

2005

Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment

Richard A. Epstein

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard A. Epstein, "Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment," 1 *New York University Journal of Law and Liberty* 1096 (2005).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.



FURTHER THOUGHTS ON THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

Richard A. Epstein*

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.¹

In a previous issue of the N.Y.U. Journal of Law & Liberty,² I offered an interpretation of the Supreme Court's decision in the *Slaughter-House Cases*³ that both strengthened and weakened a defense of the Supreme Court's decision in *Lochner v. New York*.⁴ *Lochner's* momentous decision struck down, by a 5-to-4 vote, a statute that imposed a maximum ten hour work day on certain types of bakers. My argument, in a nutshell, was that a careful reading of Section 1 of the Fourteenth Amendment exhibited a two-tier structure in the creation of new rights against the state. That structure gave a systematic advantage to citizens over noncitizens. That point is widely overlooked, even though citizenship still resonates today as an im-

* James Parker Hall Distinguished Service Professor of Law, The University of Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution. I would like to thank Daniel Hulsebosch and William Nelson for their assistance in providing me with information that allowed me to expand my own views, and to the participants at workshops at the New York University Law School, the University of Chicago Law School, and the University of Maryland Law School, for holding my feet to the fire and encouraging me to mend my intellectual ways. Rachel Kovner, Stanford Law School, 2006, provided her usual stellar research assistance. All errors are, of course, my own responsibility.

¹ U.S. CONST. amend. XIV, § 1.

² Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334 (2005) [hereinafter Epstein, *Citizens and Persons*].

³ 83 U.S. 36 (1872). For a short critique of the decision, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 342-51 (1985). For another examination, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 155-64 (1988).

⁴ 198 U.S. 45 (1905).

portant category, as is evident in the endless predicament of aliens with major legal difficulties, and with the huge public debates over immigration policy more generally. Citizenship is a big deal today, especially for people in the United States that don't have it, or, after naturalization, are at risk of losing it. Right now some scholars boldly suggest that children of illegal aliens should not count as citizens, despite the long established practice to the contrary.⁵ Remember also that the process of immigration and naturalization remains within the exclusive power of the United States under Article I, Section 8, clause 4.⁶ It would be odd if citizenship status did not confer some advantage over non-citizens who, after all, can only reside in the United States with the consent of our national government.

The key question is how to cash out the value of that distinction, which in my view demands that the Privileges or Immunities Clause confer rights that are far greater than those found in either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. The Privileges or Immunities Clause of the Fourteenth Amendment offers deep protection against state action to a narrow class of individuals, namely those who enjoyed the status of citizenship, as defined in the first sentence of Section 1. That protection, as relevant to *Lochner*, includes the right to contract freely on matters of employment, except on those matters that fell within the scope of the police power. The police power, in turn, included regulations protecting health and safety, but not restrictions that could be fairly characterized as either paternalist or protectionist. By the same token, since citizens were offered the stronger class of rights referred to as Privileges and Immunities, the Due Process and Equal Protection clauses, both of which extended to all persons (including aliens), necessarily embodied a narrower, baseline set of rights. This baseline covered arbitrary seizure of the person or of property, but did not create the extensive framework of substantive rights for which the clauses are routinely invoked today.

The upshot of this two-tiered scheme was that *Lochner* supplied a defensible, indeed correct, result in dealing with citizens, but that aliens were, as it were, second-class citizens under the key provisions of Section 1. In addition, the limited nature of the Due Process and Equal Protection Clauses makes it unlikely that either could support more comprehensive limitations on state power. A fortiori, it is unlikely that either was meant to play a large role in dictating how the states should allocate physical or human resources. If that observation is correct, then several of the most momentous decisions under these clauses, most notably *Brown v. Board of Education*⁷ and *Roe v. Wade*,⁸ lack sufficient constitutional warrant. Nor does the Privileges or Immunities Clause lend support to either of these decisions,

⁵ Editorial, *Birthright Citizenship*, WASH. TIMES, Nov. 13, 2005, available at <http://www.washingtontimes.com/op-ed/20051112-100517-7537r.htm>.

⁶ "The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . ." U.S. CONST. art. I, § 8 cl. 1, 4.

⁷ 347 U.S. 483 (1954).

