SUPREME COURT OF THE UNITED STATES

No. 98–97

RITA L. SAENZ, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS *v.* BRENDA ROE AND ANNA DOE ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 17, 1999]

JUSTICE THOMAS, with whom the CHIEF JUSTICE joins, dissenting.

I join THE CHIEF JUSTICE's dissent. I write separately to address the majority's conclusion that California has violated "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Ante*, at 12. In my view, the majority attributes a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified.

The Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U. S. Const., Amdt. 14, §1. Unlike the Equal Protection and Due Process Clauses, which have assumed near-talismanic status in modern constitutional law, the Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House Cases*, 16 Wall. 36 (1873). There, the Court held that the State of Louisiana had not abridged the Privileges or Immunities Clause by granting a partial monopoly of the slaughtering business to one company. *Id.*, at 59–63, 66. The Court reasoned that the Privileges

or Immunities Clause was not intended "as a protection to the citizen of a State against the legislative power of his own State." *Id.*, at 74. Rather the "privileges or immunities of citizens" guaranteed by the Fourteenth Amendment were limited to those "belonging to a citizen of the United States as such." *Id.*, at 75. The Court declined to specify the privileges or immunities that fell into this latter category, but it made clear that few did. See *id.*, at 76 (stating that "nearly every civil right for the establishment and protection of which organized government is instituted," including "those rights which are fundamental," are not protected by the Clause).

Unlike the majority, I would look to history to ascertain the original meaning of the Clause.[1] At least in American law, the phrase (or its close approximation) appears to stem from the 1606 Charter of Virginia, which provided that "all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said

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[1] Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873. See, *e.g.*, Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1418 (1992) (Clause is an antidiscrimination provision); D. Currie, The Constitution in the Supreme Court 341–351 (1985) (same); 2 W. Crosskey, Politics and the Constitution in the History of the United States 1089–1095 (1953) (Clause incorporates first eight Amendments of the Bill of Rights); M. Curtis, No State Shall Abridge 100 (1986) (Clause protects the rights included in the Bill of Rights as well as other fundamental rights); B. Siegan, Supreme Court's Constitution 46–71 (1987) (Clause guarantees Lockean conception of natural rights); Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L. J. 453, 521–536 (1989) (same); J. Ely, Democracy and Distrust 28 (1980) (Clause "was a delegation to future constitutional decisionmakers to protect certain rights that the document neither lists . . . or in any specific way gives directions for finding"); R. Berger, Government by Judiciary 30 (2d ed. 1997) (Clause forbids race discrimination with respect to rights listed in the Civil Rights Act of 1866); R. Bork, The Tempting of America 166 (1990) (Clause is inscrutable and should be treated as if it had been obliterated by an ink blot).

several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realme of *England*." 7 Federal and State Constitutions, Colonial Charters and Other Organic Laws 3788 (F. Thorpe ed. 1909). Other colonial charters contained similar guarantees.[2] Years later, as tensions between England and the American Colonies increased, the colonists adopted resolutions reasserting their entitlement to the privileges or immunities of English citizenship.[3]

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[2] See 1620 Charter of New England, in 3 Thorpe, at 1839 (guaranteeing "[l]iberties, and ffranchizes, and Immunities of free Denizens and naturall Subjects"); 1622 Charter of Connecticut, reprinted in 1 *id.*, at 553 (guaranteeing "[l]iberties and Immunities of free and natural Subjects"); 1629 Charter of the Massachusetts Bay Colony, in 3 *id.*, at 1857 (guaranteeing the "liberties and Immunities of free and naturall subjects"); 1632 Charter of Maine, in 3 *id.*, at 1635 (guaranteeing "[l]iberties[,] Francheses and Immunityes of or belonging to any of the naturall borne subjects"); 1632 Charter of Maryland, in 3 *id.*, at 1682 (guaranteeing "Privileges, Franchises and Liberties"); 1663 Charter of Carolina, in 5 *id.*, at 2747 (holding "liberties, franchises, and privileges" inviolate); 1663 Charter of the Rhode Island and Providence Plantations, in 6 *id.*, at 3220 (guaranteeing "libertyes and immunityes of ffree and naturall subjects"); 1732 Charter of Georgia, in 2 *id.*, at 773 (guaranteeing "liberties, franchises and immunities of free denizens and natural born subjects").

[3] See, *e.g.*, The Massachusetts Resolves, in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis 56 (E. Morgan ed. 1959) ("*Resolved*, That there are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the common Rights of Mankind– Therefore, . . . *Resolved* that no Man can justly take the Property of another without his Consent . . . this inherent Right, together with all other essential Rights, Liberties, Privileges and Immunities of the People of Great Britain have been fully confirmed to them by *Magna Charta*"); The Virginia Resolves, *id.*, at 47–48 ("[T]he Colonists aforesaid are declared entitled to all Liberties, Privileges, and Immunities of Denizens and natural Subjects, to all Intents and Purposes, as if they had been abiding and born within the Realm of *England*"); 1774 Statement of

The colonists' repeated assertions that they maintained the rights, privileges and immunities of persons "born within the realm of England" and "natural born" persons suggests that, at the time of the founding, the terms "privileges" and "immunities" (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens, and more broadly, by all persons. Presumably members of the Second Continental Congress so understood these terms when they employed them in the Articles of Confederation, which guaranteed that "the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States." Art. IV. The Constitution, which superceded the Articles of Confederation, similarly guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, §2, cl. 1.

