Privileges and Immunities Under the Fourteenth Amendment*, 18 WASH. L. REV. 120, (1943), (privileges or immunities clause is of limited practical significance); Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last"?*, 1972 WASH. U. L. Q. 405 (1972).

4. 83 U.S. (16 Wall.) 36 (1872).

5. *Id.* at 71; Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 114 (1966); Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 388 (1967).

certain measure of protection against state infringement upon civil rights.<sup>6</sup> "Juridically, relinquishment of federal power to enforce the Reconstruction Amendments [is] a violation of the nation's federal schema as well as specific Reconstruction guarantees."<sup>7</sup> Thus, any unreasonable judicial emasculation of the privileges or immunities clause might have had a significant effect upon the protection of the rights of Blacks as contemplated by its framers. In fact, it has been argued that the dismantling of reconstruction rights by the federal government imposes a duty upon that government to recompense its Black citizens.<sup>8</sup>

This Comment will examine the legislative history and the judicial interpretation of the privileges or immunities clause. Then, the right to remedial compensation or reparations for Blacks, as a consequence of the judicial construction of fourteenth amendment rights and privileges will be discussed. Finally, it will be indicated how, the privileges or immunities clause should now be interpreted.

## II. THE LEGISLATIVE HISTORY

The extreme political partisanship which characterized the period before the adoption of the fourteenth amendment led Professor Charles Fairman to describe the era as the "age of hate in America."<sup>9</sup> In the 39th Congress, a cogent group of radical republicans<sup>10</sup> introduced new legislation to reduce "an abstract adherence to the concept of equality in the South to solemn and tangible commitments."<sup>11</sup> They felt that a constitutional basis was required to more forcefully and adequately confront state practices that conspicuously disregarded national civil rights legislation.<sup>12</sup> While the congressional majority pushed for new federal constitutional powers, conservatives both inside and outside of Congress remained steadfast in support of antebellum federalism.<sup>13</sup> Thus, the nature of national citizenship and the relations of national and local governments were desperately in need of clarification.<sup>14</sup>

During the opening session of the 39th Congress, several proposals were offered to expand federal powers in order to eradicate the incidents of slav-

6. Lomen, *supra* note 3, at 121.

7. Schwartzbaum, *In Search of a Constitutional Right to Federal Compensation for the Black and the Poor*, 15 HOW. L.J. 590, 597 (1969).

8. *Id.* at 601. *But see* BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

9. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 9 (1949) [hereinafter cited as Fairman].

10. Leaders of the congressional policy committee in the 39th Congress. *See* H. ABRAHAM, *FREEDOM AND THE COURT* n.10 (1977) [hereinafter cited as ABRAHAM].

11. Anderson, *The Bill of Rights, the Fourteenth Amendment, and the Federal System*, in *ASPECTS OF LIBERTY* 287, 295 (1958) [hereinafter cited as Anderson]. *See* A. LIEN, *CONCURRING OPINION* 37 (1957) [hereinafter cited as LIEN].

12. LIEN, *supra* note 11, at 36.

13. *Id.* Antebellum or dual federalism recognizes the separate and independent existence of states within the governmental system. On the other hand, national federalism, which developed during the post-Civil War period, is premised on a theory of federal supremacy. *See* National League of Cities v. Usery, 426 U.S. 833, 842, 844 (1976) *noted in* 18 B.C. INDUS. & COM. L. REV. 736 (1977); Baker, *Federalism and the Eleventh Amendment*, 48 U. OF COLO. L. REV. 139 (1977). For a short explanation of the concept of federalism, *see* P. CAROSELL, *QUEST FOR ORDERED LIBERTY* 12 (1969) [hereinafter cited as CAROSELL].

14. LIEN, *supra* note 11, at 36.

ery and to protect the newly freed Blacks against state aggressions.<sup>15</sup> Representative John Bingham from Ohio drafted and introduced section one of the newly proposed fourteenth amendment. The originally proposed draft, as reported to the House and Senate by the Joint Committee on Reconstruction,<sup>16</sup> provided that "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."<sup>17</sup>

Representative Bingham, in the first session of the 39th Congress, explained that the proposed amendment was intended to establish greater congressional powers to enforce the Bill of Rights against the states.<sup>18</sup> He felt that the new legislation would extend constitutional protection to "the privileges and immunities of all citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."<sup>19</sup>

Other members of the 39th Congress shared the sentiments of Representative Bingham concerning the proposed amendment's effective proscription of state infringement of certain enumerated and unenumerated rights. For example, Senator Jacob Howard of Michigan, a member of the Committee on Reconstruction, quoted extensively from the opinion of Circuit Judge Washington in *Corfield v. Coryell*<sup>20</sup> while defining the intended scope of the fourteenth amendment in the Senate.<sup>21</sup> In *Corfield*, Judge Washington described the privileges and immunities of citizens in the several states mentioned in article IV, §2 of the Constitution as:

those privileges and immunities which are, in their nature, fundamental; which belong of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several [S]tates which compose this Union, from the time of their becoming free, independent, and sovereign.<sup>22</sup>

To the foregoing, Senator Howard added the first eight amendments to the federal Constitution. He further explained that "the great object of the first section of this Amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."<sup>23</sup>

Senator Luke Poland of Vermont understood the new privileges and immunities clause to be a reaffirmation of the traditional privileges and immunities referred to in article IV. However, he thought that the new amend-

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15. *Id.*

16. The Committee on Reconstruction was created by a joint resolution of the Senate and House in December of 1865. The Committee was formed to inquire into the expediency of the Constitution and to define more clearly congressional powers to enforce, by appropriate legislation, the constitutional guarantees of equal representation, privileges and immunities of citizens in the several states, and a republican form of government. CONG. GLOBE, 39th Cong., 1st Sess. 566 (1866).

17. CONG. GLOBE, 39th Cong., 1st Sess. 806, 813 (1866).

18. *Id.* at 1034.

19. *Id.* at 2542.

20. 6 F. Cas. 546 (1823).

21. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

22. *Corfield v. Coryell*, 6 F. Cas. 546 (1823); CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

23. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

ment would expand the enforcement powers of Congress against the states.<sup>24</sup> Representative Thaddeus Stevens of Pennsylvania, another member of the Committee on Reconstruction, observed that the new amendment "allows Congress to correct the unjust legislation of the States," which impinged upon the rights asserted, "in some form or other, in our Declaration or organic law."<sup>25</sup>

Pre-adoption interpretations of the fourteenth amendment by members of the 39th Congress have encouraged many commentators to conclude that the amendment was intended to incorporate the federal Bill of Rights.<sup>26</sup> More importantly, it has been argued that the privileges or immunities clause of the fourteenth amendment was framed to restrict state encroachment of those "fundamental" or "inalienable" rights which belong to every citizen of a free government.<sup>27</sup>

Opponents of this incorporation doctrine contend that "the somewhat diffuse debates on the first section of the amendment had been too permeated with ambiguities, vagaries, contradictions, and uncritical invocations of untenable doctrines to yield a clear-cut picture of the intended meaning of the provisions under consideration."<sup>28</sup> This argument is not without some

24. *Id.* at 2961. Senator Luke also said that;

[T]he radical difference in the social systems of the several States, and the great extent to which the doctrine of States rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, led to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became really a dead letter. The great social and political change in the southern States wrought by the amendment of the Constitution abolishing slavery and the overthrow of the late rebellion render it eminently proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance.

*Id.*

25. *Id.* at 1866.

