

Corfield v. Coryell and the Privileges and Immunities of American Citizenship*

Justice Bushrod Washington's famous discussion in *Corfield v. Coryell*¹ of the meaning of the Privileges and Immunities Clause² is, as Charles Fairman remarked, "certainly one of the most famous pronouncements ever made in a circuit court."³ The fame of Washington's decision is well-deserved, for it was long considered *the* authoritative interpretation of the Privileges and Immunities Clause.⁴ His discussion of the clause was one of the first offered by a federal court. He was surely capable of undertaking such initiatory interpretation, as he was no doubt aware of the original understanding of the clause. He had studied law with James Wilson (whom he replaced on the Supreme Court in 1798) and had been a member of the Virginia ratifying convention, where he had voted with James Madison, John Marshall, and others in favor of the Constitution.⁵ In fact, his pronouncement in *Corfield* represents one of the few elaborate interpretations of the Privileges and Immunities Clause left by anyone who participated in the adoption of the Constitution.⁶

* This Note is largely an adaptation of chapters 2–7 from my unpublished dissertation: Exploring "That Unexplored Clause of the Constitution": The Meaning of the "Privileges and Immunities of Citizens" Before the Fourteenth Amendment (2002) (Unpublished Ph.D. dissertation, University of Dallas) (on file with author). I am especially grateful to my wife, Libby, for her patience and support while I was writing both this piece and the dissertation on which it is based. I am also indebted to Professors Richard Dougherty and Thomas West of the University of Dallas for their invaluable guidance through the dissertation process, and to the editors and members of the Texas Law Review for their excellent suggestions and editing.

1. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).
2. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").
3. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 10 (1949).
4. See Adam J. Rosen, *Slaughtering Sovereignty: How Congress Can Abrogate State Sovereign Immunity to Enforce the Privileges or Immunities Clause of the Fourteenth Amendment*, 11 TEMP. POL. & CIV. RTS. L. REV. 111, 130 n.102 (2001) (characterizing *Corfield* as the "premier case of the antebellum period" explaining privileges and immunities); Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1158 (2002) (referring to the *Corfield* opinion as the "most widely-cited enumeration" of privileges and immunities at the time of the Fourteenth Amendment's adoption); see also Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 1001–02 (2002) (arguing that modern cases reaffirm Justice Washington's interpretation of privileges and immunities).
5. George W. Goble, *Bushrod Washington*, in 10 DICTIONARY OF AMERICAN BIOGRAPHY pt. 1, 508–09 (Dumas Malone ed., 1964). [hereinafter DICTIONARY OF AMERICAN BIOGRAPHY].
6. Although Alexander Hamilton stated that the Privileges and Immunities Clause might be the very "basis of the Union," THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961), the Founders generally refrained from providing any detailed exposition of this provision, even during the framing and ratification of the Constitution. The only exceptions with which I am familiar are Hamilton's remarks in the Federalist Papers, *id.*; James Madison's brief

Washington's *Corfield* opinion not only served as a leading interpretive authority for the Privileges and Immunities Clause, but also greatly influenced the drafting of the later Privileges *or* Immunities Clause of the Fourteenth Amendment.⁷ In the minds of the drafters of that Amendment, *Corfield* provided the most authoritative interpretation of the expression "privileges and immunities of citizens."⁸ Indeed, Washington's pronouncement was the legal authority to which the congressional framers most frequently appealed in describing the constitutional privileges of citizenship.⁹ Most notably, while introducing the proposed Amendment to the Senate, Jacob Howard explained the import of the "privileges and immunities of citizens" secured therein by means of a lengthy quotation from *Corfield*.¹⁰

Washington's exposition of "privileges and immunities of citizens" is, therefore, essential to American constitutional studies, for it provides evidence crucial to any inquiry into the roots of two different clauses of the Constitution: the Privileges *and* Immunities Clause of Article IV and the Privileges *or* Immunities Clause of the Fourteenth Amendment. Through *Corfield*, Washington both became the leading judicial expounder of the former provision and posthumously influenced the drafting of the latter. Surely, if one is to understand the history of the privileges of citizenship, as guaranteed in both the original and the amended Constitution, one must understand *Corfield*.

Despite the compelling significance of the case, legal scholars have largely failed to give *Corfield* much attention. Even in studies devoted to the Privileges and Immunities Clause, discussions of the case generally cover no

discussion in the same, THE FEDERALIST NO. 42, at 269–70 (James Madison) (Clinton Rossiter ed., 1961); claims by two Anti-Federalists that the clause would, in conjunction with Article III, Section 2, render the federal courts' jurisdiction limitless, FEDERAL FARMER NO. 18 (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 346–47 (Herbert J. Storing ed., 1981) and BRUTUS NO. 12 (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 427; Samuel Chase's opinion in *Campbell v. Morris*, 3 H. & McH. 535, 553–54 (Md. 1797) (discussed *infra* text accompanying notes 68–82); and Washington's *Corfield* opinion (discussed *infra* Part V).

7. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV, § 1.

8. See Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 228 (2003) (explaining that Senators Howard and Trumbull, two of the amendment's framers, referred to Justice Washington's discussion of privileges and immunities when explaining that clause); Smith, *supra* note 4, at 1158–59 (noting that many commentators have pointed out that Senator Howard's extensive quotation from *Corfield* in introducing the Fourteenth Amendment indicates the opinion's relevance).

9. See, e.g., *Index to THE RECONSTRUCTION AMENDMENTS' DEBATES* 754–56 (Alfred Avins ed., 1967) [hereinafter DEBATES] (indicating that, in this compilation of congressional debates, *Corfield* was one of the most frequently cited cases).

10. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). In introducing the excerpt from *Corfield*, Howard remarked that "[i]t would be a curious question to solve what are the privileges and immunities of citizens of each of the States But we may gather some intimation . . . by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington" *Id.*

more than a few pages.¹¹ In sum, *Corfield v. Coryell* remains a famous, important, but largely unexamined constitutional case.

It is the purpose of this Note to provide, for the first time, a close analysis of Justice Washington's famous remarks. After surveying the scholarly treatment of *Corfield* in Part I, I begin the study with a sketch of the understanding of the Privileges and Immunities Clause that prevailed before *Corfield*. In Part II, I briefly examine the Framers' understanding of the provision; in Part III, I discuss some of the important questions that the Framers left unanswered; and, in Part IV, I survey the ways in which courts grappled with the clause prior to the *Corfield* decision. In Part V, the longest part, I present a detailed analysis of Justice Washington's opinion. In the concluding part, I consider in what way this opinion sheds light on the original understanding of the Privileges or Immunities Clause of the Fourteenth Amendment.

I. The Limited Scholarship on *Corfield*

In large part, the failure by scholars to give *Corfield* any careful attention is due to the fact that, for the courts, Washington's pronouncement no longer carries the authority that it once enjoyed. Writing in 1823, he seems to have interpreted the Privileges and Immunities Clause in light of the now-abandoned, but then-prevalent, natural-rights theory. Accordingly, he sought the meaning of "privileges" and "immunities," not simply in the positive law of the states, but also in certain purportedly universal principles: he ruled that the privileges to which citizens were entitled under the clause were those which were "in their nature, fundamental; which belong[ed], of right, to the citizens of all free governments."¹² Yet in the decades following the Civil War, the Supreme Court abandoned this natural-rights reading and replaced it with a strictly anti-discriminatory construction. Beginning in

11. See, e.g., W. J. Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 MICH. L. REV. 286, 290–92 (1903) (noting that Judge Washington's "statement of the rights comprehended by the terms 'privileges and immunities'" did not have "considerable influence upon the subsequent decisions of the courts"); ROGER HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP 18–20 (Johns Hopkins Univ. Studies in Historical and Political Science, Series 36, no. 3, 1918) (noting that all of the privileges discussed in the *Corfield* opinion were "since held to be secured to the citizens of the several States" because the individual States granted those rights to their own citizens); Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1335–37 (1960) (criticizing Judge Washington's discussion of the Privileges and Immunities Clause in *Corfield*); Johathan Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 512 n.101 (1981) (confining the discussion of *Corfield* to a footnote although the study of the provision is over one hundred pages). For somewhat longer treatments, see L. H. LARUE, LIBERTY, EQUALITY, PRIVILEGES, IMMUNITIES: LOST KNOWLEDGE 32–38 (Washington & Lee Public Law and Legal Theory Research Paper Series, Working Paper No. 00-4, 2000), available at http://papers.ssrn.com/abstract_id=247655; DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 23–27 (2003).

12. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

Paul v. Virginia,¹³ and more emphatically in the *Slaughter-House Cases*,¹⁴ the Supreme Court insisted:

[The clause's] sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.¹⁵

So the privileges and immunities secured were peculiar to each state, being creations of local law.

As Justice Owen Roberts, writing for the majority in *Hague v. C.I.O.*,¹⁶ acknowledged, this post-Civil War jurisprudence represented a break with *Corfield*:

At one time it was thought that [the Privileges and Immunities Clause] recognized a group of rights which, according to the jurisprudence of the day, were classed as "natural rights", and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.¹⁷

In contrast, the modern jurisprudence rejected such absolute claims and affirmed that the clause entitled citizens only to a freedom from discrimination on the basis of state citizenship:

[Yet] it has come to be the settled view that Article IV, Section 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a state from discriminating against citizens of other states in favor of its own.¹⁸

In sum, as a result of the triumph of this strictly antidiscrimination reading of the clause, Washington's *Corfield* pronouncement could be, and has since been, largely ignored as a binding precedent.¹⁹

13. 75 U.S. (8 Wall.) 168, 180 (1868).

14. 83 U.S. (16 Wall.) 36 (1872).

15. *Id.* at 77.

16. 307 U.S. 496 (1939).

17. *Id.* at 511, cited in Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 14–15 (1967).

18. *Hague v. C.I.O.*, 307 U.S. 496, 511 (1939). *Accord* *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

19. The courts do not, however, totally ignore *Corfield*; it still serves as a precedent, but only as a limitation on the applicability of the strictly antidiscrimination rule. Whereas Washington seemingly held that the clause secured to out-of-state citizens only rights that are fundamental—

For constitutional historians, however, *Corfield* continues to hold ample interest. Washington's opinion has found a place in virtually all the studies of the histories of the two "privileges and immunities" clauses. Scholars have offered two opposing readings of the decision. Similar to Justice Roberts, most have read *Corfield* to have affirmed that the clause entitled the citizens of each state, while visiting other states, to certain absolute, national rights of citizenship, notwithstanding state laws to the contrary. For example, Professor Chester Antieau has written that for Washington "the privileges and immunities protected under Article IV are not those graciously accorded to its citizens by a state of sojourn, but the rights, privileges and immunities of citizens of the several or United States—the natural, fundamental rights of free men everywhere."²⁰ This seems to be the natural conclusion to be drawn from Washington's statement that the rights secured were those that were "in their nature, fundamental; which belong[ed], of right, to the citizens of all free governments."²¹

Others, however, have maintained that Justice Washington's position was consonant with the modern, strictly antidiscrimination reading of the clause. They argue that Washington's enumeration of fundamental rights was designed only to distinguish those rights that a state must extend equally to visiting citizens if the state chose to grant such rights to its own citizens. Professor David Currie, for instance, has insisted that

Justice Washington's solo performance in *Corfield* . . . concluded no more than that the clause allowed discrimination against an outsider if the right in question was not "fundamental." It seems more than a

without any further qualification—the modern courts have held that the clause secures only those rights a state may grant to its own citizens, *provided* that such rights be fundamental. See, e.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 387 (1978) (explaining that later courts viewed Washington's enumeration of "fundamental" rights as merely a limit to the antidiscrimination rule).

20. Antieau, *supra* note 17, at 11; see also JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 259–60 (1978) (arguing that there was no doubt that Washington and others considered privileges and immunities to include certain fundamental rights, whether those rights were defined by states or at the national level); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 816–18 (1982) (noting that some courts and commentators have relied on Justice Washington's dictum in *Corfield* to support a "natural law" approach to the interpretation of the Privileges and Immunities Clauses); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 66–67* (1986) (noting that "some of the early decisions, especially Justice Bushrod Washington's 1823 decision in *Corfield v. Coryell*, seem to support a reading of the clause [that recognizes] a body of national rights"); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-34, at 529 (2d ed. 1988) (stating that Washington concluded that the Privileges and Immunities Clause encompassed absolute, fundamental rights); Kimberley C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 11 (1998) (stating that prior to the Civil War, Washington's *Corfield* opinion was considered "the authoritative interpretation of Article IV's Privileges and Immunities Clause," and noting that, for Washington, the clause was substantive and not a "mere equal protection clause, the content to be supplied later by some legislative body").

21. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

'small step' to convert this passage narrowing the clause into one expanding it, or to transform what Justice Washington termed a necessary condition into a sufficient one.²²

Some scholars who endorse the antidiscrimination reading, however, have acknowledged that Justice Washington's dictum may at least be favorable to the absolute-rights interpretation. Professor Earl Maltz, who argues that the clause was generally interpreted in the nineteenth century as only forbidding discrimination on the basis of state citizenship, notes that "Justice Bushrod Washington's famous opinion in *Corfield v. Coryell* provides a somewhat equivocal exception [to the exclusively antidiscrimination interpretation]. . . . [His] discussion is certainly susceptible to an interpretation which supports the absolute rights theory of privileges and immunities."²³

Nevertheless, none of these studies has provided anything resembling a thorough analysis of *Corfield*. Whereas supporters of Washington's opinion have contented themselves with simply endorsing his position,²⁴ his detractors have asserted, without much elaboration, that it was undisciplined and irredeemably vague. One commentator has contended: "The vagaries

22. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 239 n.12 (1985). Currie is responding to *TRIBE*, *supra* note 20, at 529 (arguing that it would be "only . . . a small step beyond *Corfield*" to find that Article IV gives citizens uniform fundamental rights against their own states). In support of Currie's interpretation, see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1400 n.48 (1992) (stating opinion that Washington meant to embrace an antidiscrimination interpretation of the Privileges and Immunities Clause). See also David A. Faber, *Justice Bushrod Washington and the Age of Discovery in American Law*, 102 *W. VA. L. REV.* 735, 769 (2000) (citing Charles Fairman, *Reconstruction and Reunion 1864–88*, in 6 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 1121 (Paul Freund ed., 1971), for the proposition that Washington's words should not be supposed to charge each State with providing whatever fundamental rights the Supreme Court might hold to exist); 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, 1088 (2000) ("Nothing in *Corfield* suggests any reason to conclude that Washington intended any departure from an interstate equality theory of the Article IV Clause. His holding and express language indicated his intent was merely to 'confine' the scope of the Clause's reach in that regard."); Nicole I. Hyland, Note, *On the Road Again: How Much Mileage is Left on the Privileges or Immunities Clause and How Far Will It Travel?*, 70 *FORDHAM L. REV.* 187 (2001) (arguing that because Washington assumed that the states already guaranteed the right to interstate travel to its own citizens, Washington's language should be understood to grant equal protection to citizens of other states and not to create fundamental rights). Cf. *Baldwin*, 436 U.S. at 387 (discussed *supra* note 19).

23. Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 *AM. J. LEGAL HIST.* 305, 337–38 (1988) [hereinafter Maltz, *Fourteenth Amendment*]. For his part, Charles Fairman criticized Washington's opinion as "badly confused" for its failure to answer the "really controlling question [D]oes Article IV, Section 2 take as its measure the rights enjoyed by the citizens of the state in question, merely requiring that the visitor be treated like the local citizen? Or does the Section look to some national, perhaps some natural standard?" Fairman, *supra* note 3, at 11.

