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The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art

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ARTICLES

The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art

KURT T. LASH*

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INTRODUCTION

Historical accounts of the Privileges or Immunities Clause of the Fourteenth Amendment generally assume that the author of the text, John Bingham, based the Clause on Article IV of the Constitution.¹ Article IV speaks of “privileges” and “immunities” and, during the debates over the Fourteenth Amendment, members of the Thirty-ninth Congress often referred to Article IV cases like *Corfield v. Coryell*.² These repeated references to *Corfield* have convinced a number of scholars that Bingham and the other Republican members of the Thirty-ninth Congress embraced Justice Bushrod Washington’s opinion in *Corfield* as a uniquely authoritative statement on the meaning of Article IV.³

1. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 191 (1998) (describing Bingham’s “pious blending of phraseology from no fewer than four sections of the pre-1866 Constitution (Article I, section 10; Article IV; and Amendments I and V)”; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28–29 (1980) (claiming that the “amendment’s framers repeatedly adverted to the *Corfield* discussion [of Article IV] as the key to what they were writing” (citing *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230))); David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 404 (2008) (describing Bingham’s use of Article IV in crafting the Clause); Daniel A. Farber, *Constitutional Cadenzas*, 56 DRAKE L. REV. 833, 842–43 (2008) (“The debates confirm that, by referring to privileges or immunities, the supporters of the Fourteenth Amendment were drawing a link to the ‘P & I’ Clause of the original Constitution In the House, Bingham explained that the effect of the Amendment was ‘to protect by national law . . . the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.’”); Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1493 (2008) (“Scholars arguing that the Privileges or Immunities Clause of the Fourteenth Amendment was modeled on Article IV’s Comity Clause note that proponents of the Fourteenth Amendment, including its primary author, Representative Bingham, often referred to Justice Washington’s language in *Corfield*, including its discussion of the right to access the courts.”); Derek Shaffer, Note, *Answering Justice Thomas in Saenz: Granting the Privileges or Immunities Clause Full Citizenship Within the Fourteenth Amendment*, 52 STAN. L. REV. 709, 721 (2000) (“Bingham envisioned that the Clause would serve a vital role in securing substantive protection for certain fundamental rights of the sort enumerated in *Corfield* and previously violated by the states.”).

2. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,320).

3. See, e.g., AMAR, *supra* note 1, at 177–78; RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 61–62 (2004) (“It is not seriously disputed, however, that some time after

Because Justice Washington read Article IV as protecting all “fundamental” privileges and immunities, these scholars assume that Bingham and the Republicans must have understood Section One as somehow federalizing a broad category of fundamental common law rights that had been provided only a degree of equal protection under Article IV.⁴ According to this view, the Supreme Court in the *Slaughter-House Cases*⁵ wrongly ignored the Framers’ intent by distinguishing Article IV privileges and immunities from Fourteenth Amendment privileges or immunities and by rejecting Justice Washington’s opinion as a template for understanding the privileges or immunities of citizens of the United States.⁶

Historical evidence suggests that every aspect of this commonly presented historical account is incorrect. John Bingham did not base the final version of the Fourteenth Amendment on Article IV; he never relied on *Corfield* during the framing debates; and he went out of his way to distinguish the rights protected under Section One from the rights protected under Article IV. Far from relying on the language of Article IV, Bingham’s final draft of the Fourteenth Amendment deleted such language and replaced it with a reference to the privileges and immunities of United States citizens, a term of art broadly understood in antebellum America as having nothing to do with state-conferred common law

ratification it came to be widely insisted by some judges, scholars, and opponents of slavery that Article IV was indeed a reference to natural rights. Nor is it disputed that, whenever it first developed, the members of the Thirty-ninth Congress meant to import this meaning into the text of the Constitution by using the language of ‘privileges’ and ‘immunities’ in the Fourteenth Amendment.”); Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 57 (2007) (stating that Republicans believed that “the purpose of the Fourteenth Amendment” was to give Congress power to grant the authority to enforce the rights protected under Article IV); Farber, *supra* note 1, at 842–43 (discussing references to *Corfield* during the debates); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 565–67 (2005) (same); James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1958 (2004) (“If still contested, the story of the Privileges or Immunities Clause of the Fourteenth Amendment has a familiar set of chapters. Most everyone agrees that it broadens and extends the guarantees that had previously appeared in the Privileges and Immunities Clause of Article IV, making them applicable to citizens of the United States as well as to citizens of the several states.”).

4. A recent example of this scholar’s linking of *Corfield*, Article IV, and the Privileges or Immunities Clause is found in a recent amicus brief signed by five legal scholars supporting incorporation of the Second Amendment. See Brief of Constitutional Law Professors as *Amici Curiae* in Support of Petitioners, *McDonald v. City of Chicago*, No. 08-1521 (U.S. July 9, 2009) (signed by professors Richard L. Aynes, Jack M. Balkin, Randy R. Barnett, Michael Kent Curtis, Michael A. Lawrence, and Adam Winkler).

5. 83 U.S. (16 Wall.) 36 (1872).

6. See, e.g., Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 298 (2006) (claiming that in the *Slaughter-House Cases* Justice Miller erroneously distinguished the nature of rights protected under Article IV and Section One); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 317 (2007) (linking the Privileges or Immunities Clause to Article IV of the original Constitution and criticizing the majority in *Slaughter-House* for its “crabbed reading[, which] was not faithful to the constitutional text and underlying constitutional principles because the Privilege or Immunities Clause was supposed to be the Amendment’s major source for constitutional protection of both civil liberty and civil equality”).

rights. Justice Miller's reading of the Privileges or Immunities Clause in *Slaughter-House* not only mirrored the views of the man who drafted Section One, it also followed a well-established strain of antebellum anti-slavery Republican thought.

The first of a three-part article investigation of the origins of the Privileges or Immunities Clause, this Article explores the textual and jurisprudential roots of the Clause. Unlike most scholarly works that focus on the historical usages of single words like "rights," "privileges," and "immunities,"⁷ this Article considers historical usage of phrases like "privileges and immunities," especially the phrase "privileges and immunities of citizens of the United States," as terms of art. As such, this Article is the first substantial effort to identify the historical antecedents of the *legal concept* found in Section One of the Fourteenth Amendment.

From the time of Blackstone and throughout the period between the Founding and Reconstruction, pairing of the terms "privileges and immunities" was broadly understood to denote specially or uniquely conferred rights. When made part of a larger phrase regarding the conferred rights of *citizens*, the phrase took on an even more specified meaning, depending on the status of the citizens at issue: antebellum American judges, treatise writers, and politicians broadly viewed the "privileges and immunities" of citizens *in the states* as referring to a completely different set of rights than the "privileges and immunities" of *United States citizens*. This distinction was well-developed in antebellum case law and political argument, and it played a critical role in free-state constitutional rhetoric during the debates over the admission of new states and in the struggle to prevent the nationalization of slavery.

This Article will proceed in four steps. First, I will consider the general usage of the particular terms "privileges" and "immunities" at the time of the Founding. This Part will show that the terms were used in such a broad variety of contexts that it is impossible to discern a particular meaning without knowing more about the specific context in which the term appeared. The next Part considers how the paired term "privileges and immunities" took on a more focused meaning, with legal and political writers generally using the phrase to refer to a set of specially or uniquely conferred rights. The third Part takes this a step further by considering the meaning of the phrase "privileges and immunities of citizens in the several states" as used in the Privileges and Immunities Clause of Article IV. Courts and commentators broadly read this phrase to refer to a limited set of state-conferred rights that states had to bestow equally upon their citizens and sojourning citizens from other states. Finally, the last section considers antebellum usage of the term "privileges and immunities of citizens of the United States"—the closest precursor to the language of the Privileges or

7. See, e.g., Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1297 (2009) ("[T]hese terms were part of the usage and culture of people in America for at least 250 years prior to their use in the proposed Fourteenth Amendment.").

Immunities Clause. Like the language of Article IV, and almost all other uses of the paired terms “privileges and immunities,” this phrase was broadly understood as referring to a set of specially conferred rights. Unlike the state-conferred rights of Article IV, however, this particular phrase referenced rights expressly conferred by the Federal Constitution. The distinction between Article IV privileges and immunities and “privileges and immunities of citizens of the United States” remained well-recognized in judicial opinions and political debate up to the Civil War.

The goal of this first Article is to present how the terms “privileges” and “immunities” took on different meanings when embedded in a broader term of art, such as “privileges and immunities of citizens in the several states” or “privileges and immunities of citizens of the United States.” This sets the stage for the next article, *The Origins of the Privileges or Immunities Clause, Part II: Mr. Bingham’s Epiphany (Part II)*, which will explore how the distinction between state- and federal-conferred privileges and immunities informed the debates of the Thirty-ninth Congress.⁸ The distinction explains the reaction of Bingham’s colleagues to his initial draft of Section One, which used the language of Article IV’s state-conferred rights, and it explains why Bingham ultimately discarded the language of Article IV and altered the final draft to announce the privileges or immunities of citizens of the United States.

Finally, understanding antebellum law regarding citizenship-based “privileges and immunities” substantially vindicates Justice Miller’s refusal to equate the privileges and immunities of Article IV with the privileges or immunities of Section One in *Slaughter-House*—a decision that left the door open to future incorporation of the Bill of Rights and embraced a reading of Section One substantially shared by its author.

I. METHODOLOGY

As a work of constitutional history, this Article, and the ones that will follow, are intended to become part of the general debate over the original meaning of the Fourteenth Amendment. Because there are different ways to explore and apply historical evidence, it is important that I explain my own normative commitments and historical methodology.

This Article explores the public use and understanding of “privileges and immunities” as a term of art in the period between the Founding and Reconstruction. The primary sources I investigate include newspaper articles, sermons, books, legal treatises, political tracts, public political debates, and judicial opinions. When appropriate, I refer to the broader social context of the period, but primacy of place is given to the use and development of legal terms as a part

8. *Part II* is currently in the draft stages, but at times I have cited it to indicate where my thoughts will be further elaborated. It is cited in this Article as Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: Mr. Bingham’s Epiphany*, 99 *Geo. L.J.* (forthcoming 2010), available at <http://papers.ssrn.com/abstract=1457360>.

of public legal debate. This is not an attempt to artificially separate legal argument from social reality. In fact, social advancements at the time of Reconstruction were often facilitated, or impeded, by the convincing use of legal argument.⁹ As Eric Foner notes, “this was an age which cared deeply about constitutional interpretation, and regarded the Constitution as the embodiment of legal wisdom,”¹⁰ or as John Bingham put it, “everything was reduced to a Constitutional question, in those days.”¹¹ It is reasonable, then, to seriously consider the legal arguments that preceded and dominated the Reconstruction debates, even while acknowledging the influence of political events and personal motivations.

The members of the Thirty-ninth Congress did not invent the particular words and legal phrases that came together in the Privileges or Immunities Clause of the Fourteenth Amendment. Terms like “privileges” and “immunities,” and concepts like the rights of state and national citizenship, were well-known and commonly used in antebellum legal and political debate. One can find uses of the phrases “immunities and privileges of United States citizens” and “privileges and immunities of citizens of the United States” in legal and political argument prior to John Bingham’s introduction of Section One in the Thirty-ninth Congress. Thus, although one can assume that members of the Reconstruction Congress took advantage of whatever legal tools and concepts were available in order to advance their particular position, their use of particular phrases and concepts reflected legal meanings and ideas that had emerged in antebellum judicial cases and legal commentary—both of which were regularly quoted on the floor during debate. Understanding the antebellum distinction between Article IV rights and the rights of national citizenship thus illuminates both how the members of Congress understood the development of the Privileges or Immunities Clause and how the public at large likely understood the final version of that text.

Readers will recognize this approach as an exercise in originalism: the effort to identify the original meaning of constitutional text in the belief that this meaning should play a nontrivial role in contemporary interpretation and applica-

9. A number of contemporary Fourteenth Amendment scholars stress the importance of legal theory and argument in securing sufficient political majorities for legislative and constitutional change. See, e.g., EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 12 (1990) (discussing the importance of framing text and crafting legal arguments in a manner acceptable to Republican moderates in the Thirty-ninth Congress). See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 85 (1970); DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* (2007).

10. FONER, *supra* note 9, at 85.

11. WALTER GASTON SHOTWELL, *DRIFTWOOD: BEING PAPERS ON OLD-TIME AMERICAN TOWNS AND SOME OLD PEOPLE* 81 (photo. reprint 1966) (1927) (quoting Bingham); see also Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 *CHI.-KENT L. REV.* 1197, 1254 n.382 (1995) (citing Shotwell’s discussion with Bingham).

tion of the Constitution.¹² Nothing in this Article requires the embrace of originalism—the history presented in this Article should stand on its own two feet, so to speak. Nevertheless, I acknowledge that my choices of which aspects of the historical record to focus on are influenced by my adoption of “original public meaning originalism” as a normatively attractive approach to constitutional interpretation.

Because original public meaning originalism is a bit of a departure from older forms of originalism, a short explanation is in order. Until the last couple of decades, originalist scholars tended to search for the original intent of the drafters of a constitutional text. This kind of “original intent” originalism was subjected to a withering fire of scholarly criticism, stressing the difficulty of determining subjective psychic intent and aggregating the multiple private intentions that informed whichever group drafted or supported a particular constitutional text.¹³ Today, most originalist scholars follow an approach known as “original public meaning” originalism.¹⁴ This approach seeks to determine the likely public understanding of a proposed constitutional text, with special emphasis placed on those with the authority to ratify the text and make it an official part of the Constitution.¹⁵ This form of originalism has been embraced by a wide range of constitutional historians of various ideological persuasions¹⁶ and avoids many of the difficulties associated with original intent analysis. It also has the added advantage of tracking the normative political theory of the Founders: popular sovereignty.¹⁷ By emphasizing the understanding of those

12. For outstanding theoretical works on contemporary originalism, see University of Illinois Professor Lawrence Solum's *Semantic Originalism*, and Princeton University Professor Keith E. Whittington's *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW*. See *infra* note 14.

13. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

14. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Balkin, *supra* note 6; Randy E. Barnett, *An Origination for Nonoriginalists*, 45 LOY L. REV. 611 (1999); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. (forthcoming 2010); Lawrence B. Solum, *Semantic Originalism* 15 (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), available at <http://papers.ssrn.com/abstract=1120244>.

15. See Solum, *supra* note 14, at 18.

16. See, e.g., AMAR, *supra* note 1, at 177–78; BARNETT, *supra* note 3; MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); WHITTINGTON, *supra* note 14; Balkin, *supra* note 6; Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009).

17. See KRAMER, *supra* note 16, at 3–8.

who had the authority to ratify the text, original public meaning originalism echoes the views of Founders like James Madison, who stressed the importance of interpreting the Constitution according to ratifier understanding.¹⁸ Original public meaning originalism does not dismiss the personal intentions of the Framers (to the extent they can be determined) but considers such views only to the degree that they reflect or illuminate the likely public understanding of the proposed constitutional text.

Although the search for original public meaning in the last decade or so has become the norm among originalist legal theorists, it is important to remember that some of the most influential works on the historical Fourteenth Amendment were written at a time when the search for the Framers' intent dominated the field of constitutional historical debate.¹⁹ Such works generally focused on discerning, or debating, the private intentions of key members of the Thirty-ninth Congress at the time of the debates over the Fourteenth Amendment.²⁰ Again, this Article accepts such historical investigation of individual intent as potentially important (indeed, it will be the focus of *Part II*) but only to the degree that it informs an understanding of the final draft of the Privileges or Immunities Clause and how that text was likely understood by the people who made it part of our fundamental law. Most originalists today agree that the public's understanding is far more important than the specific intentions of John Bingham or any other single player in the debates.

II. PRIVILEGES AND IMMUNITIES AS INDIVIDUAL TERMS

A. ON RIGHTS AT THE TIME OF THE FOUNDING

Having inherited a conception of rights rooted in medieval English common law,²¹ American legal theorists at the time of the Founding faced the task of translating common law terms and ideas into the political and legal context of post-Revolutionary America.²² In the middle to late eighteenth century, most

18. See James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in *WRITINGS: JAMES MADISON* 480, 482–83, 489 (Jack Rakove ed., 1999).

19. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed., Liberty Fund, Inc. 1997) (1977); 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953); CURTIS, *supra* note 16; CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION 1864–88* (1971); JACOBUS TENBROEK, *EQUAL UNDER LAW* (rev. ed., Collier Books 1965) (1951); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 *STAN. L. REV.* 5 (1949). Even those works that criticized originalism found themselves caught up in the debates over original intent. See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 2–12 (1988).