⁸ 410 U.S. 113 (1973).

given the understanding of the phrase “privileges and immunities” that can be gleaned from earlier source materials such as *Corfield v. Coryell*⁹ or the Articles of Confederation.¹⁰ Given these structural points, I asked, how might constitutional law have developed had the *Slaughter-House* cases been differently—and correctly—decided? Notwithstanding the legal arguments above, my own conclusion, reached with evident mixed emotions, was that the strong universalist tendencies of natural law theory would in fact have led courts, especially in the case of *Brown*, to ignore the important structural features of the Fourteenth Amendment and to strike down segregation.¹¹ How other Fourteenth Amendment claims would have been treated is always subject to speculation.

In working out my views of the Privileges or Immunities Clause, I had the benefit of three provocative workshops held at the University of Chicago, N.Y.U., and the University of Maryland, and I had revised my paper to reflect the comments and criticisms that were made on those occasions. Unfortunately, the NYU Journal of Law & Liberty had already spirited an earlier version of the paper off to the printers while these revisions were being prepared, so none of them were included in the original published version. I am grateful that the Journal has granted me this reprieve so that I can add a few additional thoughts reflecting the passionate criticisms voiced at the workshops to my earlier treatment of the topic. In Part I, I shall comment briefly on the use of historical materials to explicate the role of the Privilege or Immunities Clause, in part by putting it in perspective with the Thirteenth and Fifteenth Amendments. In part II, I shall trace out some further implications of the Clause for more modern discussions.

I. The Historical Background of the Privileges or Immunities Clause

One great irony of the historical and legal debates over the construction of the Privileges or Immunities Clause is that no one with any familiarity of the case thinks that Justice Miller’s majority decision in the *Slaughter-House Cases* caught the meaning of the Clause. Deeply concerned about the whip hand that the Privileges or Immunities Clause would give the federal government over the activities of the state, Miller read the clause to protect only the rights that ordinary individuals had in their capacity as citizens of the United States, such as the right to petition the national government, but not any of the ordinary common law rights relating to the protection of property and contract.¹² In the eyes of virtually all historians, there is little doubt that *Slaughter-House* is wrong. “No one who sat in Congress or in the state legislatures that dealt with the Fourteenth Amendment doubted that section one was designed to put to rest any doubt about the power of the federal government to protect basic common law rights of property and contract.”¹³ The debates

⁹ 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

¹⁰ Articles of Confederation, Art. IV (1781).

¹¹ Epstein, *Citizens and Persons*, *supra* note 2, at 351–54.

¹² 83 U.S. at 74.

¹³ NELSON, *supra* note 3, at 163.

over the scope of the Privileges or Immunities Clause swirled around the question of whether it provided substantive protection to these common law rights, or only guaranteed that if the rights were supplied to some (i.e. white) citizens, then they had to be supplied to all. I read the Clause as providing for direct substantive protection. William Nelson takes this point of view, and thus sides with Justice Field's *Slaughter-House* dissent: "His [Field's] stated concern with providing equal protection for the fundamental rights of all citizens was consistent with the concerns of the amendment's proponents, while his limitation of section one only to cases involving unequal state action in reference to those fundamental rights minimized federal intrusion into state affairs, as the proponents of the amendment had striven to do."¹⁴ In one of the great constitutional ironies, Justice Miller's decision rejected *both* these plausible renditions in favor of a reading that shattered a great constitutional pillar in a single blow. Miller's bolt from the blue offers a sober realization of how difficult it is to predict the historical path of any key constitutional provision on the strength of its basic understandings.

The larger question that this dispute over privileges and immunities raises is this: how should historical materials extrinsic to the constitutional text be used to interpret that text? The historians who commented on my paper varied from skeptical to apoplectic about my studied indifference to the historical sources on which they customarily rely to make sense of some difficult constitutional text. I took—and continue to take, after the onslaught—the view that these sources should have at most a very narrow use in constitutional interpretation, one limited chiefly to learning the meaning of terms (like Privileges or Immunities) in light of common usage of the time. The task here is only to find common usage, and on that matter the debates supply some information that is no better or worse than that which comes from other sources. The careful, strategic positions staked out in the congressional debates should not be allowed to contradict the text once the basic meaning of the terms has been established. Thus, lawyers can look to any source to see whether the phrase "privileges or immunities" generally conveyed a meaning that included access rights to common pool resources—the very meaning denied in *Corfield*. But it is not persuasive to quote legions of individuals who insisted for their own purposes that the Privileges or Immunities Clause was a nondiscrimination provision for citizens within the same state, when the text (especially when read in opposition to parallel "privileges and immunities" language in Article IV) can only be read as a substantive guarantee. Outside evidence, in other words, can be used to explain uncertain terms, but not to contradict them.