26. See ABRAHAM, *supra* note 10, at 24-25; I. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 512 (1965) [hereinafter cited as BRANT]; H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT, *passim* (1908) [hereinafter cited as FLACK]; Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 25 (1954) [hereinafter cited as Graham]; Meyers, *Federal Privileges and Immunities: Application to Ingress and Egress*, 29 CORNELL L. Q. 489, 489 (1944); Note, *The Bill of Rights and the Fourteenth Amendment*, 33 IOWA L. REV. 666, 667 (1948); Note, *Constitutional Law—Was It Intended that the Fourteenth Amendment Incorporate the Bill of Rights?*, 42 N. CAR. L. REV. 925, 935 (1964). But see Fairman, *supra* note 9, at 138-139, where the author concludes that the intent of the 39th Congress is unclear. Lien agrees that the fourteenth amendment, "as construed in the context in which it was finally framed has remained obscure." Moreover, he determines that "the idea that the privileges or immunities clause imposed the limitations of the Bill of Rights on the States, . . . found no recognition in the practice of Congress, or in the action of state legislatures, constitutional conventions or courts' or, it might be added, the press". LIEN, *supra* note 11, at 45, 58. This may not be entirely true, however. Although most state legislatures which ratified the fourteenth amendment focused upon sections 2, 3, and 4 of the amendment, at least a few states interpreted the privileges or immunities clause to afford increased protection to basic fundamental rights. See BRANT, *supra* at 340-341.

27. Antieau, *supra* note 2, at 34. The Congress responsible for proposing the privileges or immunities clause of the fourteenth amendment expected thereby to provide better protection for the rights safeguarded by the fourth article—rights which the 39th Congress, like all previous generations of Americans, honored as fundamental, natural attributes of free men. *Id.* See also Note, *The Privileges or Immunities Clause of the Fourteenth Amendment: Colgate v. Harvey*, 49 HARV. L. REV. 935, 936 (1936).

28. LIEN, *supra* note 11, at 52. Although Lien argues that the actual debates on the implications of the clause were strikingly lacking in clarity and precision, he concludes that the Privileges or Immunities Clause was meant to warn the states against any encroachment upon the rights that

merit. During the congressional debates, Representative Bingham stressed the fact that the proposed legislation "does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution."<sup>29</sup> He later admitted, however, that the federal Bill of Rights, prior to the adoption of the fourteenth amendment, did not operate as a restraint or prohibition upon state legislation.<sup>30</sup>

Apparently, Representative Bingham's confusion as to the applicability of the federal Bill of Rights to the states is attributable to his initial and erroneous interpretation of an earlier Supreme Court decision in *Barron v. Baltimore*.<sup>31</sup> In that case, Chief Justice Marshall wrote the majority opinion, holding that the federal Bill of Rights does not apply to the states.<sup>32</sup> At first, Representative Bingham thought that the decision ruled that Congress had no power to enforce the Bill of Rights against the states. Realizing his mistake, the Congressman revised his original proposal with the specific intent of overruling the *Barron* decision.<sup>33</sup> His new draft was adopted by Con-

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citizens have under the national government, and these warnings imposed no new limitations on the states and conferred no new powers on the national government. *Id.* at 56, 57. See also FAIRMAN, *supra* note 9, at 138, 139; Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 159 (1949) [hereinafter cited as Morrison].

29. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

30. *Id.* at 2765.

31. 32 U.S. (7 Pet.) 243 (1833). In *Barron*, municipal street engineers diverted several streams from their natural course in order to develop new streets. As a result, gravel and sand accumulated in the Baltimore Channel and prevented ships from approaching Barron's wharf. Mr. Barron alleged that the city had violated his fifth amendment rights which prohibit the confiscation of private property for public use without just compensation. *Id.* at 244-246. Brant has written that:

[T]he course pursued by Congressman Bingham, when presented without explanation, does make him appear to be a confused flounderer. But his purposes, and the purposes of the amendment, become perfectly clear when one takes account of the cause of his initial confusion. When Bingham offered his amendment, he had the erroneous impression that the first eight amendments were intended to restrict both the federal and state governments. That belief was widely held among legislators, laity and lawyers during the first half century after the amendments were adopted, and it persisted even after Marshall's Supreme Court decided in *Barron v. Baltimore* (1833) that they did not apply to the States. . . . The author . . . drafted an amendment designed to overcome that decision by giving Congress the enforcement power which the Supreme Court said Congress did not possess. Learning, during the debate, that he had misread Marshall's opinion, and accepting that opinion as valid, he recast the amendment to reach the same end in a different way. That change of position, and the reason for it, have to be understood to make Bingham's course intelligible and the purposes of Congress clear.

BRANT, *supra* note 26, at 322.

32. 32 U.S. (7 Pet.) at 249.

33. In a speech during the 1st Session of the 42nd Congress, Representative Bingham explained very clearly his reason for rewriting the first section of the fourteenth amendment. He intimated that the *Barron* decision had induced him to attempt to impose, by constitutional amendments, new limitations upon the states. He also stated that:

In reexamining that case of *Barron* . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: 'Had the framers of these amendments 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 had 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 provision of the first section of the fourteenth amendment as it

gress and the states, and it became operative on July 28, 1868 as part of the fourteenth amendment. It provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.<sup>34</sup>

Despite the divergence of opinion as to the true meaning of the privileges or immunities clause, "there seems to be little doubt that the Amendment's principle framers and managers, Representative Bingham . . . and Senator Howard, if not every member of the majority in the two houses of Congress, did believe the Bill of Rights to be made generally applicable to the several states."<sup>35</sup> In fact, no member of the Joint Committee on Reconstruction, primarily responsible for examining civil rights legislative proposals, nor Congress, questioned Bingham's interpretation or offered a different one.<sup>36</sup> Thus, it seems clear that the legislators of the 39th Congress intended the privileges or immunities clause of the fourteenth amendment to become a mechanism for the protection of state citizens. However, this vigorous attempt of the framers to protect the fundamental and unenumerated rights of citizens, especially the recently emancipated Blacks, was subsequently frustrated by an unanticipated and narrow construction of the privileges or immunities clause by the judiciary.

### III. THE JUDICIAL INTERPRETATION

Initially, it appeared that the judiciary would adopt the broad interpretation of the fourteenth amendment that had been offered by its authors. *United States v. Hall*<sup>37</sup> was the first significant case which involved the legal parameters of the new privileges or immunities clause. Plaintiffs alleged that the defendant state officials had feloniously conspired to deprive them of their constitutionally guaranteed rights to peaceful assembly and to free speech.<sup>38</sup> The Washington Circuit Court, without discussing the legislative history on the matter, declared that the fourteenth amendment made the

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stands in the Constitution . . . [T]he privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.

CONG. GLOBE, 42nd Cong., 1st Sess. app. 84 (1871) (Citations omitted).

34. U.S. CONST. amend. XIV, § 1.

35. Abraham, *supra* note 10, at 47.

36. See Note, 42 N. CAR. L. REV. 925, 931 n.50 (1964). Lien argues, however, that a majority of the members of Congress gave no opinion at all upon the specific issue, although he admits that many of them had some impression that the new privileges or immunities clause afforded protection to civil rights in general. LIEN, *supra* note 11, at 57. But Brant contends that Congressmen Bingham and Howard were not speaking for themselves alone in describing the purposes of the fourteenth amendment. In fact, Brant says, "their speeches were not merely expressions of approval, but were 'formal expositions of purpose by the men in charge of the amendment'. . . . Is it conceivable that in a Congress where a majority disagreed with these men, not one man would have stood up to tell them they were wrong and wherein and why they were wrong?" BRANT, *supra* note 26, at 338-339.