Justice Bushrod Washington's landmark opinion in *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (No. 3, 230) (CCED Pa. 1825), reflects this historical understanding. In *Corfield*, a citizen of Pennsylvania challenged a New Jersey law that prohibited any person who was not an "actual inhabitant and resident" of New Jersey from harvesting oysters from New Jersey waters. *Id.*, at 550. Justice Washington, sitting as Circuit Justice, rejected the argument that the New Jersey law violated Article IV's Privileges and Immunities Clause. He reasoned, "we cannot accede to the proposition . . . that, under this provision of the constitu-

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Violation of Rights, 1 Journals of the Continental Congress 68 (1904) ("[O]ur ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England . . . Resolved . . . [t]hat by such emigration they by no means forfeited, surrendered or lost any of those rights").

tion, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens." *Id.*, at 552. Instead, Washington concluded:

> We feel no hesitation in confining these expressions to 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 states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; . . . and an exemption from higher taxes or impositions than are paid by the other citizens of the state; . . . the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities." *Id.* at 551–552.

Washington rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all

public benefits (such as the right to harvest oysters in public waters) that a State chooses to make available. Instead, he endorsed the colonial-era conception of the terms "privileges" and "immunities," concluding that Article IV encompassed only *fundamental* rights that belong to all citizens of the United States.[4] *Id.*, at 552.

Justice Washington's opinion in *Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment. When Congress gathered to debate the Fourteenth Amendment, members frequently, if not as a matter of course, appealed to *Corfield*, arguing that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified in his opinion. See Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1418 (1992) (referring to a Member's "obligatory quotation from *Corfield*"). For just one example, in a speech introducing the Amendment to the Senate, Senator Howard explained the Privileges or Immunities Clause by quoting at length from *Corfield*.[5] Cong. Globe, 39th Cong., 1st Sess., 2765 (1866). Furthermore, it appears that no Member of Congress

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[4] During the first half of the 19th century, a number of legal scholars and state courts endorsed Washington's conclusion that the Clause protected only fundamental rights. See, *e.g.*, *Campbell* v. *Morris*, 3 Harr. & M. 535, 554 (Md. 1797) (Chase, J.) (Clause protects property and personal rights); *Douglass* v. *Stephens*, 1 Del. Ch. 465, 470 (1821) (Clause protects the "absolute rights" that "all men by nature have"); 2 J. Kent, Commentaries on American Law 71–72 (1836) (Clause "confined to those [rights] which were, in their nature, fundamental"). See generally Antieau, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 Wm. & Mary L. Rev. 1, 18–21 (1967) (collecting sources).

[5] He also observed that, while, Supreme Court had not "undertaken to define either the nature or extent of the privileges and immunities," Washington's opinion gave "some intimation of what probably will be the opinion of the judiciary." Cong. Globe, 39th Cong., 1st Sess., 2765 (1866).

refuted the notion that Washington's analysis in *Corfield* undergirded the meaning of the Privileges or Immunities Clause.[6]

That Members of the 39th Congress appear to have endorsed the wisdom of Justice Washington's opinion does not, standing alone, provide dispositive insight into their understanding of the Fourteenth Amendment's Privileges or Immunities Clause. Nevertheless, their repeated references to the *Corfield* decision, combined with what appears to be the historical understanding of the Clause's operative terms, supports the inference that, at the time the Fourteenth Amendment was adopted, people understood that "privileges or immunities of citizens" were fundamental rights, rather than every public benefit established by positive law. Accordingly, the majority's conclusion– that a State violates the Privileges or Immunities Clause when it "discriminates" against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefit appears contrary to the original understanding and is dubious at best.

As THE CHIEF JUSTICE points out, *ante* at 1, it comes as quite a surprise that the majority relies on the Privileges

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[6]During debates on the Civil Rights Act of 1866, Members of Congress also repeatedly invoked *Corfield* to support the legislation. See generally, Siegan, Supreme Court's Constitution, at 46–56. The Act's sponsor, Senator Trumble, quoting from *Corfield*, explained that the legislation protected the "fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in." Cong. Globe, *supra*, at 476. The Civil Rights Act is widely regarded as the precursor to the Fourteenth Amendment. See, *e.g.*, J. tenBroek, Equal Under Law 201 (rev. ed. 1965) ("The one point upon which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills, particularly the latter, beyond doubt").

or Immunities Clause at all in this case. That is because, as I have explained *supra*, at 1–2, The *Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the "predilections of those who happen at the time to be Members of this Court." *Moore* v. *East Cleveland*, 431 U. S. 494, 502 (1977).

I respectfully dissent.