20. See generally BERGER, *supra* note 19; CURTIS, *supra* note 16; William Winslow Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 *U. CHI. L. REV.* 1, 2–119 (1954); Fairman, *supra* note 19.

21. Gordon S. Wood, *The History of Rights in Early America*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 233, 233 (Barty Alan Shain ed., 2007).

22. For example, the first major American edition of *Blackstone's Commentaries* was a self-conscious effort by the author to translate English common law into the context of American

Englishmen embraced the general Whig understanding of rights as running against the crown.²³ From the Magna Carta, to the Petition of Right, to the English Bill of Rights, the perceived danger was one of arbitrary and unconstrained executive (royal) power.²⁴ Although some of the more radical Whig writing warned about the dangers of the legislative branch as much as the executive,²⁵ most Englishmen in the mid-eighteenth century were not as concerned about the powers of Parliament as they were about the prerogatives of the King. Parliament, after all, stood as the body representing the people of England—why would the people constrain themselves?²⁶ Accordingly, English rights in the mid-eighteenth century were thought best protected through mechanisms that ensured that life, liberty, and property would not be arbitrarily denied, but regulated only by way of laws enacted by the people's representatives in Parliament.²⁷ As time went on, this deference to the English legislative assembly evolved into the general idea of Parliamentary supremacy.²⁸

Americans, on the other hand, were drawn to the more radical Whig tradition that saw all branches of government as potential sources of tyranny and abuse. The self-serving, and sometimes corrupt, actions of the post-Revolutionary state governments fueled the emergence of a particular strain of popular sovereignty that viewed the people as both sovereign and distinct from their institutions of government, including the legislative branch.²⁹ As Gordon Wood has chronicled, the idea of popular sovereignty maintained that governments lawfully exercised only those powers delegated to them by the people themselves through a written constitution.³⁰ These constitutions not only described the general structure of state government, they also usually included a written declaration of rights in order to ensure that certain actions and activities fell beyond the unenumerated police powers of state governments.³¹

The proposed Federal Constitution, on the other hand, was presented by its advocates as granting the federal government only certain enumerated powers.

constitutionalism. See ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND THE LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND THE COMMONWEALTH OF VIRGINIA* (Phila., Birch & Small 1803).

23. See John Phillip Reid, *The Authority of Rights at the American Founding*, in *THE NATURE OF RIGHTS OF THE AMERICAN FOUNDING AND BEYOND*, *supra* note 21, at 67, 68; see also EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 101–21 (1988).

24. Wood, *supra* note 21, at 235.

25. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 14–15 (1969).

26. Wood, *supra* note 21, at 235–36.

27. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* §§ 138–40, at 161–63 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) (discussing the rights to freedom from arbitrary government and deprivation of property only by consent of the people's representatives); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *137–38 (discussing the necessity of courts to protect against arbitrary executive deprivations of life, liberty, and property, and to ensure the enforcement of the law of the land).

28. Wood, *supra* note 21, at 235–36.

29. WOOD, *supra* note 25, at 372–89.

30. *Id.*

31. *Id.*

This is why, the Federalists explained, the document's drafters in Philadelphia saw no need to include a written declaration of rights.³² No power over subjects like speech, religion, and press had been delegated to the federal government, and thus, according to the fundamental principles of popular sovereignty, all nondelegated powers and rights would be retained by the people in the states.³³ Although Federalists ultimately acquiesced to the calls for a national Bill of Rights,³⁴ the addition of the Ninth and Tenth Amendments ensured that the basic idea of retained nondelegated powers and rights remained an express aspect of the Federal Constitution.³⁵ As the Maryland General Court explained in 1797, under the Federal Constitution "[a]ll power, jurisdiction and rights" not delegated into the hands of the federal government remained under the control of the people in the states.³⁶ The scope of conferred federal power was a matter of continual debate in the early years of the Constitution as Congress debated matters such as the establishment of a national bank³⁷ and the authority to criminalize seditious speech.³⁸ Nevertheless, even the most aggressive proponents of federal power accepted the basic concept of enumerated federal authority.³⁹ Although the states faced certain restrictions under Article I, Section 10 according to Chief Justice John Marshall in *Barron v. Baltimore*,⁴⁰ the provisions of the Bill of Rights bound only the federal government.⁴¹ This left the subject matter of the Bill of Rights, and personal rights in general, under the care and protection of state majorities.

Whether federal- or state-conferred, the actual substance of rights at the time

32. See James Wilson, State House Yard Speech (Oct. 6, 1787), in 1 COLLECTED WORKS OF JAMES WILSON 171, 172 (Kermit L. Hall & Mark David Hall eds., 2007).

33. *Id.*

34. See James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in WRITINGS, *supra* note 18, at 437, 442–43.

35. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

36. *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797). This locution, originally found in the Articles of Confederation, continued to be used as a description of the limited delegated powers of the federal government after the adoption of the Constitution. See Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1899 (2008).

37. See Madison, *supra* note 18.

38. See James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in WRITINGS, *supra* note 18, at 608, 631–55; John Marshall, The Address of the Minority in the Virginia Legislature to the People of that State, Containing a Vindication of the Constitutionality of the Alien and Sedition Laws (Dec. 1798), in JOHN MARSHALL: MAJOR OPINIONS AND OTHER WRITINGS 34, 34–47 (John P. Roche ed., 1967).

39. See Alexander Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), reprinted in 3 THE FOUNDERS' CONSTITUTION 247, 248–49 (Philip B. Kurland & Ralph Lerner eds., 1987); see also John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1798), partially reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra*, at 136, 138–39.

40. 32 U.S. (7 Pet.) 243, 249 (1833).

41. *Id.* at 247–28.

of the Founding, and throughout the early nineteenth century, included a rich mix of liberties, advantages, exemptions, privileges, and immunities.⁴² Today, rights are most often conceived as individual in nature. At the time of the Founding, however, rights could be individual,⁴³ majoritarian,⁴⁴ collective,⁴⁵ or governmental.⁴⁶ Sources of law included natural law,⁴⁷ the law of nations,⁴⁸ common law,⁴⁹ positive law, or, quite commonly, a combination of all the above.⁵⁰ “Bearers of rights,” to use Richard Primus’s phrase, potentially included everything from individuals and groups to local, state, and national governments.⁵¹

Making the picture even more complicated, after the Founding an individual rights bearer could be both a citizen of the United States and a citizen of a particular state.⁵² This created a situation where the same right could have a

42. For a general discussion of the variety of rights in play at the time of the Founding, see KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* 82–83 (2009); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 78–91 (1999).

43. 1 *ANNALS OF CONG.* 732 (Joseph Gales ed., 1834) (statement of Rep. Theodore Sedgwick) (discussing the unenumerated individual right of a man “to wear his hat if he pleased” or “go to bed when he thought proper”).

44. LOCKE, *supra* note 27, §§ 95–99, at 141–43 (“When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.”).

45. See *THE DECLARATION OF INDEPENDENCE* (1776) (identifying the people’s right of revolution).

46. See EMMERICH DE Vattel, *THE LAW OF NATIONS* bk. 1, ch. 3, § 31, at 94 (Thomas Nugent trans., Bela Kaposey & Richard Whatmore eds., Liberty Fund, Inc. 2008) (1758) (discussing “[t]he rights of a nation with respect to its constitution and government”); Lord Mansfield, Speech in the House of Lords (1770), in WILLIAM SCOTT, *LESSONS IN ELOCUTION* 262 (1788) (Early Am. Imprints, Series 1, no. 21451) (claiming that a proposed bill “is no less than to take away from two thirds of the legislative body of this great kingdom, certain privileges and immunities of which they have been long possessed”).

47. See, e.g., James Madison, Notes for Speech in Congress (June 8, 1789) (“Contents of Bill of Rhts . . . 3. *natural rights*, retained—as Speech, Con . . .”), in 12 *PAPERS OF JAMES MADISON* 193, 194 (Charles F. Hobson & Robert A. Rutland eds., 1979).

48. See generally DE Vattel, *supra* note 46 (a common source of law during the Founding generation and long afterwards).

49. See, e.g., TUCKER, *supra* note 22 (an extremely influential edition of *Blackstone’s Commentaries* during the early decades of the Constitution).

50. See generally Reid, *supra* note 23. John Reid reminds us that, despite the common use of the language of natural rights during the revolutionary period, natural law was generally used as an additional authority for the rights being claimed by the colonists—rights that mainly involved being treated equally with those royal subjects in England. *Id.* at 86. According to Reid, “[t]he chief utility of nature as a source of rights was to give civil rights an authority independent of human creation.” *Id.* at 93. As far as the substance of natural rights goes, it was rarely argued that specific rights existed on the authority of nature alone; most often natural rights were “equated with British constitutional and positive law and with English common law.” *Id.* at 96. The rhetoric of natural law provided an additional source of authority for those rights demanded by the colonists equal to the rights of the British.

51. PRIMUS, *supra* note 42, at 85.

52. Article I, Section 8 conferred upon Congress the power to establish national citizenship by way of its power to establish uniform rules of naturalization, while Article IV (both impliedly and as a matter of later interpretation) referred to preexisting and ongoing rights associated with state citizenship. U.S. CONST. art. I, § 8; *id.* art. V. These two forms of citizenship were distinguished at law throughout the antebellum period. See *infra* Part IV.

different nature and scope depending on who asserted the right and against whom the right was asserted. For example, because the Federal Bill of Rights originally bound only the federal government, in 1791 one might have had an *individual* right against a *federal* law forbidding criticism of the government but only a local *majoritarian* right against a *state* law forbidding the same act.⁵³ One might argue—and many did—that the natural right to freedom of expression is abridged in both cases, but historically, one's enforceable legal protection differed depending on whether the asserted right ran against the state (as a matter of state citizenship) or against the federal government (as a matter of federal citizenship).⁵⁴

This brief survey only scratches the surface of the broad subject of rights at the time of the Founding.⁵⁵ Having a general understanding of the taxonomy of rights at the time of the Founding is important, however, as this Article's discussion of the Privileges or Immunities Clause will make clear. Antebellum religious, political, social, and legal literature is soaked in the rhetoric of rights. Terms like "rights," "advantages," "privileges," and "immunities" appear in a variety of contexts and in reference to a variety of liberties. Finding the terms used in one context may tell us much, little, or nothing at all about how the terms were used or understood in another context.⁵⁶ This does not make the search for public meaning impossible, but it does suggest that one must be especially sensitive to the legal context in which the terms were deployed.

This Article will now proceed to consider specific examples of privileges and immunities in antebellum America.

B. "PRIVILEGES" AND "IMMUNITIES" IN ANTEBELLUM AMERICA

The terms "privileges" and "immunities" evolved alongside the terms "rights" and "liberties," and were put to the same varied use. Throughout the late eighteenth and early nineteenth centuries, one finds countless examples of the terms "rights," "advantages," "liberties," "privileges," and "immunities" used interchangeably, and often at the same time.⁵⁷ As early as 1606, for example, Virginia's colonial charter spoke of the protected "Liberties, Franchises, and

53. See Madison, *supra* note 38, at 631–55.

54. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798). For an analysis of the state-autonomy aspects of *Calder*, see LASH, *supra* note 42, at 177–81.

55. For more detailed discussion of rights at the time of the Founding, see generally PRIMUS, *supra* note 42, at 78–91; THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND, *supra* note 21; WOOD, *supra* note 25.

56. Scholars like Michael Kent Curtis have done important work showing how the individual terms "privileges" and "immunities" were sometimes used in reference to the rights listed in the first eight amendments to the Constitution. See, e.g., CURTIS, *supra* note 16, at 161–63. I concede the importance of Professor Curtis's work. My effort here is to show how the words were also used in other, and sometimes very different, contexts as well as to show that when the words were combined they took on a particular meaning distinguishable from their varied uses as individual terms.

57. See Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1095 (2000) (stating that "[t]he words 'rights' and 'privileges' were used interchangeably" in colonial America).

Immunities” of English citizens in Virginia.⁵⁸ According to the 1765 Resolves of the Virginia House of Burgesses, colonists were entitled to “all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of *Great Britain*,” and “all Liberties, Privileges, and Immunities . . . as if they had been abiding and born within the Realm of *England*.”⁵⁹ The Declaration of Rights of the Continental Congress likewise insisted that the colonists were “entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England” and “to all the immunities and privileges granted [and] confirmed to them by royal charters.”⁶⁰

According to legal sources in the early years of the Republic, the words “privileges” and “immunities” often meant the same thing.⁶¹ According to the Maryland General Court in 1797, the terms “[p]rivilege and immunity are synonymous, or nearly so.”⁶² Dictionaries of the time also equated the terms.⁶³ Just as rights at the time of the Founding referred to an extremely broad range of activities, sources, and bearers, so too one can find privileges and immunities associated with everything from individual rights to corporate powers—sometimes in the same source. For example, in one section of his *Commentaries*, Blackstone uses the individual terms “privileges” and “immunities” in reference to individual natural rights,⁶⁴ while in a different section of the same book he uses the combined phrase “privileges and immunities” to refer to the

58. See THE FIRST CHARTER OF VIRGINIA (1606) (“[King James I grants to] all and every the Persons being our Subjects . . . all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions.”), reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3783, 3788 (Francis Newton Thorpe ed., Wash. Gov’t Printing Office 1909); see also 16 THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME 144 (London, Hansard 1812) (“That the Liberties, Franchises, Privileges, and Jurisdictions of Parliament, are the ancient and undoubted birthright and inheritance of the subjects of England . . .”).

59. JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA, 1761–1765, at 360 (John Pendleton Kennedy ed., 1907).

60. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 68 (Worthington Chancey Ford ed., Wash. Gov’t Printing Office 1904) (1774).

61. See Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1133 (2009) (“[I]t appears that ‘immunity’ and ‘privilege’ were reciprocal words for the same legal concept.”).

62. *Campbell v. Morris*, 3 H. & McH. 535, 553 (Md. 1797); see also *Douglass’ Adm’r v. Stevens*, 2 Del. Cas. 489, 501 (1819) (“By the second section of the fourth article of the Constitution of the United States the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states. The words ‘privileges’ and ‘immunities’ are nearly synonymous. Privilege signifies a peculiar advantage, exemption, immunity. Immunity signifies exemption, privilege.”).

63. See, e.g., WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 411, 442 (1st Am. ed., Worcester, Mass., Thomas 1788) (Early Am. Imprints, Series 1, no. 21385) (defining “Right” as a “just claim; justice; interest; prerogative, privilege,” and “Privilege” as a “publick right; peculiar advantage”); PHILADELPHIA SCHOOL DICTIONARY, OR, EXPOSITOR OF THE ENGLISH LANGUAGE 105, 152 (3rd ed., Phila., Johnson 1812) (defining “Privilege” as a “[p]eculiar advantage” and “Immunity” as a “privilege, exemption”).

64. 1 BLACKSTONE, *supra* note 27, at *129 (describing personal rights as “private immunities” and “civil privileges”).

government-conferred collective rights of corporations.⁶⁵ This last example is instructive in that it is a harbinger of how the combined terms “privileges and immunities” came to be used in legal, political, and social literature of antebellum America as a phrase denoting specially conferred rights and advantages.

C. THE PAIRING OF PRIVILEGES AND IMMUNITIES

Although one can find the single word “privilege” used in a variety of contexts, at the time of the Founding, dictionaries generally defined the term as denoting a “publick right” or a kind of unique or special advantage.⁶⁶ This same definition applied to the combined terms “privileges and immunities.” For example, when Blackstone used the phrase “privileges and immunities” in reference to the conferred rights of corporations, he meant institutions upon whom legislatures or parliaments conferred special rights not generally available to all others.⁶⁷ Early American legal sources echoed this “specially conferred rights” understanding of the paired terms. Early court decisions explained that “[p]rivilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege.”⁶⁸ When paired, the terms referred to a set of “peculiar advantages and exemptions.”⁶⁹

65. See *id.* at *468 (discussing the “privileges and immunities” of corporations).

66. See *supra* note 63; see also Natelson, *supra* note 61, at 1130 (discussing early dictionary definitions of “privileges” as having four components “(1) a benefit or advantage; (2) conferred by positive law; (3) on a person or place; (4) contrary to what the rule would be in absence of the privilege” (citation omitted)).