37. 26 Fed. Cas. 79 (1871).

38. *Id.* at 79.

federal Bill of Rights applicable to the states. Circuit Judge Wood, writing for the majority inquired:

What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be [deemed] fundamental; which belong of right to citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. Among these we are safe in including those which in the constitution [sic] are expressly secured to the people, either as against the action of the federal or state governments.<sup>39</sup>

Judge Wood's liberal construction of the privileges or immunities clause was short-lived. In the *Slaughter-House Case*,<sup>40</sup> the Supreme Court recaptured the spirit of antebellum federalism<sup>41</sup> with an incredibly narrow interpretation of privileges or immunities under the fourteenth amendment. That case concerned a Louisiana statute<sup>42</sup> that granted a twenty-five year monopoly to certain persons to operate and maintain slaughter-houses, yards, and landings for cattle in specified areas, including New Orleans. Section one of the statute prohibited the slaughtering of animals for consumption, or the keeping of other slaughter-houses within the metropolitan New Orleans area, except by persons designated in the statute. Civil penalties were prescribed for any violators.<sup>43</sup>

Local butchers alleged that the statute created involuntary servitude, violated the due process and equal protection clauses of the fourteenth amendment, and abridged their privileges and immunities as citizens of the United States.<sup>44</sup> They also asserted that the privileges and immunities referred to in the fourteenth amendment are "the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country."<sup>45</sup> This contention was consistent with the majority opinion in *Hall*, but the Supreme Court refused to accept it. Speaking for the majority, Mr. Justice Miller ruled that the legislated monopoly did not impinge upon the privileges or immunities protected under the fourteenth amendment, and the state had engaged in a legitimate exercise of its police powers.<sup>46</sup>

Ostensibly, the Court's decision was premised upon the notion of dual citizenship.<sup>47</sup> Mr. Justice Miller maintained that under the first clause of the

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39. *Id.* at 81.

40. 83 U.S. (16 Wall.) 36 (1872).

41. See note 13, *supra*.

42. The statute was entitled "An Act to Protect the Health Of The City of New Orleans, To Locate the Stocklandings And Slaughter-houses, And To Incorporate The Crescent City Live-Stock Landing And Slaughterhouse Company". 83 U.S. (16 Wall.) at 59.

43. *Id.* at 38-44.

44. *Id.* at 66.

45. *Id.* at 62, 78.

46. *Id.* at 80.

47. Concerning the notion of dual citizenship, one commentator has said:

[T]he implications of this duality of citizenship bear a certain superficial likeness to those that exist where a person is a member of two functionally different clubs or other organizations which have been chartered and operate under the same fundamental law. Each membership carries with it its own distinct privileges and immunities conferred and protected by the club or organization to which it attaches, subject to the grants and restraints stipulated in the fundamental law.

fourteenth amendment "the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established."<sup>48</sup> It was obvious to him "that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics of circumstances in the individual."<sup>49</sup> He felt that the phrase "citizens of the States" would have been employed in the amendment if the framers intended to afford greater protection against state legislative powers. Mr. Justice Miller then reasoned that the substitution of the phrase "citizens of the United States" for "citizens of the States" in the final draft of the amendment was done "understandingly and with a purpose."<sup>50</sup>

To further clarify the dual citizenship concept, Mr. Justice Miller reluctantly<sup>51</sup> stated that a citizen of the United States has a right:

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 function. He has the right to free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States. . . . 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. . . . 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, . . . all rights secured to citizens by treaties with foreign nations, . . . 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. To these may be added the rights secured by the Thirteenth and Fifteenth Articles of Amendment, and by the other clauses of the Fourteenth.<sup>52</sup>

Four Justices in the *Slaughter-House Cases* vigorously and tenaciously dissented. Mr. Justice Field argued that "the recent amendments to the Federal Constitution protect the citizens of the United States against deprivation of their common law rights by the States."<sup>53</sup> He believed that this was intended by the Congress which framed and the states which adopted the four-

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LIEN, *supra* note 11, at 73. One flaw in the analogy is that chartered clubs derive their legal rights and powers from the State which charters them, whereas under a system of dual federalism, State sovereignty is arguably independent from the federal government.

48. 83 U.S. (16 Wall.) at 74.

49. *Id.*

50. *Id.*

51. Justice Miller declared that:

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection . . . we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so. But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

*Id.* at 78-79.

52. *Id.* at 79. See, *The Privileges of Citizens of the United States*, 10 U. OF KANSAS L. REV. 77, 82 (1942) [hereinafter cited as Trimble].

53. 83 U.S. (16 Wall.) at 83, 89 (Field, J., dissenting).

teenth amendment.<sup>54</sup> More importantly, Mr. Justice Field saw that the practical effect of the majority's decision was to relegate the privileges or immunities clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."<sup>55</sup> Mr. Justice Swayne and Chief Justice Chase concurred with Justice Field. Mr. Justice Swayne also contended that "a citizen of a State is *ipso facto* a citizen of the United States . . ." and "the privileges and immunities of a citizen of the United States include, among other things, the fundamental rights of life, liberty and property. . . ."<sup>56</sup> Mr. Justice Bradley believed that the dual citizenship argument of the majority was irrelevant to the constitutionality of fundamental rights:

[E]ven if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less violable than they are now. It was not necessary to say in words that the citizens of the 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 those privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any State or not.<sup>57</sup>

The emasculation of the privileges or immunities clause by the *Slaughter-House* majority cannot be reconciled with the legislative history on the matter. It seems Mr. Justice Miller deliberately ignored the congressional record on the fourteenth amendment while making a most "cursory glance"<sup>58</sup> at events, "almost too recent to be called history,"<sup>59</sup> in order to ascertain the true meaning of the amendment. Presumably, the Justices of the *Slaughter-House* Court were generally familiar with the political controversy that had developed during the congressional debates on the post-war

54. *Id.*

55. *Id.* at 86. Justice Field also noted that given the narrow interpretation of the privileges or immunities clause by the majority, no new constitutional provision was needed to prohibit state interference with the exercise of rights belonging to citizens of the United States. Under the majority's ruling, the supremacy clause of the Constitution would suffice to control any state legislation of that character. Therefore, only if the privileges or immunities clause referred to the natural and inalienable rights which belong to all citizens, would the new restriction upon the States have any profound significance or consequence. *Id.* See also Beth, *The Slaughter-House Cases—Revisited*, 23 LOUISIANA L. REV. 487, 492 (1963) [hereinafter cited as Beth]. See generally Abraham, *supra* note 10, at 50; Trimble, *supra* note 52, at 81; Note, *Privileges and Immunities of Citizens of the United States—Colgate v. Harvey Overruled*, 9 GEO. WASH. L. REV. 106, 116 (1940).

56. 83 U.S. (16 Wall.) at 124, 126 (Swayne, J., dissenting).

57. *Id.* at 111, 119 (Bradley, J., dissenting). Morris declares that:

[U]nder the minority rule in *Slaughter-House*, no state after 1868 could have withdrawn from even its own citizens any civil rights which it had theretofore given them, expressly or by acquiescence, or which such citizen had derived from any source whatever, if, in the opinion of the Federal judiciary when regularly invoked in a proper case, the right were a 'fundamental' one . . . The Supreme Court . . . would today be the ultimate arbiter[s] of civil rights.