24. See, e.g., Antieau, *supra* note 17, at 10–12 (quoting, but not analyzing, *Corfield* to support the thesis that the privileges and immunities of Article IV are "fundamental rights of free men everywhere").

and vagueness of thought and expression in this statement are obvious.”²⁵ These deficiencies, he insists, resulted from Washington’s reliance on “a vague notion of ought-to-be rights, frequently called natural and even ‘inalienable’ rights.”²⁶ No one, to my knowledge, has responded to this objection; indeed, for some proponents of the absolute-rights reading, Washington’s apparent vagueness was meritorious, for it allowed for the discovery of “new” constitutional rights.²⁷

Yet as we shall see, although Washington’s opinion relied in part on the natural-rights theory of the Founders, it was not as confused as many critics have alleged. Rather, his general interpretation of the Privileges and Immunities Clause, including his partial enumeration of the privileges secured therein, makes sense in light of both the original intent and the earliest judicial interpretations of the clause. Yet, in contrast to the interpretation of Professor Antieau and others, we shall keep in mind two decisive features of Justice Washington’s natural-rights reading. First, Washington understood that the abstract principles of the natural law required determination through peculiar positive laws. Accordingly, the natural rights of citizenship, as secured by the American Constitution, were necessarily peculiar to the American political tradition. Second, Washington made an implicit (but crucial) distinction between the universal, natural rights of humanity, to which all persons, citizens or otherwise, were entitled, and the privileges of citizenship. With these distinctions in mind, we will see that Washington’s natural-rights reading of the clause was neither as vague nor as indiscriminate as its critics have asserted and its proponents have seemingly conceded.

II. Prelude to *Corfield*: The Adoption of the Privileges and Immunities Clause

Although the Founders left us little record of any discussion of the Privileges and Immunities Clause, the very fact that they had so little to say may, ironically, give substantial indication as to their understanding of that provision. Regardless of whether they supported or opposed the adoption of the Constitution, they were largely silent about the clause, most likely because it was essentially conservative and thus uncontroversial. And in truth, the clause was not new at all, for an analogous, more elaborate

25. D. O. McGovney, *Privileges or Immunities Clause: Fourteenth Amendment*, 4 IOWA L. BULL. 219, 228 (1918), cited in Currie & Schreter, *supra* note 11, at 1337.

26. McGovney, *supra* note 25, at 228; cf. Fairman, *supra* note 3, at 11–12.

27. See, e.g., Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 613 (1992) (claiming that Washington “understood Article IV, Section 2 to embrace unenumerated and, as of yet, unidentified federally protected rights under the Constitution,” such as the right to education).

“privileges and immunities” provision had been included in the Articles of Confederation, the fourth article of which affirmed:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States, or either of them.²⁸

This antecedent clause seems also to have been a conservative and therefore uncontroversial provision.²⁹ The introductory phrase indicates the conservative aim: “to *secure* and *perpetuate* mutual friendship and intercourse among the people of the different States.”³⁰ Indeed, the initial draft for the provision—prepared by a congressional committee chaired by John Dickinson—was radically conservative; it would have required the states to continue to extend to the inhabitants of other states all the rights enjoyed by out-of-state Americans at that time:

ART. VI. The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities, and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.

28. ARTICLES OF CONFEDERATION art. IV, § 1 (U.S. 1781).

29. The decision to include some interstate citizenship provision seems not to have been a particular point of controversy. For example, James Duane, a delegate to the Continental Congress, in a letter to John Jay written soon after Congress initially approved the Articles, reported that there were “only two points that can admit of much Debate—The *Equality* of each State in Congress; and the Ratio for assessing their respective Quotas of the publick charges. Both are copious Themes and have, and will, occasion much Controversy.” Letter from James Duane to John Jay (Dec. 23, 1777), in 1 JOHN JAY: THE MAKING OF A REVOLUTIONARY: UNPUBLISHED PAPERS 459 (Richard B. Morris ed., 1975) (emphasis in original); see also Letter from Samuel Chase to Richard Henry Lee (July 30, 1776), in 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 32 (Edmund C. Burnett ed., 1923); Letter from Samuel Chase to Philip Schuyler (Aug. 9, 1776), in 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra* at 44. There does, however, seem to have been considerable thought put into the drafting of this provision, as the Continental Congress considered several different drafts for what would become Article IV. See 5 JOURNALS OF THE CONTINENTAL CONGRESS 547 (1776); 9 *id.* at 888–89 (1777).

30. For an early case supporting this claim, see *Douglass’ Adm’r v. Stevens*, 2 Del. Cas. 489, 495 (1819) (“The article was made the better to secure and perpetuate what then existed. It conferred no new right, but legalized and preserved such as were then fully enjoyed.”).

ART. VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony enjoy.³¹

Dickenson, along with the majority of the committee, was apparently concerned that the thirteen United States, having declared their separation from Great Britain, would soon become separate from one another. As a result, the citizens of the several states, having once been fellow subjects, would become aliens to one another. So they proposed a restrictive plan that would have fixed much of the existing colonial laws; the states would have been obliged to respect, *indefinitely*, all the noncommercial rights enjoyed in 1776 by *all* persons living in other states, citizens or otherwise. With respect to commercial rights, however, citizens would have been entitled to a freedom from economic regulations that discriminated on the basis of state citizenship.

The eventual “privileges and immunities” provision of the Articles was more modest. The beneficiaries of that clause were not all inhabitants, but those “free inhabitants”³² who were not “paupers, vagabonds, [or] fugitives from justice.”³³ Moreover, the rights to which such persons would be entitled were limited to the “privileges and immunities of free citizens.”³⁴ Yet the provisions retained the original conservative purpose. As the language of the measures suggests, the goal was to ensure that the newly independent states would not become so independent of one another that the citizens thereof would no longer enjoy throughout the several states the “Community of Privileges”³⁵ that they had enjoyed as fellow subjects of the British Empire. Accordingly, although Article II of the Confederation declared that “[e]ach state retains its sovereignty, freedom, and independence,”³⁶ the first among the exceptions to this principle was Article IV, which declared that “the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States”³⁷ In addition to this provision, Article IV also mandated that “the people” of the several states enjoy the right to travel within the several states, the freedom from economic regulations and taxation that the states did not impose equally on their respective citizens, and the right to export certain

31. 5 JOURNALS OF THE CONTINENTAL CONGRESS 547 (1776).

32. ARTICLES OF CONFEDERATION, art. IV, § 1 (U.S. 1781).

33. *Id.*

34. *Id.*

35. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 135 (Max Farrand ed., rev. ed. 1937) (including a document from the Philadelphia Convention’s Committee of Detail that summarized the Privileges and Immunities Clause with this expression).

36. ARTICLES OF CONFEDERATION, art. II (U.S. 1781).

37. *Id.* art. IV, § 1.

property. In brief, the citizens of each state would be treated like citizens, rather than aliens, in the other states.³⁸

The drafters of the Constitution of 1787 included a much shorter “privileges and immunities” provision. The beneficiaries were not all “free inhabitants,” only the “Citizens of each State.”³⁹ Moreover, the rights to which they would be entitled were simply the “Privileges and Immunities of Citizens in the several States,”⁴⁰ without any additional enumeration of such privileges as the right to travel or the freedom from discriminatory economic regulation. As James Madison explained in *Federalist 42*, these changes served to simplify and clarify the antecedent clause in the Articles. He noted that the new Constitution both avoided the use of a confusing variety of terms like “free inhabitants,” “free citizens” and “the people,” but simply guaranteed citizens the “rights of citizenship,” and eliminated the redundant enumeration of certain of these rights, such as the equal privileges of trade and commerce.⁴¹

Yet as Madison’s discussion made clear, the new Privileges and Immunities Clause would guarantee the same “privileges and immunities” secured by the privileges and immunities provision of the Articles. And these privileges, he suggested, were not the peculiar privileges recognized in the different states, but were certain absolute rights to be enjoyed by visiting citizens, notwithstanding state laws to the contrary. Madison’s discussion of the Privileges and Immunities Clause occurred within his explanation of the necessity of granting Congress the power to establish a “uniform Rule of Naturalization.”⁴² Madison claimed that such an exclusive federal power was necessary in order to prevent the Privileges and Immunities Clause from operating so as to allow one state’s generous naturalization laws to trump the stricter laws of another;⁴³ under the provision, Madison wrote, any individual bearing the title of “citizen” had the right, by virtue of the Privileges and Immunities Clause, to enjoy certain “rights of citizenship” in all the other states, even though those states might not extend such rights to individuals with his qualifications. In short, a uniform rule of naturalization was required because the Privileges and Immunities Clause guaranteed certain uniform privileges of citizenship.

38. *Id.*

39. U.S. CONST., art. IV, § 2.

40. *Id.*

41. THE FEDERALIST NO. 42, *supra* note 6, at 269–70 (“Why the terms free inhabitants are used in one part of the article, free citizens in another, and people in another; or what was meant by superadding to ‘all privileges and immunities of free citizens,’ ‘all the privileges of trade and commerce,’ cannot easily be determined.”).

42. U.S. CONST., art. I, § 8.

43. THE FEDERALIST NO. 42, *supra* note 6, at 270 (“An alien, therefore, legally incapacitated for certain rights in the latter [state], may, by previous residence only in the former [state], elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other.”).

What were these privileges that the Founders wished to secure to the citizens of the independent, but still united, states? Justice Joseph Story later gave some indication in his *Commentaries*. He noted that prior to the Revolution the American colonists “were not wholly alien to each other.” Rather, “they were fellow subjects, and for many purposes one people. Every colonist had a right to inhabit, if he pleased, in any other colony; and as a British subject, he was capable of inheriting lands by descent in every other colony” and had the right to conduct trade therein.⁴⁴

The privileges that Story mentioned corresponded to some of the disabilities of alienage—or noncitizenship—under English law. For example, an alien was not fully entitled, as a matter of equal right, to travel or reside within the national territories.⁴⁵ Moreover, as Blackstone commented, aliens were subject to a number of other disabilities: An alien was not permitted to purchase, convey, or hold real property for his own use, nor was he able to inherit or transmit by inheritance such property; aliens were subject to special commercial taxes; they were at times forbidden from working at certain trades; and aliens were unable to hold any public office.⁴⁶ In contrast, the privileges of citizenship could be expressed thus: the right to travel and reside; the right to acquire, hold, and convey real estate, including the right to inherit and transmit by inheritance such property; the freedom from other trade and commercial restrictions customarily imposed on aliens; and the rights to elect and be elected to public office.

Of the disabilities of alienage—and the corresponding privileges of citizenship—by far the most practically significant were economic rights. In the eighteenth century, the most important of these was the right to hold real property. As Justice Samuel Chase explained in the first reported judicial construction of the Privileges and Immunities Clause, one of the chief motivations for the inclusion of the analogous provision in the Articles was to secure the rights of real property ownership.

By taking a retrospective view of our situation antecedent to the formation of the first general government, or the confederation, in which the same clause is inserted *verbatim*,^[47] one of the great objects

44. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 178, at 164 (photo. reprint 1991) (Boston, Hilliard, Gray, & Co. 1833) [hereinafter STORY, COMMENTARIES]; see also JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 21, at 23 (photo. reprint 1992) (New York, American Book Co. 1840) [hereinafter STORY, FAMILIAR CONSTITUTION].

45. See 10 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 394–96 (1938) (describing the Crown’s wide powers over the ingress and expulsion of aliens).

46. 2 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES 371–74 (St. George Tucker ed., Philadelphia, Birch & Small 1803) (photo. reprint 1969). Hereinafter, all references will be to Tucker’s five-volume edition of Blackstone’s four-volume work. Tucker’s extensive annotations and commentary required him to divide Blackstone’s first volume into two volumes.

47. This statement is obviously somewhat inaccurate. See *supra* notes 32–38 and accompanying text (discussing Article IV of the Articles of Confederation).

must occur to every person, which was the enabling [of] the citizens of the several States to acquire and hold real property in any of the States, and deemed necessary, as each State was a sovereign independent State, and the States had confederated only for the purpose of general defence and security, and to promote the general welfare.⁴⁸

So the first—but by no means the only—right included among the “privileges and immunities of citizens” to be enjoyed in other states was the right to acquire, hold, and convey real property. Under the clause, the states could not prohibit this to out-of-state citizens, nor impose any of the other customary disabilities of alienage on these citizens.

III. Questions Left Unanswered

The Privileges and Immunities Clause had a simple purpose: to ensure that the citizens of each state would not be treated like aliens in the other states. Nonetheless, the Founders used sweeping, indefinite language to effect this goal. Because they left almost no explanation of either the precise meaning of the “privileges and immunities of citizens” or the precise extent of the citizens’ entitlement to such advantages, they failed to address several major interpretive difficulties. We will take a brief note of three of these here, for all three were implicitly addressed by Justice Washington in *Corfield*.

First, it was far from clear how to reconcile, on the one hand, the clause’s requirement that all citizens be positively entitled to such privileges as the right to hold land and to vote in other states, with, on the other hand, the states’ continued authority to regulate and even restrict these rights so as to *disentitle* a large number of citizens from these same rights. This difficulty emerged from the very language of the clause. The Founders chose to express the absence of the disabilities of alienage in terms of a positive entitlement. Yet the absence of a disability—a double negative as it were—is not necessarily a positive. A citizen might have been free from one disability but remain subject to other legal disabilities that effectively disentitled him or her from a certain privilege. The states, for example, customarily required that an individual not only be a citizen, but also possess other attributes—such as those related to age, residence, wealth, sex, race, etc.—in order to enjoy many of the privileges of citizens.⁴⁹ Did the Framers of the Privileges and Immunities Clause actually intend to repeal not only the disabilities of alienage, but also these other legal disabilities?

48. *Campbell v. Morris*, 3 H. & McH. 535, 553–54 (Md. 1797).

49. DEREK HEATER, A BRIEF HISTORY OF CITIZENSHIP 72–79, 120 (2004) (chronicling the attributes of the limited class of Early American “citizens” who attained full rights accordant with citizenship).

Given the universality of such disabilities, the answer must surely be no. In fact, both before and after the adoption of the Constitution, all of the states restricted the privileges of citizenship to only some citizens. For example, all the states reserved the suffrage to only a minority of in-state citizens, and prohibited all out-of-state citizens from this franchise. Moreover, this latter restriction seems actually required by the federal system recognized by the Constitution. Indeed, as one member of the Continental Congress recognized, it would have been a “political absurdity” to allow the citizens of each state to vote in the elections of every other state.⁵⁰ All of the citizens of Pennsylvania, for example, could then travel into Delaware and elect a government hostile to the interests of the people therein. Given the constitutional necessity of residency requirements, and the universality of other restrictive practices, it is impossible to believe that the Framers of the Constitution intended the clause to restrict the right of the states to impose many kinds of suffrage restrictions, including those related to residence, age, wealth, sex, etc.

Furthermore, even the nonpolitical privileges of citizenship, although generally available to citizens, were not extended to all citizens. Customarily, one needed to be not only a citizen, but also a sane adult man or unmarried woman in order to enjoy the right to acquire realty⁵¹ or exercise the other economic privileges of citizenship. While the level of citizenship necessary for entitlement to these nonpolitical rights of citizenship was less strict than that necessary for the enjoyment of political rights, it remained true that nowhere in the several states were all citizens entitled to all the nonpolitical privileges of citizenship. Here again, there is absolutely no evidence that shows the Founders intended to prohibit the universal practice of reserving these privileges of citizenship to only some citizens. To what extent, then, were the citizens of each state to be constitutionally “entitled to all privileges and immunities of citizens in the several states”?