67. According to Blackstone:

We have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable, it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called bodies politic, bodies corporate, (*corpora corporata*) or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. . . . If [a college] were a mere voluntary assembly, the individuals which compose it . . . could neither frame, nor receive any laws or rules of their conduct; none at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? . . . But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law . . . [T]he privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be forever vested, without any new conveyance to new successions

1 BLACKSTONE, *supra* note 27, at *467–68.

68. *Campbell v. Morris*, 3 H. & McH. 535, 533 (Md. 1797).

69. *Id.*

From the time of the Founding right up to and beyond the Civil War, one finds countless references to the peculiar "privileges and immunities" of kings,⁷⁰ diplomatic emissaries,⁷¹ private societies,⁷² churches,⁷³ artillery companies,⁷⁴ ecclesiastics,⁷⁵ Christian apostles,⁷⁶ and corporations⁷⁷ (including incorporated towns and municipalities⁷⁸). This last group was so thoroughly associated with conferred privileges and immunities that dictionaries of the day defined "disfranchise" as meaning "to deprive cities, &c. of chartered privileges or immunities."⁷⁹

70. See, e.g., MARSHALL v. LOVELASS, REPORTS OF CASES RULED AND DETERMINED BY THE COURT OF CONFERENCE OF NORTH-CAROLINA 217, 234 (Duncan Cameron & William Norwood eds., Raleigh, Gales 1805) (Early Am. Imprints, Series 2, no. 9035) ("[A]lthough the King cannot be sued, yet his aliene may be, for he does not partake of his privileges or immunities.").

71. See DE VATTEL, *supra* note 46, at bk. 4, ch. 7, at 696-729. In 1801, a New York court declared that the law of nations did not grant "to consuls who enter into trade, any particular privileges or immunities above those enjoyed by the native subjects of the country." UNITED INS. CO. v. ARNOLD, COURT FOR THE TRIAL OF IMPEACHMENTS AND THE CORRECTION OF ERRORS 7 (Albany, N.Y., Webster 1801) (Early Am. Imprints, Series 2, no. 1033).

72. In 1783, the Society of Cincinnati published a defense of the society, reminding readers that it lacked the "privileges or immunities" granted to corporations. See A REPLY TO A PAMPHLET, ENTITLED, CONSIDERATIONS ON THE SOCIETY OR ORDER OF CINCINNATI 18 (Annapolis, Green 1783) (Early Am. Imprints, Series 1, no. 18149).

73. See *An Act to Alter the Name of the Second Presbyterian Church of Newark* (Jan. 31, 1811), in ACTS OF THE THIRTY-FIFTH GENERAL ASSEMBLY, OF THE STATE OF NEW-JERSEY 402, 402 (Trenton, Wilson 1811) (Early Am. Imprints, Series 2, no. 23525) ("[N]othing in this act contained shall in any manner or degree invalidate or impair any rights, powers, privileges or immunities to which the said body politic and corporate are entitled by the said act of incorporation and the said supplement thereto.").

74. See, e.g., *An Act, Regulating the Militia in this Colony*, in ACTS AND LAWS OF THE ENGLISH COLONY OF RHODE-ISLAND AND PROVIDENCE-PLANTATIONS, IN NEW-ENGLAND, IN AMERICA 179, 189 (Newport, Hall 1868) (Early Am. Imprints, Series 1, no. 10749) ("PROVIDED always, That nothing in this Act contained shall extend, or be construed to extend to take away or diminish any of the Liberties, Privileges, or Immunities of any independent or Artillery-Company or Companies established by Law in this Colony; but that the same, according to their Establishment, be preserved to them entire, any Thing herein contained to the contrary.").

75. See 1 JOHN GIFFORD, THE HISTORY OF FRANCE, FROM THE EARLIEST TIMES, TILL THE DEATH OF LOUIS SIXTEENTH 500 (Phila., Bioren & Madan 1796) (Early Am. Imprints, Series 1, no. 30489) (discussing the "particular privileges or immunities, granted by the pope to ecclesiastics").

76. See DAVID OSGOOD, A DISCOURSE ON THE VALIDITY OF THE PRESBYTERIAN ORDINATION 12 (Cambridge, Hilliard 1802) (Early Am. Imprints, Series 2, no. 2830) ("At the height of their exaltation however, [the Apostles] acknowledged themselves in all other respects, to be but *earthen vessels*, on a par with one another and with their Christian brethren in general, subject alike with them, both to the same infirmities and to the same laws, having no exclusive privileges or immunities.").

77. See, e.g., ACT OF INCORPORATION, CONSTITUTION, BY-LAWS, &C. OF THE ASSOCIATED MECHANICS AND MANUFACTURERS OF THE STATE OF NEW-HAMPSHIRE 4-5 (Portsmouth, N.H., Treadwell 1810) (Early Am. Imprints, Series 2, no. 19389) ("And be it further enacted, That the said corporation, shall have a common seal, such as shall be determined on by a major vote at any meeting, and which seal shall be affixed to grants of real estates that may be made by the corporation, and to grants of privileges or immunities to any member, and to certificates."). The references to the privileges and immunities of corporations are far too many to list, and in fact, not surprising in light of the references in Blackstone's *Commentaries*. See *supra* note 67 and accompanying text.

78. The 1772 laws of New York protected the "Powers, Pre-eminences, Privileges or Immunities over, or in Respect to the said Township of Harlem." LAWS OF NEW-YORK, FROM THE YEAR 1691, TO 1773 INCLUSIVE 714 (N.Y., Gaine 1772).

79. JOSEPH HAMILTON, JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE 71 (2d ed., Newburyport, Thomas & Whipple 1806) (Early Am. Imprints, Series 2, no. 10643); see also SUSANNA ROWSON, A

Antebellum legal documents, court cases, newspaper articles, and treatises repeatedly placed adjectives like “special,”⁸⁰ “peculiar,”⁸¹ “exclusive,”⁸² and “particular”⁸³ in front of the paired terms “privileges and immunities” in order to highlight the unique nature of such conferred rights. These “peculiar” rights might include natural rights or any other variety and combination of conferred liberties. The paired terms did not refer to a defined set of rights but rather indicated the existence of a unique set of liberties or advantages, the content of which differed depending on the context and the group at issue.

Having “privileges and immunities” was not always something to be celebrated.⁸⁴ Newspaper editorials during the Jacksonian era commonly decried

SPELLING DICTIONARY 42 (2d ed., Portland, Me., A & J Shirley 1807) (Early Am. Imprints, Series 2, no. 35815) (children’s version of *Johnson’s Dictionary* with the same definition of “disfranchise”).

80. See, e.g., J.V. Smith, *Ohio Constitutional Convention*, OHIO DAILY STATESMAN, Feb. 14, 1851, at 2 [hereinafter Smith, *Ohio Constitutional Convention* (Feb.)] (reporting on a proposed clause in the Ohio Bill of Rights providing that the legislature may have a right “to alter, revoke, repeal or abolish . . . any grant or law conferring special privileges or immunities, upon any portion of the people, which cannot reasonably be enjoyed by all”); J.V. Smith, *Ohio Constitutional Convention*, OHIO DAILY STATESMEN, Mar. 1, 1851, at 2 [hereinafter Smith, *Ohio Constitutional Convention* (Mar.)] (reporting on a proposal to remove a portion of a proposed amendment to the Ohio Bill of Rights stating “and no special privileges or immunities shall ever be granted injurious to the public, and which cannot reasonably be enjoyed by all”); *The Constitutional Convention*, FREEDOM’S CHAMPION (Atchison City, Kan.), July 23, 1859, at 1 (discussing an article from Kansas’s Bill of Rights that was adopted at Kansas’s Constitutional Convention stating that “[n]o special privileges or immunities shall ever be granted by the Legislature which may not be altered, revoked or repealed by the same body”); *Virginia Legislature—House of Delegates Convention*, RICHMOND ENQUIRER (Va.), Jan. 15, 1829, at 1 (citing statement of Representative Mason of Frederick: “But, sir, under what sanction can individuals of the same community, holding a peculiar species of property, or any particular district of country, stipulate in like manner for *especial privileges or immunities* to that property, as a pre-requisite to the formation of a common government?” (emphasis added)).

81. See *Douglass’ Adm’r v. Stevens*, 2 Del. Cas. 489, 501 (1819) (“By the second section of the fourth article of the Constitution of the United States the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states. The words ‘privileges’ and ‘immunities’ are nearly synonymous. Privilege signifies a peculiar advantage, exemption, immunity. Immunity signifies exemption, privilege.”); *Campbell v. Morris*, 3 H. & McH. 535, 553 (Md. 1797) (discussing “[t]he peculiar advantages and exemptions contemplated under [Article IV]”); PHILADELPHIA SCHOOL DICTIONARY, *supra* note 63, at 152 (defining “Privilege” as a “[p]eculiar advantage” and “Immunity” as a “privilege, exemption”); see also *Magill v. Brown*, 16 F. Cas. 408, 428 (C.C.E.D. Pa. 1833) (No. 8,952) (“The words ‘privileges and immunities’ relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places . . .”).

82. In 1841, *The Emancipator* called for “[e]qual rights, equal and exact justice to all men, and no exclusive privileges or immunities.” *The Necessity of a Liberty Party*, THE EMANCIPATOR (N.Y.), Nov. 11, 1841, at 112.

83. See *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (discussing the “particular privileges and immunities” protected under Article IV); *Campbell*, 3 H. & McH. at 554 (stating that a “particular and limited operation is to be given to [the privileges and immunities clause of Article IV]”); *UNITED INS. CO. v. ARNOLD*, *supra* note 71, at 7 (denying a diplomat any “particular privileges or immunities above those enjoyed by the native subjects of the country”); 1 GIFFORD, *supra* note 75, at 500 (discussing the “particular privileges or immunities, granted by the pope to ecclesiastics, with the permission of their sovereigns”).

84. An 1803 editorial in the *Aurora General Advertiser* declared that neither state legislatures nor the Federal Senators they elected possessed special or “exclusive rights, powers and immunities” other than those “granted to them by the people.” Editorial, *A Vindication of the Democratic Constitutions of*

“the possession of privileges or immunities, in which ninety-nine hundredths of the community, by the very nature of their situation, are denied all participation,”⁸⁵ and they vilified the “‘privileged order’ . . . on whom the law confers certain privileges or immunities not enjoyed by the great mass of the people.”⁸⁶ In 1841, *The Emancipator* called for “[e]qual rights, equal and exact justice to all men, and no exclusive privileges or immunities.”⁸⁷ Legislatures during this period drafted constitutional amendments that expressly opposed the granting of special privileges and immunities to corporations. For example, the members of the 1851 Ohio Constitutional Convention drafted a proposed addition to the state Bill of Rights that declared that “[n]o special privileges or immunities shall ever be granted, injurious to the public” and provided that the legislature could “alter, revoke, or repeal or abolish . . . any grant or law conferring special privileges or immunities, upon any portion of the people, which cannot reasonably be enjoyed by all.”⁸⁸

In sum, although antebellum use of the single terms “privileges” and “immunities” occurred in an almost bewildering array of contexts, use of the *paired* terms “privileges and immunities” seems to have been generally reserved to a description of specially conferred rights. Put another way, “privileges and immunities” did not refer to the natural rights belonging to all people or all institutions but referred instead to rights belonging to a certain group of people or a particular institution.

III. THE PRIVILEGES AND IMMUNITIES OF CITIZENS

Antebellum discussion of the rights of citizenship offers a particularly focused example of how the phrase “privileges and immunities” was understood in American law during the period between the Founding and the Civil War. The very concept of citizenship involves issues of group membership and the

America, AURORA GEN. ADVERTISER (Phila.), Aug. 20, 1803, at 2. In 1820, a Mr. Grundy offered the following resolution in the Tennessee legislature:

Whereas, the Congress of the United States will probably at their present session, take into consideration the propriety of establishing a uniform system of Bankruptcy throughout the United States, and whereas this General Assembly consider every measure, which bestows on one class of our citizens, rights, privileges or immunities, which are withheld from others, as unjust and impolitic

Resolved, That our Senators in Congress be instructed, and our Representatives requested, to use their best exertions to prevent the passage of any act or acts calculated to violate the principles laid down in the preamble to this resolution.

Legislature of Tennessee, AGRIC. INTELLIGENCER, & MECHANIC REG. (Boston), Jan. 21, 1820, at 23.

85. *The Cry of the Poor Against the Rich*, OHIO STATESMAN (Columbus), July 10, 1839, at 4.

86. *Banks; a Privileged Order*, WIS. ENQUIRER, Oct. 17, 1840, at 1.

87. *The Necessity of a Liberty Party*, *supra* note 82.

88. Smith, *Ohio Constitutional Convention* (Feb.), *supra* note 80, at 2; *see also* Smith, *Ohio Constitutional Convention* (Mar.), *supra* note 80, at 2 (reporting on a proposal to remove the following portion of a proposed amendment to the Ohio Bill of Rights: “and no special privileges or immunities shall ever be granted injurious to the public, and which cannot reasonably be enjoyed by all”).

identification of rights associated with that membership. As the next two sections of this Article will explore in detail, just as different groups and institutions could have different “privileges and immunities,” the citizens of various governments also had uniquely defined rights and advantages.

A. “PRIVILEGES AND IMMUNITIES OF CITIZENS IN THE STATES”

One of the greatest sources of friction between Britain and the American colonies was the colonists’ belief they had been denied the equal privileges and immunities of English citizens—rights they had “purchased” through the grueling and perilous act of emigrating from England and colonizing America.⁸⁹ The colonists, like all English citizens, expected the equal enjoyment of the privileges and immunities of English common law as long as they lived under the British flag.⁹⁰ English citizens traveling in foreign countries enjoyed only those privileges and immunities secured to them by international treaty.⁹¹

Following the Revolution, the concept of the conferred rights of citizenship transferred to the newly independent states. State laws determined conditions of citizenship and naturalization, and state citizens expected the equal enjoyment of those privileges and immunities secured to them by their state’s constitution.⁹² Prior to the adoption of the Federal Constitution, however, it was not at all clear what privileges or immunities they could expect when traveling to, or through, other states. It seemed inappropriate to establish “visitation” rights by treaty—such an approach would create friction with nonparticipating states and it would have the effect of treating the sojourning citizen as if he were an alien from a foreign country, a status that would deprive the traveler of a number of rights commonly enjoyed by citizens, including the right of entrance and the right to own and dispose of real property.

Article IV of the Articles of Confederation attempted to remedy the situation by declaring:

89. See Reid, *supra* note 23, at 77.

90. See, e.g., 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 60, at 68 (“That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.”); THE FIRST CHARTER OF VIRGINIA, *supra* note 58, at 3788 (“[King James I grants to] all and every the Persons being our Subjects . . . all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.”); Reid, *supra* note 23, at 67 (quoting Rhode Island Governor Stephen Hopkins as stating “[t]he British subjects in America have equal rights with those in Britain. . . . They do not hold those rights as a privilege granted them, nor enjoy them as a grace and favor bestowed, but possess them as an inherent, indefeasible right, as they and their ancestors were freeborn subjects, justly and naturally entitled to all the rights and advantages of the British constitution”).

91. See, e.g., PA. GAZETTE, June 19, 1766, at 2 (reporting news of a treaty between Great Britain and Sweden stating that “[t]he two Powers shall reciprocally enjoy, in the Towns, Ports, Harbours and Rivers of their respective States, all the Rights, Advantages, and Immunities, which have been, or may be henceforth enjoyed there by the most favoured Nations”).

92. See WOOD, *supra* note 25, at 127–43.

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.⁹³

A streamlined version of this provision became Article IV of the Federal Constitution: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁹⁴

At the time of its enactment, there was little in the way of substantive discussion regarding the meaning and potential application of Article IV, Section 2. James Madison indicated that it clarified the language of the older Article IV.⁹⁵ Alexander Hamilton unhelpfully explained that it formed "the basis of the Union" and that federal courts should be available to ensure an "equality of privileges and immunities to which citizens of the Union [would] be entitled."⁹⁶ As we shall see, at the time of the Civil War, the particular meaning of this Clause became a matter of serious discussion and debate. In the early decades of the Constitution, however, it attracted little controversy, probably due to its obvious roots in the Articles of Confederation.⁹⁷

In antebellum American law, five basic approaches to Article IV were considered, with one emerging as the dominant approach. First, the Clause could be

93. See ARTICLES OF CONFEDERATION, art. IV, § 1 (1788).

94. U.S. CONST., art. IV, § 2, cl. 1.

95. See THE FEDERALIST No. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961) ("In the fourth article of the Confederation, it is declared 'that the *free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of *free citizens* in the several States; and *the people* of each State shall, in every other, enjoy all the privileges of trade and commerce,' etc. There is a confusion of language here which is remarkable.").