Morris, *What Are the Privileges and Immunities of Citizens of the United States?*, 28 W. VA. L. Q. 38, 54 (1921). But the author may only be expressing exactly the intent of the framers to permanently shift the powers over fundamental rights to the federal government. Indeed, more recent developments have clearly made the Supreme Court the champion of civil rights. See e.g., *Brown v. Bd. of Education*, 349 U.S. 294 (1955).

58. 83 U.S. (16 Wall.) at 67, 71.

59. *Id.* at 71.

amendments.<sup>60</sup> They were also cognizant of the possible ramifications of the Court's decision upon the balance of state and national powers.<sup>61</sup> Consequently, the majority was vehemently opposed to becoming "a perpetual censor upon all legislation of the States."<sup>62</sup> On the other hand, the Court readily accepted the opportunity to settle the issue on the limitations of national and state powers. This is evident from the Court's summary disposition of the due process and equal protection issues, as well as its failure to formulate a less drastic basis for its decision.<sup>63</sup>

Indeed, the fabric of the majority opinion collapses under close scrutiny. The Court's reliance upon the specific phraseology of the amendment without reference to the legislative history neglects the admittedly known purpose of the enactment.<sup>64</sup> Justice Miller recognized that:

[O]n the most casual examination of the language of these [civil war amendments], no one can fail to be impressed with the one pervading purpose found in them all; . . . 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 firmly exercised unlimited dominion over him.<sup>65</sup>

But the practical effect of the *Slaughter-House* decision was to leave the rights of individuals, especially Blacks, unprotected from the states.<sup>66</sup> Moreover, the Court's reference to the broad historical relationship between the federal and state governments without mentioning the specifics of the framing and adoption of the amendment underscores the political motivations for the restrictive decision.<sup>67</sup>

Except on a few occasions, *Slaughter-House* has been tacitly accepted by the courts.<sup>68</sup> One attempt to more clearly delineate the parameters of the

60. See ABRAHAM, *supra* note 10, at 50.

61. Mr. Justice Miller intimated that when he observed:

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States, have been before this court during the official life of any of its present members.

83 U.S. (16 Wall.) at 67.

62. *Id.* at 78.

63. *Id.* at 80, 81. Beth points out that the Court in *Slaughter-House* could have reached the same decision without eliminating the potential significance of the privileges or immunities clause. The author suggests that the Court could have said that the fourteenth amendment was meant to apply only or mainly to Blacks; that the Louisiana statute did not create a monopoly, therefore the plaintiffs had no cause of action; that the fourteenth amendment was not meant to encompass state regulation of business; or that the fourteenth amendment was meant to protect fundamental rights which do not include the right to engage in a particular trade or occupation. Beth, *supra* note 55, at 500-503.

64. See BRANT, *supra* note 26, at 346-348.

65. 83 U.S. (16 Wall.) at 71.

66. See Benoit, *supra* note 3, at 66; Graham, *supra* note 26, at 25.

67. In fact, the Court refers to the fourteenth amendment as the bulwark of the rights of emancipated slaves even though the amendment does not mention Blacks at all. This undeniably contradicts the Court's acceptance of the citizenship clause of the fourteenth amendment on its face without considering its intended relationship to the privileges or immunities clause. The decision is a perfect example of judicial legislation which significantly affects our political system. Beth, *supra* note 55, at 487.

68. See LIEN, *supra* note 11, at 85; Beth, *supra* note 55, at 491, 498, 505.

privileges or immunities clause was made in *Colgate v. Harvey*.<sup>69</sup> That case involved a Vermont statute which imposed a tax on dividends earned outside of the state while exempting from the tax, dividends earned within the state. The distinction was challenged as an abridgement of fourteenth amendment privileges or immunities.<sup>70</sup> Writing for the majority, Mr. Justice Sutherland interpreted the concept of dual citizenship promulgated in *Slaughter-House* as the establishment of a system of ordered government rather than the placing of state and national citizenship in juxtaposition.<sup>71</sup> He concluded that "a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And while the fourteenth amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship."<sup>72</sup> Furthermore, the Court held that the right of a citizen of the United States to engage in business outside of his/her domiciliary state is attributed to his/her national citizenship and protected by the fourteenth amendment.<sup>73</sup>

Perhaps the impetus for the majority decision in *Colgate* was a more liberal interpretation of the due process clause which had been accepted by the Court in *Allgeyer v. Louisiana*.<sup>74</sup> Mr. Justice Sutherland stated that "the right of a citizen of the United States resident in one state to contract in another may be a liberty safeguarded by the due process of law clause, and at the same time, nonetheless, a privilege protected by the privileges and immunities clause of the Fourteenth Amendment. In such case he may invoke either or both."<sup>75</sup> The analogy is based upon the Court's interchangeable use of the terms "liberty" and "privilege."<sup>76</sup> He also opined that:

The purpose of the pertinent clause in the Fourth Article was to require

69. 296 U.S. 404 (1935), *overruled by* *Madden v. Kentucky*, 309 U.S. 83 (1940).

70. 296 U.S. at 416-418.

71. As citizens of the United States we are members of a single great community consisting of all the States united and not of distinct communities consisting of the states severally. No citizen of the United States is an alien in any state of the Union; and the very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States. This fact is obvious and vital and no elaboration is required to establish it.  
296 U.S. at 426-427.

72. *Id.* at 427.

73. *Id.* at 430.

74. 165 U.S. 578 (1897). In *Allgeyer*, the Louisiana Constitution prohibited foreign insurance companies from doing business within the state unless the company had a known place of business or an authorized agent within the state upon whom service of process could be made. The question presented to the Court was whether the act unconstitutionally interfered with the rights of the defendants to contract in Louisiana with a foreign insurance company to insure property within the state. The Court held the act to be violative of the due process clause of the fourteenth amendment. *Id.* at 593. Dictum in the Court's opinion gave an expansive interpretation of due process, which would afford individuals liberties beyond the rights of procedural safeguards against the states. *Id.* at 589. See also ABRAHAM, *supra* note 10, at 110-117; Note, 49 HARV. L. REV. 935, 939 (1936).

75. 296 U.S. at 433.

76. 165 U.S. at 589-592. Benoit suggests that the motive for the controversial *Colgate* decision was the Depression, "a period of intense reexamination of fundamental assumptions and values held by the nation, and, consequently by the Court." He hypothesizes that "the more conservative members of the Court saw the coming demise of the due process clause [sic] as a meaningful substantive check on state economic legislation and hoped that the privileges or immunities clause might play a substantive role in economic matters." Benoit, *supra* note 3, at 76. See also *Hague v. C.I.O.*, 307 U.S. 496 (1939), discussed in note 79, *infra*.

each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left by that article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges or national citizenship in other states. A provision which thus extended and completed the shield of national protection between the citizen and hostile and discriminating state legislation cannot be lightly dismissed as a mere duplication, or of subordinate or no value, or as an almost forgotten clause of the Constitution.<sup>77</sup>

In a dissent in which he was joined by Justices Brandeis and Cardozo, Mr. Justice Stone followed the clear directive and precedent of *Slaughter-House* and numerous other cases.<sup>78</sup> He argued that the Vermont statute did not offend the privileges or immunities clause, and that the majority decision would result in a "serious apprehension for the rightful independence of local governments."<sup>79</sup> Although the majority acknowledged the earlier decisions, it concluded that since none of them contained facts similar to the present case, reference to them would be "without useful result."<sup>80</sup> Consequently, the Court had to "examine each new situation separately to determine whether or not it falls within the charmed circle."<sup>81</sup>

In retrospect, the *Colgate* decision did not significantly affect the practical application of the somewhat moribund privileges or immunities clause. Five years later in *Madden v. Kentucky*,<sup>82</sup> the Supreme Court ruled that the right to carry out an incident of trade or business beyond the boundary of a resident state is not a privilege or immunity of national citizenship.<sup>83</sup> With-

77. 296 U.S. at 431.