The ambiguous language of the clause created a second difficulty: what were all the benefits secured therein? One could not rely on a simple reference to the rights customarily denied to aliens. As we have seen, “*all* privileges and immunities” did not neatly correspond to “rights customarily denied to aliens.” In fact, in eighteenth-century America, not only were the privileges of citizens not available to all citizens, they were often available to some aliens. All lawfully resident aliens enjoyed the right to travel and reside, many could own real estate,⁵² and some could even vote.⁵³ From

50. Thomas Burke, Notes on the Articles of Confederation (Nov. 15, 1777), in 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra* note 29, at 552 (discussing the “privileges and immunities” provision of the Articles).

51. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 209–10 (2d ed. 1985).

52. KETTNER, *supra* note 20, at 214–18.

these facts, one might conclude either that there were no distinctive *privileges* of citizens, or that these privileges had little or nothing to do with *citizenship*. Yet the very terms used in the clause—“privileges,” “immunities,” and “citizens”—reveals that the Framers wished to guarantee certain, definite rights that were reserved to citizens as such.

What was it, then, that distinguished precisely the privileges of citizenship from other benefits? The fact that a right was enjoyed by some or all aliens did not necessarily exclude it from the privileges of citizenship. The crucial test seems to have been not whether aliens enjoyed a certain right, but whether they did so as a matter of *equal right* or *indulgence*. So even a right enjoyed by all aliens could qualify as a privilege of citizenship if such a right was extended to them by *customary indulgence* rather than equal right.

It seems that any right was a privilege of citizenship if it was membership in the political community that conferred an *entitlement* to such a right. Among privileges of this sort was the right to acquire, hold, and convey personal—as opposed to real—property. Although aliens customarily enjoyed the privileges of personal property, aliens were not, as Blackstone made clear, equally *entitled* to such privileges:

[A]n alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation; for personal estate is of a transitory and moveable nature; and, besides, this *indulgence to strangers* is necessary for the advancement of trade. . . . Aliens also may trade as freely as other people; only they are subject to certain higher duties at the custom-house: and there are also some obsolete statutes of Henry VIII, prohibiting alien artificers to work for themselves in this kingdom⁵⁴

There is no evidence to show that the Founders differed from Blackstone as to aliens' nonentitlement to the rights of personal property. Indeed, as St. George Tucker noted in his 1803 annotated edition of Blackstone's *Commentaries*, the First Congress followed the English custom by imposing higher duties on alien traders.⁵⁵ Moreover, although the states generally retained the customary indulgences of English law with respect to personal property, it was never maintained that aliens were equally entitled to such rights. In fact, one state, Georgia, did not allow aliens to acquire, hold, or convey personal estate, or to rent real estate unless such persons had begun the process of naturalization.⁵⁶

53. *Id.*; Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AMER. POL. SCI. REV. 114–16 (1931); *see, e.g.*, The Northwest Ordinance, ch. 8, 1 Stat. 50, 51 n.a. (1789) (extending suffrage to noncitizens, albeit on more stringent terms).

54. 2 BLACKSTONE, *supra* note 46, at 371 (emphasis added) (footnotes omitted).

55. *Id.* at 371 n.7.

56. KETTNER, *supra* note 20, at 216.

There were, to be sure, other rights not usually denied to aliens that could have been designated “privileges” or “immunities” of citizens. Yet because the Founders never addressed this issue, they never provided a full enumeration of all the rights secured by the Privileges and Immunities Clause. Like their English predecessors,⁵⁷ early American jurists had contented themselves with defining the privileges of citizenship negatively—with reference to the disabilities of alienage.⁵⁸ The difficulty was left for the future. By way of anticipation, I note that any discernment of those rights that belonged to citizens by right, but to aliens only by indulgence, would, in the absence of any clear legislative pronouncement, require an inquiry outside of strictly positive law—i.e., a theoretical inquiry into principles prior to or transcendent of such law.⁵⁹

The third interpretive difficulty involved the relationship between the privileges of citizens (whatever they all might be) and those rights that both citizens and noncitizens enjoyed as a matter of absolute “natural” or “human” right. Among the rights that the Founders considered universal was the right to be secure in one’s life, liberty, and lawfully acquired property. The securing of these rights was the first and indispensable obligation of government.⁶⁰ Security in these rights entailed not only the right to protection by the government, but also security from arbitrary governmental power.⁶¹ Strictly speaking, universal rights such as these could not be

57. *Id.* at 5. Kettner writes:

English jurists never attempted fully and explicitly to catalog the rights attached to subjectship. Rather they were content to define those rights implicitly by specifying the disabilities suffered by those who did not enjoy subject status. Most crucial was the restriction on real property rights that began to emerge in the fourteenth century.

58. Many early authorities assumed that naturalization, *ipso facto*, served to remove the disabilities of alienage. See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 35, at 235–36, 268–72 (recording the discussion of the naturalization power in the Convention); 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 146–69 (Helen E. Veit et al. eds., 1994) (reporting the discussion of the first naturalization bill in the House of Representatives); 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 214–22, 494 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (discussing the Senate’s examination of the first naturalization bill). Among these authorities was Justice Washington. See *Campbell v. Gordon*, 10 U.S. (6 Cranch) 176, 182 (1810) (“The oath [of naturalization], when taken, confers upon [the former alien] the rights of a citizen.”); cf. *Spratt v. Spratt*, 26 U.S. (1 Pet.) 343, 349 (1828) (holding that land purchased by a naturalized citizen vested in him by the act of naturalization itself rather than local state law).

59. See *infra* text accompanying notes 161–64.

60. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (affirming that “to secure these rights, Governments are instituted among Men . . . [and] [t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it”).

61. See, e.g., U.S. CONST. amend. V (“No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); cf. *id.* amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

designated “privileges of citizenship”—for they belonged, of right, to all persons.⁶² Nonetheless, even these benefits might have been secured by the Privileges and Immunities Clause, insofar as a citizen’s entitlement to such privileges as travel, residence, or property acquisition involved, by necessary implication, a right to security in person and property. Although the Founders never addressed this question directly, early cases held, we will see, that the Privileges and Immunities Clause protected the citizens’ rights of life, liberty, and property.

IV. Prelude to *Corfield*: Early Interpretations of the Privileges and Immunities Clause

During the thirty-five years between the adoption of the Constitution and Justice Washington’s decision in *Corfield v. Coryell*,⁶³ the courts of several jurisdictions offered interpretations of the Privileges and Immunities Clause. To my knowledge, the courts in nine states and one federal circuit provided at least some discussion of the meaning of the clause.⁶⁴ As we shall see, three widely different interpretations were offered. Some courts held that the clause guaranteed to the citizen of one state while in the other states, certain absolute rights of citizenship, including the right to acquire, hold, and convey real property.⁶⁵ Other authorities affirmed that the clause restricted not the state governments, but the federal government by prohibiting discrimination in federal law between citizens on the basis of their state of citizenship.⁶⁶ Still others maintained that the clause only protected out-of-state citizens against state laws discriminating against individuals on the basis of their state of citizenship.⁶⁷

62. See, e.g., *Clarke v. Morey*, 10 Johns. 69, 72–73 (N.Y. 1813) (ruling that aliens, even those who were subjects or citizens of enemy nations, were entitled to file suit in defense of their private property).

63. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

64. In chronological order, the nine state jurisdictions were: Maryland (*Campbell v. Morris*, 3 H. & McH. 535, 553–54 (Md. 1797); *Ward v. Morris*, 4 H. & McH. 330, 341 (Md. 1799)); Virginia (*Hadfield v. Jameson*, 16 Va. (2 Munf.) 53, 55–56 (1809); *Murray v. M’Carty*, 16 Va. (2 Munf.) 393, 398 (1811)); New York (*Livingston v. Van Ingen*, 9 Johns. 507, 561, 577 (N.Y. 1812)); Tennessee (*Kincaid v. Francis*, 3 Tenn. (1 Cooke) 49, 51–52 (1812)); Massachusetts (*Ainslie v. Martin*, 9 Mass. (8 Tyng) 454, 460 (1813); *Barrell v. Benjamin* 15 Mass. (9 Tyng) 354, 358 (1819)); Delaware (*Lavery v. Woodland*, 2 Del. Cas. 299, 307–08 (1817); *Douglass’ Adm’r v. Stevens*, 2 Del. Cas. 489, 501–04 (1819)); Kentucky (*Aspinwall v. Chase*, 10 Ky. (3 A.K. Marsh.) 266, 267 (1821); *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 333–35 (1822)); North Carolina (*Sheepshanks & Co. v. Jones*, 9 N.C. (2 Hawks) 211, 213 (1822)); and Pennsylvania (*Thurston v. Fisher*, 9 Serg. & Rawle 288, 292 (Pa. 1823)). The one reported federal case that treated the provision before *Corfield* was *Costin v. Washington*, 6 F. Cas. 612, 613–14 (C.C.D.C. 1821) (No. 3,266).

65. See discussion *infra* subpart IV(A).

66. See discussion *infra* subpart IV(B).

67. See discussion *infra* subpart IV(C).

A. *The Absolute-Rights Interpretation*

The first and perhaps most important judicial interpretation of the clause occurred in *Campbell v. Morris*.⁶⁸ The case involved a challenge to a Maryland law providing that a creditor residing in the state could obtain an attachment on the property of a debtor who was not a citizen or resident of Maryland, but not upon the property of a local citizen who remained in the state. The counsel for the defendant-debtor argued, in part, that any law “putting the property of a citizen of another state in a different condition from that of the property of a citizen of this state, [was] a violation of [the Privileges and Immunities Clause].”⁶⁹ The plaintiff’s attorneys responded that the clause did not require the states to extend all of the same rights enjoyed by its own citizens to citizens of other states; rather, it secured only certain “general rights of citizenship” throughout the Union.⁷⁰ The relevant question, then, “as to the effect of a law of any state, will not be whether it makes a discrimination between citizens of the several states; but whether it infringes upon any civil right, which a man as a member of civil society [i.e., a citizen] must enjoy.”⁷¹

In its opinion, Maryland’s General Court ruled with the plaintiff on this point.⁷² The author of the opinion was Samuel Chase, Justice of the U.S. Supreme Court, who at the time was also serving on the courts of his home state.⁷³ Chase had been a leading participant in the establishment of the United States; he had signed the Declaration of Independence, participated in the drafting of the Articles of Confederation, and had later been an Anti-Federalist at the Maryland ratifying convention. Yet by the 1790s, he had become a committed Federalist and was appointed to the U.S. Supreme Court by President Washington in 1796.⁷⁴

In order to arrive at his conclusion, Chase began by analyzing what motivated the Framers to include the clause in the Constitution. As noted above,⁷⁵ he attributed the inclusion of the clause in the Constitution (and the Articles) to a desire to guarantee such privileges as the rights of real property:

68. 3 H. & McH. 535 (Md. 1797).

69. *Id.* at 536.

70. *Id.* at 565.

71. *Id.*

72. *Id.* at 553–54.

73. Edward S. Corbin, *Samuel Chase*, in 2 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 5, at pt. 2, 34–37.

74. *Id.* The report of the *Campbell* case does not identify the first name of the deciding judge, but most scholars have concluded (or assumed) that the author was Justice Samuel Chase. *See, e.g.*, Fairman, *supra* note 3, at 13. One scholar, however, has identified the author as “Judge Jeremiah Townley Chase,” and not Justice Chase. BOGEN, *supra* note 11, at 22, 25. Jeremiah Chase was Justice Chase’s cousin, and like his cousin, had been an Anti-Federalist at the Maryland ratifying convention. *WHO WAS WHO IN AMERICA, HISTORICAL VOLUME 1607–1896*, 102 (1963).

75. *See supra* text accompanying notes 47–48.

[O]ne of the great objects must occur to every person, which was the enabling of citizens of the several States to acquire and hold real property in any of the States, and deemed necessary, as each State was a sovereign independent State, and the States had only confederated for the purpose of general defence and security, and to promote the general welfare.⁷⁶

So according to Chase, a principal (but not the sole) aim of the clause was to ensure that the newly free and independent states did not treat the citizens of other states as aliens with respect to a particular substantive right: the right to acquire real property.⁷⁷ There was no indication that Chase (or the other Founders, for that matter) believed that such a right qualified as a “privilege of citizens” only if the local law of a state recognized it as such. This right simply was a privilege of citizenship, antecedent to any state law.

Chase proceeded to provide a rough sketch of what rights were included among the “privileges and immunities” of citizenship:

It seems agreed, from the manner of expounding, or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected. The Court are of opinion it means that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State, in the same manner as the property of the citizens of the State is protected. It means, such property shall not be liable to any taxes, or burdens which the property of the citizens is not subject to. It may also mean, that as creditors, they shall be on the same footing with the State creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights.⁷⁸

These brief remarks merit our careful attention. First, we see that the court acknowledged the difficulty of applying the Privileges and Immunities Clause to the political privileges of citizenship. Under the clause, the citizens of each state could not be entitled to the political privileges of citizenship in other states, so they could not be entitled to *all* privileges and immunities of citizens. Consequently, the court gave “a particular and limited operation, [not] a full and comprehensive one,” to the expression “privileges and immunities of citizens.”⁷⁹ The clause did not secure the political privileges of citizenship.

76. *Campbell*, 3 H. & McH. at 553–54.

77. *See id.*

78. *Id.* at 554. *Accord* *Ward v. Morris*, 4 H. & McH. 330, 341 (Md. 1799) (discussing the interstate comity reading of the Privileges and Immunities Clause).

79. *Campbell*, 3 H. & McH. at 554.

Second, we see that the privileges of citizenship enumerated by Justice Chase were not all freedoms from discrimination. The first right mentioned, viz., “the peculiar advantage of acquiring and holding real as well as personal property,” was not related to any general rule of equality; there was no hint of any qualification that visiting citizens were to enjoy it only if a state extended this right to its own citizens.⁸⁰ In contrast, another privilege of citizenship, the freedom from “any taxes, or burdens which the property of the citizens is not subject to,” was plainly a privilege of nondiscrimination.⁸¹ These two privileges corresponded perfectly to two of the main privileges of subjectship according to Blackstone: the right to acquire and hold real property and the freedom from aliens’ duties and restrictions.⁸²

Third, this decision is also remarkable in that Chase recognized that governmental protection of lawfully acquired property was also secured by the Privileges and Immunities Clause. Strictly speaking, such a right was not a privilege of citizenship, but one of the universal human rights the enjoyment of which was absolutely necessary to the enjoyment of the privileges of citizenship.⁸³ Accordingly, Chase affirmed that under the clause, the citizens of each state were entitled not only to the right to acquire and hold real and personal property, but also to the assurance “that such property shall be protected and secured by the laws of the State, in the same manner as the property of the citizens of the State is protected.”⁸⁴ Chase added that this principle *might* also forbid the states from passing or enforcing laws discriminating between in-state and out-of-state creditors.⁸⁵ Yet, as he made clear in his ruling, the states could discriminate between in-state and out-of-state debtors, at least with respect to attachment proceedings.⁸⁶

In the last sentence of the paragraph cited above, Chase cryptically notes that the Privileges and Immunities Clause “secures and protects

80. *See id.* at 553–54.