The fatal vice of the historian's favored technique of intensive on the ground investigation is that it supplies *too much* information that often points in all directions at the same time. The effort to sort through these materials has the unfor-

¹⁴ *Id.* at 164. David P. Currie reaches the same conclusion in CURRIE, *supra* note 3, at 347-48 (arguing that the purpose of the clause was to provide a constitutional basis for the Civil Rights Act of 1866, ch. 31, sec. 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981, 1982 (2005))).

tunate consequence of leading lawyers and historians to slight the text, particularly the placement and structure of language. Of course, these historical materials are certainly indispensable in understanding the political cross-currents in any major constitutional struggle, of which Reconstruction is surely one. But for the legal job of deciding cases no lawyer or judge should be allowed, let alone required, to wander into a vast wilderness from which there is no escape. These multiple background understandings should not be allowed to plunge the interpretation of the Privileges or Immunities Clause, or indeed the rest of the Fourteenth Amendment, into hopeless darkness. These collateral records are a form of parol evidence, which however useful for understanding the political crosscurrents of the time, should never be allowed to *contradict* the written text, which is what the nondiscrimination view of privileges or immunities does.

As I argued in the first paper, we should use only two tools from our kit. The first consists of historical records—dictionaries, current examples—used to get a handle on standardized terms. Article IV of the Articles of Confederation is one such text, but it too has antecedents. Thus, the earliest references to privileges and immunities go back at least to early colonial charters, such as the Virginia Charter of 1606: “all . . . Persons being our Subjects, which shall dwell and inhabit within any or any of the said several Colonies and Plantations shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realm of *England* . . .”¹⁵ The terminology is not quite the same, but the family resemblance is evident to the Privileges or Immunities Clause, and it helps explain why the Clause’s curious omission of the term liberty should not be regarded as decisive in figuring out what the entire phrase means. Its “as if” language skirts that question, as all nondiscrimination provisions do, by saying whatever rights they have in England, they have in the colonies—a clever way to induce people to take the hazardous journey across the seas in the first place. We can of course argue over the fine points of interpretation, but this Charter has one advantage that the debates cannot match. No one can say that the words were inserted into the record in order to influence the terms of the political compromise.

The second relevant tool consists of the background principles of interpretation of the natural law tradition, which explains how to incorporate exceptions into a basic theory. The first principle is an anti-circumvention strategy. A constitution that is drafted to limit the abuses of government will not be met with legislative or executive indifference. Public officials will seek to go to the line, and perhaps behind it. The anti-circumvention principle, similar to that used in tax law, *expands* the clause’s protections to situations closely enough related to those undoubtedly covered by the text. The second interpretive principle recognizes that no

¹⁵ Virginia Charter of 1606, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3784 (Francis Newton Thorpe ed., 1909). My thanks to Daniel Hulsebosch for pointing out this and similar sources.

constitutional text confers an absolute right of property or liberty: the right to do as one please does not embrace the rights to kill others. We need principles to secure the like liberty of all individuals. Hence the police power *limits* the scope of protection that any constitutional rights confer on ordinary individuals.¹⁶ This last correction is a way in which our legal system deals with two major challenges: negative externalities of personal injury and property damage that tort law guards against in private areas, and second, coordination and public goods problems that arise in common pool situations, including those involving overconsumption, or, as was the case in *Corfield v. Coryell*,¹⁷ "certain destructive methods" of oyster collection.¹⁸ Both of these interpretive devices are extensively used in all sorts of constitutional areas. A constant concern with appropriate coverage coupled with an appreciation for the police power's role together work as the constitutional glue that links together, through judicial interpretation, the otherwise overwhelming and contradictory protections found in the Constitution. Indeed, the narrower question that was side-stepped in *Corfield* raised just this kind of issue: was the single area for butchers set aside in the *Slaughter-House Cases* meant to discourage competition or protect against noxious waste?

Justice Miller went so far astray because he disdained these more limited instruments of interpretation and relied instead on his own intuitive sense of the appropriate balance between federal and state power. Rather than reanalyze the historical evidence, let me concentrate on the relationship of the Privileges or Immunities Clause to the rest of Section 1 of the Fourteenth Amendment and to the Thirteenth and Fifteenth Amendments as well.