78. Before *Colgate*, the privileges or immunities clause had been invoked in a catalogue of cases. None of these cases supported a view that the privileges or immunities clause protected fundamental rights from state infringement. Among these are *Maxwell v. Dow*, 176 U.S. 581 (1900); *Walker v. Sauvinet*, 92 U.S. 90 (1875) (the right to a trial by jury in state courts is not a privilege or immunity of national citizenship); *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873) (the right to practice law in state courts is not a privilege of federal citizenship); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875) (the right to vote in state elections is not a privilege or immunity of federal citizenship); *Miller v. Texas*, 153 U.S. 535 (1804) (the right to carry firearms in violation of state law is not a privilege or immunity of national citizenship); *Haymen v. City of Galveston*, 273 U.S. 414 (1927) (the right to practice medicine is not a privilege or immunity of federal citizenship). In *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court listed several rights which were considered derived from national citizenship, including: the right to pass freely from state to state; the right to petition Congress for redress of grievances; the right to vote for national officers; the right to be protected from injury while in the custody of a United States marshal; the right to inform federal authorities of a violation of federal laws; and the right to enter public lands. 211 U.S. at 97.

79. 296 U.S. 431, 444, 445 (Stone, J., dissenting). Mr. Justice Stone was reiterating a position he held in *Hague v. C.I.O.*, 307 U.S. 496 (1939), decided a year before *Colgate*. There a suit was brought to enjoin municipal officers from enforcing ordinances forbidding the distribution of printed matter and the holding of public meetings without a permit. Petitioners charged that the ordinances were unconstitutional and in deprivation of their rights and privileges secured by the fourteenth amendment. The Court held for the petitioners, but Mr. Justice Stone, relying upon the argument made in *Slaughter-House*, claimed that the majority's decisions would interfere with the balance of state and national powers, and that the freedom of speech and right to peaceable assembly are rights secured by the due process clause. 307 U.S. at 518, 520 n.1 (Stone, J., dissenting).

80. *Id.* at 432.

81. Lomen, *supra* note 3, at 130.

82. 309 U.S. 83 (1940).

83. *Id.* at 93. Plaintiffs in *Madden* alleged that a Kentucky statute which imposed an *ad*

out discussing the merits of Mr. Justice Sutherland's opinion in *Colgate*, the majority summarily overruled the *Colgate* decision.<sup>84</sup> One commentator has noted that "the bluntness of the *Madden* decision in overruling the only clearcut case that had overthrown state legislation on the grounds of being a violation of the clause under consideration had an air of finality which would make most men chary of resorting again to that particular guarantee of the fourteenth amendment."<sup>85</sup>

After *Madden*, the courts have been most reluctant to adopt a more expansive interpretation of the privileges or immunities clause. In *Edwards v. California*,<sup>86</sup> the Court rejected the position of concurring Justices Douglas and Jackson that the right to travel is a privilege of national citizenship.<sup>87</sup> Later, in *United States v. Guest*,<sup>88</sup> such a right was held to be "fundamental to the concept of our Federal Union,"<sup>89</sup> the majority asserting that there was no need to canvass other cases to determine the source of a constitutional right to travel.<sup>90</sup>

Mr. Justice Douglas continued to defend the view he expressed in *Edwards* twenty years later in *Bell v. Maryland*.<sup>91</sup> Petitioners in *Bell* were twelve Black students who had been convicted in a Maryland state court for violating a Maryland criminal trespass statute. The students had participated in a sit-in demonstration at a Baltimore restaurant which routinely refused to serve Blacks. They challenged the trespass statute under the fourteenth amendment. The case was dismissed without a ruling on the merits because a significant change in Maryland's laws had nullified the criminal trespass statute.<sup>92</sup> But Mr. Justice Douglas, concurring in part, did consider the merits of the case and expounded upon the proper application of the privileges or immunities clause:

When we deal with Amendments touching the liberation of people from slavery, we deal with rights 'which owe their existence to the Federal Gov-

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*valorem* tax on its citizens for their deposits in banks outside of the state was repugnant to due process, equal protection, and the privileges or immunities clauses of the fourteenth amendment. Speaking for the majority, Mr. Justice Reed tersely disposed of the equal protection and due process arguments.

84. *Id.* Justices Roberts and McReynolds felt that *Colgate v. Harvey* was controlling in *Madden*.

85. Lomen, *supra* note 3, at 133.

86. 314 U.S. 160 (1941).

87. 314 U.S. at 177, 179 (Douglas, J., concurring); 314 U.S. at 181, 183 (Jackson, J., concurring). The *Edwards* majority found that the interstate transport of indigents is constitutionally protected and based its decision upon the less controversial commerce clause.

88. 383 U.S. 745 (1966).

89. *Id.* at 757.

90. *Id.* at 759. The source of the constitutional right to travel is not entirely clear. In *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), the Court found that a citizen has a "right to come to the seat of government to assert any claim he may have upon that government." *Id.* This language has been relied upon to support the constitutional right in later cases. See, e.g., *Twining v. New Jersey*, 211 U.S. 78 (1908); *Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring). But in *Williams v. Fears*, 179 U.S. 270 (1900), the Court supported the "right to remove from one place to another according to inclination "as a personal liberty guaranteed by the fourteenth amendment." 179 U.S. at 274. Even though the exact source is unclear, the right has continued to be recognized. See Comment, *Implying Constitutional Rights*, *supra* at pp. —; Comment, *Right to Travel: In Search Of A Constitutional Source*, 55 NEB. L. REV. 117 (1975); *Right to Travel—Quest For a Constitutional Source*, 6 RUTGERS-CAMDEN L.J.122 (1974).

91. 378 U.S. 226 (1964).

92. *Id.* at 228.

ernment, its National Character, its Constitution, or its laws.' We are not in the field of exclusive municipal regulation where federal intrusion might fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of power theretofore universally conceded to them of the most ordinary and fundamental character. . . . There has been judicial reluctance to expand the content of national citizenship beyond racial discrimination, voting rights, the right to travel, safe custody in the hands of a federal marshal, diplomatic protection abroad, and the like. . . . The reluctance has been due to a fear of creating constitutional refugees for a host of rights historically subject to regulation. . . . But those fears have no relevance here, where we deal with Amendments whose dominant purpose was to guarantee the freedom of the slave race and establish a regime where national citizenship has only one class.<sup>93</sup>

According to Mr. Justice Douglas in *Bell*, segregation of Blacks in restaurants is a "relic of slavery" and a "badge of second-class citizenship" which results in a denial of a privilege and immunity of national citizenship, and a violation of equal protection.<sup>94</sup>

The Civil Rights Act of 1965<sup>95</sup> has been credited with preventing the widespread acceptance of Mr. Justice Douglas' privileges or immunities argument in *Bell*.<sup>96</sup> But perhaps an even greater impediment was the judiciary's dependency upon the due process clause for the preservation of fundamental rights in *Palko v. Connecticut*,<sup>97</sup> the Court elaborated upon the concept of "substantive due process"<sup>98</sup> which was first mentioned in *Allgeyer v. Louisiana*.<sup>99</sup> In *Palko*, the majority concluded that neither the privileges or immunities clause nor the due process clause made the fifth amendment's

93. *Id.* at 242, 250 (Douglas, J., concurring).

