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Lessons of Charleston Harbor: The Rise, Fall and Revival of Pro-Slavery Federalism

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The Republic can no more live without its supreme law duly obeyed or duly enforced than can its citizens who compose it live without air.
—Congressman John Bingham[1]

I. INTRODUCTION

Boston Harbor, Philadelphia's Independence Hall, Washington, D.C., and the fields of Gettysburg: all these locations have earned their place in constitutional history as high-water marks of popular and national sovereignty. But in order to understand the relationship between the nation and its constituent states today, lawyers and scholars must also look to a place less well studied than Philadelphia, less evocative than Gettysburg: nineteenth century Charleston, South Carolina. In the cauldron of Charleston Harbor, conflicting visions of sovereignty simmered, and eventually boiled over. The competing conceptions of state sovereignty that emerged continue to shape the contours of national power.

Delegates to the Constitutional Convention had previously attempted an innovative solution to the dilemma of balancing state and national authority: ultimate sovereignty would rest in the hands of the people, with immediate sovereignty divided between state and national governments. Long after the ink had dried on the framers' signatures, several key episodes fundamentally challenged the founders' compromise. First, South Carolina authorities defied federal law in 1823 when they arrested and jailed Harry Elkison, a black Jamaican seaman aboard a British ship who had the misfortune to dock in Charleston Harbor. Ten years later, South Carolina authorities ordered their citizens to violate federal tariff laws on goods flowing into the Harbor, President Andrew Jackson ordered military companies to fortify federal posts, and the South Carolina governor countered by organizing a militia of 25,000 troops to protect his state supremacy doctrine. Compromise in 1833 merely postponed the inevitable confrontation, and on April 12, 1861, South Carolina troops fired the first shots of the Civil War against Fort Sumter in Charleston Harbor. This series of events eventually gave rise to the Fourteenth Amendment, which was intended to resolve questions about sovereignty that had plagued prior generations.

These three episodes helped to shape the conception of federalism embodied by the Fourteenth Amendment to the Constitution.[2] When the primary author of

1. CONG. GLOBE, 37th Cong., 2d Sess. 345 (1862) (supporting the resupply of federal troops during the Civil War). Congressman Bingham was the primary author of the Fourteenth Amendment. *See* Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 590 (2003).

2. The three events chronicled in this article were not the only significant "constitutional crises" to occur in the first century of United States history. The Alien and Sedition Act of 1798 brought the federal government into direct conflict with the command of the First Amendment, and spawned the *Kentucky* and *Virginia Resolutions* in which two state governments urged defiance of the federal laws. *See infra* text accompanying notes 162-75. For more extended discussion, see MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE:" STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 52-116 (2000). The

that Amendment referred to South Carolina in his final speech advocating adoption, his congressional audience could not have mistaken the reference.[3] All would have understood that the new Privileges or Immunities Clause prohibited state defiance of national laws.

The lessons of Charleston, however, appear to have been forgotten. On May 28, 2002, the United States Supreme Court decided that owners of a cruise ship could not bring an action before the Federal Maritime Commission to complain that the South Carolina Ports Authority violated federal anti-discrimination laws by barring the ship from docking in Charleston Harbor.[4] Five Supreme Court justices relied on principles of state sovereign immunity to bar individuals from enforcing the nation's supreme law in federal administrative proceedings. Reading from the bench, Justice Breyer dissented, asking: "Where does the Constitution contain the principle of law that the Court enunciates?"[5] And answering: "I cannot find the answer to this question in any text, in any tradition, or in any relevant purpose."[6]

Neglect of South Carolinian history contributes to the confusion and conflict that marks contemporary Supreme Court battles over the issue of federalism and state sovereign immunity. Both the majority and the dissenters search in vain for definitive guidance from framers of the Constitution. Writing for the majority, Justice Thomas cited a "relatively barren historical record"[7] and noted that the "relevant history does not provide direct guidance."[8] He then leapt from ratification of the Eleventh Amendment at the end of the eighteenth century to the decision a century later in which the Court abandoned the text of that amendment and chartered its own course on issues of state sovereign immunity.[9] Neither the majority nor the dissenters made any reference to the constitutional reshaping of federalism that took place *within* the nineteenth century. In the pages which follow, I will explain how answers to the justices' questions emerge from a study of that history.

Cherokee Nation crises of the 1830's involved Georgia's defiance of federal law protecting Indian Nations. A potential challenge to Supreme Court authority died with the determination that the Court lacked jurisdiction to resolve the dispute. *See* Cherokee Nation v. Georgia, 30 U.S. 1 (1831). Although both the Alien and Sedition Act and the Cherokee Nation dispute affected subsequent understandings [I've been converted to Judith's terminology in which there are multiple "understandings" of federalism!] of federalism in the United States, neither of those events were as closely tied to development of the Fourteenth Amendment as the episodes that I focus upon in this article.

3. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). *See* discussion *infra* text accompanying note 306.

4. Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002).

5. *Id.* at 772 (Breyer, J., dissenting).

6. *Id.*

7. *Id.* at 755.

8. *Id.* See also Justice Breyer's dissenting opinion, which stated that "total 18th-century silence about state immunity in Article I proceedings would argue against, not in favor of, immunity." *Id.* at 779 (Breyer, J., dissenting).

9. *Id.* (citing Hans v. Louisiana, 134 U.S. 1, 18 (1890)).

I begin my analysis by focusing upon conceptions of sovereignty and federalism that prevailed when the Constitution and the Eleventh Amendment were framed. Those conceptions precluded consideration of state sovereignty within the sphere of congressional authority. In short, recent Supreme Court decisions promoting state sovereignty rely upon a theory of federalism that did not exist when delegates met in Philadelphia. At that time, "everyone" understood the "plan of the convention"[10]: that a transfer of sovereignty over enumerated powers also eliminated state claims to sovereignty related to those subject areas.[11]

Limits in eighteenth century conceptions of sovereignty help to explain the absence of debate over the issue of federal question jurisdiction at the time when Congress promulgated the Eleventh Amendment. A relatively "barren" record, however, stirs confusion without providing definitive answers. The comparative lack of eighteenth century evidence merely provides a starting place for understanding American federalism, because the real battles over this issue were fought in the century that followed. The belief that state sovereignty retains force even within the context of "supreme" federal authority arose as part of a defense of slavery in the 1820s, and framed the classic debates in the 1830s between Massachusetts Senator Daniel Webster and South Carolina Senators John C. Calhoun and Robert Y. Hayne.[12]

By focusing attention on the history of Charleston Harbor, I will explain why Congress sought to bury the pro-slavery conception of federalism, and how recent Supreme Court decisions revived that conception. I will conclude by discussing how nineteenth century lessons apply to development of a credible twenty-first century framework for federalism.

A. *Sovereignty and Federalism*

Before I begin my historical narrative, it will help to distinguish between the terms "sovereignty" and "federalism." Failure to make this distinction results in confusion and may help to explain the underlying incoherence of recent "states' rights" decisions of the Supreme Court.[13] While federalism refers to a division of government operations, the concept of sovereignty refers to final and exclusive power in either an immediate or ultimate sense.[14]

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10. *See* THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

11. *See infra* notes 13-41 and accompanying text for the repeated explanations of Justice Brennan.

12. *See infra* notes 183-240 and accompanying text.

13. *See* Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1622-23 (2002) (explaining that "key differences between the two terms relate to conclusions about ultimate control over policy . . . concepts of federalism and state sovereignty have become confused because the modern champions of states' rights on the Supreme Court themselves often seem confused about which concept they are advocating").

14. *Id.* at 1626-33. The difference between ultimate and immediate sovereignty can be understood in terms of the assumption that, in a constitutional democracy, ultimate sovereignty remains with the people while immediate sovereignty is vested in the government itself.

The Articles of Confederation guaranteed that "each state retains its sovereignty,"[15] but the United States Constitution brought about a fundamental change in this allocation of sovereign power. In marked contrast to the Articles of Confederation, the main body of the Constitution makes no provision for state sovereignty. The Tenth Amendment addressed that "defect" by assuring that "powers not delegated to the United States . . . nor prohibited by it to the States, are reserved to the States respectively, or to the people."[16] The Tenth Amendment, however, merely confirmed a division of authority already implied by the enumeration of powers in Article I of the Constitution. No record from the framing era suggests that the central government lacked any attributes of sovereignty while acting within its delegated powers, and those attributes were understood to include exclusivity, finality and enforcement capability.[17] The idea that states retain elements of sovereignty within the sphere of central authority would have been tantamount to restoring the Articles of Confederation.[18]

Confusion regarding these issues may be traced in part to the broad language used during the ratification debates that some mischaracterize as evidence of an intent to protect state sovereign immunity even in the context of federal question jurisdiction. This discussion covers terrain frequently plowed by participants in Eleventh Amendment debates.[19] Advocates of a broad conception of state

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15. U.S. ARTICLES OF CONFEDERATION art. II.

16. U.S. CONST. amend. X.

17. *See* Gey, *supra* note 13, at 1631 (noting that "a government entity can only be deemed 'sovereign' . . . if that government's power to adopt policies in a given area is exclusive, if those policies are final, and if the government has the authority to enforce the policies"); Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (explaining that at the time when the Constitution was framed, "the *true* sovereign—must necessarily enjoy the essential attributes of indivisible, final and unlimited authority").

18. *See* Mark Strasser, *Chisholm, the Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 647 (2001) (arguing that the *Alden* majority misconstrued history and contradicted Framers' intent).

19. *See, e.g.*, Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (presenting arguments that founders understood courts to lack only personal jurisdiction over sovereign states); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002) (viewing entrenched system of immunities as result of multiple, historical errors); Paul E. McGreal, *Saving Article I from Seminole Tribe: A View from the Federalist Papers*, 55 SMU L. REV. 393 (2002) (arguing for a limited category of cases that meet Hamilton's "plan of the convention" test); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485 (2001) (defending sovereign immunity, even in the Fourteenth Amendment context); Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court's Reformation of the Constitution in Seminole Tribe and Its Progeny*, 45 HOW. L.J. 77 (2001) (arguing that justices have misread or inappropriately deferred to comments of Hamilton, Madison and Marshall); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1118 (2001) (decrying protection of state sovereign immunity as "intellectually unfounded and unjust"); Erwin Chemerinsky, *Symposium: Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 STAN. L. REV. 1202 (2001) (declaiming sovereign immunity as an antiquated concept that lacks historical or functional support); James F. Pfander, *History and State Suability: An "Explanatory Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998) (explaining that the Constitution and the Eleventh Amendment reflected compromise establishing future national fiscal authority and protecting states from liability for pre-existing debts); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989) (supporting congressional authority to abrogate state immunity except where limited by Eleventh Amendment text); *see also* articles cited *infra* note 39.

sovereign immunity cite the language of Alexander Hamilton, James Madison and John Marshall to support their claims for state sovereign immunity even within the context of federal authority.[20] For example, Hamilton wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*"[21] During the Virginia Ratification Convention, Madison argued that "[i]t is not in the power of individuals to call any state into court."[22] During the same debate, Marshall declared: "I hope that no gentleman will think that a state will be called at the bar of the federal court . . . . It is not rational to suppose that the sovereign power should be dragged before a court."[23]

Viewed in isolation, these statements appear to support claims that state sovereign immunity survived the constitutional convention.[24] Hamilton, Madison and Marshall, however, all addressed the context of claims based upon diversity jurisdiction regarding issues over which states had claims to sovereign authority.[25] For example, the remainder of the paragraph in which Hamilton's comment appeared addressed the "privilege [of state governments] of paying their own debts in their own way . . . ."[26] Hamilton concluded that the Constitution should not be construed to authorize "suits against States for the debts they owe."[27] Within the same paragraph, Hamilton explained that the protection of state sovereignty would not apply if "there is a surrender of this immunity in the plan of the convention."[28]

Similarly, when James Madison and John Marshall defended the Constitution during ratification debates by reassuring delegates to the Virginia Convention that states would retain sovereign immunity, they did so only in reference to the Diversity Clause,[29] and by implication, only within a context in which states retained sovereignty. Furthermore, in the context of legitimate federal questions, Madison and Marshall both recognized the final and exclusive nature of central government authority.[30] Madison explained this distinction by noting: "With

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20. *See, e.g.*, Nelson, *supra* note 19, at 1592-93. Development of this argument appears in *Hans v. Louisiana*, 134 U.S. 1, 13-14 (1890).

21. THE FEDERALIST NO. 81, *supra* note 10, at 487.

22. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 1836).

23. *Id.* at 555.

24. *See* Alden v. Maine, 527 U.S. 706, 716-18 (1999).

25. *See* Strasser, *supra* note 18, at 639-40.

26. THE FEDERALIST NO. 81, *supra* note 10, at 488.

27. *Id.*

28. *Id.* at 487.

29. *See* Hans v. Louisiana, 134 U.S. 1, 14 (1890) (citing 3 ELLIOTT'S DEBATES 533, 555 (2d ed. 1836)). For additional explanation, see Strasser, *supra* note 18, at 639-40.

30. Madison explained that national jurisdiction extended to "certain enumerated objects" with the boundary between national and state jurisdiction to be determined by the national government, concluding "in the operation of these powers, it is national, not federal." THE FEDERALIST NO. 39, at 245-46 (James Madison) (Clinton Rossiter ed., 1961). In *Cohens v. Virginia*, 19 U.S. 164 (1821), Chief Justice Marshall recognized a "general proposition" supporting state sovereign immunity, *id.* at 380, but explained that states had surrendered that immunity as to matters where the Constitution transferred sovereignty to the national government. *Id.* at 380-82. *See also* Alden v. Maine, 527 U.S. 706, 762 (1999) (Souter, J., dissenting).

respect to the laws of the Union, it is so necessary and expedient that their judicial power should correspond with the legislative, that it has not been objected to."[31]

In contrast to the positions of Hamilton, Madison and Marshall, Luther Martin sought to preserve state sovereignty throughout the Constitutional Convention, introducing the first draft of a "supremacy clause" that "pointedly failed to specify the supremacy of the federal Constitution over its state counterparts."[32] Martin did not challenge the view of others that ultimate sovereignty was in the people,[33] but argued instead that sovereignty remained with the people of each state rather than with the people of the nation.[34] The Convention's repudiation of Martin's views theoretically preempted any arguments that the new Constitution was a compact among sovereign states rather than the establishment of a new sovereign subject only to the ultimate sovereignty of the nation's people.[35]

Claims for the survival of state sovereign immunity center upon the Supreme Court's decision in *Chisholm v. Georgia*.[36] Both *Chisholm* and the Eleventh Amendment which it spawned, however, reinforce a conception of separate state and federal sovereignty. Georgia's explosive reaction to the Supreme Court's decision in *Chisholm* is best understood in terms of federal encroachment into a sphere of authority—state liability for debts—that did not appear within the enumerated powers of Congress and, therefore, had not been surrendered to the national government. The Eleventh Amendment that grew out of *Chisholm* incorporated this same conception of separate sovereignty.[37] In the years that

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31. 3 ELLIOTT'S DEBATES 532 (2d ed. 1836)).

32. Amar, *supra* note 17, at 1458 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 28-29 (M. Farrand rev. ed. 1937).

33. As noted by Amar, *id.* at 1452, ultimate sovereignty of the *people* seemed to be one principle that "all republicans" and "all federalists" agreed on. Their debate was whether sovereignty rested in the people of the state or the people of the union.

34. *Id.* at 1458.

35. *Id.*

36. 2 U.S. 419 (1793).

37. The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. By taking away diversity jurisdiction, the Eleventh Amendment effectively barred the federal courts from exercising sovereignty over a state within a sphere of continuing final state authority. A majority of current Supreme Court justices argue that the Eleventh Amendment symbolized a more general principle of state sovereign immunity, see Alden v. Maine, 527 U.S. 706, 727-730 (1999), but the decision not to capture that broad principle within the text of the Amendment can not be explained by a simple lack of foresight. During the ratification debates, participants proposed an amendment that "nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 278 n.28 (Brennan, J., dissenting) (citing debates in the New York Convention recorded in 2 ELLIOT'S DEBATES at 409). The choice of narrow language limited to instances of diversity jurisdiction, rather than broad language comparable to that previously proposed, provides evidence of an intelligent choice, refuting claims that a broader principle would have been preferred if the authors had only "thought about" the matter. *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890) (asking if "Congress, when preparing the Eleventh Amendment had appended to it a proviso that nothing therein contained should prevent a State

followed, the Supreme Court's discussion of the relationship between state and federal governments continued to reflect the "assumption that each government's area of sovereignty would be exclusive and absolute."[38]

The only limits to federal sovereignty applicable to the range of responsibilities delegated by the Constitution to the national government were those embodied by the Bill of Rights. Participants in the ratification debates and early Supreme Court justices never provided direct fuel for arguments that states retained elements of sovereignty within the context of delegated central government power.[39] Indeed, the "very chief end" of the Constitution was to displace the ultimate state sovereignty embodied by the Articles of Confederation.[40]

The belief that states retained *sovereign* immunity even in relationship to the duly authorized exercise of federal power only makes sense if one assumes that, when confronted with a challenge to federal law, states retained a preeminent role. Arguments for that perspective have deep historical roots, but they will not be found in the constitutional text, in the ratification debates, in the arguments

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from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States?"); *see also* Amar, *supra* note 17 at 1481 (noting that "If the Eleventh Amendment's framers had intended a broad sovereign immunity principle applicable even in federal question cases, they knew the words").