96. THE FEDERALIST No. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton misquotes the provision as "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." *Id.* The error, however, does not affect his general point about the value of having a neutral (federal) tribunal available for trying cases involving disputes between one state and citizens from another state.

97. James Madison described the Article as simply clearing up some of the ambiguous language of the Articles of Confederation. See THE FEDERALIST No. 42, *supra* note 95, at 269–71 (describing how Article IV of the proposed Constitution avoided the confused and legally problematic language of the related provision in the Articles of Confederation). In the first constitutional treatise, St. George Tucker had little to say about the clause beyond the fact that it was based on the earlier provision in the Articles of Confederation and would not apply to individuals made citizens by state law but not made citizens in conformance with a law establishing a uniform federal law of naturalization. See 1 TUCKER, *supra* note 22, app. at 365.

read as binding the federal government, not the states, with a requirement that federal legislation not discriminate on the basis of state citizenship. Second, the Clause could be read as referring to a set of national rights that all states were bound to respect. Third, the Clause could be read to require states to grant all citizens visiting from other states the same rights that the visitors had received in, and brought with them from, their home state. Fourth, the Clause could be read as requiring states to grant visiting citizens *all* of the same privileges and immunities which the state conferred upon its own citizens. Fifth, the Clause could be read as requiring states to grant visiting citizens *some* of the same privileges and immunities that the state conferred upon its own citizens. These are not the only possible interpretations of the Clause,⁹⁸ but they appear to be the only options that were seriously considered. It was the fifth and last possible interpretation that came to dominate case law and scholarly commentary from the Founding until Reconstruction.

In 1797, the Maryland Supreme Court provided what became the most influential interpretation of the privileges and immunities clause of Article IV for the next sixty years. The case, *Campbell v. Morris*, involved a claim that Maryland's attachment process for out-of-state citizens violated the privileges protected under Article IV.⁹⁹ Judge Chase¹⁰⁰ rejected the claim in an opinion that construed the Clause as requiring no more than equal access to a limited set of state-protected rights:

The peculiar advantages and exemptions contemplated under this part of the constitution, may be ascertained, if not with precision and accuracy, yet satisfactorily[.]

. . . .

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

98. One could, for example, read the Clause as requiring all states to protect a certain set of rights, and to protect them in an equal manner, regardless of state citizenship—a kind of “full and equal” protection of substantive national liberties. Some arguments were made along these lines during the Reconstruction Congress, but no case or commentary adopted such a reading in the period between the Founding and the Civil War.

99. 3 H & McH. 535 (Md. 1797).

100. There is some question whether Samuel Chase authored this opinion. If he did, then he was doing double duty at the time on both the United States Supreme Court and the Maryland court. Additionally, there was another “Chase” on the Maryland court at the time the opinion was issued—J.T. Chase. Regardless, later antebellum courts appear to have believed Samuel Chase authored the opinion. See *Anderson v. Baker*, 23 Md. 531, 624 (1865) (attributing the decision to C.J. Chase—an appellation only Samuel and not J.T. would have had at the time *Campbell* was decided); *Opinion of Judge Appleton*, 44 Me. 521, 548 (1857) (same).

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.¹⁰¹

Two aspects of Judge Chase's opinion are especially important given their impact on later court decisions. First, Chase read Article IV as protecting only those rights conferred by state law. Property rights under Article IV, for example, are protected "in the same manner as the property of the citizens of the state is protected."¹⁰² Secondly, the set of rights that must be equally extended to sojourning citizens of other states is a subset of the rights conferred upon the citizens of the state. In other words, not all state-conferred rights counted as Article IV "privileges and immunities," with one particular exception being the political rights of suffrage.¹⁰³ Finally, as would later courts, Chase limited the rights of Article IV to "personal rights"—a category that excludes corporations from the protections of Article IV.¹⁰⁴

Other courts and commentators during the early decades of the nation echoed Judge Chase's "equal but limited" reading of Article IV's privileges and immunities. In 1811, the author of the first official treatise on the United States Constitution, St. George Tucker, described Article IV as bestowing on out-of-state citizens a limited degree of equal access to state-conferred privileges.¹⁰⁵ In

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

102. *Id.*

103. Some scholars have suggested Judge Chase in *Campbell* read Article IV to protect a set of substantive fundamental personal rights, such as property rights, regardless of whether the rights had been protected under state law. *See, e.g.*, Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 845 (1997); David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1501–02 (2005). At least one abolitionist pressed this reading of Chase at the time of the Civil War. *See* 2 JOHN CODMAN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 343 (Boston, Little, Brown & Co. 1862). At the time, however, despite frequent citation to the decision, no court read Chase's opinion as presenting a theory of fundamental personal rights. Instead, it was regularly paired with other judicial opinions that read Article IV as protecting a limited set of state-conferred rights. *See infra* note 122 and accompanying text.

104. *See, e.g.*, *Tatem v. Wright*, 23 N.J.L. 429, 445–46 (N.J. 1852); *Commonwealth v. Milton*, 51 Ky. (12 B. Mon.) 212, 216–17 (1851).

105. *See Hadfield v. Jameson*, 16 Va. (2 Munf.) 53, 56 (1811) (explaining, in an opinion written by Tucker, that Article IV entitled citizens from other states to the same judicial remedies available to citizens of Virginia). In his *View of the Constitution*, Tucker wrote about Article IV in the context of federal power to establish a uniform rule of naturalization:

3. The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

This article, with some variation, formed a part of the confederation: we have in another place supposed, that the states retain the power of admitting aliens to become denizens of the states respectively, notwithstanding the several acts of congress establishing an uniform rule

1812, the highest court in New York upheld the existence of a state monopoly against a claim by an out-of-state citizen that the monopoly violated the Privileges and Immunities Clause of Article IV. The panel of judges deciding the case included future Supreme Court Justice Smith Thompson, New York Chief Justice James Kent, and future New York Governor Joseph Yates—all of whom voted to uphold the monopoly. Yates's opinion stressed the equal state-conferred rights reading of Article IV:

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. As this Constitution, then, according to my view, does not prevent the operation of those laws granting this exclusive privilege to the appellants, they are entitled to the full benefit of them.¹⁰⁶

Chief Justice Kent took the same position on Article IV:

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. Their persons and property must, in all respects, be equally subject to our law. This is a very clear proposition, and the provision itself was taken from the articles of the confederation.¹⁰⁷

With the exception of a small minority of courts who read Article IV as restricting the powers of the federal government,¹⁰⁸ prior to 1823 almost every

of naturalization. But such denizens, not being properly citizens, would not, I apprehend, be entitled to the benefit of this article in any other state. They would still be regarded as aliens in every state, but in that of which they may be denizens. Consequently, an alien before he is completely naturalized, may be capable of holding lands in one state, but not of holding them in any other.

TUCKER, *supra* note 22, app. at 365 (citation omitted).

106. *Livingston v. Van Ingen*, 9 Johns. 507, 561 (N.Y. 1812) (Yates, J., opinion).

107. *Id.* at 577 (Kent, C.J., opinion). Kent made the same point in his *Commentaries on American Law*:

The article in the constitution of the United States, declaring that the citizens of each state were entitled to all the privileges and immunities of citizens in the several states, applies only to natural-born or duly nationalized citizens; and if they 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.

2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* pt. 4, at 35 (7th ed., N.Y., Kent 1851).

108. Although the vast majority of cases decided in this early period of the Republic follow Judge Chase's equal state-conferred rights reading of Article IV, two cases appear to read Article IV as a

court to consider the issue had adopted the same reading of Article IV. According to this reading, the Privileges and Immunities Clause secured to sojourning state citizens equal access to a limited set of local state-conferred rights. These rights did not include political rights such as suffrage, and they excluded any liberty not granted by the state to its own citizens.

B. *CORFIELD V. CORYELL*

In some ways, Justice Bushrod Washington's 1823 opinion in *Corfield v. Coryell*¹⁰⁹ is more important for how it was later construed than for what it actually held. The case was a prosaic dispute over the right of a boat crew from Philadelphia to gather New Jersey oysters.¹¹⁰ The key issue in the case involved whether New Jersey's law prohibiting all but New Jersey residents from "raking" oysters violated the Article IV privileges and immunities of the boatmen from Philadelphia.¹¹¹ Justice Washington's opinion was that the oysters were held in common ownership by the people of New Jersey and that the privileges and immunities of Article IV did not include the right of out-of-state citizens to abscond with the property of New Jersey residents.¹¹²

Justice Washington's decision in favor of New Jersey law was not controversial at the time, and for decades, *Corfield* was cited as simply one of many decisions limiting the scope of Article IV privileges and immunities. In arriving at his conclusion, however, Washington described the privileges and immunities of citizens in the states in such potentially expansive language that Reconstruction-era proponents of civil rights frequently quoted the case in support of federal efforts to protect fundamental liberties in the former Confederate states.¹¹³ It is because *Corfield* plays such a key role in the debates over the Privileges and Immunities Clause of the Fourteenth Amendment that it is important to take a close look at the key section of Justice Washington's opinion.

constraint on the powers of Congress, forbidding any federal grant of special privileges or immunities to citizens of a particular state. See *Douglass' Adm'r v. Stevens*, 2 Del. Cas. 489, 502 (1819) ("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 state, which seems to limit the operation in 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. It is not that the citizens in any state shall be entitled to all the privileges of citizens in each state . . ."); *Kincaid v. Francis*, 3 Tenn. (Cooke) 49, 53-54 (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.").

109. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

110. *Id.* at 547-48.

111. *Id.* at 550.

112. *Id.* at 552.

113. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866) (remarks of Rep. Wilson); Lash, *supra* note 8.

Here is the passage that attracted so much attention in 1866:

The next question is, whether this act infringes that section of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?" The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; 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 fundamental: 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. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of 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." But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, 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; much less, 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. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of

this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.¹¹⁴

During the Reconstruction Congress, some of Justice Washington's more expansive language in *Corfield* regarding "fundamental" rights belonging to "the citizens of all free governments" became embroiled in debates over Congress's power to define and protect federal civil rights in the states. No such issue was before the Court in *Corfield*. Instead, Washington's opinion focused on an issue that all sides conceded was a matter of state law. The out-of-state oyster gatherers argued that, because New Jersey allowed its own citizens to rake oysters, this same right must be granted to sojourning visitors as a privilege or immunity protected under Article IV. As Washington phrased it, the claim was that out-of-state citizens should enjoy state-conferred oyster gathering rights "merely upon the ground that they are enjoyed by [in-state] citizens," and that "the [New Jersey] legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens."¹¹⁵

Justice Washington rejected such a broad reading of Article IV; not all—but only some—state-conferred rights fell within the scope of Article IV. Washington then expounded upon what he believed ought to be considered privileges and immunities of citizens in the States. His list differs in some respects from that of Judge Chase (particularly in regard to the rights of suffrage), but the precise content of the list is not as important to our analysis as is the source of such rights. Washington describes Article IV privileges and immunities as those that 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."¹¹⁶ By grounding Article IV privileges and immunities in liberties that were granted by preconstitutional American states, Washington limits his list to *state*-conferred rights. As were the liberties granted under the original state constitutions, Washington's list contains a mix of natural, common law, civil, and political rights, covering everything from travel and trade to equal taxes, suffrage, and the pursuit of happiness.¹¹⁷ Once again, however, the list includes only those privileges and immunities that states have "always" provided their own citizens.

It is possible that Justice Washington meant those state-conferred rights that had been, and that constitutionally had to be, granted by states, but if so, he did not say (and it would have been dicta in any event). Nor did any court or commentator prior to the Civil War read his opinion as referring to any kind of

114. *Corfield*, 6 F. Cas. at 551–52.

115. *Id.* at 552.

116. *Id.* at 551.

117. *See id.* at 551–52. For a critical account of Washington's opinion in terms of its original meaning, see Natelson, *supra* note 61, at 1122–24. I take no position in this paper regarding whether Washington's account reflects the original understanding of Article IV.

nationally mandated set of substantive rights.¹¹⁸ It was only after 1865 that radical Republicans, and proponents of women's suffrage,¹¹⁹ attempted to use *Corfield's* language in support of federal protection of fundamental rights.¹²⁰

On its face, then, Washington's theory of the rights protected under Article IV's Privileges and Immunities Clause mirrors that of Judge Chase in *Campbell* and Chancellor Kent in *Livingston*.¹²¹ All three decisions described Article IV's privileges and immunities as a set of state-conferred rights, and all three rejected the idea that sojourning state citizens must be granted *all* the rights of state citizenship. Where these cases diverge is in their description of what falls within that limited set. For example, Justice Washington believed that the rights of state-regulated suffrage fell within the circle of privileges and immunities, while Judge Chase did not. The basic theory of Article IV, however, is the same.

Later antebellum judicial opinions that cited *Corfield* treated the case as following the same reasoning as *Campbell* and *Livingston*, with the cases often cited in tandem.¹²² In fact, with only a couple of excep-

118. See *supra* note 104 (using the "fundamental rights" passage to distinguish persons from corporations). Other scholars also have noticed the lack of later judicial reliance on Washington's fundamental rights language. See Natelson, *supra* note 61, at 1124–25.

119. Proponents of women's suffrage also would call upon Washington's language in *Corfield*. See 2 ELIZABETH CADY STANTON ET AL., HISTORY OF WOMAN SUFFRAGE 453 (Rochester, N.Y., Mann 1887) (citing Bushrod Washington's *Corfield* opinion in support of women's suffrage); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family*, 115 HARV. L. REV. 947, 972 n.68 (2002).

120. See, e.g., *Smith v. Moody*, 26 Ind. 299 (1866). In *Moody*, a newly elected panel of Republican judges upheld the Civil Rights Act and may have interpreted *Corfield* as referring to fundamental national rights. *Id.* at 302, 307.

121. Some scholars treat *Corfield* as an outlier among a more dominant trend of judicial interpretation of Article IV. See, e.g., Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 337–38 (1988) (describing *Corfield* as a widely cited but "somewhat equivocal exception" to the dominant trend in antebellum case law regarding Article IV privileges and immunities). This was probably true in regard to Washington's brief reference to state-regulated suffrage as an Article IV privilege and immunity. See Currie, *supra* note 1, at 405 n.133; Harrison, *supra* note 16, at 1417. Judge Chase certainly disagreed with Washington on this point. See *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797). Despite this disagreement on particular substance, however, Washington's basic theory of Article IV was widely viewed as being no different than that presented in *Campbell*, *Livingston*, and other "equal access to state-conferred rights" cases, as illustrated by the common practice of citing some or all three cases in tandem. See, e.g., *Wiley v. Parmer*, 14 Ala. 627, 632 (1848).

122. In 1848, Alabama Chief Justice Henry Collier collected the cases and explained:

By the second section of the fourth article of the federal constitution, it is enacted, that "the citizens of each State, shall be entitled to all privileges and immunities of citizens in the several States." It has been held that the intention of this clause was to confer on the citizens of each State a general citizenship; and to communicate all, the privileges and immunities, which the citizens of the same State would be entitled to, under the like circumstances. *Corfield v. Cargill* [*Corfield v. Coryell*], 4 Wash. C. C. Rep. 371; *Livingston v. Van Ingen*, 9 Johns. Rep. 507. In *Campbell v. Morris*, 3 Har. & McH. Rep. 535, it was said that the terms *privilege* and *immunity* are synonymous, or nearly so; *privilege*, signifies a peculiar advantage, exemption, immunity; *immunity*, signifies exemption, privilege. A particular and limited operation is to be given to the words "immunities and privileges" in this section of the constitution, and not a full and comprehensive one. . . . The object of the entire provision was to secure to the citizens of all the States the peculiar advantage of acquiring and holding real

tions,¹²³ all of the cases identified in this Article discussing Article IV privileges and immunities between the Founding and the Civil War read Article IV as referring to a limited set of state-conferred rights.¹²⁴ The decisions come from both north and south of the Mason–Dixon Line. In the 1827 case *Abbott v. Bayley*, the Chief Justice of the Massachusetts Supreme Court provided an extended discussion of Article IV privileges and immunities that distinguished state-conferred rights from federal rights and explained how Article IV left the regulation of life, liberty, and property to the state legislatures.¹²⁵ According to Chief Justice Parker:

The jurisdiction of the several States as such, are distinct, and in most respects foreign. The constitution of the United States makes the people of the United States subjects of one government *quoad* every thing within the national power and jurisdiction, but leaves them subjects of separate and distinct governments. The privileges and immunities secured to the people of each State in every other State, can be applied only in case of removal from one State into another. By such removal they become citizens of the adopted State without naturalization, and have a right to sue and be sued as citizens; and yet this privilege is qualified and not absolute, for they cannot enjoy the right of

as well as personal property, and to provide 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.