94. *Id.* at 260.

95. Civil Rights Act of 1965, § 1973 *et seq.*, 42 U.S.C. § 1973 *et seq.* (1978).

96. See Benoit, *supra* note 3, at 87. Although Justice Douglas repeatedly attempted to give purpose and meaning to the privileges or immunities clause, it is not clear exactly which provision he considered the source of constitutional protection for individual rights. In *Bell*, he found that the trespass statute also violated the equal protection clause. On an earlier occasion, in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Douglas professed that the Bill of Rights were "indispensable to a free society" and had been made applicable to the states by the due process clause of the fourteenth amendment. 367 U.S. at 509, 516 (Douglas, J., dissenting).

97. 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 392 U.S. 925 (1969).

98. Generally, substantive due process refers to the content or subject matter of a law or ordinance, whereas procedural due process has been confined to the manner in which any governmental regulation or law is applied. The constitutional test in both instances is whether the state action involved is arbitrary, capricious, or unreasonable in either content or procedure. See Anderson, *supra* note 12, at 294-307; BRANT, *supra* note 26, at 355-405. The courts have largely abandoned substantive due process as a check on economic regulation which was first enunciated in *Lochner v. New York*, 198 U.S. 45 (1905). See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Griswold v. Connecticut*, 381 U.S. 479, 482, 485 (1965). But in the area of civil liberties, judicial action in the substantive due process area is relatively frequent. ABRAHAM, *supra* note 12, at 56, 110. See generally Dixon, J., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B. Y. U. L. REV. 43, 64, 70 (1976).

99. 165 U.S. 578, 589 (1897). Notwithstanding *Allgeyer*, the origin of the substantive due process doctrine is often traced to *Gitlow v. New York*, 268 U.S. 652 (1925). In *Gitlow*, Mr. Justice Sanford announced in *dictum* that freedom of speech and of the press, traditionally protected by the first amendment from impingement by Congress, "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." 268 U.S. at 666. For other cases that touch upon the incorporation of the federal Bill of Rights through the due process clause, see *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Powell v. Alabama*, 287 U.S. 45, 71 (1932); *Pointer v. Texas*, 380 U.S. 400, 403, 404 (1965); *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring); *Klopfert v. North Carolina*, 386 U.S. 213, 222 (1967); *Duncan v. Louisiana*, 391 U.S. 145, 149-150 (1968).

prohibition against double jeopardy applicable to the States.<sup>100</sup> However, the Court recognized that:

[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states. . . . So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.<sup>101</sup>

Implicit in *Palko* is the notion that the constitutional guarantee of due process mandates the conservation of certain fundamental rights from state infringement. More specifically, Justice Cardozo noted in the majority opinion that "the privileges and immunities that have been taken over from the earlier articles of the federal Bill of Rights and brought within the fourteenth Amendment [have had their source] in the belief that neither liberty nor justice would exist if they were sacrificed."<sup>102</sup> Although *Palko* was later overruled,<sup>103</sup> the flexible standard of selective incorporation which absorbs particular privileges or immunities enumerated in the Bill of Rights and other unenumerated rights under the auspices of due process has been followed.<sup>104</sup>

Mr. Justice Black, dissenting in *Adamson v. California*,<sup>105</sup> vigorously disputed the employment of the due process clause as an incorporating device. The *Adamson* Court rejected a claim that the fourteenth amendment required the states to comply with the fifth amendment's restrictions against self-incrimination.<sup>106</sup> Joined by Mr. Justice Douglas, Mr. Justice Black interposed his now famous dissent<sup>107</sup> declaring that the chief object of the fourteenth amendment as determined from the expressions of those who sponsored it, as well as those who opposed it, was to incorporate the entire Bill of Rights through the privileges or immunities clause.<sup>108</sup> He warned that the majority's reliance upon *Palko* and *Twining v. New Jersey*<sup>109</sup> was

100. 302 U.S. at 328.

101. *Id.* at 324, 327 (footnotes omitted).

102. *Id.* at 326.

103. *Benton v. Maryland*, 395 U.S. 784 (1969).

104. Mr. Justice Marshall's majority opinion in *Benton v. Maryland*, 395 U.S. 784 (1969), held that the double jeopardy provision of the fifth amendment represented a fundamental aspect of our democratic government and is applicable to the States through the due process clause of the fourteenth amendment. The *Benton* decision, however, did not reject totally Mr. Justice Cardozo's doctrine of selective incorporation. Instead, the Court determined that the right asserted is fundamental to the scheme of ordered liberty, thereby preserving the incorporation test laid down in *Palko*. *Id.* 795-796. For an informative discussion of the different approaches to incorporation of the Bill of Rights under the due process clause, see ABRAHAM, *supra* note 10, at 96-105. See generally, CAROSELL, *supra* note 13, at 29.

105. 332 U.S. 46, 68 (1947), *overruled in* *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); See also *Murphy v. Waterfront Com. of New York Harbor*, 378 U.S. 52, 77 (1964).

106. 332 U.S. at 54.

107. 332 U.S. at 68, 74 (Black, J., dissenting).

108. *Id.*

109. 211 U.S. 78 (1908). Justice Moody, speaking for the majority, hypothesized that "it is

misplaced because of the Court's failure in those cases to examine the legislative and contemporary history of the framers to ascertain the true meaning of the amendment.<sup>110</sup> To support his contention, Mr. Justice Black reviewed the historical background and legislative history of the fourteenth amendment in an extensive appendix attached to his dissenting opinion.<sup>111</sup>

In contrast to Mr. Justice Black's theory, the *Adamson* majority faithfully decided that "the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment"<sup>112</sup> governs the proper application of the due process and privileges or immunities clauses. "This construction," the majority continued, "has become embedded in our federal system as a functioning element in preserving the balance between national and state power."<sup>113</sup> Finally, Mr. Justice Frankfurter observed in his concurrence that "an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption'. . . . For it was for public adoption that it was proposed."<sup>114</sup>

The *Adamson* decision perfectly dramatizes the persistent debate which has successfully impeded any significant development of the privileges or immunities clause. Since *Madden v. Kentucky*, only a minority of the Justices in the Supreme Court have deliberately searched beyond the *Slaughter-House* Cases to determine the original purpose of the fourteenth amendment.<sup>115</sup> Instead, the Court has tacitly adhered to the state-national citizenship dichotomy promulgated in *Slaughter-House* as the operative rule in privileges or immunities cases.<sup>116</sup> Nevertheless, the conviction that "the Constitution could not have left these fundamental and vital liberties wholly unprotected against state abridgement"<sup>117</sup> helped to encourage a broad judicial interpretation of liberty under the fourteenth amendment's due process

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possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process. *Id.* at 99.

110. 332 U.S. at 68, 73 (Black, J., dissenting).

111. *Id.* at 92-123.

112. *Id.* at 53.

113. *Id.*

114. *Id.* at 63 (Frankfurter, J., concurring).

115. As early as *Twining v. New Jersey*, 211 U.S. 78 (1908), Justice Moody demonstrated a general attitude concerning the intent of the framers to incorporate fundamental rights in the Privileges or Immunities Clause when he noted that "this view has been, at different times, expressed by justices of this court . . . and was undoubtedly that entertained by some of those who framed the Amendment. It is, however, not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court." 211 U.S. at 98. Justice Frankfurter exhibited similar sentiments in *Adamson v. California*, 332 U.S. 46 (1947), when he referred to Representative Bingham's speeches in the 39th Congress and declared "remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech." 332 U.S. at 59, 64 (Frankfurter, J., concurring).