38. Gey, *supra* note 13, at 1610.

39. Justice Brennan made this point consistently during his tenure on the Court. *See, e.g.*, Parden v. Terminal Ry. of the Ala. State Docks Dept., 377 U.S. 184, 191 (1964) (explaining that "States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce" and quoting Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. 1, 196-97 (1824) that "[t]his power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution"). Note that when the *Parden* decision was rendered, all of the justices appeared to agree that Congress had the authority to impose liability on states when exercising power pursuant to Article I of the Constitution. The dispute among the justices was over the question of whether Congress needed to expressly abrogate state immunity, or whether, as Justice Brennan and the majority concluded, waiver of immunity could be implied. *See Parden*, 377 U.S. at 198 (White, J., dissenting) (explaining that "the decision to impose such conditions is for Congress and not for the courts"). Writing for a plurality of the justices in *Pennsylvania v. Union Gas Co.*, Justice Brennan again explained "that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable." 491 U.S. 1, 19-20 (1989) (concluding that Congress could authorize suits for monetary damages pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980). In his concurring opinion in *Union Gas*, Justice Stevens noted that Brennan's explanations, along with that of "numerous scholars" had "exhaustively and conclusively refuted the contention that the Eleventh Amendment embodies a general grant of sovereign immunity to the States." *Id.* at 24 (Stevens, J., concurring) (*citing* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Amar, *supra* note 17; Carol F. Lee, *Sovereign Immunity and the Eleventh Amendment: The Uses of History*, 18 URB. LAW. 519 (1986); David L. Shapiro, Comment, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61 (1984); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976)).

40. THE GREAT DEBATE: HAYNE AND WEBSTER 205 (Lindsay Swift ed., 1898) (quoting Daniel Webster in his Senate debate with Robert Y. Hayne) [hereinafter GREAT DEBATE].

that gave rise to the Supreme Court decision in *Chisholm v. Georgia*,[41] or in the subsequent promulgation of the Eleventh Amendment. They originated instead in desperate attempts to establish states' rights in order to preserve the institution of slavery. The first detailed arguments that state sovereignty extended over the powers granted to Congress by Article I of the Constitution arose in the 1820s in and around the port of Charleston, South Carolina.

B. Introduction to Charleston

A conception of federalism that recognized state sovereignty within the sphere of enumerated national powers originated in the unique political environment of South Carolina. A brief introduction to the social and political context in which states' rights doctrine originated illuminates this relationship.

Charleston, South Carolina, stood out from other American cities in the 1820's. William Freehling describes it as "the most English city in America" with "enormous wealth and exquisite cultivation" that characterized "the Carolina chivalry."[42] Frederic Bancroft notes that the "leisure or semi-leisure class in South Carolina was relatively much larger than in any other state."[43] The "carriages with coats of arms" and the "exclusive balls,"[44] however, could not hide the rot of slavery from which Charleston society derived its wealth.

The political elite of South Carolina depended upon slavery more than any other state. As described by Manisha Sinha, "slavery lay at the heart of a relatively unified plantation economy presided over by a statewide planter class. A majority of the population were slaves, and in no other state did the nonplantation-belt yeomanry lie more at the fringes of slave society."[45] Lopsided apportionment coupled with requirements that political office holders owned either slaves or substantial amounts of property reinforced a "thoroughly undemocratic" system of government.[46] Carolinian "planter politicians" led their state and guided the unique ideological stance of southern nationalism for which the state became known.[47]

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41. 2 U.S. 419 (1793).

42. WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816-1836, at 1 (1966).

43. FREDERIC BANCROFT, CALHOUN AND THE SOUTH CAROLINA NULLIFICATION MOVEMENT 24 (1966).

44. FREEHLING, *supra* note 42, at 1.

45. MANISHA SINHA, THE COUNTER-REVOLUTION OF SLAVERY: POLITICS AND IDEOLOGY IN ANTEBELLUM SOUTH CAROLINA 9 (2000) (citing RACHEL N. KLEIN, UNIFICATION OF A SLAVE STATE: THE RISE OF THE PLANTER CLASS IN THE SOUTH CAROLINA BACKCOUNTRY 1760-1808 (1990); PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION (1974)).

46. *Id.* at 13. South Carolina retained property and slaveholding qualifications for political office and a malapportioned legislature until Reconstruction. *Id.* at 14.

47. *Id.* at 5.

A series of interwoven events helped shape the political hysteria of antebellum South Carolina. As the slave population grew, so did fears of a slave rebellion. Economic conditions also affected political ideology. A sharp decline in the price of cotton followed the panic of 1819 and contributed to a period of economic stagnation.[48] Politicians who had previously identified themselves as nationalists instead assumed the mantle of states' rights and railed against tariff policies of the national government.[49] Putting these pieces together, the national tariff became portrayed as "an antislavery plot,"[50] and southern slaveholders were told to turn to their states in order to "protect themselves from a hostile majority."[51]

In the pages that follow, I will describe in more detail how events that took place in and around Charleston Harbor helped shape the peculiar nineteenth century conceptions of state sovereignty that became identified as the "South Carolina Doctrine."[52] I have two reasons for focusing on this period of history. First, I intend to illustrate the premise that the contemporary Supreme Court majority's conception of state sovereignty is derived from the pro-slavery arguments of the nineteenth century rather than from the generation of constitutional founders. My second point is that framers of the Fourteenth Amendment explicitly responded to that conception of state sovereignty with the intent of putting it to rest. In other words, understanding the history of Charleston Harbor—and the constitutional response to that history—fills a gap that the Supreme Court left open in its most recent encounter with federalism and the Charleston Port Authority.

II. CONSTITUTIONAL CRISES SURROUNDING CHARLESTON HARBOR

A. *Seamen and Slaves*

Two distinct, but interrelated, concerns motivated South Carolina's drive for asserting state sovereignty. On one hand, the state's leaders feared national interference with the institution of slavery, and on the other hand they feared the slaves themselves. It was fear of their slaves that led to the decision to seize and jail all seamen who arrived in the port of Charleston and who were not of European ancestry. This law, the Negro Seamen's Act of 1822, marked the first clear act of southern defiance of federal law.

48. *Id.* at 16.

49. *Id.*

50. *Id.* at 17 (citing Robert J. Turnbull, whose "Crisis essays" appeared in the *Charleston Mercury*).

51. *Id.* at 18.

52. *See infra* text accompanying notes 198-201.

1. Denmark Vesey and Fears of a Slave Rebellion

An African American named Denmark Vesey, who had purchased his freedom with lottery winnings and subsequently prospered as a carpenter, set off alarm bells in the city of Charleston.[53] Vesey also preached at the newly established Negroes' African Church which grew out of ties to Philadelphia's African Methodist Society.[54] He combined biblical authority with the text of the Declaration of Independence to challenge the institution of slavery.[55]

Together with a cadre of assistants, Vesey made elaborate plans for a slave rebellion in the city of Charleston. At the stroke of midnight on June 16, 1822, six battle units were to lead a surprise attack, taking over unguarded Charleston stables and arsenals and capturing key positions throughout the city.[56] In the days before the planned attack, however, two prospective participants confessed their plan to white authorities.[57] Military companies under the command of then Colonel Robert Y. Hayne went into action, and Vesey and his cohorts suspended their plans.[58] In the months that followed, South Carolina hanged thirty-five African Americans and banished another thirty-seven from the state.[59] It was generally understood, however, that a much larger number of slaves stood ready to participate in the uprising. In subsequent years, "Charleston had to live with the distressing conviction that most rebels remained at large."[60]

2. Harry Elkison and the Rise of State Sovereignty

The South Carolina legislature responded swiftly to the "Vesey Conspiracy," reacting in particular to fears of foreign "agitators."[61] Before the end of 1822, the legislature enacted a law "for the better regulation of free negroes and persons of color, and for other purposes."[62] The law provided for seizure and imprisonment of all "persons of color" who arrived in South Carolina ports, subject to release for departure when their ship's captain had paid for their expenses, and to be sold into slavery if the captain failed to pay for their release.[63] In January of 1823, individuals were seized from both British and American ships,[64] inviting

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53. FREEHLING, *supra* note 42, at 54.

54. *Id.* at 55.

55. *Id.*

56. *Id.* at 57-59.

57. *Id.* at 58-59.

58. *Id.* at 59.

59. *Id.*

60. *Id.* at 60 (noting that some members of the "conspiracy" refused to give the names of their followers).

61. *Id.* at 112.

62. Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366).

63. *Id.*

64. *Id.*

immediate conflict with the federal government.[65] Protests from the British government led to an admonition from Secretary of State John Quincy Adams and to an apparent suspension of the law.[66]

In July 1823, however, the South Carolinians responded again, creating the South Carolina Association, an "extralegal, law-enforcing organization of private citizens" formed for the primary purpose of controlling the black population.[67] The Association demanded enforcement of the seamen law, and authorities seized and imprisoned Harry Elkison, a Jamaican on the British ship Homer sailing from Liverpool.[68] The British consul brought a petition for writ of habeas corpus to United States Supreme Court Justice William Johnson, a Charleston native,[69] who heard the case while riding circuit. Representatives of the South Carolina Association responded on behalf of the state.[70]

In his written opinion, Justice Johnson expressed displeasure with the actions of his native state. He recounted the background of correspondence with the Secretary of State, and his initial confidence that "the [Negro Seaman's] act had been passed hastily, and without due consideration."[71] State authorities had been informed of the "unconstitutionality and injurious effects upon our commerce and foreign nations" caused by the South Carolina law.[72] As described by Justice Johnson, state officers had "shown every disposition to let it sleep,"[73] and new cases were being prosecuted only because of intervention by the South Carolina Association. In Johnson's opinion, the South Carolina law was "altogether irreconcilable with the powers of the general government."[74]

Representatives of the Association openly acknowledged the conflict between the South Carolina law and the power of Congress to regulate commerce. According to one representative, "South Carolina was a sovereign state when she adopted the constitution; a sovereign state cannot surrender a right of vital importance . . . she is herself the sovereign judge."[75] Another lawyer for the Association directly challenged the Founders compromise on sovereignty, exclaiming that "if a dissolution of the Union must be the alternative, he was ready to meet it."[76]

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65. *See* FREEHLING, *supra* note 42 at 112.

66. *Id.*

67. *Id.* at 113.

68. *Elkison*, 8 F. Cas. at 493.

69. Philip M. Hamer, *Great Britain, the United Sates, and the Negro Seaman Acts, 1822-1848*, 1 J. OF S. HIST. 3, 5 (1935).

70. *Elkison*, 8 F. Cas. at 494.

71. *Id.* at 493.

72. *Id.* at 494.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

In rejecting states' rights arguments, Justice Johnson identified two specific federal rights that were at stake. First, he described "navigation of ships" as an element of the "paramount and exclusive right" of Congress to regulate commerce.[77] Second, he referred to an 1815 treaty with Great Britain establishing "reciprocal liberty of commerce" and in particular "the right of navigating their ships in their own way."[78] In Johnson's view, transfer of commerce and treaty powers to the federal government eliminated state authority to enact conflicting legislation.[79]

All of Justice Johnson's remonstrance against the law and actions of his state, however, were rendered dictum by his court's lack of jurisdiction. The Judiciary Act of 1789 only extended habeas corpus jurisdiction to persons held under the authority of the United States. Because Elkison was being held in a state jail by state authorities, Johnson concluded that he had no right to intervene.[80] While passage of the South Carolina statute may have been "tantamount to a declaration of war,"[81] relief would have to come from other federal authorities.

Through passage and implementation of what became known as the "Negro Seamen Act," South Carolina had claimed its sovereignty and asserted its supremacy. Other southern states followed the South Carolina example and enacted similar laws.[82] Appeals to federal authorities for relief were often made, but to no effect. In an 1824 letter to John Quincy Adams, Justice Johnson complained that he had been "obliged to see the Constitution 'trampled on' by men . . . 'as much influenced by the Pleasure of bringing its Functionaries into contempt by exposing their impotence as by any other consideration whatever.'"[83]

British authorities demanded "redress and reparation" and repeal of the "obnoxious law."[84] After conferring with President Monroe, Secretary of State Adams sought the opinion of Attorney General William Wirt who concluded that South Carolina's law conflicted with the Commerce Clause and with the laws and treaties of the United States.[85] In response to a letter from Adams to the Governor of South Carolina, however, the state senate declared that "[t]he duty of the state to guard against insubordination or insurrection . . . is paramount to

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77. *Id.* at 495.

78. *Id.*

79. Johnson expressed these views more explicitly in his concurring opinion in the case of *Gibbons v. Ogden*, 22 U.S. 1, 226 (1824), noting that, upon ratification of the Constitution, state laws regulating interstate commerce "dropped lifeless from their statute books, for want of the sustaining power, that had been relinquished to Congress."

80. *Elkison*, 8 F. Cas. at 496-97.

81. *Id.* at 496.

82. *See* DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 38 (1981) (discussing Georgia law against black seamen).

83. Hamer, *supra* note 69, at 8.

84. *Id.* at 9.

85. *Id.* at 10.

all *laws*, all *treaties*, all *constitutions*."[86] Despite periodic protests, South Carolina continued to imprison black seamen. British authorities made eight subsequent written protests to the federal government, but to no avail.[87]

3. Samuel Hoar and the Conflicts Over Sovereignty

After Andrew Jackson became president, responses from the attorney general's office changed to support the validity of South Carolina's law. Attorney General John M. Berrien, from Georgia, took a states' rights view of the issue, concluding that the Tenth Amendment took precedence over federal commerce clause authority.[88] When Roger Taney took Berrien's place, he approached the issue from a different perspective that foreshadowed his defense of slavery in the case of *Dred Scott*.[89] In a lengthy opinion, Attorney General Taney concluded that:

> The African race in the United States even when free, are everywhere a degraded class .... They were not looked upon as citizens by the contracting parties who formed the Constitution ... [a]nd were not intended to be embraced in any of the provisions of that Constitution but those which point to them in terms not to be mistaken.[90]

Taney also relied upon arguments that states could not have ceded power over such issues to the federal government. "The slave holding states could not have surrendered this power, without bringing upon themselves inevitably the evils of insurrection and rebellion among their slaves ...."[91] Both Berrien and Taney thus foreclosed a federal response to South Carolina's seizure of northern or British seamen with African ancestry.[92]

The public controversy, however, continued. In 1842, as a member of the House of Representatives, John Quincy Adams sponsored resolutions asking the President to release state department documents related to the Negro Seamen Acts. Over protests from a South Carolina delegate, the House passed the

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86. FREEHLING, *supra* note 42, at 115.

87. Hamer, *supra* note 69, at 14.

88. *See* FEHRENBACHER, *supra* note 82, at 38.

89. Dred Scott v. Sandford, 60 U.S. 393 (1857) (concluding that Congress had no power to free slaves in United States territories because African Americans had no claim to constitutional rights).

90. FEHRENBACHER, *supra* note 82, at 38. Fehrenbacher explains that Taney's opinion "had little influence at the time, because for some reason it was not published along with other opinions of the attorney general" but it included "the same harsh racial doctrine that he would proclaim from the bench twenty-five years later." *Id.* at 39.

91. 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE TANEY PERIOD 1836-64, at 380 (1974).

92. Note, however, that Taney conceded the existence of conflicting views on the subject: "Indeed, judging by the past I think it highly probable that the Court will declare the law of South Carolina null and void if contrary to the stipulations in the treaty whenever the subject comes before it." *Id.* at 381.

resolutions, the President complied, and Adams arranged for the publication in Boston of those documents along with Justice Johnson's opinion.[93] Although a House of Representatives Committee supported a declaration that the acts violated the Constitution, the full House of Representatives tabled the issue.[94] When federal authorities failed to act, Massachusetts decided to take up the cause and sent Samuel Hoar as an emissary to Charleston "for the purpose of instituting suits and bringing the question of the constitutionality of the acts before the Supreme Court."[95]

Hoar traveled with his daughter to Charleston and upon arrival presented a statement of purpose to the Governor of South Carolina that was transmitted to the state legislature.[96] That body denounced Hoar as a "dangerous . . . emissary of a foreign Government," and sought his expulsion.[97] Echoing arguments made by former Attorneys General Berrien and Taney, the South Carolina legislature couched its arguments both in the inherent right of the state to exclude "seditious persons" from their territory, and the claim that "free negroes and persons of color" were not United States citizens and therefore not protected by "the privileges and immunities of citizens in the several States."[98] Before Hoar could be formally expelled, the threat of mob violence forced him to flee from Charleston.[99]

Other events of national importance coincided with Samuel Hoar's visit to Charleston. On the same day that the news reported the South Carolina legislative effort to expel Hoar, it also reported John Quincy Adams' effort in Congress to rescind rules of the House of Representatives that excluded petitions for abolition.[100] On the day after Hoar's arrival in Charleston, the South Carolina House of Representatives was asked to call a Convention to be held in Charleston of the "Southern States of this Confederacy."[101] The purpose of the proposed Convention was "to solicit the cooperation of our sister States of the South in the effort to reform the Legislature of the Federal Government on the subject of the Tariff, and avert the progress of *Abolition*."[102] Intermingled issues of slavery, tariffs, federalism, and state sovereignty thus combined to drive the agenda of South Carolina legislators.

