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The privileges and immunities of citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) are mentioned twice in the Constitution. Article IV, Section 2, states that “[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” Section 1 of the Fourteenth Amendment to the Constitution also refers to the privileges and immunities of citizens when it declares that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ...” While these provisions reflect similar principles, they have their own peculiar histories and roles in protecting, or failing to protect, the civil rights and liberties of American citizens.

Article IV was part of the original constitution. That article, which also contained the full-faith and credit and fugitive slave clauses, was designed to protect citizens of one state when they journeyed to sister states. It reflected the founding period’s state-based ideas of citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) and federalism that protected state sovereignty and racial slavery. The Fourteenth Amendment, on the other hand, represented the rejection of slavery—the slavery-protecting version of federalism. The amendment was worded to protect U.S. citizens, including African Americans, from violations of their basic privileges even by their state of residence. Yet, despite these differences in origin, the two clauses have had a parallel history of confusion in constitutional law, a history rich in potential but impoverished in real legal effect. This entry will first consider the history of the privileges and immunities clause of Article IV. It will then review the history of the privileges or immunities clause of the Fourteenth Amendment. Finally, it will conclude with a short discussion of the current role of both clauses in the protection of civil rights and liberties under modern constitutional law.

Privileges and Immunities under Article IV

The privileges and immunities clause of Article IV of the constitution received little comment during the Constitutional Convention and was modeled after a similar clause in the Articles of Confederation. The phrase “privileges and immunities” had long been used in Anglo-American law, including in colonial charters (<http://uscivilliberties.org/themes/3620-colonial-charters-and-codes.html>) and

documents, to reflect the basic rights, privileges, and immunities held by a British subject or a colonial denizen. It did not, however, have a precise meaning even then and seems to have gained longevity in large part because of its generality.

The central question raised by the vagueness of the clause is whether it requires only that states grant equality of privileges to persons from other states or whether it establishes a basis for securing fundamental privileges of American citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>). Although scholars have found support for the idea that the drafters of the Constitution presumed that some unspecified level of fundamental rights, privileges, and immunities was inherent in free citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) within each state, those drafters probably meant for the privileges and immunities clause of Article IV to focus on the nondiscrimination of outsiders with respect to rights and privileges that a state granted its citizens. This is, after all, one reason for the clause appearing in Article IV alongside other provisions involving state comity.

This point is also supported by Alexander Hamilton's comments in Federalist Paper Number 80, where, in justifying federal judicial power over disputes between citizens of different states, he declared that the privileges and immunities clause formed "the basis of the union" because it established "equality of privileges and immunities to which the citizens of the Union [were] entitled" in cases where citizens from one state needed to secure rights in their nonresident state.

The courts during the first part of the nineteenth century largely supported this nondiscrimination view of the Article IV clause, and in 1833 Justice Joseph Story wrote in his highly regarded Commentaries on the Constitution that the clause gave outsiders "all the privileges and immunities, which the citizens of the same state would be entitled to under the same circumstances." An alternative understanding of the clause occasionally appeared, however. For example, in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), a lower court opinion written by Supreme Court Justice Bushrod Washington (the first president's nephew), the court described the clause as protecting rights that were "fundamental ... [and] belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union." Justice Washington then enumerated several of these fundamental rights, including rights to life, liberty, property, the pursuit of happiness, commerce, and even suffrage, although he also granted that the states could place restrictions on these for the general good.

Justice Washington's language eventually became a touchstone for the authors of the Fourteenth Amendment. But the case did not represent a shift in judicial understandings of the privileges and immunities clause of Article IV. In the rather limited number of cases in which the clause has arisen, before and after the Civil War, it has mainly been in the context of persons asserting a right to conduct business or engage in leisure activities as out of state residents, with the Court focusing on whether a state has a substantial reason for discriminating against them in the way it allocates those privileges it chooses to grant to its citizens. As the Supreme Court said in *Toomer v. Witsell* (334 U.S. 385, 395) in

1948, the clause “was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” Thus, the modern Supreme Court has relied on the privileges and immunities clause to bar states from placing heavier tax burdens on in-state income earned by out of state residents or from granting employment preferences to in-state residents.

The Court has, however, found substantial reasons for discrimination against out of state residents in upholding state residence restrictions on voting, obtaining a divorce, and holding elective office. Most notably for the area of civil liberties, in Doe v. Bolton (<http://uscivilliberties.org/cases/3707-doe-v-bolton-410-us-179-1973.html>), 410 U.S. 179 (1973), a case decided on the same day as Roe v. Wade, 410 U.S. 113 (1973), the Court employed an Article IV analysis to reject a state restriction barring nonresidents from obtaining medical services of an abortion because the state permitted state residents to obtain that same medical service. Doe, however, remains a rare case of protection of civil liberties under Article IV’s privileges and immunities clause outside the areas of business and employment areas that the Court has at times hinted are fundamental privileges, at least under Article IV.