81. With reference to this paragraph from the *Campbell* decision, Charles Fairman wrote: “Evidently it is the existing local system of rights [of a particular state], not a standard set by national or natural law, to which the citizen from out-of-state is entitled.” Fairman, *supra* note 3, at 14; *see also* Harrison, *supra* note 22, at 1401 n.50 (“The privilege or capacity of taking, holding, conveying, and transmitting lands, lying within any of the United States, is by the general government conferred on, and secured to all the citizens of any of the United States, in the same manner as a citizen of the state where the land lies could take, hold, convey, and transmit the same.”); BOGEN, *supra* note 11, at 22. It is difficult to see how Fairman and others could have arrived at this conclusion. Justice Chase made no reference to state law in relationship to the right to acquire and hold both real and personal property. The interstate equality principle applied only to the other rights mentioned: the freedom from discriminatory taxation and regulation on the one hand, and the protection of property and person on the other.

82. 2 BLACKSTONE, *supra* note 46, at 371–72.

83. *See supra* text accompanying notes 55–56.

84. *Campbell*, 3 H. & McH. at 554.

85. *Id.*

86. *Id.*

personal rights.”⁸⁷ This final statement was, in the words of one nineteenth-century commentator, “a remark of importance in this connection, notwithstanding its brevity.”⁸⁸ By “personal rights,” Chase surely did not mean all the rights belonging to persons, but the rights of person—personal security and personal liberty—as opposed to the rights of property that he had just enumerated. Moreover, the mention of both the broader “secures” as well as “protects,” with respect to the rights of person and property, no doubt served to indicate that the citizen was entitled not only to be protected *by* the government but also *from* the government.

So in the first judicial construction of the Privileges and Immunities Clause, it was ruled that while *some* of the privileges of citizenship were protected under the clause, the political rights of citizenship were not. The protected rights included the following: the ability to acquire, hold, and convey property, both real and personal; and the freedom from (arbitrarily) discriminatory taxation or economic regulation. Moreover, the clause secured those human rights that were absolutely necessary for the enjoyment of those privileges. Citizens had a right to be protected by the laws in their person and property. Conversely, a citizen’s person and property were to be guaranteed against acts of governmental injustice. Chase probably would have understood this latter principle to involve the citizen’s right not to have his or her life, liberty, or property taken without due process of law. Finally, the rights of person and property, along with the two economic privileges of citizenship, did not, for Chase, exhaust the import of the clause. Rather, his stated goal was not to discern the rights included under the clause “with precision and accuracy,” but only “satisfactorily.”⁸⁹

Nearly fifteen years later, in *Murray v. M’Carty*,⁹⁰ Virginia’s Supreme Court of Appeals affirmed that the Privileges and Immunities Clause did not secure political privileges to out-of-state citizens. According to Judge William Cabell, such privileges were, strictly speaking, privileges of citizenship of a particular state. But the provision *did* guarantee certain privileges of national citizenship, including the right to acquire real property throughout the several states:

[The Constitution] clearly recognises the distinction between the character of a citizen of the United States, and of a citizen of any individual state; and also of citizens of different states; and, although a citizen of one state may hold lands in another, yet he cannot interfere

87. See *supra* text accompanying note 78.

88. 2 JOHN CODMAN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 343 (photo. reprint 1968) (Boston, Little Brown 1862).

89. *Campbell*, 3 H. & McH. at 553. Chase ruled for Morris on other grounds, a decision that the Maryland Court of Appeals reversed. *Id.* at 562, 576.

90. 16 Va. (2 Munf.) 393 (1811).

in those rights, which, from the very nature of society and of government, belong exclusively to citizens of that state.⁹¹

As in *Campbell*, there was no indication that the court believed that a citizen's enjoyment of the nonpolitical privileges of citizenship was dependent on the recognition of such privileges by local state law. Rather, Cabell said unqualifiedly that under the clause, the citizens of each state may hold lands in another. The implication was that out-of-state citizens were simply entitled to this and other rights of citizenship, irrespective of state law.

While not taking up the question of political rights, the Supreme Judicial Court of Massachusetts also suggested that the clause entitled visiting citizens to at least one absolute right: the right to acquire and hold land. Chief Justice Theophilus Parsons noted that "citizens of some other of the *United States* [are] by the federal constitution, entitled to the privileges of citizens within this state," including the right to acquire and hold real estate.⁹² Like Cabell, Parsons in no way suggested that the enjoyment of this right was dependent upon the recognition of such a right in local law.⁹³

B. *The Federal-Restriction Interpretation*

At roughly the same time that *Murray v. M'Carty* was decided, the Tennessee courts heard a case involving the same issue that prompted the controversy in *Campbell v. Morris*—a state law that discriminated between in-state and out-of-state citizens with respect to attachment proceedings. In *Kincaid v. Francis*,⁹⁴ the Tennessee Supreme Court of Errors and Appeals likewise ruled that such laws did not violate the Privileges and Immunities Clause, yet the court based its decision on a construction of the clause radically different from that which had been offered by the Maryland court in *Campbell v. Morris*. Rather than viewing the clause as a restraint on state governments, the Tennessee court held that it was intended to prohibit the federal government from discriminating between citizens of different states. Writing for the court, Judge White stated:

91. *Id.* at 398. This discussion of the clause was only indirectly related to the case. The defendant, who had moved to Maryland, had claimed his exemption from a Virginia law prohibiting slave importation by state citizens. *Id.* at 396. The Supreme Court of Appeals rejected his claim by asserting, in part, that the Privileges and Immunities Clause, although establishing certain rights of national citizenship, had not so destroyed the principle of citizenship in different states so as to enable any state citizen to claim full, unqualified citizenship in any other state. *Id.* at 398.

92. *Ainslie v. Martin*, 9 Mass. (8 Tyng) 454, 460 (1813) (emphasis in original).

93. In two other cases, judges of the high courts of Massachusetts and Virginia also mentioned that the Privileges and Immunities Clause had some anti-discriminatory force. *See Barrell v. Benjamin*, 15 Mass. (14 Tyng) 354, 358 (1819) (affirming that if a citizen of Massachusetts "has the privilege to sue any foreigner who may come within this state[, then] a citizen of [another state] has the same privilege secured to him by the constitution"). *Hadfield v. Jameson*, 16 Va. (2 Munf.) 53, 56 (1809) (opinion of Tucker, J.) (noting, in dicta, that the clause entitled citizens from other states to the same judicial remedies available to citizens of Virginia).

94. 3 Tenn. (1 Cooke) 48 (1812).

It seems to us most probable that this clause in the Constitution was intended to compel the general government to extend the same privileges and immunities to the citizens of every State, and not to permit that government to grant privileges or immunities to citizens of some of the States, and withhold them from those of others; and that it was never designed to interfere with the local policy of the State governments as to their own citizens. The question must then be decided upon our attachment law.⁹⁵

By itself, such an interpretation seems to be consistent with the language of the Privileges and Immunities Clause. Yet both its placement in Article IV, an article largely devoted to relations between the states, and all the available historical evidence indicate that the Framers understood the clause to restrict the manner in which the states would treat out-of-state citizens.

C. *The Strictly Antidiscrimination Interpretation*

In New York's highest court, still a third interpretation of the Privileges and Immunities Clause was set forth. In *Livingston v. Van Ingen*, the New York Court for the Correction of Errors held that the provision only prohibited state laws that discriminated against citizens of other states.⁹⁶ In the case, the court rejected the argument that a state law granting a temporary monopoly over the use of steamboats on state waters represented a violation of the provision.⁹⁷ In one of several seriatim opinions, Justice Joseph Yates insisted that absent any discrimination between in-state and out-of-state citizens, the monopoly did not violate the clause:

To all municipal regulations, therefore, in relation to the navigable waters of the State, according to the true construction of the Constitution, to which the citizens of this State are subject, the citizens of other states, when within the state territory, are equally subjected; and *until a discrimination is made, no constitutional barrier does exist*. The Constitution of the United States intends that the same immunities and privileges shall be extended to all the citizens equally, for the wise purpose of preventing local jealousies, which discriminations (always deemed odious) might otherwise produce.⁹⁸

Even more emphatically, Chief Justice James Kent's opinion affirmed that with respect to all the privileges of citizenship, the *sole* function of the clause was to prevent states from discriminating between United States citizens on the basis of state citizenship:

95. *Id.* at 53.

96. 9 Johns. 507, 561 (N.Y. 1812).

97. *Id.* at 561, 577.

98. *Id.* at 561 (emphasis added).

The provision that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, has nothing to do with this case. It means *only* that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights.⁹⁹

North Carolina's high court seemingly endorsed the strictly antidiscrimination reading. In *Sheepshanks & Co. v. Jones*,¹⁰⁰ the court explained the extent to which citizens of other states were entitled to serve as jurors in North Carolina: "If our own laws do not permit our own citizens who are not freeholders in this State to serve on a Jury, it cannot be considered as the denial of a right or privilege to the citizens of another State, who are not freeholders here, to consider them disqualified."¹⁰¹

In effect, the Privileges and Immunities Clause entitled citizens of other states to no more than equality with North Carolina's citizens:

For, upon the supposition that the right to serve on a jury here was claimed by the citizen of another State, as a privilege or immunity, he must shew that it is enjoyed by our own citizens not otherwise qualified than himself; otherwise it would be a claim, not of privileges *equal* to but *greater* than those of our own citizens.¹⁰²

The opinions offered in *Livingston* and *Sheepshanks* represent strong evidence that state courts in the early nineteenth century interpreted the Privileges and Immunities Clause as an exclusively anti-discriminatory provision. Yet this evidence is far from decisive. The *Livingston* case involved that particular privilege of citizenship—the freedom from discriminatory economic regulation—that had always been understood to entail a freedom from discrimination between the citizens of different states. Recall Chase's opinion that the clause ensures that the property of an out-of-state citizen should "not be liable to any taxes, or burdens which the property of the citizens is not subject to."¹⁰³ Similarly, in *Sheepshanks*, the particular right involved—the political privilege of serving as a juror—was one that no authority held to be an absolute right under the Privileges and Immunities Clause. Other courts were aware of the problem posed by political rights; as I have noted, the high courts of Maryland and Virginia both solved this problem by simply declaring such rights to be beyond the scope of the clause.¹⁰⁴ But as we shall see later, although Justice Washington would later

99. *Id.* at 577 (emphasis added); see also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 61 (1st ed., New York, O. Halsted 1827) ("[If the citizens] remove from one state to another, they are entitled to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other.").

100. 9 N.C. (2 Hawks) 211 (1822).

101. *Id.* at 213.

102. *Id.*

103. *Campbell v. Morris*, 3 H & McH. 535, 554 (Md. 1797).

104. See *supra* text accompanying notes 78–89.

endorse the absolute-rights reading, he also affirmed that the clause might protect political rights, but only in conformity with the peculiar regulations and prohibitions imposed by local state law.¹⁰⁵

In *Amy v. Smith*,¹⁰⁶ however, Kentucky's highest court adopted this reading in a case involving a basic, purportedly absolute nonpolitical right: the right to file suit in defense of one's person and property. The case was brought by a "woman of color" suing for her personal freedom. Although Kentucky law prohibited "persons of color" from filing such a suit, she claimed, by her former residence in other states, that she was an out-of-state citizen and was thereby entitled to the benefits of the Privileges and Immunities Clause, including the absolute right to file lawsuits, state laws to the contrary notwithstanding. The Kentucky Court of Appeals, however, rejected her claim on two grounds. First and foremost, the court claimed that no black person could be a constitutional citizen.¹⁰⁷ Secondly, the court added that even if the plaintiff had been a citizen of another state, she still would not have been entitled to an absolute right to file suit, for the clause only secured a freedom from discrimination on the basis of state citizenship. Since the Kentucky statute enjoining her suit discriminated only on the basis of skin color, the statute did not violate the clause.¹⁰⁸

One federal circuit court made a similar holding. In *Costin v. Washington*,¹⁰⁹ the Circuit Court of the District of Columbia upheld the constitutionality of a policy requiring free blacks to post a bond—as a guaranty of "good behavior"—in order to maintain a residence in the District.¹¹⁰ Chief Judge William Cranch argued:

[I]f there be a class of people more likely than others to disturb the public peace, or corrupt the public morals, and if that class can be clearly designated, [the government] has a right to impose upon that class, such reasonable terms and conditions of residence, as will guard the state from the evils which it has reason to apprehend. A citizen of one state, coming into another state, can claim only those privileges and immunities which belong to citizens of the latter state, in like circumstances.¹¹¹

105. See *infra* text accompanying notes 195–99.

106. 11 Ky. (1 Litt.) 326 (1822).

107. *Id.* at 333–34; accord *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

108. *Amy*, 11 Ky. at 335. The *Amy* court noted:

[A] citizen of [any other] states . . . as the act [in question] operates as well upon citizens of this state, as upon those of any other, it can not be a violation of the clause of the constitution in question; for it can not upon any principle, be construed to secure to the citizens of other states, greater privileges, within this state; than are allowed by her institutions to her own citizens.

Id. *Contra id.* at 342–45 (Mills, J., dissenting).

109. 6 F. Cas. 612 (C.C.D.C. 1821) (No. 3,266).

110. *Id.* at 614.

111. *Id.* at 613–14.

Curiously, Judge Cranch apparently assumed that the Privileges and Immunities Clause had application to the District of Columbia as well as the states.

D. Delaware: Douglass' Administrator v. Stevens

In Delaware, however, judicial authorities rejected the exclusively antidiscrimination interpretation in affirming that a bona fide out-of-state citizen was entitled to an absolute right to file suit to secure the rights of person and property. In *Douglass' Administrator v. Stevens*¹¹² the Delaware High Court of Errors and Appeals upheld a regulation of the distribution of assets of a deceased debtor, which regulation favored creditors who were state residents over those who were not.¹¹³ The majority decided that the Privileges and Immunities Clause did not forbid all forms of discrimination between in-state and out-of-state citizens; at the same time, the court noted in passing that the clause did secure the absolute right to file suit to recover one's debts.¹¹⁴

In his majority opinion, Chief Justice Johns reached these conclusions through a lengthy analysis of the clause. He began by citing, nearly verbatim, but without citation, the brief remarks made in *Campbell* with respect to the meaning of the words "privileges" and "immunities."¹¹⁵ He then set forth a rule for constructing the clause:

The privileges and immunities to be secured to all citizens of the United States are such only as belong to the citizens of the several states, which includes the whole United States; and must be understood to mean such privileges as should be common, or the same in every state¹¹⁶

According to Johns, the privileges and immunities were national and uniform, and were not peculiar to the respective states. He interpreted the clause's final prepositional phrase, "in the several states," as a modifier of "privileges and immunities of citizens" rather than of the verb "shall be entitled"; "in the several states" described the *type* of privileges—those that

112. 2 Del. Cas. 489 (Del. 1819).

113. *Id.* at 503–04. Recall that in *Campbell*, Justice Chase had stated that legislation that discriminated between in-state and out-of-state creditors *might* violate the clause. *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797) (stating that the Privileges and Immunities Clause secures personal rights, and thus may imply that out-of-state creditors "shall be on the same footing with State creditors in the payment of the debts of a decedent").

114. *Douglass' Adm'r*, 2 Del. Cas. at 501–04.

115. *Id.* at 501 ("The words 'privileges' and 'immunities' are nearly synonymous. Privilege signifies a peculiar advantage, exemption, immunity. Immunity signifies exemption."), *paraphrasing without citation Campbell*, 3 H. & McH. at 553 ("Privilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege.").

116. *Douglass' Adm'r*, 2 Del. Cas. at 502.

were universal in the several, or all the states—rather than *where* the citizens of each state would be entitled to enjoy them.