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93. Hamer, *supra* note 69, at 21-22.

94. *Id.* at 22.

95. *Id.* Massachusetts also sent an emissary to New Orleans on the same mission, and with the same results. *Id.* at 23.

96. *Id.* at 22.

97. *Id.* at 22-23.

98. STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 238 (Herman V. Ames ed., 1970) [hereinafter STATE DOCUMENTS].

99. *See* Hamer, *supra* note 69 at 23.

100. THE CHARLESTON MERCURY, Dec. 7, 1844, at 2.

101. THE CHARLESTON COURIER, Dec. 2, 1844, at 2.

102. *Id.*

4. *The Legacy of Samuel Hoar's Mission*

The Hoar affair did not simply die a quiet death. In words that typified the southern perspective, editors of the *Charleston Mercury* expressed an expectation that Hoar's experiences were "likely to prove a salutary and durable lesson."[103] The legislatures of Arkansas, Georgia, Mississippi and Alabama all endorsed the actions of South Carolina and condemned those of Massachusetts.[104] Meanwhile, the Massachusetts legislature demanded congressional action to protect her citizens in 1845 and again in 1852, both times to no avail.[105] The British ambassador continued to press the point with the federal executive, but James Buchanan, President Polk's Secretary of State in 1847, asserted that the federal government lacked the power to meet the British demands and warned that continued appeals for equal treatment of black British seamen could lead to annulment of the Commercial Convention of 1815 between the United States and Great Britain.[106]

The harsh treatment of Samuel Hoar galvanized slavery opponents in the northern states. Far from learning their lesson, northern politicians used the Hoar event as a focal point for their complaints against the south, evidenced by Congressional debates which recorded the subsequent life of the incident. In 1849, while debating the future of slavery in the District of Columbia, Congressman Charles Hudson recounted the history of British complaints, Justice Johnson's decision in the *Elkison* case, the treatment of Hoar, and the efforts made by South Carolina to block Supreme Court consideration of the issues.[107] One year later, Senator Henry Clay addressed the Compromise of 1850 by recounting Hoar's experience of being driven out of Charleston,[108] and the venerable senator from Massachusetts, Daniel Webster, referred to Hoar's attempt to address the "unjustifiable, and oppressive" South Carolina legislation.[109] In 1854, while debating terms for the admission of Kansas and Nebraska as new states, the experiences of Hoar were again debated on the floor of Congress.[110] In 1856, Massachusetts Congressman Linus Comins read from a letter drafted by Samuel Hoar about the violent threats made at the time of his expulsion from Charleston.[111]

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103. THE CHARLESTON MERCURY, Dec. 11, 1844, at 2.

104. STATE DOCUMENTS, *supra* note 98, at 237.

105. *Id.* at 238.

106. Hamer, *supra* note 69, at 25.

107. CONG. GLOBE, 30th Cong., 2d Sess. 418-19 (1849).

108. CONG. GLOBE, 31st Cong., 1st Sess. app. 123 (1850).

109. *Id.* at 482.

110. CONG. GLOBE, 33d Cong., 1st Sess. 1154-55 (1854) (remarks of Representative William Boyce, South Carolina Democrat, and Edward Dickinson, Massachusetts Whig); *id.* at app. 1012 (remarks of Senator Charles Sumner, Massachusetts Republican); *id.* at app. 1556 (remarks of Senator Andrew Butler, South Carolina Democrat).

111. CONG. GLOBE, 34th Cong., 1st Sess. 1598 (1856).

After the Civil War, as members of Congress debated constitutional amendments, references to the Hoar affair continued.[112] While advocating promulgation of the Thirteenth Amendment, Congressman William Kelley, a Pennsylvania Republican, noted that "[i]t was slavery that denied the right of asylum to the beautiful and accomplished daughter of Samuel Hoar, of Massachusetts, and expelled that venerable scholar, jurist, and statesman from the limits of South Carolina."[113] Six months later, still debating the same amendment, Congressman John Kasson, Republican from Iowa, noted that "it was slavery which positively refused the agents of what gentlemen are pleased to style a Sovereign State in the Union a hearing in its courts."[114] When Senator John Sherman, an Ohio Republican, addressed the enforcement clause of the Thirteenth Amendment, he did so by explaining that "in the celebrated case of Mr. Hoar," failure to provide federal protection was not for lack of a constitutional right to "exercise the immunity of a citizen of the United States," but rather the lack of an enforcement mechanism. "This Constitutional provision was in effect a dead letter . . . [because] there was no provision in the Constitution by which Congress could enforce this right."[115]

In 1866, in his first speech before Congress in support of an amendment to the Constitution that would protect the "equal rights of every man,"[116] Congressman John Bingham of Ohio denounced the lack of safety for "a citizen of Massachusetts . . . found anywhere in the streets of Charleston."[117] He went on to decry the "utter disregard" of South Carolina for the "privileges and immunities . . . [of] the honored representative of Massachusetts."[118] Debate on the Civil Rights Act of 1866 was peppered with references to Hoar,[119] including the lament of Congressman John Broomall that,

> [s]trange as it may seem, while the Government of the United States has been held competent to protect the lowest menial of the minister of the most obscure prince in Europe, anywhere between the two oceans, and from the Lakes to the Gulf, it had no power to protect the personal liberty of the agent of the State of Massachusetts in the city of Charleston, or enable him to sue in the State courts.[120]

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112. In his chronicle of the Reconstruction Debates, Alfred Avins notes thirteen separate references to the "Hoar incident in South Carolina." *See* THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 748 (Alfred Avins ed., 1967).

113. CONG. GLOBE, 38th Cong., 1st Sess. 2984 (1864).

114. *Id.* at 193 (referring to the "ignominious" treatment of Hoar which would not have occurred "if slavery had not existed").

115. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865).

116. *Id.* at 158.

117. *Id.* at 157.

118. *Id.* at 158.

119. *See, e.g., id.* at 475 (containing remarks of Senator Trumbull).

120. *Id.* at 1263.

In 1871, Senator Frederick Frelinghuysen, a New Jersey Republican, advocated passage of the Ku Klux Klan Act,[121] remnants of which may be found today in 42 U.S.C. § 1983. He noted that prior to the Fourteenth Amendment, "when citizens of Massachusetts went to South Carolina they were imprisoned, and when Judge Hoar went to argue their cause he was mobbed."[122] The "extreme State-rights doctrine denied all national citizenship" to persons like Hoar.[123] The Ku Klux Klan Act would enforce the Fourteenth Amendment protection given to the "privileges of citizens of the United States."[124]

References to congressional debates illustrate a simple point, that Samuel Hoar's treatment when he arrived in Charleston Harbor remained on the minds of northern congressman who crafted the Fourteenth Amendment. The continued notoriety of Hoar and his family undoubtedly fueled attention to the episode. Samuel Hoar had been a member of Congress in the 1830s, and chaired the 1855 State convention forming the Republican Party in Massachusetts.[125] His son George Frisbie Hoar served in Congress from 1869 to 1904, including six terms as chairman of the Senate Judiciary Committee.[126] He has been identified as one of the persons "principally responsible for convincing President Grant to issue the message" that led to enactment of the Ku Klux Klan Act and evolved into 42 U.S.C. § 1983.[127] Another son, Ebenezer Rockwood Hoar, became the United States Attorney General in 1869. One year later, the Senate rejected President Grant's nomination of Rockwood Hoar to the United States Supreme Court. In 1873, Rockwood Hoar also became a member of Congress.[128] Prominent presence of the Hoar sons would have underscored the significance of Samuel Hoar's trip to Charleston for those who shaped civil rights enforcement policies in the 1870s.

Some have treated the Hoar affair as evidence that, when Congress promulgated the Privileges or Immunities Clause of the Fourteenth Amendment, members of Congress had in mind Hoar's freedom of speech and his right to petition the South Carolina government.[129] From that evidence, we might logically deduce that drafters of the Privileges or Immunities Clause intentionally used that language to incorporate the protections of the Bill of Rights. Clearly,

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121. Ch. 22, 17 Stat. 13 (1871).

122. CONG. GLOBE, 42d Cong., 1st Sess. 500 (1871).

123. *Id.*

124. *Id.* at 501.

125. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1996, at 1220 (John D. Treese ed., 1997) [hereinafter BIOGRAPHICAL DIRECTORY].

126. *Id.*

127. David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 544 (1992) (arguing that members of the forty-second Congress intended to give priority to individual rights over immunity claims).

128. BIOGRAPHICAL DIRECTORY, *supra* note 125, at 1220.

129. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 261, 301 (1998).

however, the Hoar affair was not *just* about free speech. The events of 1842 also reflected underlying issues of federalism, and in particular the perceived lack of federal power to assure that individuals could initiate actions to enforce federal law against recalcitrant states.[130] Hoar's trip came about in response to South Carolina's laws which defied Commerce Clause and Treaty Clause protections of the right to navigate freely in and out of Charleston Harbor. Hoar planned to argue that *all* United States citizens were entitled to the protection of the Privileges and Immunities Clause of Article IV, but South Carolina authorities blocked him from being able to raise those arguments.[131] As Senator Sherman explained, the incident showed the need for effective enforcement of federal rights against states. Individuals lacked the ability to enforce federal law against state authorities; as understood at the time, the Fourteenth Amendment Privileges or Immunities Clause assured that such problems would never arise again.[132]

B. The Nullification Crisis

The conflict over black seamen provides one thread leading from Charleston Harbor to promulgation of the Fourteenth Amendment. A second thread, intertwined with the first, wove around tariff disputes between the North and South, and in a fundamental sense again involved southern efforts to preserve the institution of slavery.

On November 24, 1832, a South Carolina convention adopted by overwhelming vote an Ordinance of Nullification, declaring federal tariff laws "utterly null and void."[133] In ominous and ironic terms, the convention delegates declared "we would infinitely prefer that the territory of the state should be the cemetery of freemen than the habitation of slaves."[134] Three days later, Governor Hamilton called for a complete revision of the state's militia laws and asked the legislature to raise an army of 12,000 volunteers.[135]

In Washington, D.C., an enraged President Andrew Jackson swore to enforce the tariff laws and to crush the nullification movement, using force if necessary.[136] He threatened to hang the leading nullifiers,[137] directing such comments with particular force against his own Vice President, John C.

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130. More than two decades later, Congressman John Bingham repeatedly emphasized the need for federal authority to enforce its laws. *See infra* text accompanying notes 285-306.

131. *See supra* text accompanying notes 95-99.

132. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 71-73 (1993) (noting John Bingham's repeated references to the need for federal authority to enforce, "at a minimum," the Bill of Rights).

133. RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS 75-76 (1987).

134. *Id.* at 75.

135. *Id.* at 76.

136. *Id.* at 77.

137. *Id.*

Calhoun.[138] As Jackson fortified the federal troops in Charleston Harbor,[139] Daniel Webster wrote: "I am prepared any day to hear that matters have come to blows in Charleston . . . . I have not the slightest doubt, that both General Jackson and Governor Hamilton Jr. fully expect a decision by the sword."[140]

Some scholars have viewed the nullification dispute as a discrete incident in United States history limited to economic differences over imports and exports. Southern opposition to national tariffs has been depicted as part of an emerging republican ideology reflecting a "love of liberty and independence."[141] In a thorough account of the intellectual history of antebellum South Carolina, however, Manisha Sinha demonstrates that the nullification doctrine was rooted in a "separatist ideology based on the values of slavery and a rigorous critique of democracy, rather than democratic and republican principles."[142] This separatist ideology, in turn, provided support for preservation of state sovereignty even in the face of countervailing constitutional rights and federal laws.

1. Background to the Tariff Conflict

James Madison introduced the first United States Tariff Act which Congress enacted in 1789.[143] From the outset, tariff policies provoked sectional conflict. Already in 1790, a free trade proponent warned that protective tariffs would lead to "dissolution of the Union."[144] Subsequent tariffs increased in amount and added to the range of protected products, including woolens, iron, lead, glass, hemp and salt.[145] From a southern perspective, tariff policies protected northern industry while exposing the south to the prospect of retaliation from foreign competitors.[146] Furthermore, at the same time that the cost of consumer goods went up, the price of cotton fell.[147] When economic stagnation hit South Carolina in the 1820's, national tariff policies became a ready target to blame for the miseries of the cotton farmers.[148] The tariff of 1828, condemned as an "abomination," raised rates toward 50 percent of the value of imported goods.[149]

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138. *Id.* at 78.

139. *Id.* at 79.

140. *Id.* at 78-79.

141. SINHA, *supra* note 45, at 3. As an example, Sinha cites Lacy Ford's depiction of white South Carolinians as favoring "not the planter ideal or the slaveholding ideal, but the 'old country republican' ideal of personal independence, given peculiar fortification by the use of black slaves as a mud-sill class." *Id.* (quoting LACY K. FORD, ORIGINS OF SOUTHERN RADICALISM 372 (1988)).

142. *Id.* at 2-3.

143. LOUIS P. MASUR, 1831: YEAR OF ECLIPSE 145 (2001).

144. *Id.* (quoting Letter from James Martin, Jr., to Willie P. Mangum (Dec. 27, 1831).

145. *Id.*

146. *Id.*

147. *Id.*

148. SINHA, *supra* note 45, at 16.

149. FREEHLING, *supra* note 42, at 94 (quoting Pierce Butler).

John C. Calhoun began his political career as a nationalist and a "war hawk."[150] In 1816, he voted in favor of the national tariff, and in 1825 he opposed the faction in the South Carolina legislature that passed resolutions declaring national tariff laws unconstitutional.[151] At the time, George McDuffie, a Calhoun protégé declared the doctrine of "states' rights" a "refuge of ambitious and less talented men who could not make their mark in national politics."[152] Shortly thereafter, however, Calhoun's views shifted.

Tariff policies became characterized as "an unholy bargain struck between the North and the West at the cost of the South.[153] In 1827, Robert J. Turnbull published a series of essays entitled "The Crisis" in which he linked national tariff policy to slavery, arguing that the same constitutional clauses used to justify tariff laws could also be relied upon to abolish slavery.[154] Turnbull argued that southern slaveholders needed to turn to their states in order to protect themselves from a hostile majority.[155] Sectionalism, slavery and anti-tariff arguments became closely linked.[156]

By 1827, Calhoun had contrived "the idea of a state 'negative' as a way to '*compel the majority*' to redress the grievances of the slaveholding minority."[157] He identified the concept of state sovereignty and the power to nullify federal law as a solution to the problem of a sectional majority dominating a sectional minority.[158]

Calhoun's new doctrine departed from prior states' rights dogma in two significant ways. First, traditional theory had been based upon a conception of powers divided between state and federal governments with each sovereign within its sphere.[159] Calhoun and the nullifiers introduced the concept that sovereign states had authority to check the federal government, thereby breaching the understanding of national preeminence with respect to enumerated powers.[160] Second, because constitutional text did not support the nullification doctrine, it violated the "strict construction" rule that had been previously accepted as a cardinal tenet of states' rights advocates.[161]

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150. SINHA, *supra* note 45, at 16.

151. *Id.*

152. *Id.* (citing statements of George McDuffie).

153. *Id.* at 17 (citing the contentions of David J. McCord).

154. *Id.* at 18; FREEHLING, *supra* note 42, at 127-28.

155. SINHA, *supra* note 45, at 18; FREEHLING, *supra* note 42, at 127.

156. SINHA, *supra* note 45, at 18.

157. *Id.* at 20.

158. *Id.* at 22.

159. *Id.* at 24.

160. *Id.*

161. *Id.* (noting that John Randolph "opposed nullification as unrepublican and as going far beyond the written word of the Constitution").

Advocates tried to tie the nascent nullification doctrine to early writings of Thomas Jefferson and James Madison.[162] The term "nullification" had appeared in the *Kentucky Resolution of 1798* in the context of a response to the Alien and Sedition Act.[163] Jefferson, who had secretly authored early drafts of the *Kentucky Resolution*, used the term "nullification" as part of an appeal to other states to join "in declaring these acts void and of no force."[164]

The notion that states could nullify federal law or, as described in the *Virginia Resolution*, "interpose" themselves to arrest the "progress of evil,"[165] contained elements of claims to state sovereignty echoed by the South Carolina nullifiers. But significant factors distinguish Jefferson's words in the *Kentucky Resolution* from the doctrine of John C. Calhoun. An emphasis upon strict construction in both the *Kentucky* and *Virginia Resolutions*[166] was consistent with their attack on the Alien and Sedition Acts which, in addition to being beyond the delegated powers of Congress, were also "expressly and positively forbidden" by the First Amendment.[167] It has also been pointed out that Jefferson "never did quite say whether a single state could properly judge the constitutionality of a federal law [or] whether, if so, such action could be taken by the legislature."[168] He at least implied that the appropriate course for states that opposed federal law, upon failing to secure a reversal through political means, was secession; states could not nullify federal law while remaining in the Union.[169]

Madison, who was still living at the time of the nullification crisis, actively opposed Calhoun's reliance upon the *Kentucky* and *Virginia Resolutions*.[170] He had previously expressed fear that legislators would miss the distinction between the "exercise of unconstitutional power" and the "abuse of constitutional power."[171] The Alien and Sedition Act exemplified the former, South Carolina's objection to federal tariffs the latter. Madison viewed state claims to power over elements of interstate commerce as tantamount to a return to the bad old days of the *Articles of Confederation*, when each state asserted sovereign rights to independence from the central government.[172] Directly addressing the nullification debate, Madison explained that "[a] supremacy in the Constitution and laws of the Union, without a

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162. FREDERICK BANCROFT, CALHOUN AND THE SOUTH CAROLINA NULLIFICATION MOVEMENT 175-90 (1966).