Wiley, 14 Ala. at 631–32; *see also* *Baker v. Wise*, 57 Va. (16 Gratt.) 139, 215–17 (1861) (although noting the lack of any full and authoritative interpretation of the clause, citing both *Corfield* and *Campbell* as representative cases and applying *Campbell*'s equal access to state-conferred privileges and immunities analysis in upholding as reasonable the discriminatory treatment of process for nonresidents). For additional cases citing *Corfield* alongside of *Campbell*, *Livingston*, or both, *see* *United States v. New Bedford Bridge*, 27 F. Cas. 91 (C.C.D. Mass. 1847) (No. 15,867); *Atkinson v. Phila. & T.R. Co.*, 2 F. Cas. 105 (C.C.E.D. Pa. 1834) (No. 615); *Oliver v. Wash. Mills*, 93 Mass. (11 Allen) 268 (1865). Although there are a number of cases involving disputes over waterways, tidelines, and fisheries that cite *Corfield* alone, I have managed to find only four cases prior to the Civil War (three of them again involving fisheries or clams) that discussed the Privileges and Immunities Clause and cited to *Corfield* but not to *Campbell* or *Livingston*. *See* *Bennett v. Boggs*, 3 F. Cas. 221, 226 (C.C.D.N.J. 1830) (No. 1,319) (citing *Corfield* in favor of state right to regulate fisheries); *Dunham v. Lamphere*, 69 Mass. (3 Gray) 268 (1855) (citing *Corfield* and *Boggs*); *State v. Medbury*, 3 R.I. 138 (1855); *Commonwealth v. Milton*, 51 Ky. (12 B. Mon.) 212 (1851). All four adopt the same equal access to a limited set of state-conferred rights approach of *Campbell* and *Livingston*. In *Tatem v. Wright*, the New Jersey court cited to *Corfield* alone but only to illustrate that the privileges and immunities of Article IV extend to persons, not corporations. *See* 23 N.J.L. 429, 445–46 (N.J. 1852); *see also* *Slaughter v. Commonwealth*, 57 Va. (13 Gratt.) 767, 779 (1856) (containing a single sentence referencing *Corfield* for the proposition that corporations are not protected under Article IV). This, too, echoes the language of *Campbell*: “It secures and protects personal rights.” *Campbell*, 3 H. & McH. at 554.

123. A small number of cases read Article IV to forbid federal statutes that discriminated among the several states. *See supra* note 108 and accompanying text.

124. For example, in an 1833 circuit opinion, United States Supreme Court Justice Henry Baldwin recapitulated much of this Article's discussion of the historical roots of both the terms “privileges” and “immunities” as well as the common usage of the paired terms as referred to a set of state-conferred rights. *See* *Magill v. Brown*, 16 F. Cas. 408, 428 (C.C.E.D. Pa. 1833) (No. 8,952).

125. 23 Mass. (6 Pick.) 89 (1827).

suffrage or of eligibility to office, without such term of residence as shall be prescribed by the constitution and laws of the State into which they shall remove. They shall have the privileges and immunities of citizens, that is, they shall not be deemed aliens, but may take and hold real estate, and may, according to the laws of such State, eventually enjoy the full rights of citizenship without the necessity of being naturalized. The constitutional provision referred to is necessarily limited and qualified, for it cannot be pretended that a citizen of Rhode Island coming into this State to live, is *ipso facto* entitled to the full privileges of a citizen, if any term of residence is prescribed as preliminary to the exercise of political or municipal rights. The several States then, remain sovereign to some purposes, and foreign to each other, as before the adoption of the constitution of the United States, and especially in regard to the administration of justice, and in the regulation of property and estates, the laws of marriage and divorce, and the protection of the persons of those who live under their jurisdiction.¹²⁶

In 1851, a Kentucky court examined Justice Washington's expansive language in *Corfield* and explained that he referred only to a certain set of rights protected as a matter of state law:

The Constitution certainly intended to secure to every citizen of every State the right of traversing at will the territory of any and every other State, subject only to the laws applicable to its own citizens, of exercising there, freely but innocently, all of his faculties, of acquiring, holding, and alienating property as citizens might do, and of enjoying all other privileges and immunities common to the citizens of any State in which he might be present, or in which without being present he might transact business. But in securing these rights it does not exempt him from any condition which the law of the State imposes upon its own citizens, nor confer upon him any privilege which the law gives to particular persons for special purposes or upon prescribed conditions, nor secure to him the same privileges to which by the laws of his own State he may have been entitled.

In *Corfield vs. Coryell*, Judge Washington characterizes the privileges and immunities secured by this clause as being such as 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 several States which compose this Union, from the time of their becoming free, independent and sovereign." We suppose the same idea is conveyed when we say that they are such privileges and immunities, as are common to the citizens of any State under its Constitution and constitutional laws.¹²⁷

126. *Id.* at 92-93. During the Reconstruction debates, radical Republicans like Representative Samuel Shellabarger of Ohio cited *Abbott* as representing the consensus understanding of the Privileges and Immunities Clause of Article IV. See CONG. GLOBE, 39th Cong., 1st Sess. app. 293 (1866) (remarks of Rep. Shellabarger); see also Lash, *supra* note 8.

127. *Commonwealth v. Milton*, 51 Ky. (12 B. Mon.) 212, 219 (1851) (citation omitted).

In the brief and unanimous 1855 Supreme Court opinion *Connor v. Elliot*, Justice Curtis ruled that, because a Louisiana law controlling property rights arising out of marriage applied to all marriage contracts entered into within the state regardless of citizenship, there could be no violation of the Privileges and Immunities Clause of Article IV.¹²⁸ According to Curtis, there was no “need[] to attempt to define the meaning of the word *privileges* in this clause of the constitution. . . . The law does not discriminate between citizens of the State and other persons; it discriminates between contracts only. Such discrimination has no connection with the clause in the constitution now in question.”¹²⁹

The Supreme Court’s reluctance to define the particular privileges protected under Article IV left state courts to their own devices on that particular issue.¹³⁰ The lack of substantive specificity rarely mattered, however, because most cases were resolvable upon a simple application of the equal-access-to-state-conferred-rights approach of Judge Chase in *Campbell*. Cases that required a more substantive analysis of privileges and immunities also followed the approach of *Campbell* and *Corfield* and narrowed the reach of Article IV to only a limited subset of state-conferred rights.¹³¹ As the 1861 Virginia Supreme Court explained in *Baker v. Wise*:

128. 59 U.S. (18 How.) 591, 593–94 (1855) (holding that marriage contracts are governed by the law of the state in which they were enacted and that Article IV does not require the State of Louisiana to confer the same rights upon parties to out-of-state marriage contracts that are conferred upon parties to in-state marriage contracts).

129. *Id.*

130. Article IV received an occasional reference in antebellum Supreme Court cases. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 69 (1824) (“The constitution does not profess to give, in terms, the right of ingress and regress for commercial or any other purposes, or the right of transporting articles for trade from one State to another. It only protects the personal rights of the citizens of one State, when within the jurisdiction of another, by securing to them ‘all the privileges and immunities of a citizen’ of that other, which they hold subject to the laws of the State as its own citizens; and it protects their property against any duty to be imposed on its introduction.”). The references, however, continued to follow Judge Chase’s equality of state-conferred rights reading of Article IV and provided no guidance as to the specific rights covered by the Clause. *See Baker v. Wise*, 57 Va. (16 Gratt.) 139, 215 (1861) (“We have no authoritative expositions of this clause of the constitution giving us a full and complete definition of its terms; though, it has been, I think, clearly shown that they must be received in a qualified and restricted sense.”).

131. For example, in 1855, the Chief Justice of the Rhode Island Supreme Court relied on *Corfield* in an opinion that rejected an attempt to read Article IV as requiring a state to grant visiting citizens *all* the rights and privileges granted by that state to its own citizens:

Article 4, sec. 2, of the Constitution of the United States, provides “that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” This section has been referred to in the argument, as though it conferred on the citizens of each State, all the privileges and immunities which the citizens of the several States enjoy. Such is neither its language nor its import. No Court or Legislature in the Union has ever given such a construction to it; but on the contrary, a marked distinction has ever been made by them between the rights and powers of the citizens of a State, and the rights and powers of all other persons resident within the limits of the State, whether they are citizens of other States or foreigners. To deny the right to every State to make such distinction would be to annihilate the sovereignty of the States, and to establish a consolidated government in their stead. But this section in its terms, confers on the citizens of each State, “all privileges and immunities of citizens in the several States,” that is, the rights and powers of citizenship. They are not to be deemed aliens. They are not to be accounted as foreigners; or as persons who may become

We have no authoritative expositions of this clause of the constitution giving us a full and complete definition of its terms; though, it has been, I think, clearly shown that they must be received in a qualified and restricted sense. Thus in the case of *Campbell v. Morris*, judge Chase says—“. . . 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. . . .” He added that “a restriction of the power of the State legislatures to establish modes of proceeding for the recovery of debts is not to be inferred from the clause under consideration.” . . .

. . . .

[Just as] differences between the modes of proceeding against the citizens or residents of other States and the modes of proceeding against their own citizens or inhabitants will be found in the laws of most of the States; and I know of no decision in which it has been held that, by such discriminations, the citizens of such other States are deprived of any of their rightful privileges and immunities. . . .

In neither of these instances can it be said that the non-resident is deprived of any of the immunities of citizenship, in the sense contemplated in the constitution; he is held ultimately responsible for nothing that he would not have to meet were he a resident citizen of the State¹³²

Justice Washington may have unduly restricted the scope of Article IV privileges and immunities by requiring them to be “fundamental.” In fact, later courts and treatise writers sometimes described the Clause as requiring equal access to all civil, but not political, rights.¹³³ On the other hand, in those few cases where courts struck down laws as violating the *Campbell* equality principle, one can find language that at least echoes Washington’s dicta that such rights be especially important. For example, in the 1864 Delaware case *Gray v. Cook*, the Delaware Supreme Court struck down a discriminatory arrest statute as violating Article IV.¹³⁴ After quoting Judge Chase in *Campbell*, the court rhetorically asked:

enemies. They are to have the right to carry on business, to inherit and transmit property, to enter upon, reside in and remove from the territory of each State, at their pleasure, yielding obedience to and receiving protection from the laws. Such are some of the privileges and immunities conferred by this section, and all that are granted by it are of the same character. That the right claimed by the defendant is not one of these, has been expressly decided in the cases of *Corfield v. Coryell*, (4 Wash. p. 376.)[.]

State v. Medbury, 3 R.I. 138, 142–43 (1855).

132. *Baker*, 57 Va. at 215–17 (citations omitted).

133. See, e.g., *Lavery v. Woodland*, 2 Del. Cas. 299, 307 (1817) (stating that, under Article IV, “[t]he Constitution certainly meant to place, in every state, the citizens of all the states upon an equality as to their private rights, but not as to political rights”).

134. 8 Del. (3 Houst.) 49, 60–62 (1864).

[I]f by law you exempt your own citizens from arrest on certain conditions, as for debt without fraud, which is a privilege or immunity, of no insignificant value and importance to every honest, but unfortunate debtor, not only in our own State, but in every State in the Union, how can you deny it to every citizen in every other State of the Union, against that express provision of the constitution to the contrary?¹³⁵

Even here, however, the court described Article IV as requiring states “to put a citizen of another State on a par and an entire equality with every citizen in the State.”¹³⁶

In sum, as the country entered a period of civil war, the jurisprudence of the Privileges and Immunities Clause of Article IV was surprisingly stable.¹³⁷ Courts throughout this period consistently read the cases of *Campbell*, *Livingston*, *Corfield*, *Abbott*, and *Baker* to embrace the same principle: the privileges and immunities of Article IV referred to a limited (if especially important) set of state-conferred rights. Both courts and legal commentators rejected attempts to expand the circle of privileges and immunities to include *all* state-conferred rights, and no court read Article IV as a reference to state-granted, but federally compelled, fundamental rights.¹³⁸ As Thomas Cooley wrote in his popular 1868

135. *Id.* at 61.

136. *Id.*

137. The decisions continued to adopt this approach during the war, as well. According to an 1865 decision of the Massachusetts Supreme Court:

[Article 4, Section 2] was doubtless taken and condensed from art. 4, § 1, of the articles of confederation and perpetual union, adopted by congress July 9th 1778, and which formed the basis of a national government for the United States prior to the adoption of the constitution. It was thereby provided that the “people of each state should enjoy in any other state all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.” The object of substituting the constitution for the articles of confederation was to make a more perfect Union. One of the most efficient methods of effecting this purpose was to vest in the general government the power to regulate not only foreign trade and commerce, but also that between the different states of the Union, and to secure an equality of rights, privileges and immunities in each state for the citizens of all the states. It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy an immunity of which the latter would be deprived. Such has been the judicial interpretation of this clause of the constitution by courts of justice in which the question has arisen.

Oliver v. Wash. Mills, 93 Mass. (11 Allen) 268, 280–81 (1865) (citing *Corfield* and *Coryell*, among others).

138. See 1 JOHN BOUVIER, *INSTITUTES OF AMERICAN LAW* 66 (2d ed., Phila., Peterson & Co. 1854) (“[The Privileges and Immunities Clause of Article IV] evidently refers to the privilege or capacity of taking, holding, and conveying lands lying within any state of the Union, and also of enjoying all civil rights which citizens of any State were entitled to; but it cannot be extended to give a citizen of another state a right to vote or hold office immediately on his entering the state.”). A number of cases other than the ones cited in this section also embrace this principle. See *Costin v. Washington*, 6 F. Cas. 612, 613–14 (C.C.D.C. 1821) (No. 3,266) (“[I]f there be a class of people more likely than others to disturb

Treatise on Constitutional Limitations, Article IV was meant to “prevent discrimination by the several States against the citizens” of other states.¹³⁹ In his treatise, Cooley twice described Article IV as preventing discrimination against sojourning citizens and twice cited both *Corfield* and *Campbell* for this proposition.¹⁴⁰

C. SLAVERY AND THE PRIVILEGES AND IMMUNITIES CLAUSE

The stability of Article IV jurisprudence in antebellum case law may be due at least in part to the fact that the *Campbell* doctrine did not clearly line up with either side in the debate over chattel slavery. Limiting the scope of privileges or immunities had the effect of maximizing the scope of state regulatory autonomy—a states’ rights result that protected the policy-making powers of both free and slave states alike. Nevertheless, it was inevitable that Article IV would be caught up in the same subject that became a national obsession and ultimately triggered a bloody national clash of arms.¹⁴¹

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.”); *Davis v. Pierse*, 7 Minn. 13, 1862 WL 1242, at *6 (1862) (“The main object of the section was to prevent each State from discriminating in favor of its own people, or against those of any other . . .” (citing *Corfield* in support)); *Sheepshanks & Co. v. Jones*, 9 N.C. (2 Hawks) 211, 213 (1822) (“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. 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.”); *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 335 (1822) (“[Article IV’s Privileges and Immunities Clause] 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.”); *Barrell v. Benjamin*, 15 Mass. (14 Tyng) 354, 358 (1819) (noting that, if a citizen of Massachusetts “has the privilege to sue any foreigner who may come within this state,” then an out-of-state citizen “has the same privilege secured to him by the constitution”); *Lavery v. Woodland*, 2 Del. Cas. 299, 307 (1817) (“[Under Article IV, a] redress of the private or civil rights belonging to individuals is certainly one of the privileges secured to the citizens of other states. This redress, or the exercise of this privilege, must be commensurate with the wrong and must be adapted to it, and must be obtained or exercised in the same manner and form of suit as if he were a citizen of the state. The Constitution certainly meant to place, in every state, the citizens of all the states upon an equality as to their private rights, but not as to political rights. A citizen of another state may pursue the same legal remedy by suit or action at law, whenever his right is invaded, as a citizen of the state is entitled to, but he is not entitled to the same political rights.”).

139. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 15 (Boston, Little, Brown & Co. 1868).

140. *See id.* at 15 n.3, 397 n.2.