From this general principle, Johns presented two different interpretations of the clause: one similar to that adopted in *Kincaid v. Francis*,¹¹⁷ and the other borrowed from Justice Chase’s opinion in *Campbell v. Morris*.¹¹⁸ According to Johns, the necessary uniformity of the privileges protected by the clause:

seems to limit the operation of the clause in the Constitution to federal rules, and to be designed to restrict the powers of Congress as to legislation, so that no privilege or immunity should be granted to one citizen of the United States but such as should be common to all.¹¹⁹

As in *Kincaid*, the clause was here understood to apply only to the federal government.

Johns, however, proceeded to acknowledge that the clause might have been designed to restrict the state governments.¹²⁰ Yet even if so, he insisted, the same, uniform privileges and immunities to which the citizens of each state were entitled in the several states could not include the peculiar rights established by local state law:

But suppose the design of this section of the Constitution to have been to restrict the powers of legislation by the state legislatures, it cannot be extended so far as that no peculiar advantage should be given by any state to its own citizens, but what must be extended to all citizens, in every state in the union, because the privileges secured are not such as are given to citizens in one or more states, by the state laws, but must be such as the citizens in the several states, that is, in all the states are entitled to.¹²¹

Among these privileges was the right to acquire and hold real estate. Once again paraphrasing the *Campbell* decision, Johns wrote, “The great object to be attained [by the clause] was to prevent a citizen in one state from being considered an alien in another state, to secure the right to acquire and hold real property.”¹²²

117. *See supra* text accompanying notes 94–95.

118. *See supra* text accompanying notes 72–89.

119. *Douglass’ Adm’r*, 2 Del. Cas. at 502.

120. *Id.*

121. *Id.*

122. *Id.*, paraphrasing without citation *Campbell v. Morris*, 3 H. & McH. at 535, 553–54 (Md. 1797). Note that Justice Chase had said that the securing of real property rights was “one of the great objects,” while Johns used the more restrictive, “*the* great object.” Johns’s ignorance of the history of the adoption of the clause is indicated not only by his conclusion that the clause *may* have been intended to restrict the powers of the federal government, but also by his hesitance to conclude that the clause had originated in the Articles of Confederation: “Our situation antecedent to the formation of the first general government in 1778 rendered such a provision necessary, and accordingly a similar clause was inserted in the Articles of Confederation then adopted, from which

What are the other privileges of citizenship secured by the clause? Johns did not venture to give a full enumeration:

The privileges and immunities, etc, are not enumerated or described, but they are all privileges common in the Union, which certainly excludes those privileges which belong only to citizens of one or more states, and not to those in every other state. It is more easy to ascertain whether the municipal law of this state giving a preference to state creditors is a law incompatible with the privileges secured by the second section of the fourth article of the Constitution of the United States, than it is to define all the privileges and immunities which the section was intended to secure to the people of the United States, and this will be sufficient for the purpose of deciding the present case.¹²³

“There is,” Johns observed, “no rule as to the distribution of assets which is the same in all the States; nor is this a subject for Congress to legislate on, and the rules governing it can only be made by the state legislatures.”¹²⁴ Given the lack of uniformity in this respect, the rights established by Maryland law were strictly local and therefore not the privileges of citizenship in the several states.

Nevertheless, Johns acknowledged that a creditor’s right to recover a debt was, in fact, a privilege protected by the clause. Yet the *manner* in which the creditor might do so was to be determined by the legislatures of the respective states:

If the Maryland creditor has the privilege of commencing and prosecuting a suit for the recovery of his debt, to be regulated by the municipal laws of this state, *he enjoys a privilege which this article intended to secure to him*. [But the] *lex loci* must govern as to the distribution of the fund for payment of debts.¹²⁵

So the citizens of each state, in the several states, were entitled to not only the right to acquire and hold both real and personal property, but also the right to the judicial protection of this property, including the right to file suit for the recovery of debts. We may safely presume that Johns would have added that the clause secured, more broadly, the right to the judicial and other governmental protection of the citizens’ rights of property and person. The states remained free to *regulate* these rights, but not in such a manner as to *disentitle* out-of-state citizens from the enjoyment of them.

In its broad outline, this latter construction of the Privileges and Immunities Clause followed that offered by Justice Chase in the *Campbell* decision. In both cases, there was the affirmation that the clause guaranteed

the second section of the fourth article of the Constitution of the United States was *probably* taken.” *Douglass’ Adm’r*, 2 Del. Cas. at 502 (emphasis added).

123. *Id.*

124. *Id.*

125. *Id.* (emphasis added, except to “*lex loci*”).

certain rights throughout the United States, including the right to acquire both real and personal property, as well as the right to governmental protection of such property. At the same time, both Chase and Johns acknowledged the difficulty in enumerating all of the “privileges and immunities of citizens.” Yet in any case, they could conclude definitively that the strictly local privileges—those that belonged exclusively to the citizens *of* the respective states—were not protected under the clause. In *Campbell*, as in *Murray*, political rights were explicitly designated as exclusive privileges of state citizenship. In *Douglass*, the court suggested that political rights were exclusively local and not protected by the clause, for the clause only guaranteed the rights that belonged to *all* citizens in every state. Political privileges, in contrast, only belonged to some citizens.

E. Summary

As has been shown, when the case of *Corfield v. Coryell* came before Justice Washington’s circuit court, several conflicting precedents as to the meaning of the Privileges and Immunities Clause were available. Courts in four states had affirmed, or at least suggested, that the clause protected certain absolute rights of citizenship—including the right to acquire, hold, and convey real property, and the freedom from discriminatory economic regulation and taxation—but not the political rights of citizenship.¹²⁶ In addition, two of these state courts had noted that the clause also secured the right to security in person and property, both by the government and from the government.¹²⁷ Courts in two states affirmed that the clause was designed to restrict the federal government.¹²⁸ In three other states and one federal circuit, the strictly antidiscrimination reading was affirmed.¹²⁹

V. *Corfield v. Coryell*

Corfield v. Coryell involved a constitutional challenge to a New Jersey law that provided that “it shall not be lawful for any person who is not at the time an actual inhabitant and resident” to take oysters from the state’s coastal waters.¹³⁰ Corfield, a citizen of Delaware, had rented his boat to an individual who had sailed into waters off the New Jersey coast and had taken oysters in contravention of New Jersey law. Accordingly, New Jersey authorities seized the boat. Corfield sued in trespass, claiming that the law in question was unconstitutional, in part because it violated the Privileges and

126. These states include Delaware, Maryland, Massachusetts, and Virginia. See *Douglass’ Adm’r v. Stevens*, 2 Del. Cas. 489, 502 (Del. 1819); *Campbell v. Morris*, 3 H. & McH. 535, 553–54 (Md. 1797); *Ainslie v. Martin*, 9 Mass. (8 Tyng) 454, 460 (1813); *Murray v. M’Carty*, 16 Va. (2 Munf.) 393, 398 (1811). For more discussion of these decisions, see *supra* subparts IV(A), IV(D).

127. Maryland and Delaware. See *supra* notes 77–89, 114–23 and accompanying text.

128. Delaware and Tennessee. See *supra* notes 94–95, 114–19 and accompanying text.

129. New York, Kentucky, North Carolina, and the D.C. Circuit. See *supra* subpart IV(C).

130. *Corfield v. Coryell*, 6 F. Cas. 546, 548 (C.C.E.D. Pa. 1823) (No. 3,230).

Immunities Clause “by denying to the citizens of other states, rights and privileges enjoyed by those of New Jersey.”¹³¹

The defendant, arguing on behalf of the New Jersey law, countered that the Privileges and Immunities Clause “applies only to the privileges and immunities of citizenship, not to the rights in the common property of the state [e.g., state fisheries].”¹³² In support of this interpretation, the defendant’s counsel cited four authorities: *Livingston v. Van Ingen* (Justice Yates’s opinion), *Campbell v. Morris*, *Murray v. M’Carty*, as well as the discussion of the clause by Thomas Sergeant, in his commentary entitled *Constitutional Law*.¹³³ It is not surprising that the defendant’s attorneys marshaled the authority of the *Campbell* and *Murray* decisions; in both cases, the courts ruled that state citizens were entitled to the privileges of national citizenship in the other states, but not to all the local or political privileges that a state might confer on its own citizens.¹³⁴ Yet it is difficult to see how either Yates’s opinion in *Livingston* or Sergeant’s remarks lent any support to Coryell’s interpretation of the clause. Yates had simply remarked that with respect to the rights of navigation, the clause only forbid the states from discriminating on the basis of state citizenship, but he had said little as to the extent or limits of the antidiscrimination rule.¹³⁵ And Sergeant’s commentary on the clause consisted of little more than brief quotations from various cases, including *Campbell* and *Livingston*, with little significant elaboration.¹³⁶

Justice Washington, sitting as circuit judge, ruled that the New Jersey law did not violate the Privileges and Immunities Clause.¹³⁷ In reaching this conclusion, Justice Washington provided an interpretation of the provision. As we shall presently see, his position was generally in keeping with the jurisprudence that had been developing in the state courts, especially through the *Campbell*, *Murray*, and *Douglass* decisions: that the clause required the

131. *Id.* at 549; Fairman, *supra* note 3, at 10.

132. *Corfield*, 6 F. Cas. at 549.

133. *Id.* (citing “9 Johns. 521, 560; 3 Har. & McH. 12; Serg. Const. Law, 385; 2 Munf. 393”). The citation to “3 Har. & McH. 12,” rather than to *Campbell*’s citation of 3 H. & McH. 535 (Md. 1797), was almost certainly a mistake; 3 H. & McH. 12 is the citation for *Donaldson v. Harvey* (Md. 1790), a case that did not involve the Privileges and Immunities Clause, while *Campbell* was the only case reported in Volume 3 of Harris and McHenry’s Maryland reports that contained any discussion of the Privileges and Immunities Clause. The defendant’s counsel must have used the first edition of Sergeant’s commentary, published in 1822 (one year before *Corfield* was decided) under a different title: *Constitutional Law: Being a Collection of Points Arising upon the Constitution and Jurisprudence of the United States, Which Have Been Settled, by Judicial Decision and Practice*. I have located only the second edition, published in 1830, seven years after the case was decided. THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE COURTS OF THE UNITED STATES AND OF CONSTITUTIONAL POINTS DECIDED 394 (2d ed., Philadelphia, Nicklin & Johnson 1830).

134. *See supra* text accompanying notes 68–91.

135. *See supra* text accompanying notes 96–98.

136. SERGEANT, *supra* note 133, at 393–94.

137. *Corfield*, 6 F. Cas. at 552.

states to extend the national privileges of citizenship to out-of-state citizens, including the right to be protected in person and property, the right to travel and reside in the state, the right to acquire and hold real and personal property, and the freedom from discriminatory taxation, only the last of which rights was defined as a freedom from discrimination on the basis of state citizenship. At the same time, however, Washington was reluctant to exclude political rights entirely from the protections of the clause.

A. The “privileges and immunities which are, in their nature, fundamental”

Washington’s famous dictum may be divided into five sections.¹³⁸ In the first section, he asks¹³⁹ the question of inquiry, viz., “what are the privileges and immunities of citizens in the several states?”¹⁴⁰ and then proceeds to define, in general terms, the nature of these privileges:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.¹⁴¹

Here Washington suggests that the privileges and immunities of citizens are those that are fundamental not in an undefined sense, but fundamental to citizenship in a free government. These are the privileges that “belong, *of right*, to the *citizens* of all free governments.”¹⁴² Noncitizens may enjoy these rights, but they do so as a matter of indulgence; only citizens enjoy them “of right.”

One may well wonder what Justice Washington means by “free government.” He no doubt understands the term in a manner similar to the way in which it was employed by his contemporaries. Washington, as I have noted, was a member of the founding generation. Among the Founders, the seemingly universal understanding of “free government” was that it was one in which the government ruled with the consent of the governed; free government was the opposite of despotism. The authors of the Declaration of Independence, for instance, claimed that the “present King of Great Britain” was seeking to reduce the people “under absolute Despotism” and was thus “unfit to be the ruler of a free people.”¹⁴³ At the Virginia ratifying

138. According to the division proposed here, each of these sections, with the exception of the second, is a separate sentence in Washington’s own discussion; the second section consists of two sentences.

139. As is fitting for a close textual analysis, we shall suspend our chronological narrative and use the present tense in discussing the *Corfield* opinion.

140. *Corfield*, 6 F. Cas. at 551.

141. *Id.*

142. *Id.* (emphasis added).

143. THE DECLARATION OF INDEPENDENCE paras. 2, 29 (U.S. 1776).

convention (at which Washington was present), Patrick Henry remarked that “[i]f Congress’s military power be unbounded, it must lead to despotism. For the power of the people in a free Government, is supposed to be paramount to the existing power.”¹⁴⁴

Although all free governments ruled with the consent of the governed, it was not necessary for a government to be wholly republican (or “popular”) in order to be free. Justice Washington’s uncle, President George Washington, indicated in his Farewell Address that “popular government” was only one among several “species of free Government.”¹⁴⁵ Justice Story, Washington’s colleague on the Supreme Court, likewise distinguished republican and other free governments. With reference to the Founders’ decision to establish the House of Representatives, he wrote:

Their own experience, as colonists, as well as the experience of the parent country, and the great deductions of theory, had settled it, as a fundamental principle of a free government, and especially of republican government, that no laws ought to be passed without the consent of the people¹⁴⁶

The “parent country”—Great Britain—was thus a free country because laws could not be passed without the consent of the people’s elected representatives in the House of Commons. In contrast, the United States was governed by republican, free governments, in which all governmental officers—legislative, executive, and judicial—derived all their powers “directly or indirectly from the great body of the people.”¹⁴⁷

Consulting the *Federalist Papers*, we see that the authors understood the term “free government” (or “free constitution” or “free people”) in a similar manner. This expression seems to have referred to a situation in which the government did not rule in opposition to the consent of the governed. The United States and the several states, as republican governments, were “free governments” in that sovereignty ultimately lay with the people.¹⁴⁸ Yet the American governments were not the only free governments, nor were free governments necessarily wholly republican in

144. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1299 (John P. Kaminski et al. eds., 1993).

145. George Washington, Farewell Address, in *GEORGE WASHINGTON: A COLLECTION* 521 (W.B. Allen ed., 1988) (“’Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free Government.”).

146. STORY, *FAMILIAR CONSTITUTION*, *supra* note 44, § 67, at 50–51.

147. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

148. Hamilton, for example, stated that constructing a constitution was “a subject the most momentous which can engage the attention of a free people,” THE FEDERALIST NO. 15, at 105 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and mentioned “the powers which a free people ought to delegate to any government” THE FEDERALIST NO. 23, at 156 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

form. James Madison (with whom Bushrod Washington voted for the Constitution in Virginia) quoted with approval Montesquieu's praise of the British constitution as a mirror of "political liberty" and a model "free constitution,"¹⁴⁹ as well as his description of the German confederation as consisting of "free cities and petty states."¹⁵⁰ And in refuting the claims of those who asserted that a standing army in peacetime was a threat to a free people, Publius responded that such an assertion was made "in contradiction to the practice of other free nations and to the general sense of America, as expressed in most of the existing [state] constitutions."¹⁵¹ By "other free nations," he surely meant, among others, Great Britain. Nonetheless, what made Great Britain's constitutional monarchy (and other not-wholly-republican governments) "free" was precisely the degree to which such governments were partly republican.