163. *Id.* at 77.

164. *Id.* at 79.

165. LANCE BANNING, JEFFERSON AND MADISON: THREE CONVERSATIONS FROM THE FOUNDING 215 (1995).

166. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 719 (1993).

167. *Id.* at 720.

168. *Id.* at 721.

169. *Id.*

170. 6 IRVING BRANT, JAMES MADISON COMMANDER IN CHIEF 1812-1836, at 468-500 (1961).

171. *Id.* at 470.

172. *Id.* Madison also claimed, from the outset, to have rejected nullification on grounds that safeguards for minorities should not be allowed to undermine the fundamental principle of majority rule. SINHA, *supra* note 45, at 25.

supremacy in the exposition and execution of them, would be as much a mockery as a scabbard put into the hands of a soldier without a sword in it."[173]

Calhoun and his cohorts faced another, more basic problem with relying upon the *Kentucky* and *Virginia Resolutions* as a basis for asserting state authority to nullify federal law. In spite of the stature of Jefferson and Madison, other states had soundly rebuked their calls to action. No states followed the Kentucky and Virginia leads. Ten states passed their own resolutions emphatically repudiating those from Kentucky and Virginia.[174] As explained in Vermont's response to Virginia, "It belongs not to state legislatures to decide on the constitutionality of laws made by the general government; this power being exclusively vested in the judiciary courts of the Union."[175]

Calhoun developed his ideas about nullification at the same time that he served in the office of Vice President, beginning in 1825 in the administration of John Quincy Adams and continuing four years later in Andrew Jackson's first administration. His own political ambitions led him to attempt to appear above the fray on issues that deeply divided the nation. In 1827, however, he was forced by his position as Vice President to cast the deciding vote against the woolen tariff bill.[176] Calhoun gradually assumed a stronger ideological role. In 1828, he secretly wrote the *South Carolina Exposition and Protest* which became recognized as the first public recognition of the "nullification doctrine."[177] The *Exposition* criticized the 1828 Tariff Act as "unconstitutional, unequal and oppressive, and calculated to corrupt the public virtue and destroy the liberty of the country."[178] To correct that abuse, Calhoun argued that delegation of limited powers to the national government "clearly implies a veto or control, within its limits, on the action of the General Government, on contested points of authority."[179] A state declaration that an act of Congress was null or void would bind the citizens of the State and the General Government itself.[180]

While Calhoun initially guarded the secrecy of his authorship of the *Exposition*, there could be little question that his strong ideological views would eventually clash with those of President Jackson. Jackson had been an advocate of states' rights in more traditional terms. He abhorred nullification as both anti-democratic and anti-Union.[181] By 1830, Jackson and Calhoun had openly split, with Jackson suspecting his vice-president of treasonous behavior.[182]

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173. *Id.* at 489 (refuting contentions of Senator Hayne's that the Virginia Resolutions sustained South Carolina's doctrine).

174. ELKINS & MCKITRICK, *supra* note 166, at 720.

175. *Id.*

176. BANCROFT, *supra* note 162, at 35.

177. *Id.* at 39.

178. *Id.* at 40.

179. *Id.* at 42.

180. *Id.* at 43.

181. *Id.* at 27.

182. *Id.*

2. *Debating Nullification: To the Brink of War and Back*

The "Great Debate"[183] between Robert Y. Hayne and Daniel Webster began in response to a simple proposal for management of federal land.[184] By the time both Hayne and Webster had delivered their second speech, however, it had become a "spectacle . . . of epic proportions."[185] Hayne, who rose to the Senate shortly after commanding the troops who quashed the incipient rebellion of Denmark Vesey in Charleston,[186] has been described as "youthful and debonair."[187] Daniel Webster responded "like a 'great canon loaded to the lips.'"[188] Substance of the debates ranged from verbal jousting about Banquo's ghost,[189] to questions about whether South Carolina or Massachusetts had been most loyal to the Union,[190] to battles over slavery, tariffs, and state sovereign rights to nullify federal legislation.

On the issue of slavery, Webster exclaimed the "great wisdom and foresight" of the Ordinance of 1787 which barred slavery northwest of the Ohio River,[191] pronounced "domestic slavery as one of the greatest evils, both moral and political,"[192] but disclaimed any interest in that "matter of domestic policy left with the States themselves . . . ."[193] Hayne, on the other hand, blamed others for instigating the slave trade, leaving southerners to "fulfill the high trust which had devolved upon us as the owners of slaves."[194] He contrasted southern treatment of slaves with the plight of African Americans in the north: "[T]here does not exist, on the face of the whole earth, a population so poor, so wretched, so vile, so loathsome, so utterly destitute of all the comforts, conveniences, and decencies of life, as the unfortunate blacks of Philadelphia."[195] Hayne's defense included the claim that slavery was "now contributing largely to the wealth and prosperity of every state in this Union . . . ."[196]

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183. THE GREAT DEBATE BETWEEN ROBERT YOUNG HAYNE OF SOUTH CAROLINA AND DANIEL WEBSTER OF MASSACHUSETTS (Lindsay Swift ed., 1898).

184. *Id.* at 7. The resolution by Senator Samuel Foote of Connecticut would have established a minimum price for the sale of public land. *Id.*

185. FREEHLING, *supra* note 42, at 183.

186. *See* discussion *supra* text accompanying notes 56-60.

187. FREEHLING, *supra* note 42, at 184.

188. *Id.* (quoting RALPH WALDO EMERSON, JOURNALS . . . , VII, 87 (E.W. Emerson & W.E. Forbes eds., 1909-14)).

189. Hayne: "Has the ghost of the murdered Coalition come back, like the ghost of Banquo, to 'sear the eye-balls' of the gentleman . . . ?" 6 REG. DEB. 43 (1830). Webster: "It was not, I think, the friends, but the enemies of the murdered Banquo, at whose bidding his spirit would not *down*." *Id.* at 60 (emphasis added).

190. *Id.* at 43-44, 60-61.

191. *Id.* at 61.

192. *Id.*

193. *Id.*

194. *Id.* at 46.

195. *Id.* at 47.

196. *Id.*

In his speeches, Hayne limited references to the term "nullification" to a quotation from Thomas Jefferson and the Kentucky Resolution.[197] Instead of repeating that word, he euphemistically referred to the "South Carolina doctrine,"[198] describing the Constitution as a "compact" among the states, and claiming that the states were thereby "duty bound" to "arrest . . . the progress of the evil . . . in case of a deliberate, palpable, and dangerous exercise of . . . powers not granted by the said compact."[199] Adding an ominous note to the proceedings, and foreshadowing the seriousness of the issues, Hayne defended South Carolina's "firm, manly, and steady resistance against usurpation."[200] Declaring the state's "uniform, zealous, ardent, and uncalculating devotion to the Union," Hayne nevertheless added that "[i]f the gentleman provokes the war, he shall have war . . . . I will not stop at the border; I will carry the war into the enemy's territory, and not consent to lay down my arms until I shall have obtained 'indemnity for the past and security for the future.'"[201]

Webster's response to Hayne is among the most famous of all defenses of national supremacy. Looking back to the problems of Confederation, Webster claimed that "[i]t was the very object of the constitution to create unity of interests to the extent of the powers of the General Government . . . . [T]he very chief end, the main design, for which the whole Constitution was framed and adopted was to establish a government that should not be obliged to act through State agency, or depend on State opinion and State discretion."[202] He declared that "[n]o State law is to be valid which comes in conflict with the constitution, or any law of the United States,"[203] and defended the people's choice of the judicial branch of the general government as repository of the power to construe the Constitution.[204] Drawing upon his oratorical skills, Webster concluded his second speech with the "sentiment, dear to every true American heart—Liberty *and* Union, now and forever, one and inseparable!"[205] Adding to the drama, Vice President John C. Calhoun chaired the proceedings and "angrily called [the Senate] to order" at the conclusion of Webster's speech.[206]

The Hayne-Webster debate helped to set the stage for proceedings that followed. In South Carolina, the 1830 election cycle began with a clear division between "radicals," who were determined to nullify national tariff laws, and "moderates," who opposed making a radical break from the union.[207] By the

197. *Id.* at 57.
198. *Id.* at 56.
199. *Id.*
200. *Id.* at 58.
201. *Id.* at 50.
202. *Id.* at 64, 77.
203. *Id.* at 78.
204. *Id.*
205. *Id.* at 80.
206. THE GREAT DEBATE, *supra* note 183, at 17.
207. FREEHLING, *supra* note 42, at 205.

October legislative elections, however, the issue had become obscured by divisions among alternative courses of action, and no clear direction for the state was determined by the outcome.[208] By the end of the year, nullifiers in the new legislature succeeded in calling for a convention to determine a course of action for the state.[209]

In 1831, the nullification debate intensified.[210] Calhoun, who harbored presidential ambitions, was forced to take a stand on the issue and publicly announced his support for nullification in his *Fort Hill Letter*.[211] While "unionists" ridiculed the "absurd remedy" of the "Calhounites,"[212] the pro-nullification movement gained momentum throughout South Carolina.[213]

Nullifiers made an effort to challenge the constitutionality of the federal tariff in court. Their initial attempt failed when the federal district attorney for South Carolina chose to resign rather than prosecute the individuals who had refused to pay the "prohibitive" tariff on a bale of cotton.[214] When the case eventually went to trial, the judge prevented the jury from hearing constitutional arguments, ordered that their role was limited to deciding issues of fact, leading to a jury verdict that defendants who initiated the "test case" owed the tariff.[215] The South Carolina legislature then passed a law allowing juries to hear constitutional questions, but did so knowing that their action would have little effect in federal court.[216]

In the summer of 1832, Congress enacted modest tariff reform, which President Jackson thought would remove the grievances of the nullifiers.[217] Calhoun, on the other hand, viewed the weak reforms as proof that adequate relief would not be forthcoming, writing: "The hope of the country now rests on our gallant little state. Let every Carolinian do his duty."[218]

Rising fears of a slave rebellion, fueled by Nat Turner's uprising in Virginia, added to the agitation felt by South Carolinians in 1832.[219] On July fourth of that year, celebrations were held to "kick off" the final phase of the campaign for nullification.[220] On the same day, a slave cook in Sumter poisoned a feast,

208. *Id.* at 213.

209. *Id.* at 218.

210. *Id.* at 225.

211. *Id.*

212. *Id.* at 242-43.

213. *Id.* at 244.

214. *Id.* at 245 (noting that District Attorney Edward Frost chose to resign rather than prosecute importers who refused to pay duties that Frost considered "unconstitutional and oppressive").

215. *Id.* at 246.

216. *Id.*

217. *Id.* at 248.

218. *Id.* at 249 (quoting a letter from Calhoun to Thompson).

219. *Id.* at 251.

220. *Id.* at 252.

"killing several celebrants and leaving two hundred others desperately ill."[221] As the 1832 elections approached, armed mobs regularly roamed Charleston; nullifiers and unionists barely escaped all-out battles in the streets.[222] Prompted by the combination of reactions to tariffs and slavery agitation, nullifiers swept the elections and gained a commanding two-thirds majority in the state legislature.[223]

The new South Carolina legislature met in October 1832 and quickly voted to form a convention to deal with the issue of nullification.[224] The Convention adopted an ordinance that "declared the [federal] tariffs of 1828 and 1832 unconstitutional, and null and void in South Carolina."[225] Senator Hayne joined the Convention and helped to convince the delegates to include a declaration for secession in the event that the federal government attempted to force compliance with its tariffs.[226] Nullifiers also added a "test oath" to the ordinance requiring office holders to uphold the ordinance itself and all legislation enacted to sustain it.[227] Immediately after the Convention, when the state legislature reconvened, Senator Hayne resigned to become the new Governor of South Carolina; Calhoun resigned as Vice President and was elected as the new senator from South Carolina.[228]

In the weeks following the South Carolina Convention, the two sides moved steadily towards confrontation. President Jackson transferred military companies to the islands in Charleston Harbor under the command of General Winfield Scott.[229] Governor Hayne rallied his supporters with a "full-blown statement of state supremacy."[230] On December 10, 1832, Jackson made his famous *Nullification Proclamation*, declaring "the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, . . . and destructive of the great object for which it was formed."[231] The South Carolina legislature responded with an order to Governor Hayne to issue a counter-proclamation, and Hayne again made the case for nullification.[232] The

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221. *Id.* at 250.

222. *Id.* at 253.

223. *Id.* at 254-55 (noting that among leading nullifiers, "the slavery issue was always in the background and often at the center of their concern").

224. *Id.* at 260.

225. *Id.* at 263.

226. *Id.* at 262.

227. *Id.* at 263.

228. *Id.* at 264.

229. *Id.* at 265.

230. *Id.* at 264.

231. *Id.* at 267 (emphasis omitted).

232. ELLIS, *supra* note 133, at 95; FREEHLING, *supra* note 42, at 268.

governor also issued a proclamation seeking volunteers to defend the state, and more than 25,000 joined an untrained, but enthusiastic, volunteer army.[233]

Both sides in the dispute attempted to maneuver so as to avoid being identified as the aggressor. The state devised a complicated scheme that would have forced the Customs Collector to forego federal duties or risk seizure of his personal property in slaves.[234] The federal government countered by moving the customs-house onto the federal islands in Charleston Harbor.[235] In what became known as the *Force Bill*, Congress authorized President Jackson to enforce the customs collection, protect the customs collector's property, establish federal jails if necessary to house Carolinians who violated federal laws, and allow immediate use of the national army and navy.[236]

The *Force Bill* triggered yet another debating spectacle on the floor of the United States Senate. John C. Calhoun, the new South Carolina Senator, now represented the honor and ideology of his state. Daniel Webster again stated the case for national supremacy and responded to Calhoun: "Nullification, if successful, arrests the power of the law, absolves citizens from their duty, subverts the foundation both of protection and obedience . . . and elevates another authority to supreme command . . . . [W]e cannot have one rule or one law for South Carolina, and another for other States."[237] He explained "that, as to certain purposes, the people of the United States are one people. They are one in making war, and one in making peace; they are one in regulating commerce, and one in laying duties of impost."[238] John C. Calhoun countered with arguments for ultimate state authority: "Ours has every attribute which belongs to a federative system . . . . It is founded on compact; it is formed by sovereign communities, and is binding between them . . . . The sovereignty is in the parts and not the whole."[239] Webster replied: "[T]he constitution was *not a compact between States*, but a constitution, established by the people, with a Government founded on popular election, and directly responsible to the people themselves."[240]

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233. FREEHLING, *supra* note 42, at 275.

234. *Id.* at 272. Note, however, that while the South Carolina Convention had insisted on mandatory prohibition of tariff payments, the legislature backed away from immediate confrontation by authorizing voluntary refusal to pay duties. *Id.* at 274.

235. *Id.* at 281.

236. *Id.* at 285.

237. 9 REG. DEB. 560 (1833).

238. *Id.* at 567.

239. MARGARET L. COIT, JOHN C. CALHOUN: AMERICAN PORTRAIT 253 (1950). To dispel doubts that Calhoun recognized the tie between his comments on nullification and the underlying goal of preserving the institution of slavery, note that his speech before the Senate concluded by warning of the need to protect "a domestic institution" that "exists in every Southern State," counseling southern senators "to see the danger which must one day come, if not vigilantly watched." 9 REG. DEB. 774 (1833).

240. 9 REG. DEB. 775 (1833).

In February of 1833, the sound and fury of the confrontation over nullification began to subside. Both sides had rushed to the brink of war, but, as illustrated by their avoidance maneuvers, neither wanted to be viewed as the military aggressor, and neither relished actual military confrontation.

Senator Henry Clay emerged as the "Great Compromiser"[241] by fashioning a tariff reform bill which reduced protectionism beyond the limited reductions of 1832, but over a long period of time and decidedly less than had been demanded as a minimum reform by the South Carolina Nullification Convention.[242] Calhoun immediately joined Clay in support of the compromise.[243] President Jackson emerged as the apparent "winner" of the confrontation. By securing passage of both the Force Bill and the Tariff Compromise, he achieved the "solution" to the conflict that he had long been advocating.[244]

In March, South Carolina opened a new Convention. Delegates accepted the federal compromise, symbolically "nullified" the Force Bill, and repealed their prior nullification ordinance.[245] Although they had not established a "right" to nullify federal law, they had nevertheless made effective use of the threat of nullification to win significant legislative reform. Perhaps most important, Calhoun, Hayne and their followers had established a rival vision of federalism in which state sovereignty survived the "plan of the convention" as a significant factor that could be used to check the enumerated powers of Congress.