Privileges and Immunities under the Fourteenth Amendment

If the fundamental rights interpretation of the privileges and immunities clause of Article IV has never really blossomed in the courts, it did have its day in the sun in the Civil War and Reconstruction congresses. For the Republican abolitionists (<http://uscivilliberties.org/themes/2960-abolitionists.html>) who became the moving force during Reconstruction and spearheaded the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the privileges and immunities of citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) were seen as the legal language best designed to establish full citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) for former slaves. The drafters of the Fourteenth Amendment’s Section 1 cited Justice Washington’s fundamental rights exposition in Corfield to illustrate the nature of the rights they were seeking to protect and, in particular, for why they chose language parallel to the Article IV privileges and immunities clause.

Some commentators see this evidence as indicating that the privileges or immunities clause was meant to establish and facilitate national protection of the rights, liberties, and privileges fundamental to American citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>). This view is bolstered by the fact that the Fourteenth Amendment affirmatively establishes U.S. citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) by birth in the citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) clause. Only then does it assert that the privileges or immunities of that national citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) cannot be abridged by the states, suggesting that the most important citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) privileges were ones attaching to federal citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>). Moreover, the subsequent

congresses assumed that the clause, combined with Section 5 of the amendment, which granted Congress power to enforce the first four sections, enabled Congress to enforce access to a host of fundamental privileges.

Under the Civil Rights Act of 1875 (<http://uscivilliberties.org/legislation-and-legislative-action/3602-civil-rights-act-of-1875.html>), for instance, Congress protected access for all citizens to public accommodations in inns, theaters, and public transportation, and in other statutes of the period Congress protected rights of assembly and rights to protection against violence intended to deny people their federal rights. Indeed, it has been effectively argued by scholars that the authors of the amendment assumed that the liberties and rights protected by the Bill of Rights as against federal action were, under the privileges or immunities clause, henceforth protected against infringement by the states as well. It would, however, take many years for the Supreme Court to rule that the Fourteenth Amendment applied the Bill of Rights to the states; even so, the Court did so piecemeal through the incorporation doctrine under the due process clause rather than through the privileges or immunities clause.

Despite the strong evidence that the drafters employed the privileges or immunities clause to grant affirmative rights to all U.S. citizens, some commentators have argued—not without support—that the clause merely expanded the equality aspects of the Article IV clause to ensure that all the citizens within a state would be guaranteed state-created privileges regardless of race. Certainly the clause was meant to include this right to equal treatment: It very specifically was drawn to combat the so-called black codes, laws written by postwar southern whites that aggressively restricted the freedoms of former slaves. Congress wanted a firm constitutional basis for its first civil rights law, the Civil Rights Act of 1866 (<http://uscivilliberties.org/legislation-and-legislative-action/3601-civil-rights-act-of-1866.html>), which sought to protect the “full and equal enjoyment” of the laws and to give all citizens the rights of contract, property, and court access “as is enjoyed by whites.”

The Supreme Court, however, quickly quashed the fundamental rights and equality approaches. In the first case raising the issue after ratification of the Fourteenth Amendment (the Slaughterhouse Cases, 83 U.S. 36, 1872), the Court asserted that the only federal privileges and immunities under this clause were those that already existed in the Constitution or in other federal laws; the privileges and immunities fundamental to free citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) were the stuff of state privileges and immunities. Four justices dissented, arguing eloquently, if at times disingenuously, in favor of a broader, fundamental rights view of the clause. Yet, when all was said and done, the Supreme Court in Slaughterhouse had taken the newly minted clause into a form of time travel whereby the statebased federalism central to the antebellum Constitution and interpretation of Article IV again controlled. The Court performed similar work in the Civil Rights Cases (<http://uscivilliberties.org/historical-overview/3604-civil-rights-cases-109-us-3-1883.html>) (109 U.S. 3) in 1883, in which the Court rejected congressional power to pass the Civil

Rights Act of 1875 (<http://uscivilliberties.org/legislation-and-legislative-action/3602-civil-rights-act-of-1875.html>) under the Thirteenth or Fourteenth Amendments, over a strong dissent by Justice John Marshall Harlan.

For a long time the Slaughterhouse Court's defanging of the privileges or immunities clause seemed complete. The Court did little to revive the clause, choosing instead to promote its shifting versions of fundamental rights jurisprudence with the due process clause through the largely procapitalist jurisprudence of *Lochner v. New York*, 198 U.S. 45, in 1905 and through the later development in the 1960s and 1970s of the right to privacy and other substantive rights in cases such as *Griswold v. Connecticut* (381 U.S. 479, 1965) and *Roe v. Wade* (410 U.S. 113, 1973).