By defining the "privileges and immunities" of citizenship with reference to "free government," Washington, therefore, indicates that these rights all relate to the people's right to self-government. It is not surprising, then, that he should later mention the right of suffrage as a right that could, perhaps, be included among the rights protected by the clause.¹⁵² At the same time, however, Washington does not mention, in his partial enumeration, such privileges as the freedom of speech, freedom of the press, and the right to bear arms, despite the fact that the Founders frequently insisted that these privileges were essential to "free government,"¹⁵³ and represented important features of popular sovereignty.¹⁵⁴ As we shall see,¹⁵⁵

149. THE FEDERALIST NO. 47, at 302–03 (James Madison) (Clinton Rossiter ed., 1961).

150. THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961).

151. THE FEDERALIST NO. 24, at 158 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

152. See *infra* text accompanying notes 194–96. Daniel Levin argues that Washington's mention of the privileges under a "free government" and the particular enumeration of the suffrage indicates that Washington read "*Corfield* to protect only participatory rights of government" and not "personal liberties." Daniel J. Levin, Note, *Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce*, 35 HARV. C.R.-C.L. L. REV. 569, 576–77 (2000). Levin can only reach this conclusion by ignoring the other privileges enumerated by Washington. Most notably, in Levin's quotation from *Corfield*, he uses ellipses in order to avoid mentioning, *inter alia*, Washington's reference to the right to acquire property, a right that one could only with difficulty classify as a "participatory" right. *Id.* at 575.

153. For example, the Massachusetts constitution stated that "liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restricted in this Commonwealth." MASS. CONST. OF 1780, art. XVI, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1892 (Francis Newton Thorpe ed., 1909). Similarly, the Second Amendment declares that "the right of the people to keep and bear Arms shall not be infringed" because the militia is "necessary to the security of a free State." U.S. CONST., amend. II.

154. The Founders frequently designated the freedoms of communication (speech, press, assembly) as aspects of the people's sovereignty. For example, St. George Tucker, in his annotated edition of Blackstone's *Commentaries*, made the following remarks with reference to the First Amendment:

Washington chooses to emphasize those privileges of citizenship that corresponded to the traditional disabilities of alienage. He does so most likely because the securing of these privileges was the primary (but not necessarily the exclusive) purpose of the clause.

Returning to our analysis of Justice Washington's dictum, we see that in describing the privileges of citizenship as those rights that ought to be enjoyed by citizens in every free (and therefore, good) government, Justice Washington makes what may be called a "natural law" argument. Yet he further refines his definition of the privileges of citizenship by adding that they are rights "which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."¹⁵⁶ This second rule is similar to that principle of construction, adopted by the majority decision in the *Dougllass* case, that the privileges of citizenship were common throughout the several states.¹⁵⁷

There are at least two ways of understanding the relationship between these two parts of the definition of the fundamental "privileges and immunities of citizens in the several states." First, one may argue that they represent two distinct necessary conditions, so that a particular advantage is not a constitutional privilege of citizenship unless it *both* belongs to all citizens, as a matter of right, in all free governments, *and* has always been enjoyed by the citizens in all the states. If such were the case, the implication

It being one of the great fundamental principles of the American governments, that the people are sovereign, and those who administer the government their agents, and servants, not their kings and masters, it would have been a political solecism to have permitted the smallest restraint upon the right of the people to enquire into, censure, approve, punish or reward their agents according to their merit, or demerit. . . . For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

St. George Tucker, *Appendix to 1 BLACKSTONE*, *supra* note 46, at 297; *see also* James Wilson, Lectures on Law, in 2 *THE WORKS OF JAMES WILSON* 579 (Robert Green McCloskey ed., Belknap Press 1967) (1804) [hereinafter *WORKS*]. The right to bear arms was often spoken of as an important auxiliary—a shield—to popular sovereignty. *See, e.g.*, Letter from George Washington to Bryan Fairfax (Mar. 1, 1778), in 11 *THE WRITINGS OF GEORGE WASHINGTON* 4 (John C. Fitzpatrick ed., 1931–1944) (writing that the British had planned to disarm the American colonists so as to then strip them of the privileges of Englishmen); 3 *STORY, COMMENTARIES*, *supra* note 44, § 1890, at 746 ("The right of the citizens to keep and bear arms, has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers . . .").

155. *See infra* text accompanying notes 183–84.

156. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

157. John's opinion, however, stated that the "privileges and immunities of citizens in the several states" included "such privileges as *should* be common, or the same in every State . . ." *Dougllass' Adm'r v. Stevens*, 2 Del. Cas. 489, 499, 502 (Del. 1819) (emphasis added). *See supra* text accompanying note 116. *See also* LARUE, *supra* note 11, at 36–38 (discussing Justice Washington's reading of "the several States").

would be that the several states might not, in all respects, have been free governments. It is unlikely that Justice Washington is making such a pejorative insinuation.

Another interpretation of this relationship is that the practice of the American states represents a particular instantiation or determination, by positive law, of the universal principles of good government. Thus, the second rule—the universal enjoyment of these privileges in the several states—is not another necessary condition. Rather, the second rule is a clarification and specification of the first, namely, the enjoyment of these privileges in any free government. This interpretation avoids ascribing to Justice Washington an improbable doubt as to whether the several states were, in fact, free governments.

So, for example, in his partial enumeration of the rights protected by the clause, Justice Washington mentions “the benefit of the writ of habeas corpus.”¹⁵⁸ As Fairman rightly points out, one could find this particular right only “in the Anglo-American jurisdictions.”¹⁵⁹ Yet this particular right, Washington implicitly affirms, is the determination of a fundamental, universal right that belongs to all citizens as a matter of right—the freedom from an arbitrary deprivation of personal liberty.

One might suggest that Justice Washington’s position is a mere tautology—that, by defining the privileges protected by the clause as those that have been enjoyed by the citizens in all the states since independence, the rule becomes: all the states must extend to citizens the rights that they extend to citizens. One state would then, by a single change in policy, be able to disqualify a particular right from the clause’s protection. It seems, rather, that Washington has in mind a rule that is decisively conservative: the states must extend to citizens the fundamental privileges of citizenship, in the particular form that has been common to the several states since independence. Indeed, as I noted, the aim of the clause seems to have been conservative—to ensure that the citizens of the newly independent states would continue to enjoy the privileges of subjectship or citizenship that they had enjoyed while the colonies were parts of the same empire.¹⁶⁰

Justice Washington, then, defines the rights protected by the Privileges and Immunities Clause with reference to neither “pure natural law”¹⁶¹ nor

158. *Corfield*, 6 F. Cas. at 552.

159. Fairman, *supra* note 3, at 12.

160. *See supra* text accompanying notes 35–37. Such an understanding, moreover, does not allow for a development or discovery of new rights to be protected under the clause.

161. Fairman, *supra* note 3, at 12. *See also* ARNOLD J. LIEN, CONCURRING OPINION: THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT 26–27 (1957) (quoting Justice Washington’s opinion to show that Washington believed that the rights protected under the Privileges and Immunities Clause were derived from fundamental rights). Antieau, *supra* note 17, at 11 (quoting from Justice Washington’s opinion to support the proposition that “the privileges and immunities protected under [the Privileges and Immunities Clause] are not those graciously

exclusively “positive constitutional limitations derived from our English legal heritage.”¹⁶² Rather, his construction of the clause relies on both natural law—the natural rights of citizenship—and positive law—the particular way in which these rights have been enjoyed in the several states. In other words, these rights are the privileges that belong to the citizens in every free and good government as they have been specified or determined in the Anglo-American tradition, and therefore are enjoyed in the free governments that compose the several states of the Union.

Consequently, in a particular case, a judicial inquiry into the meaning of the clause must be both theoretical and historical. Stated differently, a court must undertake an historical inquiry from a theoretical perspective. The question would be twofold: What rights have been universally enjoyed by citizens in the several states since independence? And among these, which are among those that *should* be enjoyed by citizens in all free governments? That is to say, how have the citizens of the several states enjoyed the rights that citizens in all free governments ought to enjoy?

Note that Justice Washington’s definition does not render the category “privileges and immunities” indefinite. Contrary to Susan Bitensky’s suggestion, Justice Washington does not make a “strong implication . . . that he understood Article IV, Section 2 to embrace unenumerated and, as of yet, unidentified federally protected rights under the Constitution.”¹⁶³ By identifying the constitutional privileges of citizenship as those enjoyed by the citizens of *all* the states and “at *all* times”¹⁶⁴ since independence, he indicates his understanding of the clause to be decidedly conservative.

B. *The “General Heads”: Life, Liberty, and the Pursuit of Happiness*

After laying out the general definition of “the privileges and immunities of citizens in the several states,” Justice Washington proceeds, in the second part of his analysis, to discuss what rights, in particular, may be included in this category.¹⁶⁵ He notes that exactly “[w]hat these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.”¹⁶⁶ Note that the authors of the opinions in *Campbell* and *Douglass* had emphasized the difficulty, not the tediousness, of enumerating all the rights protected by the clause.¹⁶⁷

accorded to its citizens by a state of sojourn, but . . . the natural, fundamental rights of free men everywhere”).

162. Conant, *supra* note 20, at 817.

163. Bitensky, *supra* note 27, at 613.

164. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230) (emphasis added).

165. *Id.*

166. *Id.*

167. *Campbell v. Morris*, 3 H. & McH. 535, 553 (Md. 1797) (“The peculiar advantages and exemptions contemplated under this part of the Constitution, may be ascertained, if not with precision and accuracy, yet satisfactorily.”); *Douglass’ Adm’r v. Stevens*, 2 Del. Cas. 489, 502 (Del. 1819) (noting that it is easier “to ascertain whether the municipal law of this state giving a

Justice Washington continues by noting that whatever these rights may be, they may

be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.¹⁶⁸

He does *not* say here that these general categories, and *every* right that may be included under them, are privileges or immunities of citizens in the several states. Washington does not say that the privileges of citizenship are essentially synonymous with, for example, the rights to life, liberty, and the pursuit of happiness.¹⁶⁹ He does not claim that the privileges of citizenship are identical to natural, inalienable rights. Rather, he says that all the privileges of citizenship may be classified with reference to these rights.

One may well ask why Justice Washington classifies the privileges of members of the political community with reference to natural rights. It seems likely that he holds the privileges of membership in political society to represent, in some way, a development of natural rights. While all persons have a right of personal mobility or liberty, citizens, within the jurisdiction of their government, are entitled to that liberty in an enlarged way, through their right to travel and reside. Similarly, all persons have a natural right to acquire property, yet the establishment of a political society over a certain territory partly restricts the exercise of that right within that territory to those who are members of that society.

Justice Washington's enumeration of these general categories merits attention. There are three sections to this enumeration, each separated by a

preference to state creditors is a law incompatible with the privileges secured by the second section of the fourth article of the Constitution of the United States" than "it is to define all the privileges and immunities which the section was intended to secure to the people of the United States, and this will be sufficient for the purpose of deciding the present case").

168. *Corfield*, 6 F. Cas. at 551–52.

169. Akhil Amar misleadingly cites Washington's opinion in this way:

In *Corfield*, Washington identified Article IV "privileges and immunities" as things that "are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union . . . [including] the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."

AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 177 (1998). See also Jessica E. Hacker, Comment, *The Return to Lochnerism? The Revival of Economic Liberties from David to Goliath*, 52 DEPAUL L. REV. 675, 714–15 (2002) (asserting that for Washington, the privileges and immunities "include 'protection by the government'" and noting that "[t]his construction is broad indeed"). Contrary to the suggestion made by Amar's use of the ellipsis, Washington does not say that *some* of the Article IV privileges are these rights, but rather, that *all* of these privileges may be categorized with reference to these general rights. Consequently, Washington does not indiscriminately identify the privileges of citizenship with natural rights.

semicolon. First, he mentions protection by the government. As the Declaration of Independence affirms, government is founded to protect the inalienable rights of individuals. This is the primary and indispensable obligation of every good government.¹⁷⁰

Second, he mentions “the enjoyment of life and liberty” and two rights that accompany, or are a part of, the rights to life and/or liberty: “the right to acquire and possess property of every kind” and the right “to pursue and obtain happiness and safety.”¹⁷¹ The word “enjoyment” is significant because it indicates that these rights not only be protected *by* the government, but also be secured *against* the government. So it suggests a security in the rights of person and property that is broader than “protection,” a security that requires restraints not only by the government, but also on the government itself. The right to acquire and hold property relates to both the rights to life and liberty in that it helps to secure the former, and represents an exercise of the latter. In contrast, the right to pursue happiness is not a participation in the rights to life, liberty, and/or property; rather, it is a sort of culminating right that includes the other three (and perhaps others). As the first article of the Massachusetts Constitution stated:

All men are born free and equal and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; *in fine*, that of seeking and obtaining their safety and happiness.¹⁷²

Third, Washington adds a caveat: the individual enjoys these rights “subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”¹⁷³ It is an interesting and extremely complicated question as to how this rule may apply to the various privileges of citizenship included under these general headings of life, liberty, property, and happiness. At the very least, its application to the economic rights of citizenship would allow for a multiplicity of taxations and restrictions, yet would not allow a policy that was manifestly designed to benefit one part of the community at the expense of another. Moreover, by “the whole,” Washington surely refers to neither the citizens of a particular state, nor the whole of humanity, but to the people of the United States. Therefore, in establishing economic regulations and taxation, the states are

170. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

171. *Corfield*, 6 F. Cas. at 551–52. Washington’s particular formulation was probably borrowed from the constitution of his home state. See VA. CONST. OF 1776, BILL OF RIGHTS, § 1, reprinted in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 153, at 3813 (“That all men are by nature equally free and independent, and have certain rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”).

172. MASS. CONST. of 1780, art. I, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 153, at 1889.

173. *Corfield*, 6 F. Cas. at 552.

bound to consider as preeminent the common economic good of the nation.¹⁷⁴

C. A Partial Enumeration of the Privileges of Citizenship

Having outlined the categories under which all the various fundamental privileges of citizenship in America fall, Justice Washington then presents, in the third part of his discussion, a partial enumeration of these privileges. This enumeration, rather than being confused or random, follows a certain order. Moreover, the privileges that he enumerates were all mentioned, either explicitly or implicitly, in prior court decisions, as well as in the Founders' discussion of the rights of citizenship.

In one sentence, Justice Washington lists five privileges of citizenship, each separated by a semicolon:

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental¹⁷⁵

The first two represent what one might call personal rights of citizenship; the last two are property rights of citizenship; and the third right concerns both personal and property rights. Let us consider these in order.

First, Washington mentions the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." The right of travel and residence does not belong to all persons as a matter of right but only to citizens. On the enjoyment of this privilege of citizenship, the enjoyment of virtually all the others depends. Note that Washington does not say that a citizen of one state has the right to engage in all trades or professions in another.¹⁷⁶ Rather, the

174. Of course, this principle would not forbid the states from granting any advantages exclusively to their own citizens. It may, in fact, be in the national interest for the states to exist as partial sovereignties; therefore, it serves the national interest for political rights to be extended exclusively to in-state residents and citizens, just as it serves the national interest for the several states to exercise their reserved police powers. Similarly, it may serve a national interest for certain properties, such as fisheries, to belong exclusively to state governments; accordingly, it would be a regulation serving the whole people of the nation for a state to reserve that fishery to only a part of the people—its own citizens.

175. *Corfield*, 6 F. Cas. at 552.

176. In criticizing Justice Washington, Fairman erroneously attributes to him the opinion that under the clause, the:

[V]isitor was entitled to engage in 'professional pursuits.' But think of the profession with which Justice Washington was best acquainted; certainly the attorney could not

right is merely a right to travel and reside in the other state. Washington mentions the “purposes of trade, agriculture” etc., only to indicate that the out-of-state citizen’s right to reside cannot be dependent upon his intention or promise either only to engage in certain kinds of work, or not to work at all. In other words, the citizen of one state may travel into, pass through, or reside in another state for any lawful purpose, including any lawful economic purpose.