Start with the Thirteenth Amendment, which had been ratified on December 6, 1865 and reads:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.¹⁹

¹⁶ For a more elaborate defense of both principles, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992); Richard A. Epstein, *The "Necessary" History of Property and Liberty*, 6 CHAP. L. REV. 1 (2003).

¹⁷ 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

¹⁸ *Id.* at 552 ("The former, such as fisheries of all descriptions, remains common to all the citizens of the state to which it belongs, to be used by them according to their necessities, or according to the laws which regulate their use. 'Over these . . . sovereignty gives a right to the nation to make laws regulating the manner in which the common goods are to be used.' 'He may make such regulations respecting hunting and fishing, as to seasons, as he may think proper, prohibiting the use of certain nets and other destructive methods.'") (citations omitted).

¹⁹ U.S. CONST. amend. XIII.

It is critical to note what the Thirteenth Amendment does and does not do. On the positive side of the ledger, it abolishes slavery and with it the somewhat less clear practice of involuntary servitude, except when used for punishment. Historically, there were many who thought that the Thirteenth Amendment was a charter for the full and equal participation of black Americans in national life. Unfortunately, the Clause does not remotely bear that meaning, no matter how passionate the rhetoric. Note that its abolition of slavery does not even explicitly make the former slaves citizens of the United States, confer on them any particular bundle of individual rights, or grant them legal parity with white persons. It had one function, pure and simple: to abolish the morally corrupt institution over which the Civil War had been fought.

The textual limitations of the Thirteenth Amendment became clear in the aftermath of its passage when many southern states adopted "Black Codes" in response to the Thirteenth Amendment. This in turn led to passage of the Civil Rights Act of 1866, over President Johnson's veto, which, *inter alia*, guaranteed to "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed" the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. . . ." ²⁰

Yet the deep doubts about whether this massive charter could fit within the confines of the Thirteenth Amendment led on July 8, 1868, over two and one-half years after the Thirteenth Amendment's adoption, to the adoption of the Fourteenth Amendment, each of whose clauses has a different but related function. The first sentence deals with federal and state citizenship, and thus answers a question that the Thirteenth Amendment did not address: the freed slaves are indeed citizens of the United States and the states wherein they reside. Why bother with this if the Thirteenth Amendment had enormous curative powers?

Reading the remainder of the Fourteenth Amendment further complicated because the various debates that surrounded the drafting and ratification of the Amendment did not take a uniform view of its purpose and intentions. Most evident is the disjunction between the text of the 1866 Act and the Privileges or Immunities Clause. The former reads like a nondiscrimination provision while the latter, which was designed in part to validate the former, does not. The difference matters. If one reads the Privileges or Immunities Clause to deal *only* with discrimination among different classes of persons, the right of all individuals to contract receives no explicit constitutional protection. If the white citizens lose the right to contract, then all other persons suffer the same fate. But if the Privileges or Immunities Clause gives absolute protection to certain rights, then some explicit justification

²⁰ Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27-30 (codified as amended at 42 U.S.C. §§ 1981, 1982 (2005)).

must be supplied for abridging the rights of white and non-white citizens alike. It is not enough to say that the right may be deprived from others because it has been denied to white citizens.

As noted earlier, it seems clear that most of the speeches during the ratification debates viewed the Privileges or Immunities Clause as a nondiscrimination provision, needed to provide authorization for the 1866 Act, while a substantial minority took the view that it gave absolute protection to some fundamental rights.²¹ The text, however, contradicts and therefore trumps the majority position because its language flatly forbids any abridgment of citizens' rights. We are then left with the task of determining what those rights are.

In seeking to assign content to the phrase "privileges or immunities," I argued in the earlier paper that *Corfield* showed that the clause had little to do with the relationship of the individual to the state, because its enumerated rights dealt with such matters as the right to contract and own property. But, as William Nelson pointed out in discussion, that truncated reading of the Privileges or Immunities Clause was something of an intellectual howler, because I did not scroll down far enough in *Corfield's* description of privileges that qualify as fundamental, which continues: "to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised."²²

The elective franchise does not fit easily with the other enumerated rights, which are private in nature. In particular, it does not make real sense for citizens of one state who journey to another to have the right to vote there unless they take of residence there. This situation is not quite covered by the Privileges or Immunities Clause, as it relates to discrimination among citizens of different states, not to treatment of new citizens within a state. Indeed, the main purpose of the provision is to say that once these individuals throw off their old state citizenship, they are entitled to become citizens of their new states on equal terms, as regards the franchise, with all others. But this reference in *Corfield* is hardly grist for decisions like *Baker v. Carr*,²³ which use an inflated version of the Equal Protection Clause not to bring outsiders under the state umbrella, but to change radically the nature of that umbrella by redistributing voting power among citizens of each individual state.

