

The Slaughter House Cases

The Redaction of the Privileges and Immunities Clause

Patrick Bohan pbohan1@gmail.com 2/27/23

The 1873 the [Slaughterhouse Cases](#) were controversial to say the least. The Supreme Court held the city of New Orleans could produce a law to monopolize the butcher industry to prevent cholera cases. A monopoly sounds reasonable since the Court merely wanted to protect the safety and wellbeing of citizens from the unhealthy butcher practices of dumping waste into the drinking water. However, does the solution of providing one butcher company a market monopoly choose the least evasive method to achieve its goal of public safety? No, closer inspection and commonsense would lead one to think the city did not have to eliminate the rights of dozens of butchers to work a lawful profession. Instead, a law which outlined proper methods for disposing of waste would make more sense than removing the livelihood of hundreds of people.

The [FDR](#) administration may have taken a power grab lesson from the city of New Orleans playbook. Whether public fear about a [Great Depression](#) or a public health emergency, governments have learned catastrophes are a great way to garner more political power. The City of New Orleans used a local health emergency to advance its agenda which allowed them to needlessly reduce the rights of individuals and workers. The *Slaughterhouse Cases* are a classic example of how fear can lead to irrational problem-solving. Some scholars also [suggest](#) government corruption was the motive behind the law. Nevertheless, corruption or not, the Slaughterhouse Cases was a bad decision.

[Justice Samuel Miller](#) wrote a very convoluted majority opinion which not only denied workers equal rights, the opinion essentially redacted the Privileges and Immunities Clause from the [Fourteenth Amendment](#). Miller held a very narrow reading of the Privileges and Immunities Clause to imply the sole focus of the amendment was for equal rights for freed slaves, but not equal rights for white men or women denied the right to work in the *Slaughter House Cases*. Furthermore, Miller erroneously concluded the Fourteenth Amendment only protected privileges and immunities for national citizenship, but not rights specific to state citizenship such as those rights found in the Bill of Rights or [Corfield v. Coryell](#). Corfield will be addressed in the next article.

In my opinion, there should not be any distinction between the rights protected by both national and state citizenship. The Citizenship Clause of the Fourteenth Amendment states, “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.” The Citizenship Clause seems to suggest state and national citizenship are synonymous. More than [600,000 Americans died](#) in the Civil War to draft the Fourteenth Amendment and Miller inexplicably took measures in his own hands to provide an erroneous construction of the Fourteenth Amendment.

To compensate for the egregious error in the *Slaughter House Cases* (and ignoring the Ninth Amendment) a flawed doctrine called [Substantive Due Process](#) is used by the Court to protect fundamental rights. Substantive Due Process uses the [Due Process Clause](#) of the Fourteenth Amendment instead of the redacted Privileges and Immunities Clause to both identify and protect unenumerated fundamental rights. The original [purpose](#) of the Privileges and Immunities Clause was intended to identify fundamental rights. On the other hand, the original [purpose](#) of the Due Process Clause was to enforce and protect all fundamental rights. Presently, Substantive

Due Process incorrectly uses the Due Process Clause to both identify and protect fundamental rights. For some reason, the Supreme Court felt compelled to invent a new doctrine instead of electing to use the Ninth Amendment or to overrule the *Slaughter House Cases*. Instead of cleaning up their mess, the Court made the process of protecting rights messier. Substantive Due Process was used in cases such as [Griswold v. Connecticut](#) to protect the right to privacy for family matters. Although *Griswold* was decided correctly, the case used flawed Constitutional reasoning.

Most law scholars, such as [Randy Barnett](#) and Evan Bernick, claim in their book “[The Original Meaning of the 14th Amendment: The Letter and Spirit](#)” the Fourteenth Amendment is the gem of the [Constitution](#). Barnett and Bernick argue the amendment was a necessity to end slavery. Barnett and Bernick suggest some abolitionists also argue the Constitution protected slavery and a new amendment was needed to end the practice of slavery. Decisions such as the [Prigg v. Pennsylvania](#) and [Dred Scott v. Sanford](#) as well as the [Fugitive Slave Act](#) of 1793 and 1850 would certainly seem to suggest the Constitution supported slavery.

Furthermore, Fourteenth Amendment advocates also suggest the Fugitive Clause provides a strong argument the Constitution supported slavery. Nonetheless, whether Congress had the authority to enact the Fugitive Slave Act which was used to enforce the Fugitive Clause of the Constitution was highly debatable. The [Fugitive Clause](#) can be found in [Article IV, Section 2](#) and not in [Article I, Section 8](#) of the Constitution. Future Supreme Court Chief Justice, [Salmon Chase](#), would argue before the Supreme Court the federal government had no power to enforce the Fugitive Clause because the clause was in Article IV, Section 2 of the Constitution. After all, all grants of power in the Constitution are located in Article I, Section 8. However, Congress has power to enforce Section 1 and Section 3 of Article IV only because those powers are expressly stated within those sections. Nonetheless, the omission of congressional power to enforce Section 2 becomes even more explicit because Congress had no power to enforce the Fugitive Clause.

Article IV, Section 2 can only be enforced by the states. For instance, the Privileges and Immunities Clause, also located in Article IV, Section 2, never provides the federal government with the power to prohibit states from infringing on the privileges and immunities of citizens (although the Ninth Amendment does). After all, if the federal government had such powers, then the Privileges and Immunities Clause of the Fourteenth Amendment would never have been deemed as a necessary upgrade to the Constitution. What Article IV, Section 2 accomplishes was to ensure all privileges and immunities permitted to citizens of a certain state were also provided to citizens of another state who are visiting the jurisdiction. Similarly, the federal government has no enforcement power for the Fugitive Clause. Although Chase’s arguments would fall on deaf ears, he was 100% correct, the Constitution did not yield the federal government power to defend slavery or the Fugitive Slave Clause.

I agree the Fourteenth Amendment became the gem of the Constitution, but only because [Chief Justice Marshall’s](#) ruling in [Barron v. Baltimore](#) incorrectly held the Bill of Rights did not apply to the states. *Barron v. Baltimore* coupled with the ignorance of jurists and politicians led to the redaction of the true gem of the Constitution: The [Ninth Amendment](#). If the Bill of Rights (including the Ninth Amendment) were applied to the states, the Constitution minus the Fourteenth Amendment would not have protected slavery and the original genius of the Founders would have been sufficient to end slavery. The bottom line, the Privileges and Immunities

Clause of the Fourteenth Amendment would have been a redundant amendment if not for errors in judicial judgment. That said, either enforcing the Ninth Amendment or Privileges and Immunities Clause of the Fourteenth Amendment would be better to identify rights than the fabricated doctrine of Substantive Due Process.