The citizen could not enjoy the right to travel and reside if he or she were subject to arbitrary arrest. Accordingly, Justice Washington lists, as the second privilege of citizenship, the right “to claim the benefit of the writ of habeas corpus.” As suggested earlier, this right, as a protection of individual liberty, was customarily extended, as a matter of justice, to both aliens and citizens, as a security for the inalienable and universal right of all persons to be free from arbitrary deprivation of personal liberty. In practice, it protected the individual against arbitrary imprisonment by private individuals or groups, as well as by governmental officials. It is secured by the Privileges and Immunities Clause because without this human right, the citizen would be practically unable to enjoy the privileges that pertain to his status.

The third right enumerated by Washington provides security for both personal liberty and private property. He mentions the right “to institute and maintain actions of any kind in the courts of the state.” Like the benefit of the writ of habeas corpus, the right to file suit to protect one’s person and property against private and public torts is not, strictly speaking, a privilege of citizenship. Yet the security in both these human rights is indispensable to the enjoyment of the privileges of citizenship, whether the right to travel and reside or the right to engage in the acquisition of property.

The fourth privilege of citizenship in Washington’s list is the right “to take, hold and dispose of property, either real or personal.” As we have seen, this right was the most practical and the most frequently mentioned privilege of citizenship during the Founding.¹⁷⁷ Moreover, in various decisions, the courts repeatedly stated that one of the most important, if not the most important, reason for the inclusion of the Privileges and Immunities Clause in the Constitution (as well as the antecedent clause in the Articles of Confederation) was to ensure that the citizens of each state would be able to acquire and hold real as well as personal property in the other states.¹⁷⁸

The fifth privilege mentioned is an immunity: “an exemption from higher taxes or impositions than are paid by the other citizens of the state.” The freedom from aliens’ duties was a privilege of subjectship, according to

come in and practice without admission to the local bar—and did the Justice really mean that the state might not make state citizenship a requisite to admission?

Fairman, *supra* note 3, at 11.

177. See *supra* text accompanying notes 47–48.

178. *Id.*

Blackstone.¹⁷⁹ Discriminatory taxation effectively treats the disadvantaged citizens like aliens, denying them their full share in the economic life of a polity. Regardless of whether such taxation is specifically designated for noncitizens, the effect is still to impose on citizens a disadvantage of alienage.

Washington's enumeration of this right is remarkable in three respects. First, he defines the freedom from discrimination as an exemption from taxes paid "by the other citizens of the state." He thereby suggests that the kind of discrimination that the clause forbids comprehends discrimination not only between citizens of different states, but also between citizens of the same state. The concern seems to be to ensure the equal economic opportunity for the citizens as such, without reference to the particular state in which, or of which, they are citizens.

Second, Washington fails to mention the freedom from discriminatory economic *regulation* as a privilege of citizenship. In the *Campbell* decision, Justice Chase mentioned such a right along with a freedom from discriminatory taxation.¹⁸⁰ Most probably, the omission in *Corfield* is due to the nature of the case. One cannot, on the same page, *both* insist that the clause permits a regulation of state fisheries that discriminates in favor of state citizens *and* declare that the clause prohibits discriminatory economic regulation, unless one enters into somewhat elaborate distinctions. Washington, however, provides a preliminary rule as to how the freedom from discriminatory economic regulation can be reconciled with such laws. The right to be free from such regulation surely falls primarily under the general heading: "[T]he right to acquire and possess property of every kind . . . subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."¹⁸¹ Discriminatory regulation does not, then, violate the Privileges and Immunities Clause if it genuinely serves the general good of the whole American people.

Finally, Justice Washington does not even begin to address the extremely involved question of what constitutes unjustified discrimination between citizens. Virtually all taxation laws have a disparate impact on different persons. Even a simple capitation tax is arguably discriminatory. It is unclear, then, what Washington means by "higher taxes and impositions than are paid by the other citizens of the state."¹⁸² No doubt he would make some distinction between rational and arbitrary discriminations. Yet he did not even begin to undertake the extensive distinctions that dominate modern equal protection jurisprudence, such as "suspect" classifications and "strict scrutiny."

179. 2 BLACKSTONE, *supra* note 46, at 372.

180. The clause means "such property shall not be liable to any taxes, or burdens which the property of the citizens is not subject to." *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797).

181. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

182. *Id.* at 552.

The five privileges enumerated by Washington were not those rights deemed most important or fundamental, either at the Founding or in the early nineteenth century. Those who hold that by “fundamental,” Washington refers indiscriminately to the fundamental human or natural rights enjoyed by aliens and citizens alike, would be hard pressed to explain why he includes the freedom from discriminatory taxation, but not the freedom of religion (a right that was universally regarded as an inalienable human right).¹⁸³ Washington, however, understands the privileges of citizenship to be those that are fundamental to citizenship as such; they are not the rights of humanity. His list includes only privileges of citizenship and those universal rights that are essential to the enjoyment of such privileges. Moreover, he mentions not all of the most important privileges of citizenship, but only those that correspond to the disabilities of alienage according to English and American law—those rights that were extended to aliens only as a matter of *exceptional* rather than *customary* indulgence. So he includes, for example, the right to acquire and hold real property, but not the right to bear arms.

The obvious question that Justice Washington’s enumeration leaves unanswered is the following: What other rights, besides these five, might he mention if he undertook the “tedious” task of identifying all the privileges and immunities secured by the clause? As we have suggested,¹⁸⁴ the right to bear arms and the freedoms of communication (speech, press, assembly) would seem to satisfy his requirements. These were rights of membership in a free government and enjoyed by the citizens of the several states since Independence. For Washington’s generation, the people’s right to bear arms was a necessary auxiliary to the sovereignty—the freedom—of a people vis-à-vis their government. Of seemingly greater importance were the freedoms of communication, which were at the heart of the people’s right to govern themselves by common “reflection and choice.”¹⁸⁵ The necessity of these freedoms to citizenship in a free government was clearly expressed by Washington’s law teacher, James Wilson:¹⁸⁶ “The *citizen under a free government* has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning publick men, publick bodies, and publick measures.”¹⁸⁷ Still, neither Washington nor any of his contemporaries seem to have explicitly associated these rights with the

183. The following provision of New York’s constitution typified the Founders’ understanding of religious freedom: “[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind.” N.Y. CONST. OF 1777, art. XXXVIII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 153, at 2637.

184. *See supra* text accompanying notes 153–55.

185. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

186. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 5, at pt. 1, 508–09.

187. Wilson, *Lectures on Law*, in 2 WORKS, *supra* note 154, at 579 (emphasis added). Note that the formulation “citizen under a free government” was similar to the expression used by Justice Washington in defining the “privileges and immunities of citizens.”

Privileges and Immunities Clause. Later jurists, however, would make this connection.¹⁸⁸

Many other rights could, perhaps, be mentioned. Indeed, from one of the rights that Washington does enumerate, the immunity from discriminatory taxation, a multiplicity of rights not enumerated might be implied. In effect, the immunity from arbitrarily discriminatory taxation would seem also to forbid arbitrary discrimination in the distribution of governmental benefits. Washington did not mention this possibility. Here too, the question was left for later jurists. As Earl Maltz points out, in the years leading up to the Civil War, some authorities began to hold that the prohibition on unequal taxation implied “that taxpayers were entitled to equal access to facilities financed by their tax dollars.”¹⁸⁹

One right that does not seem to qualify is religious freedom, for it satisfies neither part of Justice Washington’s general definition of “privileges and immunities of citizens.” As mentioned earlier,¹⁹⁰ religious freedom belonged, “of right,” not to citizens, but to all human beings, for it was considered a universal, inalienable right of humanity. As a reading of the first state constitutions shows, there seems to have been a broad consensus that individuals should be entitled to freedom of religion.¹⁹¹ Moreover, it was not a right enjoyed by “citizens of all free governments.” Great Britain surely qualified as a free government in the Founders’ eyes,¹⁹² yet the citizens (or subjects) thereof did not enjoy religious freedom.¹⁹³

Having mentioned five of the rights “which are clearly embraced by the general description of privileges deemed to be fundamental” to citizenship in the United States, Justice Washington continues, “to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.”¹⁹⁴ He does not clearly designate

188. *See, most notably*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416–17 (1857) (enumerating the rights to which out-of-state free blacks, if they were citizens (which the court held they were not), would be entitled under the Privileges and Immunities Clause and including not only the freedom of travel and personal locomotion (a traditional privilege of citizenship), but also “the full liberty of speech in public and private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went”). *See also infra* text accompanying notes 206–08.

189. EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 112 (1990) [hereinafter MALTZ, *CIVIL RIGHTS*]. This principle would surely call into question the constitutionality of racial discrimination in the distribution of governmental benefits.

190. *See supra* text accompanying note 183.

191. *See, e.g.*, GA. CONST. OF 1777, art. LVI, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 153, at 784; MASS. CONST. OF 1780, art. II, *reprinted in* 3 *id.* at 1889; MD. CONST. OF 1776, art. XXXIII, *reprinted in* 3 *id.* at 1689; PA. CONST. OF 1776, art. II, *reprinted in* 5 *id.* at 3082; VA. CONST. OF 1776, § 16, *reprinted in* 7 *id.* at 3814.

192. *See supra* text accompanying notes 145–51.

193. The observations in this and the preceding paragraph have obvious relevance to the question of the incorporation of the Bill of Rights through the later Privileges or Immunities Clause. That question, however, is outside the scope of this Note.

194. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

the right to vote as a “fundamental” right of citizenship—and with good reason: it never belonged to all citizens as citizens. It is, in fact, unclear whether this political privilege of citizenship “may be added” to the list of “fundamental privileges,” as another “fundamental” privilege, or as a nonfundamental, but guaranteed, privilege. In any case, he does state that the Privileges and Immunities Clause *may* also guarantee this political right of citizenship, but by using “may,” Washington seemingly hesitates to declare emphatically that suffrage is a privilege of citizenship under Article IV.

Washington’s mention of the political rights of citizenship is significant in several important respects. First, the language employed clearly indicates by negative implication that he did not intend to say that the Privileges and Immunities Clause protects all the fundamental rights of American citizenship in a particular state only *if* the law of that state establishes or recognizes these rights.¹⁹⁵ Rather, Washington applies the qualification “as regulated and established by the laws or constitution of the state” only to political rights.¹⁹⁶ He does not say, for instance, that the citizens of each state shall have the right to travel, to reside, to the benefit of the writ of habeas corpus, or to acquire real and personal property only if (and in the manner) these rights are “established” by local state law. Rather, these fundamental privileges of citizenship are “established” by the universal principles of free government as determined by the Anglo-American legal tradition.

It is true that some of the nonpolitical privileges of citizenship do represent immunities from discriminatory legislation, e.g., the freedom from discriminatory taxation or economic regulation. Moreover, there is an equality component, to be sure, to all the substantive privileges of citizenship. For example, the citizens of each state are entitled to not only the right, but also the *equal* right, to travel and reside in the other states; the states are not free to impose arbitrary burdens on these rights of an out-of-state citizen, such as discriminatory entry or exit fees, visas, or residence taxes. Nonetheless, it cannot be said that the antidiscrimination principle exhausts the meaning of “privileges and immunities of citizens.”

Furthermore, if the expression “as regulated and established” means the right to establish state residency requirements (and it surely does), then Washington clearly does not mean to apply the modern, strictly antidiscrimination or “interstate comity” rule here. That rule holds that the clause only forbids discrimination between citizens of different states with respect to certain fundamental and nonpolitical rights.¹⁹⁷ Washington, however, speculates that suffrage may be one of the rights protected by the clause and

195. None of the scholars claiming that Washington’s interpretation was consonant with the strictly antidiscrimination reading have considered the significance of the fact that he qualified only one privilege, suffrage, with reference to the law peculiar to the respective states. See sources cited *supra* note 22.

196. *Corfield*, 6 F. Cas. at 552.

197. See *supra* text accompanying notes 13–18.

also suggests that this right is not to be extended indiscriminately to in-state and out-of-state citizens alike.

We may well ask in what sense the clause would entitle the citizens to suffrage and other political rights in the several states—or to what extent it limits the power of the states to restrict these rights to certain persons. The phrase “as regulated and established” would seem to include the multiplicity of customary requirements regarding the age, property, sex, race, and residency of the citizen. It is probable that Washington implies only that states are not free to limit political rights to “natural-born” citizens of the state, by means of either an express ordinance to this effect, or by using such devices as grandfather clauses or prohibitive durational residency requirements (e.g., 21 years).

Washington’s failure to qualify a citizen’s entitlement to the other privileges of citizenship by the expression “as regulated and established by [each] state” has a second implication: the latitude that a state has in regulating the political privileges of citizenship is much broader than the latitude it has in regulating the nonpolitical privileges of citizenship. So, for example, while Justice Washington would probably endorse the constitutionality of state laws restricting suffrage to property holders, it is difficult to believe that he would uphold any state law that disentitled out-of-state citizens from the privilege of property ownership in the state simply because they do not yet own property. Nonetheless, Washington gives no clear indication of the extent of a citizen’s entitlement to nonpolitical and political rights; he only implies that a citizen’s entitlement to the former is less qualified than his or her entitlement to the latter.

Justice Washington’s reference to the political rights of citizenship is also notable in that it seems to call into question whether, in his view, the clause would also have some application to disputes between a state and its own citizens. He was as responsible as any other federal judge for the establishment of the doctrine that, with respect to the diversity jurisdiction requirements of Article III, a citizen of the United States is a citizen of that state in which he is a resident.¹⁹⁸ Moreover, when he states in *Corfield* that citizens are entitled to the vote only “as regulated and established by the laws or constitution of the state in which it is to be exercised,”¹⁹⁹ he surely means to include, among the legitimate state regulations, those residency requirements that have always been prescribed in all the states. So it would appear that, if the suffrage were protected by the clause, the citizens would then retain the clause’s protection vis-à-vis their new state, even after having established residence—and thus citizenship—in that state.

198. See *Butler v. Farnsworth*, 4 F. Cas. 902, 903 (C.C.E.D. Pa. 1821) (No. 2,240) and *Cooper v. Galbraith*, 6 F. Cas. 472, 475 (C.C.E.D. Pa. 1819) (No. 3,193), both decided by Washington.

199. *Corfield*, 6 F. Cas. at 552.

D. There are “many others which might be mentioned . . .”

In the fourth section of his discussion of the clause, however, Justice Washington writes that not only these five fundamental privileges of citizenship (and possibly the suffrage as well), but also

many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens at each state, *in every other state*, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”²⁰⁰

Besides emphasizing that his enumeration of the privileges of citizenship is only partial, this passage indicates that the clause is an exclusively interstate guaranty.

E. The Privileges Peculiar to the Citizens of a Particular State

In the fifth section of his discussion, Justice Washington insists that although the Privileges and Immunities Clause includes many other rights, this expression does not comprehend every privilege that a citizen in a particular state may enjoy. He affirms that it is erroneous to conclude that under the clause “the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens.”²⁰¹ There are, in fact, many privileges that may be enjoyed by the citizens in their respective states, yet these privileges, even if reserved to citizens of those states, as such, are not protected by the clause unless they are “fundamental”—that is, essential to citizenship in the free governments that have constituted the Union. It is, he adds, even more erroneous to conclude “that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.”²⁰² Certain state economic resources, like the fisheries in the state coastal waters, represent state property held by the state government for the common benefit of its own citizens. State property belongs to a state’s citizenry in a manner similar to that in which private property belongs to an individual or corporation. As such, out-of-state citizens can claim no rightful access to it.