141. In addition to disputes over the Article IV privileges and immunities of sojourning citizens, the controversy over slavery also triggered disputes over the scope of privileges granted to a state’s own citizens. During the 1829 Virginia Constitutional Convention, for example, Representative Mason of Frederick complained:

Independent and sovereign States can stipulate for advantages, and give and take equivalents in adjusting a federative government, and will do so, as the South did then, in the exercise of a

Slavery and Article IV privileges and immunities came together as slave owners attempted to carry their “property” through a free state on their way to some area that permitted slavery. Slave owners argued that the rules of comity and the provisions of Article IV required free states to respect the home-state-granted privileges and immunities of visiting citizens from states that permitted slavery—privileges that included the right to chattel slavery. Free states, of course, pressed for a far more limited reading of Article IV. The Supreme Court’s reasoning in *Dred Scott* appeared to buttress the claims of slave owners to the point of suggesting that owners had a constitutional right to carry slaves anywhere within the jurisdiction of the United States. Extending *Dred Scott*’s holding to states as well as territories would have the effect of nationalizing slavery, a prospect that appeared all too likely as cases wound their way through state courts, which were thought to serve as perfect vehicles for a “second *Dred Scott*.”¹⁴²

1. Slavery, *Dred Scott*, and Article IV

In his concurring opinion in the 1841 case *Groves v. Slaughter*, Supreme Court Justice Henry Baldwin briefly discussed Article IV privileges and immunities and their relationship to the regulation of slavery in the States.¹⁴³ As he had in his circuit court opinion in *Magill v. Brown*,¹⁴⁴ Justice Baldwin followed the standard account of Article IV privileges and immunities as referring to a limited set of state-conferred rights. Because chattel slavery was a creature of state law, each state remained free to adopt its own internal policy, subject only to the Article IV-imposed constraint that if state residents could own slaves, then so could visiting citizens from other states.¹⁴⁵ However, Baldwin insisted that slaves being moved from one state to another must be considered articles of commerce among the several states until they arrived at their destination, and therefore, subject to the federal government’s exclusive power to regulate interstate commerce.¹⁴⁶ This meant that states had no power to free slaves brought within their borders if that slave was “commerce in transit” to another

wise and sound policy. But, sir, under what sanction can individuals of the same community, holding a peculiar species of property, or any particular district of country, stipulate in like manner for especial privileges or immunities to that property, as a pre-requisite to the formation of a common government?

Virginia Legislature—House of Delegates Convention, *supra* note 80.

142. See *infra* notes 164–71 and accompanying text.

143. 40 U.S. (15 Pet.) 449 (1841).

144. See *supra* note 124 (discussing *Magill*’s focus on state-conferred rights).

145. *Groves*, 40 U.S. at 515 (“Hence, it is apparent, that no state can control this traffic, so long as it may be carried on by its own citizens, within its own limits; as part of its purely internal commerce, any state may regulate it according to its own policy; but when such regulation purports to extend to other states or their citizens, it is limited by the Constitution, putting the citizens of all on the same footing as their own.”).

146. *Id.* at 516.

state that permitted slavery.¹⁴⁷ Baldwin's concurrence went well beyond what was necessary to decide the case,¹⁴⁸ but the argument suggested trouble might lie ahead for those states who wished to enforce local policy when it came to slaves brought within their jurisdiction.

In *Dred Scott v. Sandford*, the Supreme Court took a critical step towards making slavery a national right.¹⁴⁹ Although *Dred Scott* specifically involved jurisdictional issues and whether slavery could be banned from the territories, Chief Justice Taney discussed Article IV as part of his analysis of whether the generation that adopted the Constitution considered blacks as current or potential citizens of the United States:

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police

147. *Id.* ("If, however, the owner of slaves in Maryland, in transporting them to Kentucky, or Missouri, should pass through Pennsylvania, or Ohio, no law of either state could take away or affect his right of property; nor, if passing from one slave state to another, accident or distress should compel him to touch at any place within a state, where slavery did not exist. Such transit of property, whether of slaves or bales of goods, is lawful commerce among the several states, which none can prohibit or regulate . . ."); see also Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 807-12 (1996) (discussing *Groves* and the antebellum legal debates about the status of persons as articles of commerce).

148. See Gerard M. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 569-70 (2002) (discussing the breadth of Baldwin's opinion).

149. 60 U.S. (19 How.) 393 (1856), superseded by constitutional amendment, U.S. CONST. amend. XIV, as recognized in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872). Although all nine Justices wrote an opinion in *Dred Scott*, the seven Justices in the majority allowed Taney's opinion to be designated as the opinion of the Court. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 19-20 (2006).

regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in 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. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.¹⁵⁰

Chief Justice Taney's opinion in *Dred Scott* in general, and this passage in particular, has long been the subject of judicial and academic commentary and debate.¹⁵¹ This Article will focus on Chief Justice Taney's apparent reading of Article IV. It is clear that Taney is in fact referring to the Privileges and Immunities Clause of Article IV when he presents his "parade of horrors" if blacks are considered citizens. Although Taney might be suggesting that Article IV protected a set of fundamental rights against state action, this is probably not the case. Taney reads the Clause as establishing the fundamental *status* of citizenship (thus the right to travel "without papers"), a traditional reading that extends back to the original provision under the Articles of Confederation.¹⁵² As far as activity within the state is concerned, however, the rights extended to blacks would be the same as those afforded to "white men." This is an equality norm—blacks would be subject to the same laws as whites. Taney repeats this equality reading of privileges and immunities in terms of the rights of speech: if blacks were to be considered citizens under Article IV, this would give them "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak."¹⁵³ This views freedom of speech as a state-controlled right, subject only to the equality restriction of Article IV.

The final two rights mentioned by Taney are the rights "to hold public

150. *Dred Scott*, 60 U.S. at 416–17.

151. See, e.g., DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); GRABER, *supra* note 149; Symposium, *150th Anniversary of the Dred Scott Decision*, 82 CHI.-KENT L. REV. 3 (2007). Taney's reference to the right to keep and carry arms has received particular attention in the debates regarding the incorporation of the Second Amendment. See, e.g., Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 899–900; Nelson Lund, *Have Gun, Can't Travel: The Right to Arms Under the Privileges and Immunities Clause of Article IV*, 73 U. MO.-KAN. CITY L. REV. 951, 955–56 (2005); see also SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 150 n.24 (2006).

152. See ARTICLES OF CONFEDERATION art. IV (1781).

153. *Dred Scott*, 60 U.S. at 417 (emphasis added).

meetings upon political affairs, and to keep and carry arms.”¹⁵⁴ Here, Taney does not use the language of equality, an omission which has led a number of scholars to read this particular passage as referring to fundamental rights.¹⁵⁵ If so, then this means that Taney read the privileges and immunities clause as protecting *equal state-conferred rights* when it comes to freedom of speech (generally considered an individual natural right) but protecting a *substantive national right* to hold public meetings and to “keep and bear arms.” This would be an idiosyncratic, two-tiered reading of Article IV—one found nowhere prior to *Dred Scott* and never repeated by anyone afterwards.

Instead of indicating an odd two-tiered reading of privileges and immunities, I believe it is more likely that Chief Justice Taney viewed all of the rights he listed in that single paragraph as state-controlled rights subject to the equality principles of Article IV. In fact, all of the rights mentioned by Taney were rights commonly protected under state law at the time,¹⁵⁶ thus making them all subject to the “equal access to state-conferred rights” protections of the *Campbell* reading of Article IV. Taney seems to have highlighted the last two rights in order to emphasize the dangerously destabilizing effect such public meetings (with armed blacks!) would have on enslaved blacks who witnessed such an event, thus “inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.”¹⁵⁷ To be sure, Taney did believe there were certain fundamental due process rights that American citizens carried with them into the territories—a belief that led Taney to strike down the Missouri Compromise. Taney’s insistence that one such right was the right of property in the guise of chattel slavery was reversed several times over with the adoption of the Thirteenth and Fourteenth Amendments. His general theory of Article IV privileges and immunities, on the other hand, was quite conventional.

One aspect of Chief Justice Taney’s claim about Article IV was controversial. Although it seemed well-established that states could not discriminate against sojourning citizens *as sojourning citizens*, it was not clear whether states could discriminate against sojourning citizens on account of race.¹⁵⁸ Taney’s parade of horrors in *Dred Scott* was premised on a reading of Article IV that would disallow discriminatory treatment of sojourning citizens even when the discrimi-

154. *Id.*

155. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 387 (2005); DON E. FEHRENBACHER, *SLAVERY, LAW AND POLITICS 188–90* (1981); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 886 (1986); Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 *DRAKE L. REV.* 1015, 1023 (2008).

156. See NELSON, *supra* note 19, at 118 (“American states in the mid-nineteenth century did, in fact, provide their citizens with most of the protections contained in the Bill of Rights”).

157. *Dred Scott*, 60 U.S. at 417.

158. Justice Curtis, in dissent, argued that Taney was wrong about Article IV’s application to race-based constraints. See *Dred Scott*, 60 U.S. at 583–84 (Curtis J., dissenting).

nation was based on race and not citizen status.¹⁵⁹ This issue would trigger fierce debate among Republicans and Democrats prior to the Civil War and inspire a young John Bingham to make his first public statements on the meaning of Article IV.¹⁶⁰ The issue, however, goes only to the scope of the equality reading of Article IV. For now, it is important simply to point out that Taney's general approach to Article IV fits within the standard reading of the Clause as presented in cases like *Campbell*, *Livingston*, and *Corfield*.¹⁶¹

The main body of Taney's opinion in *Dred Scott* posed an immediate problem for free states. In holding that slave owners had a constitutional right to carry their "property" into any territory of the United States, Chief Justice Taney appeared to be laying the groundwork for the full nationalization of slavery.¹⁶² All that was needed was a proper case to come before the Court involving a slave owner's claimed home-state-granted privilege and immunity to carry slaves into free states and territories.¹⁶³ That case appeared to be on the horizon when the New York courts decided *Lemmon v. The People*.

159. See *id.* at 480 (Daniel, J., concurring) ("He may emancipate his negro slave, by which process he first transforms that slave into a citizen of his own State; he may next, under color of article fourth, section second, of the Constitution of the United States, obtrude him, and on terms of civil and political equality, upon any and every State in this Union, in defiance of all regulations of necessity or policy, ordained by those States for their internal happiness or safety.")

160. See Lash, *supra* note 8.

161. The subject also came up, if only obliquely, in Justice Curtis's dissent where he argued that the language of Article IV, which dropped the reference to "free inhabitants" from the Articles of Confederation, suggested that the Framers believed that blacks "were entitled to the privileges and immunities of general citizenship of the United States." *Dred Scott*, 60 U.S. at 575-76. For a discussion of the opinion, including Justice Curtis's discussion of privileges and immunities, see Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 311 (1997).

162. See *Dred Scott*, 60 U.S. at 468 (Nelson, J., concurring) ("A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it."); see also Alfred Brophy, Note, *Let Us Go Back and Stand upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 221 (1990) (arguing that the *Dred Scott* decision "catalyzed Northern fears of the nationalization of slavery").

163. Abraham Lincoln was convinced that the *Dred Scott* decision was part of a broader conspiracy to nationalize slavery and warned of a

nice little niche, which we may, ere long, see filled with another Supreme Court decision, declaring that the Constitution of the United States does not permit a *state* to exclude slavery from its limits.

Such a decision is all that slavery now lacks of being alike lawful in all the States.

Welcome or unwelcome, such decision *is* probably coming, and will soon be upon us, unless the power of the present political dynasty shall be met and overthrown.

We shall *lie down* pleasantly dreaming that the people of *Missouri* are on the verge of making their State *free*; and we shall *awake* to the *reality*, instead, that the *Supreme Court* has made *Illinois* a *slave State*.

Abraham Lincoln, "House Divided" Speech at Springfield, Ill. (June 16, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 426, 432 (Don E. Fehrenbacher ed., 1989). For a discussion of

2. The *Lemmon* Slave Case

The *Lemmon* case involved a family of Virginia slave owners who were in the process of moving to Texas with their eight slaves.¹⁶⁴ While in New York awaiting a boat to New Orleans, Louis Napoleon, the black vice president of the American and Foreign Anti-Slavery Society,¹⁶⁵ managed to procure a writ of habeas corpus from a local magistrate who subsequently ruled in late 1852 that the slaves must be freed according to a New York law that banned the importation of slaves and declared the freedom of any slave illegally brought into the state.¹⁶⁶ While the case was still making its way through New York's courts of appeal, the United States Supreme Court issued its ruling in *Dred Scott*, triggering the New York legislature to adopt a set of resolutions that declared "[t]hat this State will not allow Slavery within her borders, in any form, or under any pretense, or for any time" and that "the Supreme Court of the United States, by reason of a majority of the Judges thereof, having identified it with a sectional and aggressive party, has impaired the confidence and respect of the people of the States."¹⁶⁷ The stage was now set for the final resolution of the case before the newly established New York Court of Appeals.

In their appeal, and no doubt emboldened by the Supreme Court's decision in *Dred Scott*, the Lemmons argued that the Privileges and Immunities Clause of Article IV actually protected the right of slave owners to bring slaves into the State of New York, regardless of any state laws to the contrary.¹⁶⁸ According to the Court in *Dred Scott*, the Constitution itself recognized slavery as a property right, and the fundamental nature of that right stood as one of the privileges and immunities of citizens in the states that could not be abrogated by any state law. This "fundamental property rights" reading of Article IV would be repeated by other proponents of slavery in an attempt to force free states to allow the transit of slaves across their borders.¹⁶⁹

Lincoln's repeated warnings of a "second *Dred Scott*," see Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1247-66 (2008).

164. *Lemmon v. The People*, 20 N.Y. 562 (1860).

165. John D. Gordan, III, *The Lemon Slave Case*, HIST. SOC'Y FOR CTS. ST. N.Y., 2006, at 1, 8, available at <http://www.courts.state.ny.us/history/pdf/HSNLVol.4.pdf>.

166. *Id.* at 9-10.

167. Editorial, GA. TELEGRAPH (Macon), Apr. 28, 1857, at 2 (ruefully reporting on the New York resolutions).

168. *Lemmon*, 20 N.Y. at 580-83.

169. According to a November 17, 1857 editorial in the Washington Union:

The Constitution declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several States.' Every citizen of one State coming into another State has, therefore, a right to the protection of his person, and that property which is recognized as such by the Constitution of the United States, any law of a State to the contrary notwithstanding. So far from any State having a right to deprive him of this property, it is its bounden duty to protect him in its possession.

If these views are correct—and we believe it would be difficult to invalidate them—it follows that all State laws, whether organic or otherwise, which prohibit a citizen of one State from settling in another, and bringing his slave property with him, and most especially

The New York Court of Appeals rejected the pro-slavery fundamental rights reading of Article IV, opting instead to follow the traditional reading of the Clause as requiring equal access to state-conferred rights. According to New York Justice Wright, Article IV “was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens”; the Privileges and Immunities Clause “was intended to guard against a State discriminating in favor of its own citizens. A citizen of Virginia coming into New York was to be entitled to all the privileges and immunities accorded to the citizens of New York.”¹⁷⁰ Because New York law prohibited the importation of slaves by anyone, including its own citizens, the trial court’s order releasing the slaves was affirmed.¹⁷¹

Lemmon is an example of how states’ rights principles occasionally worked against the spread of slavery. As counterintuitive from a modern perspective as it might seem, adopting a fundamental national rights view in *Lemmon* would have had the effect of laying the foundation for the nationalization of slavery.¹⁷² In fact, this was precisely what many feared would occur if the Taney Supreme Court heard *Lemmon* on appeal from the state court.¹⁷³ Despite concerns that

declaring it forfeited, are direct violations of the original intention of a Government which, as before stated, is the protection of person and property, and of the Constitution of the United States, which recognizes property in slaves, and declares that ‘the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States,’ among the most essential of which is the protection of person and property.

.....
 The protection of property being, next to that of person, the most important object of all good government

CONG. GLOBE, 35th Cong., 1st Sess. app. at 199 (1858) (internal quotation marks omitted) (editorial read aloud in the assembly).

170. *Lemmon*, 20 N.Y. at 627 (Wright, J., concurring).

171. *Id.* at 632. For discussion of *Lemmon v. The People* and the Privileges and Immunities Clause aspects of the holding, see PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 302 (1981).

172. Cases such as *Prigg v. Pennsylvania* presented the same dichotomy of interests, with the Court in that case choosing pro-slavery nationalism over anti-slavery localism. See *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (striking down state law protecting free blacks and runaway slaves as conflicting with Article IV and the Federal Fugitive Slave Law).