C. Secession, Civil War and the Fourteenth Amendment

Although the Compromise of 1833 could be viewed as a triumph for nationalism, with successful recognition of President Jackson's anti-nullification doctrine, the broader conflict between states' rights and national authority did not disappear. While tariff disputes receded from the public agenda, slavery remained as the underlying division between the North and South. Perceived threats to the institution of slavery continued to motivate South Carolina politicians who feared national domination. The new, "pro-slavery" brand of federalism thus continued to stir the South.

1. South Carolina Secession

South Carolina led the way to secession from the United States. The "nullification crisis" and conflict over the arrest of black seamen had established the groundwork. By 1850, public opinion in South Carolina favored secession, but political leaders were divided over questions of whether to proceed

241. FREEHLING, *supra* note 42, at 292.
242. *Id.* at 293.
243. *Id.* at 292.
244. *Id.* at 293-94.
245. *Id.* at 296.

independently or wait for other states to join the cause.[246] In 1850, the South Carolina legislature issued a call for a convention of slave-holding states, authorized the governor to call a state convention, and appropriated funds for development of the state military defense.[247] A state convention in 1852 adopted an *Ordinance to declare the right of this State to secede from the Federal Union*,[248] but the secession movement temporarily stalled, divided between a majority advocating cooperation with other states and a minority favoring independent secession.[249]

In subsequent years, political battles over slavery and secession continued. In 1854, the Kansas-Nebraska Act became a focal point for political debate and state resolutions and counter-resolutions regarding issues of slavery and states' rights.[250] Indicative of the tenor of the time, when Massachusetts Senator Charles Sumner delivered an impassioned attack on proslavery activities in Kansas, Representative Preston Brooks of South Carolina physically assaulted him.[251] A committee of the House recommended expulsion of Brooks, but the motion failed to secure the necessary two-thirds vote in favor, and citizens of South Carolina subsequently re-elected Brooks by an overwhelming vote.[252]

On March 6, 1857, the Supreme Court decided the case of *Dred Scott v. Sandford*.[253] Chief Justice Taney's opinion for the Court echoed the views he had expressed as Attorney General when asked to address the rights of black seamen entering Charleston Harbor.[254] The Chief Justice reasoned that, given the deeply embedded racism that characterized the legal and constitutional history of this nation,[255] descendants of slaves could not be considered citizens of the United States, and were therefore not entitled to the privileges and immunities of citizenship.[256] Furthermore, although the federal government exercised "supreme authority within the scope of the powers granted to it,"[257] it had no power to provide freedom for slaves in the territories that it governed. Chief Justice Taney concluded that "the act of Congress which prohibited a citizen from holding and

246. STATE DOCUMENTS, *supra* note 98, at 272.

247. *Id.* at 272-73.

248. *Id.* at 273-74.

249. *Id.*

250. *See id.* at 280-94.

251. *Id.* at 293.

252. *Id.*

253. 60 U.S. 393 (1857).

254. *See* discussion *supra* notes 89-92 and accompanying text.

255. *See Dred Scott*, 60 U.S. at 407-26. Chief Justice Taney explains that "[t]he legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed. . . ." *Id.* at 416.

256. *Id.* at 422-23.

257. *Id.* at 448.

owning property of this kind in the territory of the United States . . . is not warranted by the Constitution, and is therefore void."[258]

The *Dred Scott* decision failed to quell political dissent. In the north, Wisconsin asserted its authority to nullify the Fugitive Slave Law.[259] In South Carolina and several other southern states, a movement began to re-institute the slave trade.[260] When federal authorities captured the slave ship *Echo* and brought it to Charleston Harbor, a judge rejected claims for freedom for the human cargo, finding that the *Dred Scott* case had established "a perpetual and impassable barrier [between the] white race and the negro."[261] In 1859, a jury refused to convict the crew of the slave ship *Wanderer*, illustrating "slave traders' success in the Lower South at emasculating the federal laws against the African slave trade."[262] When that ship's owner was brought to trial, South Carolina Judge Andrew G. Magrath "used the opportunity to proclaim the judicial nullification of the 1820 African slave trade piracy law."[263]

When John Brown raided Harper's Ferry in 1859, Governor Gist of South Carolina called for a conference of southern states,[264] and the South Carolina legislature reasserted its "right to secede."[265] On October 12, 1860, after initiating secret correspondence with other southern state governors, Governor Gist called a special session of the South Carolina legislature.[266] After news of President Lincoln's election victory, the legislature called for a convention of the "People of the State."[267] On December 20, 1860, this convention adopted an "ordinance of secession,"[268] and four days later issued *A Declaration of Causes which Induced her Secession from the Federal Union*.[269]

2. *President Lincoln, Charleston Harbor and the Civil War*

When President Lincoln assumed office, only two federal forts of significance remained in the South: Fort Pickens in Pensacola, Florida, and Fort Sumter in Charleston.[270] One day after his inauguration, Lincoln received a message from the commanding officer at Fort Sumter that in order to defend the

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258. *Id.* at 452.

259. *See* STATE DOCUMENTS, *supra* note 98, at 303-05.

260. *Id.* at 305. *See also* SINHA, *supra* note 45, at 149 (describing South Carolina as the "storm-center" of the movement to reopen the African slave trade).

261. SINHA, *supra* note 45, at 156.

262. *Id.* at 168.

263. *Id.* at 170.

264. STATE DOCUMENTS, *supra* note 98, at 306.

265. *Id.* at 309.

266. *Id.* at 310.

267. *Id.*

268. *Id.*

269. *Id.*

270. PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 59 (1994).

federal enclave in Charleston Harbor he needed more men and a replenishment of supplies.[271] As Lincoln considered the request, southern states consolidated the Confederacy. Union forts, ships and money had been peacefully transferred to the Confederate government.[272] Both Secretary of State Seward and General Scott advised Lincoln to abandon Fort Sumter, arguing that all Union support had disappeared from Charleston.[273] Lincoln rejected their advice and sent supplies to the Fort along with instructions for its defense.[274]

South Carolina troops fired the first shots of the Civil War in Charleston Harbor, and quickly won control over Fort Sumter. In the four years of bloodshed that followed, 620,000 were killed and another half-million were wounded.[275]

The Civil War brought about fundamental changes in constitutional values. President Lincoln anticipated those changes in his *Gettysburg Address*, which began by declaring: "Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal." George Fletcher treats those words as a preamble to the amended constitution that emerged from the War, with emphasis placed upon the "interrelated and mutually supportive" values of "nationhood, equality and democracy."[276] In Fletcher's terms, those values "became the guiding forces of American politics" and "provided the bedrock for the new constitutional order erected in the Thirteenth, Fourteenth, and Fifteenth Amendments."[277] As Fletcher notes, the "least appreciated" of these guiding principles is the "commitment to nationhood."[278]

Lincoln's sense of nationhood carried with it a response to the people of South Carolina. State governments were not free to defy federal law. States could not bar American citizens from the use of their ports, nor could they threaten to punish their citizens for complying with national tariff laws. When the war ended, a new sense of nationhood became grounded in the Constitution.[279] In particular, the Fourteenth Amendment's Privileges or Immunities Clause established the preeminent status of United States citizenship.

3. *John Bingham and the Fourteenth Amendment*

Conflicting views surround the legacy of Congressman John Bingham, principal author of Section One of the Fourteenth Amendment. In an influential

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271. *Id.* at 57-58.

272. *Id.* at 61.

273. *Id.* at 62-63.

274. *Id.* at 64-65.

275. *Id.* at 66.

276. GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 56 (2001).

277. *Id.* at 57.

278. *Id.*

279. *Id.* at 57-74.

article from 1949, Charles Fairman branded Bingham as "inconsistent" and "confused."[280] Subsequent detractors picked upon the same theme that Bingham's views were "muddled"[281] and, therefore, not entitled to significant deference. More recent defenders have revived Bingham's legacy, explaining the consistency of his views as "cogent" and "clearly expressed."[282]

Battles over Bingham have focused almost entirely upon the question of whether he intended that the Fourteenth Amendment Privileges or Immunities Clause incorporate the Bill of Rights. This narrow focus contributes to the confusion that surrounds efforts to reconstruct Bingham's constitutional vision. By adding the dimension of federalism to the debate, Bingham's use of the general reference to "privileges or immunities" and his reluctance to limit the scope of protection to a specified list of rights become more comprehensible.

As Richard Aynes explains, "John Bingham, the 39th Congress, the ratifying legislatures, and antislavery theorists never suggested that the privileges or immunities of U.S. citizens were confined to the rights recognized in the first eight amendments."[283] Aynes recognizes the "worthy challenge" of discovering and defining these "other" protections.[284] The historical context that motivated the thirty-ninth Congress, including intense experiences involving the events that occurred in Charleston Harbor described in preceding pages, provides the background needed to approach the challenge that Aynes identifies.

It is also helpful to keep in mind the fact that, unlike modern theorists, Bingham was not preoccupied with the issue of direct judicial enforcement of rights. The Fourteenth Amendment established *congressional* authority to identify and protect rights derived from the text of the Constitution and from the powers granted to Congress within that text. This point can be illustrated with the language Bingham initially proposed: "The 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."[285] Bingham explained that the fundamental need for this text was to establish congressional power to "enforce obedience to these requirements of the Constitution." [286] He explained that the text came directly from Article IV of the

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280. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 66, 137 (1949). For a sociological analysis of factors that may have misled Fairman, see PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 96-131 (1999).

281. RAOUL BERGER, GOVERNMENT BY JUDICIARY 145 (1978).

282. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 103 (1993). *See also* Michael K. Curtis, *The Bill of Rights as a Limitation of State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45, 88-92 (1980).

283. Aynes, *supra* note 282, at 104.

284. *Id.*

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

286. *Id.*

Constitution and from the Bill of Rights, and he assured his colleagues that this language would not bring about fundamental changes in constitutional relationships: "[T]he proposed amendment 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."[287] He followed that statement by quoting the Supremacy Clause of Article VI.[288] When asked about the need for such an amendment if the text was already contained in that document, Bingham's ally Congressman Kelly explained that "the proposed amendment will but reinvigorate a primitive and essential power of the Constitution."[289]

The issue became more confused at a subsequent point in the debate when Congressman Bingham explained that a reason for adopting the proposed amendment was the existing absence of congressional authority to enforce the Bill of Rights. He explained that he had no desire to "mar the Constitution of the country, or take away from any State any right that belongs to it," but he saw no inconsistency between that proposition and the need "to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution."[290] He explained the need for that element of the amendment by referring to the cases of *Barron v. Baltimore*[291] and *Livingston v. Moore*,[292] citing both cases for the proposition that the Bill of Rights does not apply to the states.[293] These references preceded a quotation from Daniel Webster's debate denouncing the independent rights of states.[294] Bingham then explained that state legislators take an oath to abide by the United States Constitution, and as a result, enforcing compliance with the Bill of Rights should not be seen as anything more than an enforcement of existing "dut[ies] and oaths."[295]

As developed in his arguments before the House of Representatives, Bingham believed that the Supremacy Clause already should have been adequate to establish the preeminence of federal law, but his own prior experiences had

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287. *Id.*

288. *Id.* The text of the Supremacy Clause provides, "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

289. CONG. GLOBE, 39th Cong., 1st Sess. 1058 (1866) (referring specifically to the power of Congress to determine who should be electors of federal offices, and thereby protecting the "privileges" of voters).

290. *Id.* at 1088.

291. 32 U.S. 243, 250-51 (1833) (holding that the Fifth Amendment, requiring compensation for property taken for public use, applies solely to the government of the United States).

292. 32 U.S. 469, 551-52 (1833) (rejecting challenge to Pennsylvania lien law noting that amendments to the United States Constitution "do not extend to the states").

293. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

294. *Id.* (quoting 3 WEBSTER'S WORKS 471).

295. *Id.*

illustrated the need for reinforcement. In 1857, Bingham had tried to convince his colleagues that they should deny Oregon admission to the United States because of a clause in its proposed state constitution prohibiting entry by African-Americans. Bingham denied "that any State may exclude a law abiding citizen of the United States from coming within its Territory . . . or from the enjoyment therein of the 'privileges and immunities' of a citizen of the United States."[296] He explained the conflict between this provision and the constitutional principle that federal law was supreme.[297] During the Civil War, Bingham again emphasized the importance of federal supremacy: "The Republic can no more live without its supreme law duly obeyed or duly enforced than can its citizens who compose it live without air."[298]

During the debates surrounding the Fourteenth Amendment, Congressman Bingham again emphasized the defiance of federal law that had taken place in Oregon and throughout the southern states.[299] After referencing the southern states generally, and South Carolina in particular, Bingham declared the need to broaden federal supremacy: "Unless you put them in terror of the power of your laws . . . they may defy your restricted legislative power when reconstructed . . . ."[300] Over the course of the debates, the Fourteenth Amendment text evolved so that, in final form, it protected "the privileges or immunities of citizens of the United States" rather than "privileges and immunities of citizens in the several states."[301] Congressman Bingham explained the shift in language. The Privileges or Immunities Clause of the Fourteenth Amendment will "protect by national law the privileges and immunities of all the 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."[302] This includes "the right to bear true allegiance to the Constitution *and laws* of the United States."[303]

In different words, the initial language that Bingham proposed would have simply added an element of federal authority to enforce the provisions of Article IV, Section 2. Taking this step would allow Congress to protect individuals like Samuel Hoar from being treated as the "emissary of a foreign Government" when seeking to address the South Carolina government.[304] The change in language broadened congressional power, so that it became clear that Congress had the power to address additional rights, beyond those embodied by Article IV. In the future, counterparts of Samuel Hoar would be protected regardless of whether

296. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).
297. *Id.* at 983.
298. CONG. GLOBE, 37th Cong., 2d Sess. 345 (1862).
299. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).
300. *Id.* at 1094.
301. *See id.* at 2286 (statement of Congressman Stevens).
302. *Id.* at 2542.
303. *Id.* (emphasis added).
304. *See* discussion *supra* text accompanying note 97.

their rights were derived from the Privileges and Immunities Clause of Article IV[305] or from some other legitimate source of federal law.

In the concluding paragraphs of his final speech before the House of Representatives in favor of the Fourteenth Amendment, Bingham once again declared the link between the Privileges or Immunities Clause and the constitutional crisis that stemmed from the want of federal power to address the South Carolina efforts to nullify federal law:

> [T]hat body of great and patriotic men looked in vain for any grant of power in the Constitution by which to give protection to the citizens of the United States resident in South Carolina against the infamous provision of the ordinance which required them to abjure the allegiance which they owed their own country . . . . That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment.[306]

With this text and through these words, Congressman John Bingham clarified the authority of Congress to enforce the United States Constitution, and erased any doubts regarding the preeminence of federal law.

4. Samuel Miller and Privileges or Immunities

After Congress finished its work in crafting the Fourteenth Amendment, responsibility for construing that Amendment fell to the United States Supreme Court. The Court's first opportunity came in 1873 in the *Slaughter-House Cases*.[307] It would be difficult to find a Supreme Court opinion more consistently and unfairly maligned than Justice Samuel Miller's opinion for the Court in that case. Charles Black characterized it as "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court."[308] Other scholars have used such terms as "shabby"[309] and "shoddy"[310] to characterize Miller's decision.

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305. Note that allowing Congress to enforce Article IV did not mean that Congress also had the power to determine the content of the privileges and immunities protected by that text. As the United States Supreme Court determined in 1868, the Privileges and Immunities Clause was limited to protecting rights of comity. *See* Paul v. Virginia, 75 U.S. 168 (1868). For additional discussion, see *infra* text accompanying note 411. In other words, the text originally crafted by Bingham simply gave Congress the power to assure future individuals like Samuel Hoar that they would have the same basic legal rights as South Carolina residents, without regard to the specific substance of those rights.

306. CONG. GLOBE, 39th Cong., 1st Sess. 2543 (1866).

307. 83 U.S. (16 Wall.) 36 (1873).

308. CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 55 (1997).

309. LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 197 (1975).

310. Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 73 (1989).

After seriously questioning Justice Miller's values and motives, Richard Aynes concludes that "'everyone' agrees the Court incorrectly interpreted the Privileges or Immunities Clause."[311]

Most attacks on *Slaughter-House* focus on the Court's failure to incorporate the Bill of Rights into the Privileges or Immunities Clause of the Fourteenth Amendment. That issue, however, was not before the Court. Instead, the Justices were being asked to enshrine Adam Smith's economic theory supporting the "right of free labor."[312] Not only did the issue of incorporation never directly arise, recent scholars have demonstrated that a reasonably charitable reading of Justice Miller's opinion is more consistent with incorporation than with anti-incorporation doctrine.[313]

One reason for the mischaracterization of Justice Miller's opinion stems from the failure to see through the superficial anomaly created by the alignment of the parties and their counsel. Plaintiffs' lawyers were led by John A. Campbell, a disciple of John C. Calhoun and former United States Supreme Court Justice who resigned that position to become an officer in the confederacy.[314] In contrast, attorneys for the state had been followers of Daniel Webster, opposed to secession, and had organized an army to support President Jackson's battle against nullification.[315] The plaintiffs had claimed an inherent right to operate their slaughter-houses independently from a state created monopoly. In response, the State of Louisiana claimed the right to force plaintiffs to operate within a prescribed section of the city of New Orleans.