Congress also chose other grounds on which to build legislative protections of rights and liberties, most conspicuously by using the commerce clause power to support civil rights legislation such as the Civil Rights Act of 1964 (<http://uscivilliberties.org/legislation-and-legislative-action/3603-civil-rights-act-of-1964.html>). While the privileges or immunities clause received occasional attention in the Court—it briefly appeared in the probusiness case of *Colgate v. Harvey* (296 U.S. 404) in 1935, only to return to dormancy when the case was overruled four years later in *Madden v. Kentucky* (309 U.S. 83, 1940) and it garnered support of a minority of justices in some cases, including *Edwards v. California* (314 U.S. 160, 1941) and *Hague v. C.I.O.* (307 U.S. 496, 1939)—at no point prior to 1999 did the Court wholly embrace the clause as having independent value.

Current Status of Privileges and Immunities Clauses

Despite the fact that the drafters of the Fourteenth Amendment probably intended the privileges or immunities clause to be more important and protective of citizens' rights and liberties than the privileges and immunities clause of Article IV, the Supreme Court has treated the former clause as almost meaningless. The Court has in fact issued far more opinions employing Article IV to protect citizens than it has opinions using the Fourteenth Amendment's clause.

This appeared to change when the Court, in the 1999 case of *Saenz v. Roe*, 526 U.S. 489, relied on the privileges or immunities clause for the first time to protect a citizen's rights. In that case the Court upheld the right of citizens who had recently moved to a state to receive the same welfare payments as citizens who had resided in the state for a longer time. In *Saenz*, the Court attempted to clarify the constitutional basis for a general right to travel that the Court had long found to be essential and fundamental. The Court argued that while Article IV's privileges and immunities clause protected the citizen's right to travel into other states, the privileges or immunities clause of the Fourteenth Amendment, along with the citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>) clause, protected the right to reside in any state of one's choosing and not be treated as anything less than a full citizen.

While *Saenz* renewed the possibilities of the protection of civil liberties by breathing some life into the privileges or immunities clause, the Court did not deal conclusively with the problem of when a state could justifiably burden the liberties or interests of a new resident. The Court argued that benefits

such as education are easily “portable” and so could be restricted by in-state tuition preferences. In the Court’s view welfare payments were not so easily portable—they were usually spent within the state—and could not be restricted to long-term residents. Importantly, however, the Court did not rely on a right to welfare or on the basic fundamental nature of subsistence payments to distinguish the benefits in Saenz, despite the fact that the closest precedent, *Shapiro v. Thompson* (394 U.S. 618) in 1969, had appeared to do just that. The Saenz Court instead focused carefully on the right to travel to a state and make it one’s residence. Thus, while the case did reinvigorate the potential of the privileges or immunities clause, it did little to make the clause capable of the heavy lifting needed for a provision of the constitution to protect civil rights and civil liberties reliably.

The future of both clauses protecting the privileges and immunities of citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>), remains uncertain. In as much as the Article IV clause enables courts to police the burdens states place on out-of-state visitors and travelers, there is no reason to think the Supreme Court will change its approach by limiting or by expanding civil liberties protections. The clause will likely remain a means of enforcing equal treatment for nonresidents, but the substance of that treatment will be left to individual states.

The Fourteenth Amendment’s clause is situated somewhat differently in terms of potential development. First, Congress could still try, under its powers from Section 5 of the amendment, to define and protect more specifically the privileges of citizenship (<http://uscivilliberties.org/themes/3597-citizenship.html>)—for instance, by specifically grounding privacy-protecting legislation in the clause. As seen in *City of Boerne v. Flores* (<http://uscivilliberties.org/cases/3222-city-of-boerne-v-flores-521-us-507-1997.html>) (521 U.S. 507, 1997), however, the modern Court has not been very supportive of this type of congressional power under Section 5, and it is unclear how willing Congress would be to assert such power. Alternatively, the Court could push development of the law under the clause beyond what it did in Saenz. For example, it could use the language in some of its modern opinions under Article IV, in which the Court has hinted at a fundamental right to seek employment, to find such a right generally under the Fourteenth Amendment. Alternatively, the Court could, as Justice Thomas hinted in his dissent to Saenz, increase protections of property rights through this clause.

Finally, a Court more supportive of civil liberties generally could employ the clause to expand upon the liberties already recognized. None of these avenues seems likely, however. No matter how well one could articulate a broader meaning for the underutilized concept of constitutional privileges and immunities, it is most likely that the concept will remain one largely of historical study and unrealized potential.

JAMES W. FOX, JR.

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Related:

- Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (<https://uscivilliberties.org/cases/4493-slaughterhouse-cases-83-us-16-wall-36-1873.html>)
- Saenz v. Roe, 526 U.S. 489 (1999) (<https://uscivilliberties.org/cases/4430-saenz-v-roe-526-us-489-1999.html>)
- Right to Travel (<https://uscivilliberties.org/themes/4396-right-to-travel.html>)
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