173. There was considerable fear at the time that the New York court’s decision in *Lemmon* would be appealed to the United States Supreme Court, where its reversal would constitute the “second *Dred Scott*” decision, which Lincoln and others had warned about, in which the Supreme Court would nationalize slavery. See, e.g., *The Dred Scott Case*, 1 HARPER’S WKLY., 193, 193 (1857) (commenting on the possible future of the *Lemmon* case and complaining that “all these slave cases are sour enough”); *The Issue Forced upon Us*, EVENING J. (Albany), Mar. 9, 1857, at 2 (“The *Lemmon* case is on its way to this corrupt fountain of law. Arrived there, a new shackle for the North will be handed to the servile Supreme Court, to rivet upon us. . . . [It] shall complete the disgraceful labors of the Federal Judiciary in behalf of Slavery. . . . The Slave breeders will celebrate it as the crowning success of a complete conquest.”); see also THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 604 n.† (N.Y., Voorhies 1857) (“The *Lemmon* Case, as it is commonly called presents the transit question in one aspect distinctly, and is now before the Supreme Court of the State of New York on appeal. The case known as the *Dred Scott* Case,

Lemmon would become the "second *Dred Scott*," war broke out and the Supreme Court never heard the case. It was not until after the Civil War and the abolition of slavery that the United States Supreme Court next heard a case involving the Privileges and Immunities Clause of Article IV. In *Paul v. Virginia*, decided the year after the country ratified the Fourteenth Amendment, the Supreme Court embraced the traditional reading of Article IV and read the privileges and immunities of citizens in the states to include a limited set of state-conferred rights.¹⁷⁴ Although Justice Field could have cited any number of antebellum decisions in support of this reading of Article IV, he chose a single citation to the pro-freedom decision of the state court in *Lemmon v. People*.¹⁷⁵

D. SUMMARY

By the time of Reconstruction, the consensus understanding of Article IV was that it referred to a limited set of state-conferred rights. The record is not completely unanimous on this point; a very small number of cases read Article IV as limiting federal, not state, power, and pro-slavery advocates pressed for a reading of privileges and immunities that would force free states to allow the transitory presence of slaves. These, however, were in the distinct minority.¹⁷⁶ Cases like *Campbell*, *Livingston*, and, to a lesser extent, *Corfield* were the most cited decisions, and their reasoning dominated judicial and scholarly discussion of Article IV.

The gist of the consensus view was that the privileges and immunities of citizens in the states differed from state to state; what was expected was that a certain subset of these privileges would be extended as a matter of comity and constitutional requirement to visiting citizens of other states. As Representative Cushing explained during the debates over the admission of Arkansas to the Union:

recently decided by the Supreme Court of the United States, is understood to have incidentally discussed this subject; but we have as yet no authoritative report of the judgment of the court. If the *People v. Lemmon* shall go up on appeal to the Federal tribunal, the case will, in all probability, call for a settlement of the law on this important question.") (citation omitted).

174. 75 U.S. (8 Wall.) 168, 180 (1868).

175. *See id.* at 180 n.16.

176. I have identified one early newspaper editorial that might contain a nationalist reading of Article IV. In 1807, the editors of the *New Jersey Journal* published an editorial that complained about the taking of property without compensation for the construction of turnpikes. According to the author, this unconstitutionally deprived citizens of

their right of possessing the property which they have procured by their industry and talents, without any interruption or molestation, as tolerated by their political constitution, or as their political constitution says they shall enjoy it, is directly and categorically infringed and violated and they (the citizens) deprived of one of their primary constitutional privileges or immunities.

Letter to the Editor, *The Present Mode of Turnpiking Particularly Considered, &c.*, N.J.J., Aug. 25, 1807, at 2. This may reflect an understanding that Article IV provided substantive protection for rights listed in the Fifth Amendment. It is not clear, however, whether the author was referring to Article IV privileges and immunities.

There are no two states in the Union in which municipal "rights, advantages and immunities" are precisely the same. It is, therefore, an impossibility to admit a new state to an equality, in this respect, with each and all of the original states. The citizens of each state are entitled, by the Constitution, to all the privileges and immunities of citizens in the several states. But it is the enjoyment of those privileges which is equalized, the privileges remaining locally diverse. A citizen of New York, who removes to Pennsylvania, does not carry the laws of New York with him, but is admitted to the benefit of those of Pennsylvania, just as if he had originally resided in the latter state.¹⁷⁷

Writing in 1833, Joseph Story explained that Article IV was intended "to confer on [citizens of each state], if one may so say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances,"¹⁷⁸ and he cited among other sources, *Corfield v. Coryell* and *Livingston v. Van Ingen*.¹⁷⁹ During the Reconstruction Debates, radical Republicans elevated *Corfield* above all other Article IV precedents and attempted to use Justice Washington's expansive language in support of a national fundamental rights reading of Article IV. This was not, however, how either *Corfield* or the Privileges and Immunities Clause was generally understood outside the halls of the Reconstruction Congress either prior to the Civil War or during the years immediately following.

177. Caleb Cushing, Speech on the Bill for Admitting the State of Arkansas into the Union (June 9, 1836), reported in SALEM GAZETTE (Mass.), July 15, 1836, at 1. Arkansas had submitted a draft Constitution that included a clause providing: "The General Assembly shall have no power to pass laws for the emancipation of slaves, without the consent of the owners. They shall have no power to prevent emigrants to this State from bringing with them such persons as are deemed slaves by the laws of any one of the United States." *Id.* In his speech, Cushing addressed a proposed amendment to the Act of Admission by John Quincy Adams, which would have provided "that nothing in this act shall be construed as an assent by Congress to the article in the Constitution of the said State [of Arkansas] relating to slavery and to the emancipation of slaves." *Id.* (emphasis omitted). Arkansas was admitted as a slave state in June of 1836.

178. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1800, at 674-75 (Boston, Hilliard, Gray, & Co. 1833). In his own work, *Commentaries on American Law*, James Kent adopted the use of Washington's language in *Corfield*, including Washington's argument that privileges and immunities did not include all state-conferred rights, but only those deemed fundamental. See 2 KENT, *supra* note 107, pt. 4, at 35-36. William Rawle, in his 1829 treatise *A View of the Constitution of the United States of America*, says little about the Privileges and Immunities Clause beyond noting that it clarified the more ambiguous version in the Articles of Confederation and was not intended to allow any one state to control the rights granted to citizens when they traveled to a different state. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 84-85 (2d ed., Phila., Nicklin 1829). Beyond that, Rawle simply notes with rather dry understatement that "[i]t cannot escape notice, that no definition of the nature and rights of citizens appears in the Constitution." *Id.* at 85. Finally, in his treatise *Constitutional Law*, Thomas Sergeant describes the facts and holding of *Campbell*, as well as the debates over the admission of Missouri, before adding that "[i]t has been also held, that the above clause of the constitution means only, that citizens of other States shall have equal rights with the citizens of a particular state, and not that they shall have different, or greater rights. Their persons and property must be in all respects, subject to the laws of such state." THOMAS SERGEANT, CONSTITUTIONAL LAW 393-94 (2d ed., Phila., Nicklin & Johnson 1830). Here, Sergeant adds a footnote citing among other cases, *Livingston v. Van Ingen*. *Id.* at 394 n.(i).

179. 3 STORY, *supra* note 178, § 1800, at 675 n.1.

The sequel to this Article will explore in detail the use of *Corfield* and Article IV during the debates of the Thirty-ninth Congress. For now, it is sufficient to note that both the provision and the case enjoyed a consensus understanding by the time of the Civil War. The next and final section of this Article considers a second strain of antebellum thought that also involved “privileges” and “immunities” but referred to an entirely separate set of rights than those understood to be protected under Article IV: the privileges and immunities of *citizens of the United States*.

IV. “PRIVILEGES AND IMMUNITIES” OF CITIZENS OF THE UNITED STATES

*“The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States”*¹⁸⁰

Discussions of the Privileges or Immunities Clause generally proceed as if the phrase “privileges or immunities of citizens of the United States” had no prior existence other than its lexicographical counterparts in Article IV. Because the Privileges and Immunities Clause of Article IV seems to be the sole antecedent example of declared American privileges or immunities, that Clause and its attendant case law seem to be the obvious precursors to the Privileges or Immunities Clause of the Fourteenth Amendment. In fact, discussion of the privileges and immunities of citizens of the United States had a robust history in antebellum law, and one wholly separate from discussions of Article IV. This section considers that history and concludes that by the time of the Civil War, antebellum law recognized two distinct sets of “privileges and immunities,” one involving rights conferred by state law and the other involving rights conferred by the Federal Constitution.

In an 1862 review of case law regarding United States citizenship, United States Attorney General Edward Bates complained:

Who is a citizen? What constitutes a citizen of the United States? I have often been pained by the fruitless search in our law books and the records of our courts, for a clear and satisfactory definition of the phrase *citizen of the United States*. I find no such definition, no authoritative establishment of the meaning of the phrase, neither by a course of judicial decisions in our courts, nor by the continued and consentaneous action of the different branches of our political government.¹⁸¹

According to the Attorney General, “[i]n most instances . . . in which the

180. Treaty of Purchase Between the United States and the French Republic, art. III, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200, 202.

181. 10 Op. Att’y Gen. 382, 383 (1862).

matter of citizenship has been discussed, the argument has not turned upon the existence and the intrinsic qualities of citizenship itself, but upon the claim of some right or privilege as belonging to and inhering in the character of citizen.”¹⁸² “[L]earned lawyers and able lawyers,” complained Bates, “speak of ‘all the rights, privileges, and immunities guaranteed by the Constitution to the citizen’ without telling us what they are.”¹⁸³ In the absence of stronger authority to the contrary, Bates concluded that the phrase “‘a citizen of the United States[]’ . . . means neither more nor less than a member of the nation.”¹⁸⁴ The most Bates was willing to claim about the actual content of national citizenship was that “[i]n every civilized country the individual is born to duties and rights—the duty of allegiance and the right to protection.”¹⁸⁵

The question of what rights American citizens could expect as American citizens became a major topic of discussion during the debates over the Fourteenth Amendment. What is important for our purpose is what Bates believed *was* clear about the rights of national citizenship: whatever their specific content, the privileges or immunities of United States citizens were distinct from the privileges and immunities of state citizenship:

[The phrase “citizen of the United States”] does not specify his rights and duties as a citizen, nor in any way refer to such “rights, privileges, and immunities” as he may happen to have, by State laws or otherwise, over and beyond what legally and naturally belong to him in his quality of citizen of the United States. State laws may and do, nay must, vest in individuals great privileges, powers, and duties which do not belong to the mass of their fellow citizens¹⁸⁶

This was not an idiosyncratic view. Attorney General Bates’ 1862 distinction between the right of citizens *qua* state citizens and the rights of citizens *qua* national citizens was well-established in antebellum law. This section explores that distinction and the particular antebellum concept of the “privileges and immunities of United States citizens.”

A. DISTINGUISHING NATIONAL FROM STATE-CONFERRED PRIVILEGES AND IMMUNITIES

Thus far, we have seen how the terms “privileges” and “immunities,” when combined, were broadly understood by antebellum courts and commentators as a reference to a unique set of conferred rights. Towns, corporations, states, and nations all had their own set of privileges and immunities, both as collective entities and as a matter of rights conferred upon their individual members. Echoing this understanding of privileges and immunities as a unique set of conferred liberties, courts and scholars generally read the privileges and immunities clause of

182. *Id.* at 4.

183. *Id.* at 7.

184. *Id.*

185. *Id.* at 12 (emphasis omitted).

186. *Id.* at 18.

Article IV as protecting a limited subset of state-conferred rights. Although no consensus emerged regarding the precise nature and content of Article IV privileges and immunities, there did appear to be a consensus that, whatever their content, Article IV privileges and immunities differed from state to state, depending upon local law. Article IV simply demanded that when such rights were extended to state citizens, they must be equally extended to visiting citizens of other states.

As the following section will show, while courts and legal practitioners explored the meaning of “privileges and immunities of citizens in the several States,” a separate line of legal precedent developed simultaneously that focused on the privileges and immunities of *citizens of the United States*. This particular strain of legal thought involved a set of rights altogether different from those protected under Article IV.

As “free and independent” governments,¹⁸⁷ post-Revolutionary American states enjoyed the sovereign right to confer a unique set of rights upon their own citizens. The adoption of the Federal Constitution added an additional layer of conferred rights so that citizens of the United States could now enjoy two separate sets of government-conferred rights. This condition of dual citizenship allowed one to enjoy one set of rights vis-à-vis the federal government and an altogether different set of rights vis-à-vis one’s own state government. As the Virginia Supreme Court of Appeals explained in 1811, “[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.”¹⁸⁸ One’s privileges and immunities qua United States citizen were simply not the same as one’s privileges and immunities qua state citizen. Perhaps the clearest example of the dual aspect of citizenship rights can be found in the original understanding of the First Amendment. The Establishment Clause conferred upon all United States citizens an immunity from federal religious establishments.¹⁸⁹ Whether one enjoyed a similar immunity from one’s own state government, however, was a matter of state law.¹⁹⁰

187. See THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

188. *Murray v. M’Carty*, 16 Va. (2 Munf.) 393, 398 (1811). The Virginia court went on to hold that the privileges and immunities secured under Article IV did not include the political rights conferred upon state citizens. For an additional example of officials distinguishing national from state-conferred privileges and immunities, see CODE OF LAWS FOR THE DISTRICT OF COLUMBIA: PREPARED UNDER THE AUTHORITY OF THE ACT OF CONGRESS OF THE 29TH OF APRIL 1816, at 26 (Wash., D.C., Davis & Force 1819) (providing laws for the District of Columbia that granted each inhabitant “all the benefits, rights, privileges and immunities, secured to the citizens of Virginia and Maryland respectively by the respective constitutions and declarations of rights of those states respectively, and to all the benefits, rights, privileges and immunities of citizens of the United States so far as such benefits, rights, privileges, and immunities are consistent with the political and local situation of the inhabitants of the said District, and with the constitution of the United States.”).

189. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

190. For a discussion of the law of state religious establishment at the time of the Founding, see generally PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995).

B. "THE RIGHTS, ADVANTAGES AND IMMUNITIES OF UNITED STATES CITIZENS":
ARTICLE III OF THE LOUISIANA CESSION ACT

The rights of national citizenship were most often discussed in the context of United States treaties that promised the inhabitants of newly acquired territory that, once they were fully admitted into the Union, they would enjoy all of the privileges and immunities of United States citizens. The Treaty of Purchase Between the United States and the French Republic of 1803 (Louisiana Cession Act), for example, presents one of the earliest and most consistently referred to examples of national rights in antebellum America. According to Article III of the Act:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.¹⁹¹

Newspapers described the efforts that resulted in Article III as an attempt to provide the inhabitants of the territory "all the *immunities & privileges of citizens of the United States*."¹⁹² According to members of Congress, Article III provided for "the privileges of citizens of the United States,"¹⁹³ and later political tracts explained that the phrase "rights, advantages and immunities" in the Louisiana Cession Act "undoubtedly means those privileges that are common to all the citizens of this republic."¹⁹⁴

This equating of "privileges and immunities" with "rights, advantages and immunities," as discussed in the last section, is simply another example of how these terms were viewed as interchangeable in the period between the Founding and Reconstruction. Phrases like "rights, advantages, and immunities of citizens of the United States," "all the rights of citizens of the United States," and "all privileges, rights, and immunities of United States citizens" all referred to a unique set of rights conferred upon an individual by virtue of their status as a United States citizen. What transformed these phrases into particular terms of art was not the inclusion of one of the interchangeable terms "rights," "immunities," "advantages," or "privileges" but the use of these terms in reference to a particular *group*: in other words, the "rights, privileges, and immunities of *citi-*

191. Treaty of Purchase Between the United States of America and the French Republic, *supra* note 180, art. III; see also *The Same Old Case*, N.H. PATRIOT, Oct. 24, 1860, at 2 (citing an editorial written by the editor of the *Keene Sentinel* as stating that the terms of the Louisiana Cession Act provided inhabitants of its territory with "[t]he privileges of citizens of the United States").

192. *Louisiana Memorial*, E. ARGUS (Portland, Me.), Nov. 8, 1804, at 2 (emphasis added).

193. See DEBATES IN THE HOUSE OF REPRESENTATIVES, ON THE BILLS FOR CARRYING INTO EFFECT THE LOUISIANA TREATY 60 (Phila., Palmer Bros. 1804) (Early Am. Imprints, Series 2, no. 7492) (providing remarks of Representative Gaylord Griswold).

194. MARCUS, AN EXAMINATION OF THE EXPEDIENCY AND CONSTITUTIONALITY OF PROHIBITING SLAVERY IN THE STATE OF MISSOURI 17 (N.Y., Wilet & Co. 1819).

zens in the states” versus the “rights, privileges, and immunities of citizens of the United States.”