On the surface, it would appear that the case had resurrected the ghosts of Calhoun and Webster, but with their positions now reversed. Because plaintiffs argued against states' rights, Aynes characterizes their arguments as "exactly the opposite of the constitutional positions the 'political partisans' usually took on questions of the interpretation of the Fourteenth Amendment and its various enforcement acts."[316] Campbell cleverly manipulated that impression by arguing

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311. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 627 (1994).

312. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 110 (1873) (Field, J., dissenting) (citing ADAM SMITH, THE WEALTH OF NATIONS, b. 1, ch. X, part II; *id.* at 45-46 (discussing argument of plaintiffs' counsel).

313. *See* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 683 (2000); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1111-15 (2000). *See also* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?* 113 HARV. L. REV. 110, 183-84 (1999) (noting that "[i]t was only a series of later decisions that oddly attributed to Justice Miller's majority opinion in the *Slaughter-House Cases* the expulsion of the Bill of Rights from the privileges or immunities cathedral"). For an account of how the principle of incorporation was lost in subsequent Supreme Court decisions, see Bryan H. Wildenthal, *The Road to* Twining*: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000).

314. *See* Mitchell Franklin, *The Foundations and Meaning of the* Slaughterbouse Cases, 18 TUL. L. REV. 1, 88 (1943).

315. *Id.* at 52.

316. Aynes, *supra* note 311, at 657.

that the Fourteenth Amendment had "forever destroyed" the states rights doctrine of John C. Calhoun.[317] Far from being "opposite" to the views of Calhoun, however, Campbell's arguments were a thinly disguised attempt at preserving private property rights in the face of government regulation, and in that sense Campbell and Calhoun remained on exactly the same page.[318] Campbell was making the same argument for the New Orleans butchers that Calhoun had made for the South Carolina slave owners, and Justice Miller rejected that argument. In a repeat of the showdown between Calhoun and Webster, Miller came down on the side of Webster.

It has been noted that Miller and Bingham traveled together on a tour of the Pacific Coast in 1871, and as a result Miller's opinion in *Slaughter-House* should have been more faithful to the views of the Fourteenth Amendment framers.[319] Again, however, a sympathetic reading of *Slaughter-House* demonstrates the symmetry between Miller's views and the arguments Bingham made on the floor of the House of Representatives.[320] Both Miller and Bingham eschewed broad expansions of federal power. In Miller's opinion for the Court, he argued that federal privileges or immunities were those that "owe their existence to the Federal government, its National character, its Constitution, or its laws."[321] That statement appears entirely consistent with the point made repeatedly by Bingham: that the Fourteenth Amendment simply reinforced existing constitutional text.[322]

Even more telling are the examples given by Justice Miller, which must be understood with reference to prior conflicts between South Carolina and the federal government. Where Bingham explicitly referred to South Carolina in his arguments before Congress, Miller's references were less explicit but nevertheless unmistakable. The first category of rights identified by Miller included negative constraints found in the text of the Constitution. Those would include the Privileges and Immunities Clause of Article IV, Section 2, which had been of obvious concern to Bingham, and which had been systematically denied to African-Americans arriving at the Port of Charleston in the decades leading up to the Civil War.[323]

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317. *Slaughter-House*, 83 U.S. at 52.

318. *See* William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 179 (2002) (noting that "whether he argued for states' rights or for an expanded version of the Privileges or Immunities Clause, [Campbell] advocated private property rights and *laissez faire* economics . . . [seeking] nullification of government regulations that he perceived as interfering with those rights").

319. Aynes, *supra* note 311, at 662; Newsom, *supra* note 313, at 700 (noting, in particular, that while traveling, Bingham spoke "upon the relation and dependence of the States to the Nation").

320. *See supra* text accompanying notes 285-306.

321. *Slaughter-House*, 83 U.S. at 79.

322. *See supra* text accompanying notes 285-87.

323. *See supra* text accompanying notes 61-87. Note that the Supreme Court had previously ruled that the Privileges and Immunities Clause of Article IV did not embrace a body of inherent, substantive rights, but was rather limited to rights of comity. *See* Paul v. Virginia, 75 U.S. 168 (1868). This conclusion is consistent

The second category described by Justice Miller included rights derived from the "national character" of the federal government, including the right "to come to the seat of government to assert any claim he may have upon that government."[324] For authority, Miller cited and quoted the case of *Crandall v. Nevada*.[325] For an even more vivid example, however, he could have painted the picture of Samuel Hoar landing at the Port of Charleston and seeking to address the government of South Carolina.[326]

Miller illustrated his third category of federal privileges or immunities by reference to "[t]he right to peaceably assemble and petition for redress of grievances."[327] Again, the example of Samuel Hoar comes to mind.[328] Kevin Newsom and Bryan Wildenthal have both detailed the argument that this reference to expressive activity should be understood as incorporating the Bill of Rights.[329] Extensive evidence in congressional debates supports the view that framers of the Fourteenth Amendment expected incorporation,[330] and nothing in *Slaughter-House* directly contradicts this interpretation.

Finally, to illustrate the point that privileges or immunities could be based upon federal law more generally, Miller refers to "the [r]ight to use the navigable waters of the United States" and to "all rights secured to our citizens by treaties with foreign nations."[331] Navigation and treaty rights had both been implicated by South Carolina's seizure of black seamen who entered the port of Charleston. In the *Elkison* case, Justice Johnson had emphasized the "right to navigate," and had declared the "utter incompatibility" of South Carolina's law with congressional commerce clause authority and with the laws and treaties of the United States.[332]

A review of the history of Charleston Harbor helps to explain the tie between John Bingham's understanding of the Fourteenth Amendment and Justice Miller's interpretation of that Amendment. It also brings to light the importance of the *Slaughter-House Cases* as precedent for contemporary issues of federalism. The Privileges or Immunities Clause—as understood by its framers,

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with the argument that references to "privileges" or "immunities" were understood at the time as encompassing rights based upon positive law (i.e., statutory or constitutional text) rather than a body of inherent or "natural" rights. *But see* James W. Fox, Jr., *Re-Readings and Misreading:* Slaughter-House, *Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67 (2002) (arguing that the Privileges or Immunities Clause incorporated natural rights).

324. *Slaughter-House*, 83 U.S. at 79.

325. 73 U.S. 35 (1867) (invalidating Nevada state tax on persons traveling out-of-state).

326. *See supra* text accompanying notes 96-99.

327. *Slaughter-House*, 83 U.S. at 79.

328. *See* AMAR, *supra* note 129, at 236-37 (linking Hoar's experiences in Charleston to the purposes of the Fourteenth Amendment).

329. *See* Newsom, *supra* note 313, at 679; Wildenthal, *supra* note 313, at 1099.

330. *See, e.g.*, AMAR, *supra* note 129, at 183-85; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57-130 (1986).

331. *Slaughter-House*, 83 U.S. at 79.

332. Elkison v. Deliesseline, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4366). *See* discussion *supra* text accompanying notes 61-87.

as subsequently construed by the Supreme Court, and as repeatedly explained by early commentators—reestablished the preeminence of federal law.[333]

III. APPLYING NINETEENTH CENTURY LESSONS TO TWENTY-FIRST CENTURY ISSUES

In the nineteenth century, constitutional crises repeatedly revolved around issues of slavery and federalism, with challenges to national preeminence as their focal point. The historical record demonstrates that framers and interpreters of the Constitution shared an understanding that the national government held supreme authority within the sphere of enumerated congressional powers. Claims that state sovereignty survived within the realm of national authority arose when events in South Carolina generated desperate arguments in defense of slavery. As attorney general, Roger Taney recognized South Carolina's authority to defy federal treaties and federal protection of individual rights, in order to preserve its slave society, and therefore refused to protect the "Negro Seamen" arriving in Charleston's port. John C. Calhoun declared that states retained ultimate sovereignty. Therefore, South Carolina could defy federal law, nullifying the federal tariff on goods arriving in Charleston, and threatening to prosecute any South Carolinians who enforced or complied with the federal law. Like the Negro Seamen's Act, the Nullification Crisis also reflected a perceived need to protect the institution of slavery. Both the Negro Seamen's Act and the Nullification Crisis were direct antecedents to Civil War hostilities, which again began in Charleston Harbor. Both Congressman John Bingham and Supreme Court Justice Samuel Miller understood this context as the predicate to their interpretations of the Privileges or Immunities Clause. As explicitly declared by Bingham, the Fourteenth Amendment assured that South Carolina would never again be allowed to defy federal law.[334]

In the years following the Civil War, however, the central importance of establishing federal supremacy faded from public consciousness. With the elimination of disputes over states' rights to establish slavery or to secede, attention shifted to questions about the scope of newly established individual rights. A primary focus of that debate was whether the Privileges or Immunities Clause should be viewed as a primary source of judicially established individual rights. In that context, a folkloric version of the *Slaughter-House Cases* became the *bête noir* of the constitutional canon.[335] By the end of the twentieth century, scholars, judges and litigants all seemed to have forgotten the side of the

333. In two previous articles, I have detailed support for this argument. *See* Rich, *supra* note 318, at 188-99; William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235, 272-82 (2001).

334. *See supra* text accompanying note 306.

335. *See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 76 (1997) (blaming the Supreme Court for "annihilat[ing]" the Privileges or Immunities Clause).

Privileges or Immunities Clause that established the preeminence of rights derived from federal law.

A new century comes with a new focus. As explained in the pages which follow, five Supreme Court justices have revived the argument that elements of state sovereignty survive even within the sphere of preeminent federal power. Four dissenting justices have consistently refused to accept the fundamentally incoherent conception of state sovereign immunity championed by the majority. All of the justices appear to accept the understanding that, within its proper sphere, the Fourteenth Amendment overrides the Eleventh Amendment and pierces any existing claims to immunity. None of the justices, however, have yet been asked to consider whether rights derived from federal statutes constitute "privileges or immunities of Citizens of the United States," and therefore warrant preeminent status.[336]

A. Supreme Court Revisionism

This account of Supreme Court resurrection of state sovereign immunity within the sphere of enumerated national powers begins with the 1996 decision that Congress had no power to abrogate the Eleventh Amendment by authorizing private individuals to enforce federal statutory rights against states.[337] The question asked by the Court in the *Seminole Tribe* case has special significance when viewed from a nineteenth century perspective. In his majority opinion, Chief Justice Rehnquist asked: "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?"[338] The question directly parallels the lament voiced by Congressman Bingham and others when promulgating the Fourteenth Amendment. As Bingham noted, despite explicit constitutional text reinforced by the Supremacy Clause, a "body of great and patriotic men looked in vain for any grant of power" that would provide "protection by national law from unconstitutional State enactments" such as the South Carolina defiance of federal tariffs.[339]

After asking the question, Chief Justice Rehnquist acknowledged that the Fourteenth Amendment provides "authority to abrogate" the Eleventh Amendment.[340] In the context of discussing enforcement of the Indian Gaming Regulatory Act, however, none of the parties analyzed the question of how broadly the Fourteenth Amendment enforcement authority should be construed.[341]

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336. *See* Rich, *Privileges or Immunities, supra* note 333, at 304.

337. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

338. *Id.* at 59.

339. CONG. GLOBE, 39th Cong., 1st Sess. 2543 (1866). *See* discussion *supra* text accompanying note 306.

340. *Seminole Tribe*, 517 U.S. at 59.

341. The Chief Justice cites the lack of federal question jurisdiction as an explanation for why Congress

Chief Justice Rehnquist's analysis relies heavily upon the Supreme Court decision in *Hans v. Louisiana*.[342] He dismisses the dissenters' explanations of *Hans* as "undocumented and highly speculative."[343] While purporting to rely upon "fundamental 'jurisprudence in all civilized nations,'"[344] however, Rehnquist ignores the basic distinction between *Hans* and other cases asserting federal question jurisdiction. As Justice Stevens explains, the *Hans* dispute arose out of state contract law.[345] The "fundamental jurisprudence" that supports a continuation of state sovereignty in the context of contract disputes also supports the exclusive and preeminent national authority over federal questions that do not arise out of state law.[346]

In a series of subsequent cases, the Supreme Court majority, referred to in recent literature as the "gang of five,"[347] cling to a doctrine of state sovereign immunity that clashes with the framers' fundamental conception of sovereign

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did not use broader language when it originally promulgated the Eleventh Amendment, concluding that "it seems unlikely that much thought was given to the prospect of federal question jurisdiction over the States." *Id.* at 70. He then ignores implications of the decision by Congress to add federal question jurisdiction to the arsenal of the federal courts in 1875, shortly after ratification of the Fourteenth Amendment. *Id.* (noting parenthetically that federal courts would not have federal question jurisdiction until 1875, but ignoring the link between that expansion and enactment of the Fourteenth Amendment).

342. *Id.* at 64 (citing Hans v. Louisiana, 34 U.S. 1 (1890)).

343. *Id.* at 68-69.

344. *Id.* at 69.

345. *Id.* at 91 (Stevens, J., dissenting). *See also id.* at 116-30 (Souter, J., dissenting) (explaining reasons for not relying upon the rationale in *Hans*).

346. Note that, as Justice Stevens explained, the Court in *Hans* "expressly pointed out . . . that an individual who could show that he had an *enforceable* contract under state law would not be barred from bringing suit in federal court to prevent the State from impairing it." *Id.* at 91 (Stevens, J., dissenting). As in *Chisholm*, the plaintiff in *Hans* sought to enforce a contract obligation against the state. The only significant difference between the cases is that in *Hans* the plaintiff relied upon a federal source, the Contracts Clause of Article I, Section 10, rather than merely resting on federal diversity jurisdiction as the basis for his claim. The essence of the claim, that the state must pay its contract debts, remained the same in both cases. As a result, Justice Bradley correctly understood that allowing the plaintiff to proceed in *Hans* would have, for all practical purposes, overruled *Chisholm*. Justice Brennan also made this point in his decision for the Supreme Court in *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 192 (1964) (concluding that Alabama had waived claims to sovereign immunity by directly participating in interstate commerce), and again in his dissenting opinion in *Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 317-22 (1973) (Brennan, J., dissenting).

The error in *Hans*, therefore, was neither the Court's conclusion nor its underlying sense that the United States Constitution did not empower citizens to bring actions for monetary damages in order to enforce contract rights against states. The *Hans* Court erred only with its use of broad language which allowed for the implication that no suits may be brought against states whether or not based upon underlying claims that fall with the realm of historic state sovereignty. *See Hans*, 134 U.S. at 15-16. The Court should have simply declared that questions about enforceability of contracts with states were initially to be resolved in state courts pursuant to state law and could not be brought directly under the Contract Clause of Article I; Mr. Hans therefore failed to state a claim upon which relief could be granted by a federal court. For additional analysis of these issues, see Amar, *supra* note 17, at 1472 (noting the argument that a state's "'sovereign' immunity was . . . exactly coextensive with her derivative 'sovereign' lawmaking capacity").

347. John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091 (2000) (comparing the current Supreme Court majority with the justices who dominated the Court in the late nineteenth and early twentieth centuries).

power. In three cases, the Court deals explicitly with the question of whether the Fourteenth Amendment gives Congress authority to over-ride Eleventh Amendment constraints,[348] and in all three cases they recognize that authority.[349] In those three cases, however, the five justices in the majority rejected application of congressional authority to the cases at hand.

In the first case, involving claims that states violated the Due Process Clause when they violated individual patent rights, the Court concluded that, absent a history of state abuse of patent rights, due process considerations could not be stretched to encompass state violations.[350] In the other two cases, the Court found that, although both the Age Discrimination in Employment Act and the Americans with Disabilities Act addressed problems of discrimination against the elderly and those with disabilities, the Equal Protection Clause could not be interpreted as authority to address those concerns.[351] In all three cases, the Supreme Court concluded that the congressional acts were not congruent and proportional to the interpretation of Due Process and Equal Protection Clauses as established by the Court itself.[352] In all three cases, the majority also emphasized that powers enumerated in Article I of the Constitution were limited by Eleventh Amendment constraints.

In yet another case, *Alden v. Maine*,[353] the Court blocked claims brought in state court against state agencies for monetary damages owed for violations of federal statutes authorized by Article I. Justice Kennedy's opinion for the Court asserted that States "retain 'a residuary and inviolable sovereignty,'"[354] without explaining how that element of sovereignty extends within the sphere of enumerated national powers. Again, the Court was not presented with arguments that the federal right in question should be considered a "privilege or immunity of citizens of the United States," and again all parties ignored the nineteenth century background of that text.

Evidence relied upon by the majority, when scrutinized, not only fails to support their argument, but in a more fundamental sense demonstrates that, prior to the era of John C. Calhoun, government leaders understood sovereignty in

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348. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (rejecting abrogation provided by the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (concluding that the Age Discrimination in Employment Act does not provide authority for abrogating the Eleventh Amendment); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that a patent statute explicitly abrogating state immunity could not be justified as derived from congressional authority under the Due Process Clause of the Fourteenth Amendment).

349. *See Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Fla. Prepaid*, 527 U.S. at 637.

350. *Fla. Prepaid*, 527 U.S. at 640.

351. *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91.

352. In *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Supreme Court narrowed the authority of Congress to enact laws to remedy violations of the Due Process Clause of the Fourteenth Amendment to protecting rights deemed "congruent and proportional" to Supreme Court interpretations of that Clause.