This uneasy response to *Baker* is confirmed, moreover, when the structure of the Fourteenth Amendment is juxtaposed to the Fifteenth Amendment, enacted February 3, 1870, whose first section reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State

²¹ NELSON, *supra* note 3, at 110-47.

²² *Corfield*, 6 F. Cas. at 552.

²³ 369 U.S. 186 (1962). There is, of course, nothing to commend the scandalous behavior of the Tennessee legislature before the decision came down.

on account of race, color, or previous condition of servitude.”²⁴ This provision is instructive for two reasons. First, it indicates the extent of the protection that is given to voting rights above and beyond that which may be inferred by reading the Privileges or Immunities Clause through the lens of *Corfield*. And second, it shows by direct comparison why it is that *Slaughter-House* has to be wrong on traditional textual grounds. Note that the fatal words “citizens of the United States” were included in this Amendment less than two years after the adoption of the Fourteenth Amendment. But the rendering of those words as in *Slaughter-House* makes no sense in the context of its juxtaposition with the Fifteenth Amendment. Was it really believed that the states were bound by this Amendment solely to the extent that they could not discriminate based upon “race, color, or previous condition of servitude” in *federal* elections, but were free to exclude people from participation in *state* elections based on the same criteria on the ground that the term “citizens” covered people only in their role of federal citizens? Can’t be. Stick to the text and the classical interpretive tradition, and decisions like *Slaughter-House* refute themselves.

II. The Modern Implications of Slaughter House

This analysis of *Slaughter-House* reinforces the conclusion of my original paper, and thus does not alter the discussion of how the constitutional case law would have been transformed had the case been correctly decided in the first place. Nonetheless, it is useful to supplement the earlier discussion insofar as it relates to both alienage and sex discrimination.

A. Alienage

Previously, I noted that the limitation of the Privileges or Immunities Clause to aliens would have upset such notable decisions as *Truax v. Raich*,²⁵ which invalidated a statute that required private employers to maintain a workforce that was at least eighty percent American. That decision is clearly wrong insofar as it purports to protect the *alien*. But on reflection, it is an open question whether the decision is correct insofar as it protects the right of *employer* citizens, who are covered by the Privileges or Immunities clause, to hire workers without regard to national origin. Here the police power justifications lay open to the state, but it is hard to see how health, safety, or morals are advanced by such a law.

This question of the legal protection of aliens also arises in modern cases in which state and local governments are attacked for discriminating in the distribution of state benefits including welfare payments²⁶ or state employment. *Sugarman v. Dougall*,²⁷ for example, involved a challenge to hiring restrictions that New York

²⁴ U.S. CONST. amend. XV, §1.

²⁵ 239 U.S. 33 (1915).

²⁶ *Graham v. Richardson*, 403 U.S. 365 (1971).

²⁷ 413 U.S. 634 (1973).

City imposed on aliens. The usual argument for heightened constitutional scrutiny with respect to alienage makes repeated reference to the notion that “discrete and insular minorities” should receive special solicitude from the courts²⁸ as originally posited in footnote four of the *Carolene Products* decision.²⁹ The discussion thus adopted a high level of judicial scrutiny and, with regard to public employees, found a poor fit between the alienage classification and New York City’s objectives, chiefly that of exploiting the close “identity between a government and the members, or citizens, of the state,” as the civil servant “participates directly in the formulation and execution of government policy.”³⁰ The court makes no explicit effort to reconcile this tough scrutiny under the Equal Protection Clause with the explicit textual distinction between citizens and other persons that organizes the Fourteenth Amendment.