116. *Compare Snowden v. Hughes*, 321 U.S. 1, 6 (1944) (the right to become a candidate for state office, like the right to vote in state elections, is a right or privilege of state citizenship, not of national citizenship, which alone is protected by the Privileges or Immunities Clause) with *Oregon v. Mitchell*, 400 U.S. 112 (1970) (the right to vote for national officers is a privilege and immunity of national citizenship).

117. *Green, Liberty Under the Fourteenth Amendment*, 27 WASH. U. L. Q. 497, 499 n.8 (1941-1942).

clause.<sup>118</sup> Accordingly, the Court has read into the due process clause some of the Bill of Rights safeguards on fundamental rights.<sup>119</sup>

The argument that a liberal construction of the privileges or immunities clause would infringe upon the sovereignty of the states lost much of its force when the courts employed a substantive due process approach.<sup>120</sup> In fact, the federal courts have become censors of state legislation by protecting natural, inalienable, and fundamental rights from state abridgement under the due process clause. Nevertheless, substantive due process has been described as a more "desirable development" because it affords some judicial discretion and "comprehends the doctrine of reasonableness."<sup>121</sup> On this point, one commentator has written:

[The] basic intent [of the framers of the Fourteenth Amendment] was to strike back at the South politically and to protect the recently emancipated Negro . . . . It appears more sound to recognize that the Amendment was a political maneuver and that the restricted interpretation given it by the Court was an effective check on that maneuver emasculating the intent of the framers, but leaving as a part of our fundamental law a phrase of 'convenient vagueness' under which the Court could sit as the final censor of state action. There can be little doubt that this present concept places great supervisory power to decide reasonableness, or whether a particular act offends privileges or immunities of persons, not because of some constitutional provision, but because of 'accepted notions of justice.'<sup>122</sup>

Notwithstanding the greater judicial flexibility that might be afforded by the substantive due process doctrine, it is not unreasonable to expect or to demand that courts give full effect to the purposes of constitutional provisions intended by those who write and adopt them.

#### IV. THE REPARATIONS ARGUMENT

It has been argued that the integral framework of the reconstruction amendments anticipated the interaction of each guarantee, including those of the privileges or immunities clause, to assist emancipated Blacks in reaching economic parity with white citizens.<sup>123</sup> Essential to the success of the framers' *modus operandi*, however, was that the privileges or immunities clause be interpreted to include those fundamental rights described in *Corfield v. Coryell*,<sup>124</sup> but usually associated with article IV, §2 of the Consti-

118. *Id.* at 504.

119. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (fifth amendment); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (sixth amendment); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (sixth amendment); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (fifth amendment); *Robinson v. California*, 370 U.S. 660, 667 (1962) (eighth amendment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (fourth amendment); *Everson v. Bd. of Education*, 330 U.S. 1, 15 (1947) (first amendment); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (first amendment); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (first amendment).

120. *See Meyers, supra* note 26, at 49; *Benoit, supra* note 3, at 99.

121. Note, *Privileges and Immunities of Citizens of the United States—Colgate v. Harvey Overruled*, 9 GEO. WASH. L. REV. 106, 115 (1940). *See Anderson, supra* note 11, at 303.

122. Note, 33 IOWA L. REV. 666, 675-676 (1948).

123. Schwartzbaum, *supra* note 7, at 601. This purpose of the fourteenth amendment was recognized by Justice Miller in the *Slaughter-House Cases*, *see* note 61, *supra*, and accompanying text. *See also Neal v. Delaware*, 103 U.S. 370, 386 (1881); *Brown v. Board of Education*, 347 U.S. 483, 489, 491 (1954); *Collins, The United States Owes Reparations to Its Black Citizens*, 16 How. L.J. 82, 95 (1970).

124. *See* note 22.

tution.<sup>125</sup>

More specifically, it has been contended that the federal government's neglect of its responsibility to safeguard the fundamental rights of Black citizens "has indubitably been a denial to Black people in America of the 'privileges and immunities' of national citizenship, 'equal protection' of laws and 'due process' of laws."<sup>126</sup> In substance, the dismantling of fourteenth amendment rights by the Supreme Court severely retarded the economic development of Blacks, and thus imposed a legal duty upon the federal government to provide reparations to Black citizens in order to remove socio-economic barriers to free competition.<sup>127</sup>

[T]he current (relative) absence of legal hurdles to black political participation [are] relatively unimportant; for new *social* hurdles, themselves, the product of the failure to eradicate the dual treatment of the past, now block opportunity quite as effectively. . . . What is needed is a theory of substantive equality, requiring the provision of federal training in occupational and educational skills, to remove these new social barriers to competition. The abdication of federal responsibility to keep the political process open to blacks is one basis on which the claim of mandatory federal action to relieve black poverty might rest.<sup>128</sup>

Fundamental to the principle of substantive equality is the idea that equality of opportunity in a competitive society requires that government fulfill certain basic needs, including education, health care, employment, and housing, which are necessary to develop individual competitive abilities.<sup>129</sup> In some instances, judicial interpretation of the equal protection clause has imposed an obligation on the state to ameliorate certain deprivations which result from economic differences. Among these are the deprivation of voting rights<sup>130</sup> and of an effective opportunity to resist criminal prosecution.<sup>131</sup> In addition, affirmative measures have been required as a result of discriminatory educational<sup>132</sup> and employment<sup>133</sup> practices under the mandates of equal protection. For the most part, however, the judiciary has failed to impose an affirmative obligation upon the government to provide Blacks, or any other citizens, with the essentials of life as a means of fulfilling the equal protection mandate of the fourteenth amendment.

Although an equal protection argument in support of black reparations

125. See Collins, *supra* note 123, at 94.

126. Butler, *An Iniquitous Failure: Notwithstanding the Constitution*, 17 How. L.J. 169, 179 (1971).

127. See Schwartzbaum, *supra* note 7, at 601.

128. *Id.*

129. See Blackstone, *On Health Care as a Legal Right: An Exploration of Legal and Moral Grounds*, 10 GEORGIA L. REV. 391, 411 (1976). Social surveys have documented the relationship between a lack of the basic necessities of life, such as housing, and the inability to effectively compete in our free society. See Note, *Decent Housing as a Constitutional Right: 42 U.S.C. § 1983 Poor People's Remedy For Deprivation*, 14 How. L.J. 338, 340 n.7 (1968).

130. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

131. Douglas v. California, 372 U.S. 353 (1963); Powell v. Alabama, 287 U.S. 45 (1932). See also Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L.L. REV. 207, 209 (1970).