353. 527 U.S. 706 (1999) (barring individual claims for monetary damages against state agencies to enforce the Fair Labor Standards Act).

354. *Id.* at 715 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

exclusive terms that contradict the Court's conclusions. For example, to establish textual support for their position, the majority points to the Tenth and Eleventh Amendments.[355] In making this reference, however, the majority ignores the classic principle explained to a prior generation of aggressive justices by Justice Holmes: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[356] The text of both the Tenth and Eleventh Amendments to the Constitution corresponds with and reinforces the view of sovereignty identified by Justice Holmes. The Tenth Amendment limited authority "reserved to the States" to those "powers not delegated to the United States by the Constitution."[357] As Justice Souter has explained, no one argued at the time when the issue first arose that "the Tenth Amendment had been understood to give federal constitutional status to state sovereign immunity."[358]

Writing for the majority in *Alden*, Justice Kennedy also relied upon the commentaries of Blackstone, described as "the preeminent authority on English law for the founding generation."[359] But even if one were to accept Kennedy's account of Blackstone's link between sovereignty and immunity—a link that Justice Souter persuasively rejects[360]—the view that state immunity persists in the context of national legislation remains fundamentally incoherent. Thus, Kennedy quotes Blackstone as equating "sovereignty" with "preeminence."[361] But Kennedy and his colleagues in the majority never explain how state "preeminence" could survive a constitutional plan which gave Congress enumerated powers and then provided that "the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[362]

In other words, state sovereignty, as explained in the language of Blackstone, could not coexist within the context of *sovereign* congressional authority. Justice Kennedy skips from quoting Blackstone to "the doctrine that a sovereign could not be sued without its consent"[363] without ever explaining how states could be considered "sovereign"—as that term was understood by Blackstone and others—with respect to the exercise of powers given to the national government. None of the framers articulated that perspective.

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355. *See, e.g., id.* at 712-13.

356. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). For discussion, see *Alden*, 527 U.S. at 795-98 (Souter, J., dissenting).

357. U.S. CONST. amend. X.

358. *Alden*, 527 U.S. at 781 (Souter, J., dissenting) (noting a lack of reference to the Tenth Amendment in *Chisholm*).

359. *Id.* at 715.

360. *Id.* at 764-68 (Souter, J., dissenting).

361. *Id.* at 715.

362. U.S. CONST. art. VI, cl. 2.

363. *Alden*, 527 U.S. at 715.

The theory that states did not surrender a piece of their sovereign immunity from suits for damages brought by private individuals when they agreed to be bound by the Constitution rests upon a conception of the Constitution as a "compact among the states" rather than as an agreement reached by the people of a unified nation.[364] In that sense, the current majority's approach parallels prior explanations for why the federal government lacked power to enforce its laws against South Carolina's exclusion of black seamen from Charleston Harbor: Attorney General Roger Taney believed that "slave holding states could not have surrendered this power"[365] and the South Carolina Association claimed that "a sovereign state cannot surrender a right of vital importance . . . she is herself the sovereign judge."[366] Subsequent states' rights advocates, including five justices on the current Supreme Court, argue that states would not have agreed to constraints upon their sovereignty. They show little regard for the counterpoint, explained by Webster[367] and amplified by contemporary scholars,[368] that ultimate national sovereignty is derived from the people of the *union* rather from the people within each *state*.

In another significant sense, the current majority's insistence that the Eleventh Amendment embodies the "spirit" of state sovereign immunity violates a cardinal rule of conservative jurists. Much as Calhoun and his cohorts broke from the "strict construction" tenets that had previously characterized states' rights advocates,[369] the Chief Justice and other members of the current majority have turned their backs on the same principle.[370]

Furthermore, the Court's decisions have produced the precise impact warned against by Daniel Webster. We now have "one rule or one law for South Carolina, and another for other States"[371] that make themselves amenable to claims for violations of federal law. While Webster argued that "people of the

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364. See, for example, Justice Kennedy's statement in *Alden v. Maine* that "[a]lthough the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people's will." *Id.* at 759. Justice Kennedy's statement leaves open the question of how the *people* decide that states must comply with federal law or face the prospect of paying monetary damages to those who suffer from violations of that law.

365. SWISHER, *supra* note 91, at 380. *See* discussion *supra* text accompanying notes 88-92.

366. Elkison v. Deliesseline, 8 F. Cas. 493, 494 (C.C.D.S.C. 1823) (No. 4366). *See* discussion *supra* text accompanying notes 75-76.

367. *See supra* text accompanying notes 202-05.

368. *See, e.g.*, Gey, *supra* note 13, at 1628; Amar, *supra* note 17, at 1451-66.

369. *See supra* text accompanying note 161.

370. As explained repeatedly by the Court: "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)). For criticism of the Court's approach, see JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 151-52 (2002) (explaining that "[t]he claim that the sovereignty of the states is constitutional rests on an audacious addition to the eleventh amendment, a pretense that it incorporates the idea of state sovereignty") and Donald H. Snook, *Comment: Preserving Federalism or Perverting Constitutional Principles: A Conservative Critique of the Conservative Majority*, 42 WASHBURN L.J. 385 (2003).

371. GREAT DEBATE, *supra* note 40, at 280.

United States are one people" for purposes of regulating commerce,[372] federal statutory rights now vary based upon individual state decisions to allow enforcement of one or more federal statutory schemes.[373]

B. *Returning to Charleston Harbor*

Nineteenth century conflicts echo in the current Supreme Court's response to a refusal by the South Carolina Ports Authority to allow the cruise ship *Tropic Sea* a berth at Charleston Harbor. In 2002, the Supreme Court blocked owners of the *Tropic Sea* from pursuing their complaint against the South Carolina Ports Authority before the Federal Maritime Commission.[374] Speaking in this case through Justice Thomas, the majority again relied upon a conception of sovereign immunity that can be traced to John C. Calhoun and the nullification doctrine.[375]

South Carolina's reason for refusing berthing space to the *Tropic Sea* may be compared to that state's nineteenth century reasons for defying federal law.[376] In both cases, navigation in and out of Charleston Harbor had the possibility of undermining state domestic policy. In the current context, South Carolina objected to allowing passengers to participate in gambling activities. At least some of the *Tropic Sea* cruises would never dock at a different port; passengers would board in Charleston and be allowed to gamble until they departed at the same dock.[377] South Carolina authorities sought to advance the domestic policy of their state by blocking such use of their port.

Owners of the *Tropic Sea* argued that the Ports Authority's anti-gambling policy violated the Shipping Act of 1984.[378] They did not dispute the state's right to adopt such policies, but rather claimed that South Carolina had implemented its policy in a discriminatory manner by allowing Carnival Cruise Lines vessels, which also offered on-board gambling activities, to use the port while repeatedly barring comparable access to the *Tropic Sea*.[379]

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372. *Id.* at 287.

373. For example, Minnesota enacted a statute explicitly waiving some Eleventh Amendment immunity. MINN. STAT. § 1.05 (2003). For a description of the patchwork of immunity provisions affecting state employees in various states, see Millina Taddesse Tamrat, Note, *Sovereign Immunity Under the Eleventh Amendment:* Kimel *and* Garrett, *What Next for State Employees?*, 11 ELDER L.J. 171 (2003).

374. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).

375. *See supra* text accompanying notes 239-40.

376. Although it would be a mistake to equate slavery with the subject matter of contemporary disputes, an underlying consistent attitude towards property rights and government regulation links Calhoun's promotion of slavery (*see supra* note 239) to Campbell's arguments for property rights in *Slaughter-House* (*see supra* text accompanying notes 317-18) and the recent Supreme Court decisions blocking the rights of aged workers (*see Kimel*, 528 U.S. at 62), disabled workers (*see Garrett*, 531 U.S. at 356) and the "fair labor" rights of workers generally (*see Alden*, 527 U.S. at 706).

377. *Federal Maritime Comm'n*, 535 U.S. at 747.

378. Pub. L. No. 98-237, 98 Stat. 67 (codified at 46 U.S.C.A. app. §§ 1701-1719 (West. Supp. 2004)).

379. *Federal Maritime Comm'n*, 535 U.S. at 748.

None of the parties contested the federal Article I authority to regulate shipping. Federal law provides that "no marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person."[380] The South Carolina Ports Authority was bound by law to adhere to this provision, and Congress had specifically authorized private parties to initiate violation complaints by filing claims with the Federal Maritime Commission. The question presented to the Supreme Court was whether South Carolina's claims to sovereignty exempted the Ports Authority from having to follow the congressionally mandated procedure of responding to a private complaint. By denying the right of private parties to bring such actions, the Court places individuals at the mercy of federal discretionary authority in a manner that replicates historical experience. In parallel terms, we may question whether Attorney General John Ashcroft would have been more likely to initiate action on behalf of the gambling cruises of the *Tropic Sea* than Attorney General Roger Taney was to protect African Americans arriving in Charleston Harbor.[381]

The right of equal access to ports rests upon deep historical roots. The Supreme Court faced the same underlying issue in the case of *Gibbons v. Ogden*.[382] Chief Justice Marshall and Justice Johnson both answered the question of whether states had authority to block ships licensed by the federal government from docking in their ports. In *Gibbons*, Marshall looked to the federal law and explained that:

> [Steam boats were] entitled to the same privileges [as vessels using sails], and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire . . . . The act of a State inhibiting the use of either [waters or port] to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.[383]

Justice Johnson took an even stronger position, rejecting any conceivable claims to state sovereignty over matters included within the enumerated powers of Congress. He explained that the power to regulate commerce "can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon."[384] State statutes limiting access to the

380. 46 U.S.C.A. app. § 1709(d)(4) (West Supp. 2004).

381. *See supra* text accompanying notes 90-92.

382. 22 U.S. (9 Wheat.) 1 (1824).

383. *Id.* at 221.

384. *Id.* at 227 (Johnson, J., concurring).

ports "dropped lifeless from their statute books, for want of the sustaining power, that had been relinquished to Congress."[385]

The opinions of Marshall and Johnson did not address the question of whether a port authority could be sued for damages, either in federal court or before a federal agency, for failing to abide by federal law. They do, however, provide a backdrop for understanding the conception of sovereignty that existed in the early years of our nation's history. The repeated point is that modern notions of concurrent sovereignty had not yet been developed.[386] The prevailing view was that the transfer of sovereignty to the United States government eliminated competing claims to state sovereignty. Prior to battles over access to Charleston Harbor, no credible claims were made that state sovereignty could trump the exercise of federal power authorized by Article I of the Constitution.

Defenders of slavery challenged the views of sovereignty that prevailed at the time of *Gibbons v. Ogden*. As Attorney General, Roger Taney had acknowledged that "judging by the past" the South Carolina laws that interfered with recognized federal authority would be declared "null and void."[387] Harry Elkison may have had federal law on his side, but in absence of support from the United States Department of Justice, he lacked a forum in which to enforce federal law. In Taney's opinion of 1832, the right of slave states to guard themselves against free blacks among their slaves was a right that had not been surrendered by the adoption of the United States Constitution, and therefore could not be abrogated by federal law.[388]

Current justices acknowledge ultimate federal authority to enforce national laws, while Calhoun would have denied even that right. For owners of the *Tropic Sea*, however, this is a distinction without a difference. The first half of the nineteenth century is replete with incidents involving theoretical federal power confounded by the lack of enforcement. Thus, Harry Elkison languished in the Charleston jail solely because Congress had not granted *habeas corpus* jurisdiction to the federal courts.[389] For want of an effective individual right to bring a claim against the state, South Carolina continued to defy conflicting national laws.[390]

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385. *Id.* at 226.

386. *See supra* text accompanying notes 13-41.

387. SWISHER, *supra* note 91, at 381. *See* discussion *supra* text accompanying notes 89-92.

388. CARL B. SWISHER, ROGER B. TANEY 153 (1961).

389. *See* Elkison v. Deliesseline, 8 F. Cas. 493, 496 (C.C.D.S.C. 1823) (No. 4366) (concluding that the federal court lacked jurisdiction to provide relief). Note that, within the broader context of assuring that individuals would have access to federal courts to challenge unlawful state actions, Congress expanded the *habeas corpus* jurisdiction of the federal courts in 1867. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 189-92 (1980).

390. *See* discussion *supra* text accompanying notes 71-81.

Although beaten back by the Civil War and by the constitutional amendments designed to eliminate such arguments, the essential elements of the South Carolina Doctrine have risen like the phoenix in the guise of "state sovereign immunity." Louise Weinberg refers to recent Supreme Court opinions as "Calhoun's ghost,"[391] stirring the image of John C. Calhoun smiling from the grave as the current South Carolinian on the United States Supreme Court, Justice Clarence Thomas, declares that sovereign immunity rights could not have been surrendered to Congress by the plan of the Constitution, and therefore states could not be required to respond to individual complaints filed with federal agencies.[392]

Arguments of the South Carolina Ports Authority follow the same themes that were initially raised in the same port in the 1820's. In both contexts, the state argued that it should not have to respond to individual complaints that its laws conflict with federal rules banning discrimination in access to ports. On the other side, the *Tropic Sea's* "right to navigate" parallels the claim described by Justice Johnson when he denounced South Carolina's defiance of federal law in 1823.[393] It is also the same "right to use the navigable waters of the United States" reaffirmed by Justice Miller in his illustration of federal privileges or immunities fifty years later.[394]

But in the century following Justice Miller's opinion, the Privileges or Immunities Clause virtually disappeared from the "constitutional canon."[395] Furthermore, as one commentator recently noted, the "right to use the navigable waters of the United States" and the "rights secured to our citizens by treaties with foreign nations" have become "obscure and practically irrelevant."[396] In other words, we have forgotten the events that gave rise to the Fourteenth Amendment. Out of that neglect, the Supreme Court has fashioned a theory of federalism that clashes with both constitutional history and text.

C. Opening the (Wrong) Door

In the course of developing its current doctrine of state sovereign immunity, the Supreme Court has steadily arrogated more and more law-making authority. No prior Court has so frequently and so consistently invalidated the actions of Congress. In 2003, however, the Court appeared to retreat, at least slightly, from its stranglehold on congressional authority to exercise its power under section

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391. Weinberg, *supra* note 19, at 1156. *See also* Nowak, *supra* note 347 (linking current Supreme Court doctrine to southern states' rights arguments); David Milton Whalen, *John C. Calhoun Becomes the Tenth Justice: State Sovereignty, Judicial Review, and Environmental Law after June 23, 1999*, 27 B.C. ENVTL. AFF. L. REV. 193 (1999) (agreeing that recent Supreme Court decisions resurrect Calhoun's conception of state nullification).

392. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 769 (2002).

393. Elkison v. Deliesseline, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4366).

394. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

395. *See* Rich, *supra* note 318.

396. Newsom, *supra* note 313, at 687.

five of the Fourteenth Amendment. The Supreme Court determined in *Nevada Department of Human Resources v. Hibbs*[397] that Congress has authority under the Equal Protection Clause to enact the Family and Maternity Leave Act. The majority opinion, authored by Chief Justice Rehnquist, leaves the door ajar for a limited congressional role in broadening federal protection for victims of discrimination. In the process, however, in order to distinguish prior cases involving age discrimination or discrimination against the disabled, Rehnquist effectively imposed the rigid, three-tiered framework of Equal Protection analysis[398] on congressional efforts to secure fairness in the workplace.

The framework built by the Supreme Court to address issues of congressional power to abrogate the Fourteenth Amendment rests upon a flawed foundation. Thus, the historical reason for treating gender discrimination differently from age discrimination or discrimination against the disabled is not the lack of a history of invidious discrimination against the latter, or the relative need for legislative protection.[399] The reason for treating the two issues differently when it comes to judicial enforcement of the Equal Protection Clause is rather based on the recognized need to provide more latitude to legislatures to address the relatively complex issues of age and disability.[400] The Court makes a fundamental mistake by treating the need for legislative flexibility as a basis for blocking Congress from using its Fourteenth Amendment authority to abrogate state immunity.

The *Hibbs* decision illustrates the point that courts, rather than Congress, now decide whether to protect individuals from state violations of federal law. No justices questioned the authority of Congress to address issues of fairness in the workplace; states continue to face a "legal" obligation to comply with the full range of federal laws addressing such issues. Workers protected by the federal law theoretically retain all of the "privileges" encompassed by those laws. The Supreme Court, however, uses its rigid equal protection categories to determine in freakish fashion who will and who will not have authority to invoke the

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397. 538 U.S. 721 (2003).

398. *See* 2 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW §§ 25.02, 25.03 (2d ed. 1997).

399. When the Supreme Court initially distinguished age discrimination from race discrimination, it cited the differences in historical treatment as a basis for giving less scrutiny to lines drawn on the basis of age. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976). The more significant problem faced by the Court in that context, however, was its lack of a bright line that could be used to identify "a class defined as the aged," *id.* at 314, or to establish "need of 'extraordinary protection from the majoritarian process.'" *Id.* at 313. The justices declared that "[w]e do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual," *id.* at 316, but nevertheless chose to give the legislature broad scope for assessing complex issues of aging. *See id.* at 314-15, n.7 (explaining studies that resulted in varied Massachusetts retirement ages).