To his credit, Justice Rehnquist in dissent takes this point more seriously. He reads Justice Blackmun’s majority decision as considering alienage a “suspect” classification—although Blackmun had not specifically adopted this terminology—and notes that nothing in the Amendment justifies this holding.³¹ But even the Rehnquist approach fails to acknowledge, first, just how deeply the citizen/person disjunction in the Fourteenth Amendment cuts against *any* scrutiny of New York City’s hiring policies. Rehnquist holds that rational basis analysis should still apply to the alienage distinction in public employment. The Amendment, however, does not merely remain silent on alienage classifications. To the contrary, it consciously endorses and applies such classifications. Second, Rehnquist refuses to take the additional step of holding that the deeper reach of the Privileges or Immunities Clause renders the Equal Protection Clause inapplicable to the sort of rights involved. The Privileges or Immunities Clause confers strong rights on citizens only in their private capacity. The Equal Protection Clause, which offers a more limited (but vital) class of rights to a broader class of people, cannot leapfrog over the Privileges or Immunities Clause to limit how New York distributes its largesse. The regrettable conclusion is that *no* scrutiny is appropriate for such expansive rights under the Equal Protection clause, no matter what classification is involved. Thus, it is not necessary to give credence, as Justice Rehnquist does, to the identification and participation argument brushed aside by the majority. Taken together, these two points demonstrate that under the Equal Protection Clause, it is appropriate to limit jobs to citizens, who tend to have a vested stake in, and greater knowledge of, American culture and institutions. Of course, the Privileges or Immunities Clause

²⁸ *Sugarman*, 413 U.S. at 642; see also *id.* at 655-656 (Rehnquist, J., dissenting) (criticizing the decision).

²⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

³⁰ *Sugarman*, 413 U.S. at 642 (“In *Graham v. Richardson*, we observed that aliens as a class ‘are a prima example of a “discrete and insular” minority,’ and that classifications based on alienage are ‘subject to strict scrutiny.’ And as long as a quarter century ago we held that the State’s power ‘to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.’ We therefore look to the substantiality of the State’s interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined.”) (citations omitted).

³¹ *Id.* at 655.

would also not support scrutiny, as it has little to do with the distribution of state benefits. The provincialism of the Clause, reflected by its exclusion of aliens, would be inconsistent with the application of universal standards of natural justice.

B. Sex Discrimination

The *Slaughter-House Cases* set the stage for examination of state-imposed sex discrimination, most notably in the now infamous decision of *Bradwell v. Illinois*,³² which upheld a prohibition against the practice of law within the state by women. Justice Miller – him again – started by affirming his narrow reading of privileges and immunities, concluding that “the right to admission to practice in the courts of a State is not one of them.”³³ Yet clearly that right to so practice should fall under the liberty to engage in a lawful trade or profession covered either by privileges and immunities or, in the wake of *Slaughter-House*, by the notion of liberty forced into the Due Process Clause under the controversial rubric of “substantive due process.”

To Justice Bradley, fresh off his dissent in the *Slaughter-House Cases*, Justice Miller’s categorical dismissal of Bradwell’s claim was unpalatable. But notwithstanding his disagreement with Justice Miller on the big picture, he sided with him on the particular case, taking the position that the police power of the state, as traditionally construed, had always recognized “a wide difference in the respective spheres and destinies of man and woman.”³⁴ In so doing he missed the obvious (and fatal) rejoinder that if the difference in sexes was as pronounced as he thought, then voluntary sorting could accomplish nature’s grand plan without the assistance of the state. Although sex classifications were continually upheld throughout the *Lochner* period, often under the guise of progressive legislation,³⁵ *Bradwell* is strongly inconsistent with the more libertarian approach to the subject, which disdains the unholy mix of paternalism and protectionism implicit in that decision. Health and safety have nothing to do with flat-out prohibitions on the practice of law by anyone. So long therefore as Bradwell was a citizen of the United States, the Privileges or Immunities Clause should apply, but the police power should fail to rescue the statute.³⁶

And thus the argument comes full circle. The critics of *Lochner* would do well to ponder the comprehensive rights that it ensures before taking refuge in equal protection arguments that, if my two-tier view is correct, are not defensible within our constitutional framework. *Lochner* is, of course, a bittersweet alternative because of the one unassailable feature of the Fourteenth Amendment that every-

³² 83 U.S. 130 (1872).

³³ *Id.* at 139.

³⁴ *Id.* at 141 (Bradley, J., concurring).

³⁵ See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (Oregon’s maximum hour statute for women).

³⁶ Note, however, that Bradley’s reading “tracked what had been said in the Fourteenth Amendment debates.” NELSON, *supra* note 3, at 166.

one comfortably chooses to overlook: it does not treat citizens and persons in the same fashion. Normatively, we can subscribe to that judgment with respect to matters of political participation. But it is a lot harder to do so with respect to the common law blessings of liberty and property, which should be granted, in the twenty-first century like the nineteenth century, to all human beings. Would that we had not forgotten that lesson.