132. Brown v. Bd. of Education, 349 U.S. 294 (1954); Green v. City Sch. Bd., 391 U.S. 430 (1968).

133. Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 20 (1st Cir. 1974), *cert. denied*, 416 U.S. 957 (1974); Carter v. Gallagher, 452 F.2d 315, 330-331 (8th Cir. 1972), *cert. denied*, 406 U.S. 950 (1972).

is appealing, certain limitations and drawbacks of such an analysis should be noted. Advocates of black reparations based upon substantive equality or equal protection must implicitly allege that the courts' restrictive interpretation of the privileges or immunities clause operated to discriminate against Blacks.<sup>134</sup> This charge might be difficult to prove in the case of a judicial interpretation which has been almost consistently and indiscriminately applied since *Slaughter-House*. More accurately, the traditional concept of equal protection does not require that government provide specific necessities of life,<sup>135</sup> and therefore depriving everyone of constitutional protection of the same fundamental rights is non-discriminatory.<sup>136</sup> In addition, unless the Court is willing to take a fresh look at the privileges or immunities clause, judicial dependence upon the specific locutions of the fourteenth amendment will hinder the inclusion of certain fundamental rights under the auspices of the privileges or immunities clause.<sup>137</sup>

#### V. A MODERN APPROACH TO NATIONAL CITIZENSHIP

Despite the continued controversy over the conflicting interpretations of the fourteenth amendment, an important inquiry that remains is what role *can* the privileges or immunities clause play in future constitutional adjudication? Due to judicial respect for *stare decisis*,<sup>138</sup> any significant development of constitutional privileges or immunities under the fourteenth amendment will probably occur within the confines of the most orthodox judicial formulation of the scope of the clause. In other words, the changing character of national citizenship, and the judicial recognition of such a change, might compel a more expansive role for constitutional privileges or immunities.

In this regard, Professor Archibald Cox has noted a change in contemporary political philosophy concerning the responsibilities of the federal government.

The original Bill of Rights was essentially negative. It marked off a world of the spirit in which government should have no jurisdiction; it raised procedural barriers to unwarranted intrusion. It assumed, however, that in this realm the citizen had no claim upon government except to be let alone. Today, the political theory which acknowledges the duty of government to provide jobs, social security, medical care, and housing extends to the field

134. See generally, Barrett, J., *Judicial Supervision of Legislative Classifications—A More Modest Role For Equal Protection*, 1976 B. Y. U. L. REV. 89 (1976).

135. See Blackstone, *supra* note 129, at 399; Cantor, *The Law and Poor People's Access to Health Care*, 35 L. & CONTEMP. PROB. 901, 908 (1970).

136. See *Palmer v. Thompson*, 403 U.S. 217 (1971).

137. Collins argues that the citizenship clause and section 5 of the fourteenth amendment undeniably impose a duty upon the federal government to act affirmatively to promote the privileges and immunities of Black citizens. The author concludes that the government's procrastination in enacting appropriate fair employment and fair housing legislation effectively denied Blacks their privileges and immunities and violated the due process clause. Thus, the United States owes reparations to its Black citizens for deprivation of property without due process. Collins, *supra* note 123, at 82, 114. But the author may have mistakenly confused the privileges or immunities clause of the fourteenth amendment with the similar provision in article IV, § 2. The view propounded by Collins has been rejected by the courts. *Id.* at 94. For a comprehensive discussion of the right to Black reparations based upon compensation for slave labor, see B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

138. See Note, 42 N. CAR. L. REV. 925, 936 (1964).

of human rights and imposes an obligation to promote liberty, equality, and dignity. For a decade and a half recognition of this duty has been the most creative force in constitutional law.<sup>139</sup>

This expansive role of the federal government in current affairs is necessarily accompanied by a corrosive effect upon federalist concepts.<sup>140</sup> The shifting of responsibility has been attributed to a heightened dependency of urban areas upon the federal government, the increased mobility of the public which is attended by a demise in attachment to state control, technological advancements, the threat of thermo-nuclear extermination, the demand for equal opportunities among minorities, and a new political theory that government owes affirmative services to its citizens.<sup>141</sup> More importantly, the federal government has become a major employer and a significant source of resource distribution, "intimately involved in the workings of the private economy."<sup>142</sup>

To a certain extent, the federal government has recognized that citizens must be provided with the necessities for subsistence and the responsibility of government in achieving that end. Resolution 217, article 23 of the United Nations' International Bill of Rights, of which the United States is a signatory, declares that everyone has a right to work and to protection against unemployment.<sup>143</sup> Furthermore, article 25 of the same document provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>144</sup>

Inasmuch as affirmative services, such as health care, social security benefits, and the like, are essential to the social well-being of citizens,<sup>145</sup> it is evident that the right to these services is no less fundamental than the precepts of substantive due process. However, equal protection and due process may not be adequate constitutional underpinnings for a right to affirmative services. "It is not equality, but quality" which is paramount. "For equality can be served on a low level no less than a high one."<sup>146</sup> As pointed out by one scholar, the injury consists essentially in deprivation, not discrimination, and the cure lies not so much in equalization related to past or present policies of government, but in the satisfaction of basic needs.<sup>147</sup> Moreover, both due process and equal protection apply to any person, regardless of his citizenship, which de-emphasizes the significance of the political relationship which is basic to an allegation of an affirmative obligation of government. Consequently, if the privileges or immunities clause is not inherently devoid of content,<sup>148</sup> its revival may be mandated by a new defi-

139. Cox, *supra* note 5, at 93.

140. CAROSELL, *supra* note 13, at 17.

141. *Id.* at 17-18.

142. Schwartzbaum, *supra* note 7, at 620.

143. G.A. Res. 217, U.N. Doc. A/810, at 75 (1948).

144. *Id.* at 76.

145. See Note, 14 How. L.J. 338, 340 (1968); Blackstone, *supra* note 129, at 411.

146. Kurland, *supra* note 3, at 36; Cantor, *supra* note 135, at 908.

147. Blackstone, *supra* note 129, at 402.

148. Benoit, *supra* note 3, at 102.

inition of national citizenship in accord with more contemporary notions of government.

A more liberal interpretation of the attributes of national citizenship may result in a more rational distribution of services and resources which are necessary for the minimum welfare of all citizens. For instance, it has been noted that "the proper criterion for the distribution of medical services is illness. It is not social status, the ability to pay, the magnitude of one's contribution to society, race, sex, religion, creed or what have you."<sup>149</sup> Any other criterion is irrational. If the right to medical care is recognized as inherent in the concept of national citizenship, medical services will no longer be treated as a commodity to be purchased by those who can best afford it. Instead, the government will be responsible to assure that at least some medical care is available to every citizen.<sup>150</sup> Likewise, a new construction of national citizenship might require that acceptable housing be made available to every American citizen as part of the affirmative duties of government.<sup>151</sup>

Contrary to traditional notions of welfare, minimum welfare as used here is not intended to denote charity or gratuities to the recipients. Once national citizenship is defined to require that, to the extent resources permit, government must provide for the basic needs of all citizens unable to do so for themselves, then a correlative right to these services is fully established.<sup>152</sup> Additionally, the right to minimum welfare would not require absolute equality by placing everyone on the same socio-economic level.<sup>153</sup> It primarily involves the right to the basic necessities which are essential to survival and living with dignity.

A major criticism of a right to minimum welfare has been that it would require a massive reallocation of governmental resources.<sup>154</sup> But as Schwartzbaum points out:

The old argument that government should not attempt economic readjustments carries little weight when economic adjustment has become one of the major functions of government. Once the government has taken on the responsibility of planning to ease the cyclical economic problems endemic to capitalist production, it also takes on responsibility for a second aspect of a capitalist economy, radical inequalities in the distribution of wealth.<sup>155</sup>

The most useful constitutional construct that could be used to meet this challenge lies in the privileges or immunities clause of the fourteenth amendment.

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149. Blackstone, *supra* note 129, at 400.

150. For a discussion of the right to health care, see Christoffel, *The Right to Health Protection*.

151. Michelman, *supra* note 131, at 207.

152. Blackstone, *supra* note 129, at 401.

153. See Cantor, *supra* note 135, at 908.

154. *Id.*

155. Schwartzbaum, *supra* note 7, at 620.