400. In simplest terms, no recognizable dividing line distinguishes "the elderly" or "the disabled," and in that sense those categories remain arguably different from discrimination based upon race, gender, legitimacy or alien status. Because of this difference, it may be legitimate for the Court to defer more to the legislature when the legislature addresses issues of age or disability. That is not an acceptable reason, however, for blocking Congress from protecting elderly or disabled state employees while allowing Congress to impose financial liability on states that do not comply with the Family and Medical Leave Act.

remedial scheme that Congress constructed. We have entered the realm of government by judiciary, with no reasonable principles to guide that process or to support predictions of the scope of rights that Congress will be allowed to protect.[401]

In all of the recent cases regarding congressional authority to enforce the Fourteenth Amendment, the focus of attention has been limited to the Supreme Court's role in interpreting the Due Process Clause or the Equal Protection Clause. None of the cases have given serious attention to the potential scope of the Privileges or Immunities Clause. When understood in its historical context, particularly in relation to the events that took place at Charleston Harbor and that gave rise to the perceived need for expanding federal power, the Privileges or Immunities Clause will be seen as a resource for leading us out of the morass created by recent Supreme Court decisions. It will also be seen as a key component of a workable, contemporary conception of federalism consistent with constitutional text, historical precedent and twenty-first century democratic values.

D. Framework for Federalism

The lessons of Charleston Harbor provide an alternative framework for conceptualizing state and federal relationships. This alternative builds on the understanding that Webster won his debates with Hayne and Calhoun, that Roger Taney erred when he found a lack of congressional power to enforce federal law in the port of Charleston, and that the Fourteenth Amendment confirmed these judgments. The Privileges or Immunities Clause was recognized at the time of its enactment as the primary vehicle for reestablishing federal supremacy, thereby invigorating "a primitive and essential power of the Constitution."[402]

One element of this framework emerged in the Supreme Court's only recent consideration of the Privileges or Immunities Clause. In the case of *Saenz v. Roe*[403] the Court recognized the right to travel and thereby "become a citizen of any State of the Union . . . with the same rights as other citizens of that State." With that holding, the Court resurrected an important element of Justice Miller's opinion in the *Slaughter-House Cases*.[404]

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401. *See* Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1298 (2000) (asking why higher value should be placed on protecting state treasuries than on providing a remedy for victims of unlawful state action).

402. CONG. GLOBE, 39th Cong., 1st Sess. 1058 (1866) (quoting Congressman Kelly, speaking in support of the Fourteenth Amendment). *See* discussion *supra* text accompanying notes 280-306.

403. 526 U.S. 489 (1999) (invalidating California statute imposing durational residency requirement on TANF recipients).

404. *See id.* at 503 (quoting Justice Miller's opinion in *Slaughter-House*, 83 U.S. at 80).

In his dissenting opinion in *Saenz*, Justice Thomas highlighted a pivotal point of disagreement regarding the scope and significance of the *Slaughter-House* framework. In a footnote he reinforced popular perceptions, commenting that "[l]egal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873."[405] In the text, however, Thomas quoted Justice Miller's opinion, claiming that:

> The Court declined to specify the privileges or immunities that fell into this latter category, but it made clear that few did. See [*Slaughter-House*, 83 U.S.] 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).[406]

By taking Justice Miller's comment out of context, Thomas gives it a meaning that coincides with historical myths but is antithetical to the statement that Miller actually made.

It is accurate to say that Miller described the "privileges and immunities of citizens of the States" in the broad language that Justice Thomas quoted. By doing so, however, he did not "make clear" that little remained in the category of rights "belonging to a citizen of the United States as such."[407] Explicitly negating that inference, Miller explains: "[L]est 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."[408] In subsequent paragraphs, Miller explains that "*for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States.*"[409] Specific examples he gives include references drawn both from the Bill of Rights and from Article I of the Constitution.[410] In spite of all that has been said over the years to malign Justice Miller's opinion in *Slaughter-House*, the text of that opinion provides grounds for a robust interpretation of privileges or immunities.

The understanding that references to "privileges" and "immunities" should be broadly construed to include rights established by federal statute may be gleaned from the reference that Justice Thomas relies upon. Thus, in the quotation that Thomas selected from Miller's opinion, the Court makes it clear that the terms "privileges" and "immunities" were understood to include both "fundamental" rights and rights established through positive law. In 1868, the

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405. *Id.* at 522 n.1 (Thomas, J., dissenting).
406. *Id.* at 522 (Thomas, J., dissenting).
407. *Id.*
408. *Slaughter-House*, 83 U.S. at 79.
409. *Id.* (quoting Crandall v. Nevada, 73 U.S. 35 (1867)) (emphasis in original).
410. *Id.* at 79-80. *See* discussion *supra* text accompanying notes 323-32.

Supreme Court emphasized the latter by limiting the scope of the Article IV Privileges and Immunities Clause to those rights "common to the citizens in the latter States under their constitution and laws by virtue of their being citizens."[411] With this language, the Court had both disavowed an independent role in creating "privileges" or "immunities," while also explaining that those terms embraced both constitutional and statutory rights.

Lest there be any confusion about this point, Congress also established in unequivocal terms that rights derived from federal statutes were protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Congress enacted the Ku Klux Klan Act of 1871, and modified that Act in 1874, as an explicit exercise of its authority under section five of the Fourteenth Amendment. That text, which eventually became 42 U.S.C. § 1983, protects United States citizens from deprivation of "any rights, privileges, or immunities secured by the Constitution *and laws*" of the federal government.[412] Treatises from the late nineteenth and early twentieth centuries acknowledged this scope.[413] When Professor D.O. McGovney wrote his celebrated article summarizing privileges or immunities doctrine, he paraphrased the Fourteenth Amendment to read: "No State shall make or enforce any law which shall abridge any privilege or immunity conferred *by this Constitution, the statutes or treaties of the United States* upon any person who is a citizen of the United States."[414] Even the contemporary United States Supreme Court majority acknowledges that 42 U.S.C. § 1983 encompasses federal statutory rights.[415]

The Supreme Court decisions expanding the scope of state sovereign immunity within the context of powers ceded to the federal government revive the spirit of state nullification. Obviously, the principles are distinct since the current Court leaves the door open for potential enforcement of federal statutes. States continue to be technically bound by the federal laws in question; direct enforcement by the federal government as well as individual actions for injunctive relief against state officials continue to be viable remedies for violations.[416] In many contexts, however, these

411. Paul v. Virginia, 75 U.S. 168, 180 (1868) (concluding that corporations from one state did not have inherent rights to do business in another state without obtaining an appropriate license to do so).

412. Ku Klux Klan Act, ch. 22, sec. 1, § 1979, Rev. Stat. 347 (1874) (emphasis added).

413. *See* Rich, *supra* note 318, at 193 (citing THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 245 (1880); HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 64 (1901)).

414. D.O. McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219, 220 (1918). McGovney's article was reprinted twenty years later by the Association of American Law Schools, recognizing it as one of a collection of essays considered to have "permanent value." 1 ASS'N OF AM. LAW SCH., SELECTED ESSAYS ON CONSTITUTIONAL LAW v (1938). For discussion, *see* Rich, *supra* note 318, at 194.

415. *See, e.g.*, Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) (concluding that rights derived from the National Labor Relations Act were protected by 42 U.S.C. § 1983); Maine v. Thiboutot, 448 U.S. 1 (1980) (enforcing welfare rights derived from the Social Security Act).

416. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

alternatives may be meaningless.[417] By eliminating individual claims for monetary damages, the Court appears, in Justice Johnson's terms, "as much influenced by the Pleasure of bringing [federal] Functionaries into contempt by exposing their impotence as by any other consideration whatever."[418] As Daniel Webster warned, allowing states to violate federal law with apparent impunity, means that individual rights will "depend on State opinion and State discretion," thereby defeating "the main design for which the whole Constitution was framed."[419]

Before concluding that the Supreme Court has seriously breached the constitutional framework established following the Civil War, however, it is important to note that the Court has not yet been asked the right questions.

The answers given by the majority to the questions it has been asked fall within legitimate boundaries of judicial discretion. Although the historical footing for arguments that, in 1787, framers of the Constitution meant to preserve state sovereign immunity in the context of federal question jurisdiction seems weak, the lack of direct evidence on this issue may be seen as grounds for debate. The *Seminole Tribe* decision and its progeny may, therefore, be defensible.

The majority's argument that congressional interpretation of the Due Process and Equal Protection Clauses must be "congruent and proportional" to judicial interpretations of those clauses may also be justified.[420] The difficulty with giving Congress wide discretionary authority in this context stems from the basic observation that Congress itself remains bound by the principles in question. For example, giving Congress free reign to interpret the Free Exercise Clause creates risks of upsetting the constitutional balance between Free Exercise and Establishment Clause principles. The same dilemma must be faced in the context of Equal Protection Clause principles. While one might reasonably argue that Congress should have the authority to independently interpret the Equal Protection Clause as long as it provides more, rather than less, protection to the victims of discrimination, that argument becomes vulnerable when courts enforce those principles to protect the majority as well as the minority. Again, as in the context of the religion clauses, protection of individuals from government action takes on dimensions of balancing rather than straightforward twisting of a ratchet.[421] We can disagree with the fact that the Supreme Court has transformed

417. As previously noted, this may well be a "distinction without a difference" for owners of the *Tropic Sea*. *See supra* text accompanying note 388. As Justice Brennan explained, "in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause." Pennsylvania v. Union Gas Co., 491 U.S. 1, 20 (1989).

418. *See supra* text accompanying note 83.

419. GREAT DEBATE, *supra* note 40, at 205. *See* discussion *supra* text accompanying notes 202-05.

420. *See* Rich, *supra* note 318, at 229 (noting legitimacy of judicial supervision of due process and equal protection principles).

421. Prior to the Supreme Court's decision in *Boerne v. Flores*, the Court left the door open for Congress to take a more protective stance in determining the scope of Fourteenth Amendment powers. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (defining a ratchet approach to measuring the scope of congressional authority under section 5 of the Fourteenth Amendment).

analysis of these issues into balancing tests, and we can challenge the balance struck by the Court, while nevertheless conceding that it must ultimately be the Court rather than Congress that strikes the balance. Therefore, when asked whether the Equal Protection Clause empowers Congress to enact the Age Discrimination in Employment Act or the Americans with Disabilities Act, it is not *unreasonable* for the Court to conclude that the answer is "no."

The proper question, however, is whether federal statutory employment rights should be recognized as "privileges or immunities" of United States citizens. If asked that question, the Court's only reasonable answer should be "yes." This is true because of history, because of shared understanding of text, and because of precedent that may have been forgotten by many, and dropped by scholars from the popular constitutional canon, but which nevertheless—until overruled—retains its binding strength.[422]

In the context of the Privileges or Immunities Clause, the Supreme Court should defer to Congress in much the same manner that it defers to congressional authority to define the scope of interstate commerce. Three basic factors point in this direction.

First, it should be noted that privileges or immunities as historically defined must be derived from other powers of the central government. Those other powers, like the Commerce Clause or the Property Clause, give rise to navigation rights or homestead rights, both of which have been identified by the Supreme Court as belonging within the sphere of privileges or immunities.[423] Because Congress has broad authority to decide how to exercise its Article I powers, that authority should not be narrowed just because, when doing so, Congress issues commands that are enforceable against the states. That was, after all, the basic dispute between Daniel Webster and John C. Calhoun, and the basic principle established by the Civil War Amendments to the Constitution.[424]

Second, giving Congress responsibility for drawing the complex lines involved with privileges or immunities is consistent with the principle that the legislative branch should have authority to establish the positive law. Ironically, the Supreme Court recognized and reinforced this principle in the precise context of explaining why the Court should retain primary responsibility for determining the scope of the Equal Protection Clause.[425] Because the Court has been looking

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422. *See* Rich, *supra* note 318, at 227-32.

423. *See Slaughter-House*, 83 U.S. at 79 (citing the "right to use the navigable waters of the United States" as an example of privileges or immunities); United States v. Waddell, 112 U.S. 76, 79 (1884) (recognizing homestead rights on federal land as privileges or immunities).

424. Webster and Calhoun debated whether this was a unitary nation or a federation of contracting states; whether ultimate sovereignty resided with the people of the nation or with the people within individual states. *See supra* text accompanying notes 237-40.

425. In *Garrett*, Chief Justice Rehnquist explained: "If special accommodations for the disabled are to be required, they have to come from the positive law and not through the Equal Protection Clause." Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001). As implied by the Chief Justice, Congress has primary responsibility for development of the positive law. The fact that such protection is derived from positive law,

at the wrong clause of the Fourteenth Amendment when reviewing congressional authority to enforce its laws against the states, it has been drawn into the unseemly process of attempting to re-engineer the complex positive laws regulating employment. Furthermore, advocates for federal rights have been pressed to squeeze their arguments into boxes created by the Equal Protection or Due Process Clauses when we all understand that the basic reason for authorizing congressional action stems instead from its interest in consistent regulation of commerce. We can ignore that sham and restore coherence to constitutional doctrine by recognizing that employment rights, based upon Commerce Clause authority, constitute "privileges" of United States citizens.

Finally, recognizing congressional authority to establish and enforce federal rights against states when exercising its Article I powers will also help to restore the democratic principles that the post-Civil War Constitution reinforced.[426] The reasons for not extending legislative control over the scope of the Due Process and Equal Protection Clauses disappear in the context of the Privileges or Immunities Clause. Congress, not the Supreme Court, should have the democratic responsibility of balancing the positive employment rights of individuals against the interests of the states. While Calhoun and Hayne might disagree, fearing the power of the central government that would emerge from such an exercise of authority, Webster would counter that through such laws we become "one people."[427] In the twenty-first century, we should acknowledge that Webster's arguments have prevailed.

IV. CONCLUSION

In spite of the insistence of a current Supreme Court majority, the doctrine of state sovereignty which those justices espouse did not exist during the founding generation. The justices fail to find historical support for their conception of state immunity for the simple reason that state sovereignty within the context of a valid exercise of federal power would have been unthinkable at that time. Authors of the Eleventh Amendment were neither ignorant nor naive. They were offended by federal court interference with the conception of state sovereignty that existed at the time, and that would apply in the context of diversity jurisdiction.[428] But they never claimed state sovereign rights within the context of valid federal authority.

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however, is not a reason for discounting congressional authority to abrogate state sovereign immunity. For discussion, see Rich, *supra* note 318, at 222.

426. *See* FLETCHER, *supra* note 276, at 57. *See generally* discussion *supra* text accompanying notes 276-78.

427. *See supra* text accompanying note 238.

428. *See supra* text accompanying notes 36-38.

The conception of sovereign immunity advanced by the majority did not appear until it was raised in South Carolina in the 1820's. South Carolina leaders believed that federal tariff policies and federal treaties threatened the institution of slavery. In order to counter that threat, they needed a theory of state sovereignty that would protect them from federal encroachment. In other words, they needed to assure that states could independently establish the limits of national law. Only then could they assure that the federal government would not be able to take either direct or indirect action that would destroy the institution of slavery.

All of the elements of contemporary conservative states' rights policy came together for the first time in the South Carolina debates. Leading politicians were free traders, opposing any form of government regulation whether emanating from Congress or from their own state legislature. They were also undemocratic and profoundly conservative.[429] Unlike their conservative, states' rights predecessors, however, South Carolinians added two distinct elements to their conception of federalism: First, state sovereignty survived the "plan of the convention" and gave ultimate authority to the states to act even within the sphere of enumerated national powers; and second, this claim to state sovereignty over-rode prior conservative principles of strict construction.[430]

John C. Calhoun and Robert Y. Hayne expressed their claims of ultimate state sovereignty in some of the highest profile debates in the history of the United States Senate; their views were backed by action, defying federal treaties and law, bringing the nation to the brink of war in the 1830's, and finally plunging the nation into Civil War. After the war, the nation embraced Daniel Webster's conception of a consolidated union, President Lincoln restored that national vision, and John Bingham led Congress to enact the Fourteenth Amendment Privileges or Immunities Clause to provide additional constitutional enforcement of that principle. In subsequent years, Congress and the Supreme Court reestablished the preeminence of rights, privileges or immunities based upon federal law.

The current Supreme Court majority ignores that history, with arguments that echo the views of Calhoun and Hayne, sounding themes that emerged in the 1820's and 1830's. The justices share the same profound conservatism of their predecessors, including a dedication to principles of free trade and broadly based opposition to government regulation of the economy. They also break from conservative insistence on "strict construction" to claim that elements of state sovereignty survived the "plan of the convention," and to entrench that claim with constitutional status while disregarding constitutional text. No one in the founding generation shared this combination of views.

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429. *See* SINHA, *supra* note 45, at 25.

430. *See supra* text accompanying notes 159-61.

In 2002, the Supreme Court blocked owners of the *Tropic Sea* from enforcing their claims that South Carolina defied federal law by denying their right of access to the port of Charleston. The Court rendered its decision without reference to Charleston Harbor's history as the staging ground for nineteenth century battles over federalism. No one asked whether a traditional "right to navigate" includes a right to dock in state ports free from unlawful discrimination, and no one cited Supreme Court precedent tying that right to the Privileges or Immunities Clause of the Fourteenth Amendment. When lawyers and judges finally ask the right questions, they will discover that constitutional text and judicial precedent provide a way out of the undemocratic and incoherent web of state sovereign immunity that the justices have spun.