200. *Id.* (emphasis added).

201. *Id.*

202. *Id.*

F. Summary

The *Corfield* holding can be summarized as follows: The Privileges and Immunities Clause does not secure to the citizens of each state all the rights enjoyed by citizens in every other state, and it especially does not secure the right to enjoy the property that the citizens of another state may hold in common. Rather, the clause guarantees to the out-of-state citizen only those privileges that are fundamental to citizenship in all free governments, in the particular manner in which the citizens in the several states of the Union have enjoyed these privileges since independence. These fundamental rights include, among others, certain rights of person and property: the privileges of travel and residence, the right to the writ of habeas corpus, the right to file suit in vindication of one's person and property, the right to acquire and hold real and personal property, and the freedom from discriminatory taxation. In addition to securing these rights of general citizenship, the clause may also protect the out-of-state citizen's opportunity eventually to exercise political rights in a new state, in accordance with local state law.

VI. Conclusion: *Corfield* and the Fourteenth Amendment's Privileges or Immunities Clause

With Justice Washington as our guide, we may attain a deeper knowledge of the original intent behind the Privileges and Immunities Clause of Article IV. Its aim was conservative: to preserve for citizens from other states the traditional privileges of citizenship, defined with reference both to the universal, natural rights of citizenship—according to the Founders' social compact theory—and the particular instantiation of these rights through the Anglo-American legal tradition. Consequently, the rights that the Founders had in mind were primarily (but not exclusively) those generally denied to aliens under English and American law. Under the clause, out-of-state citizens would be entitled to travel through, and establish residence in, the several states. They would be entitled to acquire, hold, and convey property, both real and personal. They would be free from taxation (and perhaps, economic regulation) that treated them like aliens. Moreover, they would enjoy that security in person and property necessary to enjoy these privileges of citizenship.

Although Washington's absolute, natural-rights reading of the clause is foreign to modern jurisprudence, for his contemporaries it was quite unexceptional. Multiple authorities endorsed his interpretation, generally without comment. For instance, in *Bennett v. Boggs*, which was decided in the same Federal Circuit in which Justice Washington had presided, Justice Henry Baldwin went out of his way "to express [his] entire assent both to the

opinion and the reasoning of Judge Washington.”²⁰³ Many other judicial authorities endorsed *Corfield*, especially in the state courts.²⁰⁴ To my knowledge, no one prior to the Civil War openly criticized Washington’s reading.²⁰⁵

What seems most striking about the absolute, natural rights reading of the Privileges and Immunities Clause is the degree to which it circumscribed the legislative discretion of the states. This provision thereby served as a kind of bill of rights, at least for out-of-state citizens. These citizens were positively entitled to certain absolute rights, notwithstanding state laws to the contrary; they had a right to exemptions from laws imposed by a state on its own citizens. But as long as the Founders’ consensus as to the rights of citizens dominated, it was unlikely that there would be many laws violating the absolute-rights guaranty of the clause. As Earl Maltz has noted, “the idea of a state government failing to generally provide its own citizens” with the rights of citizenship “was almost unthinkable.”²⁰⁶

If, however, a state or states came under the influence of an ideology hostile to the Founders’ understanding of citizenship, then the unthinkable would have become a reality—and the dormant vigor of the Privileges and Immunities Clause would have become manifest. Arguably, such was the case in the slaveholding states in the years before and immediately after the Civil War. Under the various “black codes,” free blacks, both out-of-state and in-state, were increasingly subject to legal disabilities in the South (and in some Northern states) that impaired their right to travel, establish residence, or enjoy the economic privileges of citizenship. In sum, they were treated as aliens. Moreover, in some respects they were treated as less than aliens. Free blacks did not even enjoy the right to the equal protection of the

203. 3 F. Cas. 221, 226 (C.C.D. N.J. 1830) (No. 1,319). The case involved the same kind of law adjudicated in *Corfield*, but those challenging the law did not claim that it violated the Privileges and Immunities Clause.

204. See *Dunham v. Lamphere*, 69 Mass. (3 Gray) 268, 276 (1855) (citing *Corfield* with approval); *State v. Medbury*, 3 R.I. 138, 142–43 (1855) (same); *Slaughter v. Commonwealth*, 54 Va. (13 Gratt.) 767, 774 (1856) (same). See also *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (argument for appellant in error); *Tatem v. Wright*, 23 N.J.L. 429, 444 (1852) (Elmer, J., concurring) (citing *Corfield* with approval); *Crandall v. State*, 10 Conn. 339, 350 (1834) (argument for appellant in error); *id.* at 364 (argument for respondent in error); 2 STORY, COMMENTARIES, *supra* note 44, § 1800, at 675 n.1. In two state cases, courts cited Washington’s exposition of the clause, but in support of an exclusively antidiscrimination interpretation. *Wiley v. Parmer*, 14 Ala. 627, 631–32 (1848); *Commonwealth v. Milton*, 51 Ky. (12 B. Mon.) 212, 219 (1851). See also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 71 (2d ed., New York, O. Halsted 1832).

205. Yet in *Comer v. Elliott*, 59 U.S. (18 How.) 591 (1856), and *Dred Scott*, 60 U.S. (19 How.) at 393, two cases in which there was extensive discussion of the Privileges and Immunities Clause, the Supreme Court conspicuously failed to mention *Corfield*. And in its only antebellum case in which the deciding opinion cited the *Corfield* decision, the Court endorsed only Washington’s holding that the states owned, for the benefit of their own citizens, the natural resources located within their jurisdictions, but ignored his exposition of “privileges and immunities.” *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855).

206. Maltz, *Fourteenth Amendment*, *supra* note 23, at 339.

laws, for they were often, by positive law, formally deprived of the equal right to file suit in defense of their person and property, and by the informal toleration of mob violence, denied governmental protection. Even white citizens found themselves treated as noncitizens—and nonhumans—at times. Laws suppressing the freedom of speech for abolitionists, Republicans, and other unionists prevented these citizens from full participation in citizenship; and mob violence, or the threat thereof, deprived them of security in their person and property.²⁰⁷

It was to overturn the effects of such policies, adopted under the influence of a decidedly pro-slavery and racist ideology, that the drafters of the Fourteenth Amendment sought to invigorate and extend the reach of the old Privileges and Immunities Clause. Accordingly, one of the first proposals for the Fourteenth Amendment would have given Congress the power both to enforce the clause and to ensure that all persons be protected in their person and property:

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.²⁰⁸

This proposal eventually became the Privileges or Immunities and Equal Protection Clauses of that amendment.

Although it is beyond the scope of this Note to analyze the original understanding of the Privileges or Immunities Clause, I may, with *Corfield* in mind, offer a few tentative conclusions. Insofar as *Corfield* served, for those who adopted the clause, as the leading exposition of the “privileges and immunities of citizens,” it seems likely that the rights they intended to secure therein were the same absolute rights of citizenship that Justice Washington identified. First and foremost, these included the right to travel and establish residence, the right to acquire, hold, and convey property, both real and personal, and the freedom from arbitrary governmental discrimination in the exercise of economic rights. Besides these travel and economic rights, the constitutional privileges of citizenship comprehended all other rights fundamental to citizenship in a free government. Among these other rights could have been the freedoms of speech, press, assembly, and the right to bear arms.

Accordingly, it is not surprising to see that the framers of the Privileges or Immunities Clause frequently mentioned the well-established economic rights of citizenship. The Civil Rights Bill, proposed by the same Congress

207. MALTZ, CIVIL RIGHTS, *supra* note 189, at 38; CURTIS, *supra* note 20, at 35; FRIEDMAN, *supra* note 51, at 218–24; CLEMENT EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH 118–43 (1964).

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

that drafted the amendment, contained an enumeration of rights that was remarkably similar to Justice Washington's enumerated "fundamental rights," as both concerned the privileges of property acquisition, as well as the right to security in person and property.²⁰⁹ Moreover, the framers were interested in the citizen's immunity from racial and other arbitrary discrimination; indeed, the Civil Rights Bill was itself an antidiscrimination measure: it provided that black citizens would enjoy certain enumerated rights in the same manner as they were extended to white citizens in the respective states.²¹⁰

Besides the traditional privileges and immunities of citizenship, other rights of citizenship were likewise to be secured by the amendment. The drafters of the Amendment plainly believed that the privileges of citizenship also included some of the rights enumerated in the Bill of Rights. For example, Representative John Broomall enumerated in his list of "rights and immunities of citizens," not only the "right of transit" and the "right of domicil," but also the "right of speech" and the "right of petition."²¹¹ For his part, Representative Henry Raymond mentioned both the right to travel and the "right to bear arms."²¹² It is, therefore, not true that the authors of the Fourteenth Amendment limited the privileges of citizenship only to the traditional economic and travel privileges, and perhaps the right to security in person and property. Contrary to the claims of Raoul Berger, the rights set forth in the Civil Rights Bill—the right to personal security, the liberty of contract, the right to acquire real and personal property, etc.—did not exhaust the category "privileges and immunities of citizens."²¹³ Rather, the protected privileges also seem to have encompassed the right to bear arms and the various freedoms of communication.²¹⁴

209. *Id.* at 1366. The proposed Bill provided:

That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens

Id.

210. *Id.*

211. *Id.* at 1263.

212. *Id.* at 1266.

213. According to Berger, there was a virtually "universal identification of [Section 1 of the Fourteenth Amendment] with the Civil Rights Act." RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 39 (1977).

214. The authors of the Amendment did not, however, indiscriminately include all the rights listed in the Bill of Rights under the heading "privileges and immunities of citizens." Such an interpretation would have represented an entirely new understanding, one unsupported by any pre-existing authority. Moreover, such a reading would have eviscerated the distinctive meaning of the words "privileges" and "citizens," by obfuscating the distinction between the privileges peculiar to citizenship and the basic rights of humanity. In effect, some of the rights listed in the first eight amendments had always been identified as universal human rights, and not as privileges of

In this respect, the drafters of the Privileges or Immunities Clause did not break with the *Corfield* precedent, but developed it. As I have mentioned, Washington's general definition of the constitutional "privileges and immunities of citizens," although conservative, was broad enough to include all the rights deemed fundamental to citizenship in a free government, as such rights were determined by the universal practices of the several states.²¹⁵ Although he had not specifically enumerated such rights as the freedom of speech and the right to bear arms, it seems likely that he would have concurred that these advantages belonged among the constitutional privileges of American citizenship.

In three important particulars, however, the drafters of the Fourteenth Amendment apparently did not adhere to Washington's understanding of the "privileges and immunities of citizens." First, while he, with most authorities, had viewed the clause as protecting sojourning (or out-of-state) citizens exclusively, the drafters of the Amendment apparently held that the clause required the states to respect the citizenship privileges of their own citizens as well as those of out-of-state citizens. Representative William Lawrence, for instance, noted that "a State cannot constitutionally deprive" any citizen of the absolute rights of citizenship.²¹⁶ In explaining the need for congressional enforcement of the clause, John Bingham remarked: "No State ever had the right, under the forms of law or otherwise . . . to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."²¹⁷ A Republican colleague noted that Bingham's proposal would secure the fundamental privileges of citizenship to each citizen "in whatever State he may be."²¹⁸

Second, while Washington had included the right to security in person and property among the benefits guaranteed by the Privileges and Immunities Clause, the Fourteenth Amendment apparently disentangled these universal rights of "persons" from the privileges reserved to "citizens." The very terminology used in Section 1—its Privileges or Immunities, Due Process, and Equal Protection Clauses—suggests a distinction between citizens and all other persons. These provisions manifestly aimed, on the one hand, to secure to U.S. citizens certain privileges pertaining to their special status as citizens; and on the other hand, the provisions were intended to protect all persons, both citizens and noncitizens alike, in their inalienable rights to life, liberty, and property, not only against unjust governmental action (the Due

citizenship. Such were the procedural rights enumerated in Amendments V–VIII (and perhaps also Amendment IV) and the religious freedom guaranteed in Amendment I.

215. See *supra* text accompanying notes 157–60.

216. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. William Lawrence).

217. *Id.* at 2542 (statement of Rep. John Bingham).

218. *Id.* at 1088 (statement of Rep. Frederick Woodbridge).

Process Clause) but also against private action facilitated by governmental inaction (the Equal Protection Clause). Indeed, as John Bingham (the chief sponsor of the amendment) explained, Section 1 of the amendment required the states to respect and secure “the privileges and immunities of all the citizens of the Republic *and* the inborn rights of every person”²¹⁹

Third, whereas Washington had held that the Privileges and Immunities Clause *might* secure political rights at least to some extent, the drafters of the amendment were adamant that their Privileges or Immunities Clause would not protect or expand political rights.²²⁰ In this respect, the authors of the amendment could rely on precedents older than *Corfield—Campbell, Murray*, and *Douglass*—to support their contention that the right to elect, or be elected, to public office was not a constitutional privilege of citizenship. In fact, it is probable that the reason why the drafters of the amendment substituted “privileges [and] immunities of citizens of the United States” for “privileges and immunities of citizens in the several States” was not to posit some sharp distinction between the privileges secured in the amendment and those secured in Article IV,²²¹ but, as in *Campbell* and *Douglass*,²²² to clarify that the constitutional privileges of citizenship included only those rights that should be generally available to *all* citizens in *all* the states.²²³

Despite these differences between Justice Washington and congressional Republicans, it is nonetheless true that a reading of *Corfield* provides valuable insights into the original understanding not only of the Privileges and Immunities Clause of Article IV, but also of the Privileges or Immunities Clause of the Fourteenth Amendment. The authors of that amendment found in *Corfield* an authority that declared the citizen’s constitutional entitlement to the rights of travel and personal locomotion, the right to acquire, hold, and convey property of all kinds, the freedom from

219. *Id.* at 2542 (emphasis added).

220. *See, e.g., id.* at 2766 (“[T]he first section of the proposed amendment does not give to [anyone] the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution.”) (statement of Sen. Jacob Howard). *See generally* MALTZ, CIVIL RIGHTS, *supra* note 189, at 118–20.

221. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74–75 (1872) (making a radical distinction between the privileges of state citizenship, secured by Article IV, Section 2, and those of national citizenship, secured by the Fourteenth Amendment).

222. *See supra* text accompanying notes 91, 116, and 123.

223. During the debate over the initial amendment proposal—which gave Congress the power to secure the citizen’s entitlement to “all privileges and immunities of citizens in the several states”—opponents cited Justice Washington’s dictum to argue that Congress would have the power to regulate the suffrage. Representative Andrew Rogers, for example, cited *Corfield v. Coryell* to support his contention “that ‘privileges and immunities’ are so broad as even to include the right of suffrage.” CONG. GLOBE, 39th Cong., 1st Sess. app. 135 (1866). In order to answer the objections of opponents, and to allay the fears of moderate Republicans, many of whom were not yet ready to endorse black suffrage, let alone women’s suffrage, the authors of the amendment relied upon this more precise (or slightly less vague) formula supplied by antebellum legal authorities in order to draw a distinction between the nonpolitical and political privileges of citizenship and to exclude the latter.

discriminatory economic policies, the security in person and property, and more generally, all the rights that were fundamental to citizenship in the free governments of the United States. It was precisely these rights that were undermined by the new policies adopted primarily in the southern states. To face this challenge, it would seem, the authors of the Fourteenth Amendment found it necessary to impose *new* constitutional restrictions on the states and grant Congress sweeping *new* powers, to restore these old, well-established privileges of citizenship that had been defined and vindicated by Justice Washington and other early authorities.

—*David R. Upham*