The language of Article III of the Cession Act adopted the common language of international treaties,¹⁹⁵ and it clearly influenced later American treaties involving territorial cession. For example, under the 1819 treaty with Spain by which the United States acquired the territory of Florida, inhabitants of the territory were guaranteed “the enjoyment of all the privileges, rights, and immunities, of the citizens of the United States.”¹⁹⁶ Similarly, when Texas joined the Union, it did so with congressional understanding that the territory and the new state complied with the Cession Act’s guarantee of all “rights, advantages, and immunities of United States citizens.”¹⁹⁷ Additionally, in 1848, then Secretary of State James Buchanan advised his diplomatic agent to include a provision like Article III of the Cession Act in any peace treaty with Mexico:

[The treaty should include] an article similar to the third article of the Louisiana treaty. It might read as follows: “The inhabitants of the territory over which the jurisdiction of the United States has been extended by the fourth article of this treaty shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and, in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.”¹⁹⁸

Buchanan’s advice resulted in Article IX of the treaty between the United

195. See, e.g., PA. GAZETTE, *supra* note 91 (reporting of a treaty between Great Britain and Sweden that stated that “[t]he two Powers shall reciprocally enjoy, in the Towns, Ports, Harbours, and Rivers of the respective States, all the Rights, Advantages, and Immunities, which have been, or may be henceforth enjoyed there by the most favoured Nations”).

196. See Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, U.S.-Spain, art. 7, Oct. 24, 1820–Feb. 19, 1821, 8 Stat. 252, 258. Additionally, the treaty included language noting that “[t]he treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.” *Id.* at 252 n.(a).

197. According to a proposed bill regarding the annexation of Texas:

And whereas the then territory of Texas was a part of the said territory of Louisiana, ceded by France to the United States by the treaty aforesaid: And whereas the said territory of Texas was ceded by the United States to Spain by the treaty of Florida of the 22d February, 1819: And whereas the citizens of said territory have declared, vindicated, and established their independence as a nation, and erected for themselves an independent republic; and, as it is represented, are desirous of having said territory reannexed to these United States, and the citizens of said republic restored to the rights, privileges, and immunities guaranteed by the said third article of the said treaty of Louisiana: And whereas a faithful adherence to the stipulations of treaties is the glory of a nation, and should be preserved inviolate; and good faith to France, and justice to the citizens of Texas, require that it shall be done . . .

CONG. GLOBE, 28th Cong., 2d Sess. 76 (1845).

198. S. EXEC. DOC. NO. 30-52, at 83 (1848).

States and Mexico, commonly known as the Treaty of Guadeloupe Hidalgo, which declared that inhabitants of the territory were entitled

to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.¹⁹⁹

American treaties continued to use the language of the Louisiana Cession Act up to Reconstruction. According to the 1867 treaty ceding Alaska to the United States:

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion.²⁰⁰

In sum, declarations of the “rights and immunities” of national citizenship were a common feature of antebellum American law, particularly as it regarded the rights of United States citizens in areas incorporated into the Union.²⁰¹ The words of Article III of the Louisiana Cession Act, which protected the “rights, advantages and immunities of United States citizens,” were understood at the time as protecting the “immunities and privileges of United States citizens” or simply “the privileges of citizens of the United States.”²⁰² Thus, when John Bingham added the phrase “privileges or immunities of United States citizens” to Section One of the Fourteenth Amendment, he used phrasing found in the Louisiana Cession Act and a legal term of art that had been a common feature of antebellum American law.

199. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, art. IX, U.S.-Mex., May 30, 1848, 9 Stat. 922, 930.

200. Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, U.S.-Russ., art. III, Mar. 30–June 20, 1867, 15 Stat. 539, 542.

201. For additional discussion of the use of the terms “privileges” and “immunities” in antebellum treaties and their relevance to Section One of the Fourteenth Amendment, see AMAR, *supra* note 1, at 167–68 & nn.*–2.

202. As pointed out in the first substantive section of this Article, the terms “privileges” and “immunities” were words used interchangeably with terms like “rights” and “advantages.” Thus, it is not surprising to find Article III of the Louisiana Cession Act’s language of “rights, advantages and immunities” paraphrased as “immunities and privileges” or simply “privileges.” For example, one can find Article IV of the Bill of Rights’ reference to “privileges and immunities” described as a reference to the “rights, advantages, and immunities” conferred by a state upon its own citizens. See Cushing, *supra* note 177. All of these phrases were interchangeable—the key difference was on which group the privileges and immunities (or rights, advantages, and immunities) were conferred.

C. DEBATING THE NATIONAL RIGHTS OF CITIZENSHIP: THE MISSOURI QUESTION

One of the most extensive antebellum discussions involving the privileges and immunities of United States citizens occurred during the debates over the admission of Missouri and congressional efforts to ban slavery in the state as a condition of admission.²⁰³ The effort failed, and Congress instead adopted a compromise that admitted Missouri as a slave state but banned slavery in any future state added north of the 36°30' parallel.²⁰⁴ During the debates over the Missouri question, the opponents and proponents of slavery traced out the positions that would dominate the increasingly bitter sectional debate over the next four decades.²⁰⁵ As would later abolitionists, free-state advocates called upon all manner of sources to defend the proposed ban on slavery in Missouri, including natural law, the Declaration of Independence, and the precedential ban of slavery in the Northwest Territories.²⁰⁶ This section, however, focuses on the particular claims involving Article III of the Louisiana Cession Act and the rights, advantages, and immunities of United States citizens.

On February 13, 1819, New York Representative James Tallmadge proposed an amendment to the bill admitting Missouri that would ban future importation of slaves into the state and free all children of current Missouri slaves when they reached the age of twenty-five.²⁰⁷ Battle lines were quickly drawn both inside and outside Congress, with opponents of Tallmadge's amendment arguing that Congress had no power to make either slavery or abolition a condition for admitting a new state.²⁰⁸ In particular, opponents argued that imposing such a restriction on the inhabitants of the states would deny them the "rights, advantages and immunities" promised to them under the Louisiana Cession Act (Missouri having been carved out of the original Louisiana Purchase).

Missouri Delegate John Scott asked:

Can any gentleman contend . . . that, laboring under the proposed restriction, the citizens of Missouri would have the rights, advantages, and immunities of

203. Tallmadge's amendment, see *infra* text accompanying note 207, was approved by the House but rejected by the Senate. When the House voted to reapprove the amendment, the result was to put the matter over until the next Congress. See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 224 (2005).

204. For a discussion of the legal side of the congressional debate, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 232-49 (2001). For the political side, see GRABER, *supra* note 149, at 120; DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 147 (2007); WILENTZ, *supra* note 203, at 218-40.

205. See, e.g., GRABER, *supra* note 149, at 122 ("Slaveholders in Congress during the Missouri debates anticipated the central themes of *Dred Scott*.").

206. See, e.g., *Debate on the Missouri Bill in the House of Representatives*, HILLSBORO' TELEGRAPH (Amherst, N.H.), Mar. 18, 1820, at 1 (providing comments of Representative Clifton Clagett of New Hampshire).

207. Howe, *supra* note 204, at 147.

208. See *Remonstrance of the Grand Jury of Howard County*, ST. LOUIS ENQUIRER, Aug. 4, 1819, at 2 (arguing that, per the terms of the Louisiana Cession Act, Congress could not condition the admission of Missouri on the banning of slavery).

other citizens of the Union? Have not other new states, in their admission, and have not all the states in the Union, now, privileges and rights beyond what was contemplated to be allowed to the citizens of Missouri?²⁰⁹

“[I]f you compel Missouri to relinquish any of the rights of self-government enjoyed by the other States,” argued Kentucky Representative Hardin, “her citizens will not enjoy the same privileges and immunities of citizens of the several states, through their respective State governments.”²¹⁰

As Massachusetts Representative Henry Shaw explained:

I voted against [Tallmadge’s amendment] because I believed it a violation of the treaty of cession. By the third article of the treaty by which we acquired Louisiana, it is expressly stipulated, “that the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted, as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States citizens &c.[”]

. . . [A]nd yet Congress, by this amendment, says to Missouri, you shall not be admitted as a sovereign state, and your citizens shall *not* have the same *rights* and *advantages* that citizens of every state may have, and that the citizens of eleven states absolutely enjoy. A clearer and more palpable violation of a treaty, in my opinion, was never made.²¹¹

According to an editorial published in both the *St. Louis Enquirer* and *Kentucky Reporter*, Article III of the Louisiana Cession Act required Congress “to admit the people of the Missouri into the union, with all the rights, advantages, and immunities of the citizens of the United States.”²¹² As the controversy reverberated around the country, slave-holding states saw the danger of conceding any measure of congressional power to regulate slavery. In Virginia, the House of Delegates passed a Resolution that expressed the assem-

209. WILENTZ, *supra* note 203, at 228 (citing 33 ANNALS OF CONG. 1200 (1819)).

210. *See* 35 ANNALS OF CONG. 1083 (1820).

211. Henry Shaw, Letter to the Editor, *The Missouri Slave Question*, DAILY NAT’L INTELLIGENCER (Wash., D.C.), May 8, 1819, at 2.

212. Kentucky Reporter, *The Question of Slavery to the West of the Mississippi*, ST. LOUIS ENQUIRER, June 9, 1819, at 2. The editorial continued:

[B]y what authority can Congress impose upon them a restriction which has not been imposed by the constitution on the citizens of the other states?

. . . [T]he *right* of “the citizens of the United States” to hold slaves, if not prohibited by their local constitutions and laws, is recognized in numerous articles of [the Constitution]. It being then clearly a *right and advantage* of the citizens of the United States, according to the principles of the federal constitution that they may hold slaves, unless they choose to deny themselves that right and advantage by their local institutions, how can Congress require a prohibition of slavery in the state of Missouri, without a manifest violation of the compact by which we are bound to grant such state all the rights and advantages which accord with the principles of the federal constitution?

bly's "common cause with the people of the Missouri Territory" and supported Missouri's demand to be admitted to the Union "upon equal terms with the existing States. How else can they enjoy the rights, advantages, and immunities of other citizens of the United States?"²¹³

Free-state advocates, on the other hand, argued that the rights protected under Article III of the Louisiana Cession Act were federal rights as opposed to state-conferred rights like slavery. Article III, wrote Daniel Webster, "cannot be referred to rights, advantages and immunities derived exclusively from the State governments, for these do not depend on the federal Constitution."²¹⁴ Writing to the people of Illinois, the pamphleteer Aristides asked,

if it were possible to consider slavery as a *right*, an *advantage*, or an *immunity*, with what propriety could it be classed among the rights, advantages, and immunities of *citizens of the United States*, when more than one half of those citizens do not enjoy this pretended right, advantage, or immunity?²¹⁵

As Pennsylvania Representative Joseph Hemphill pointed out:

If the right to hold slaves is a federal right and attached merely to citizenship of the United States, [then slavery] could maintain itself against state authority, and on this principle the owner might take his slaves into any state he pleased, in defiance of the state laws, but this would be contrary to the constitution.²¹⁶

According to a report of the abolitionist Delaware Society, "[i]n the *character* of citizens of the United States, as members of the federal compact, slaves cannot be held. They can be held only by citizens of some particular States, deriving their power solely from the State government. On this point of distinction between citizens of the United States, and citizens of particular States, your committee can perceive no ground for contrariety of opinion."²¹⁷

213. *Virginia Legislature: Missouri Question*, CAROLINA CENTINEL (Newbern, N.C.), Jan. 22, 1820, at 2.

214. DANIEL WEBSTER ET AL., A MEMORIAL TO THE CONGRESS OF THE UNITED STATES, ON THE SUBJECT OF RESTRAINING THE INCREASE OF SLAVERY IN NEW STATES TO BE ADMITTED INTO THE UNION 15 (Boston, Phelps 1819) (Early Am. Imprints, Series 2, no. 47390). Although Webster was one of four signatories, he chaired the Committee that produced the report. According to his biographer, "[t]he resulting memorial clearly bore the marks of Webster's hand." ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 169 (1997). Remini goes so far as to call the *Memorial* Webster's "handiwork." *Id.* For purposes of this paper, I will follow Remini's lead and treat Webster as the prime, if not the sole, author of the *Memorial*.

215. Aristides, *To the People of Illinois*, EDWARDSVILLE SPECTATOR (Ill.), June 5, 1819, at 6.

216. Joseph Hemphill, Speech on the Missouri Question in the House of Representatives (Feb. 5, 1820), in JOSEPH HEMPHILL, SPEECH OF MR. HEMPHILL ON THE MISSOURI QUESTION: IN THE HOUSE OF REPRESENTATIVE OF THE U. STATES 16 (Wash., D.C., Shaw & Shoemaker 1820) (Early Am. Imprints, Series 2, no. 48206).

217. Report of a Committee of the Delaware Society (Sept. 29, 1819), in MINUTES OF THE SIXTEENTH AMERICAN CONVENTION FOR PROMOTING THE ABOLITION OF SLAVERY, AND IMPROVING THE CONDITION OF THE AFRICAN RACE 18, 25 (Phila., Fry 1819) (Early Am. Imprints, Series 2, no. 46985).

1. Federal Rights “Common to All”

The basic approach of the free-state advocates was to distinguish state-conferred rights from the federal rights of the Louisiana Cession Act. “Any citizen who enjoys a right which another citizen in the United States does not enjoy,” argued New Hampshire Senator David Morill, “acquires that right from some other source than the constitution of the United States.”²¹⁸ The rights protected under Article III were *federal* rights derived from the Constitution and were common to all citizens throughout the United States. “If it were the right of a citizen of the United States, *as such*, to hold [slaves],” wrote “Philadelphian” Robert Walsh, “then they might be legally held in New York or Pennsylvania, as Georgia; since a *federal right* could not be impaired by the laws of any member of the confederacy.”²¹⁹

Over and over again, free-state advocates stressed that the immunities of United States citizens were uniform throughout the country and “common to all.” According to Joseph Blunt, writing under the pseudonym Marcus, Article III referred only to “those privileges that are common to all the citizens of this republic, not those depending upon state laws.”²²⁰ In his *Memorial to Congress*, Daniel Webster explained that

[t]he rights, advantages and immunities here spoken of [in Article III] must, from the very force of the terms of the clause, be such as are recognized or communicated by the Constitution of the United States; such as are common to all citizens, and are uniform throughout the United States.²²¹

Although it is possible to understand “rights common to all” as referring to “rights commonly found in state law throughout the United States,” this is not how the term was used by those seeking to ban slavery in the state of Missouri. According to Daniel Webster, these national privileges and immunities were those “recognized or communicated by the Constitution of the United States.”²²² According to New Hampshire Senator David Morill, these were rights “derived

218. David Morill, Remarks of Mr. Morill in the Senate of the United States on the Missouri Question (Jan. 17, 1820), in *HILLSBORO' TELEGRAPH* (Amherst, N.H.), Mar. 4, 1820, at 1.

219. A PHILADELPHIAN, FREE REMARKS ON THE SPIRIT OF THE FEDERAL CONSTITUTION, THE PRACTICE OF THE FEDERAL GOVERNMENT, AND THE OBLIGATIONS OF THE UNION RESPECTING THE EXCLUSION OF SLAVERY FROM THE TERRITORIES AND NEW STATES 49 (Phila., Finley 1819); see also Shaw, *supra* note 211.

220. MARCUS, *supra* note 194, at 17–18. Marcus continued:

It is the privilege, and a great a glorious one, of a citizen of Massachusetts, that his security and comfort cannot be destroyed by a slave population. This privilege is denied to the citizens of Georgia. On this very subject the laws of the different states grant different rights. Therefore they are not federal but state rights, and the inhabitants of Missouri may be admitted to the enjoyment of the rights, advantages, and immunities of citizens of the U.S. with or without the power of slave holding.

Id. at 18.

221. WEBSTER ET AL., *supra* note 214, at 15.

222. *Id.*

from the constitution; and these are federal rights, enjoyed by every citizen, in every state in the Union."²²³ These were rights, in other words, of United States citizens *as* United States citizens. As Rufus King explained, once Missouri became part of the Union, under Article III of the Cession Act its inhabitants would receive "'all the rights, advantages and immunities' which citizens of the United States derive from the constitution thereof:—these rights may be denominated federal rights, are uniform throughout the Union, and are common to all its citizens."²²⁴

Although doing so was not necessary for their argument, free-state advocates occasionally addressed the nature of federal rights that the Louisiana Cession Act's Article III would protect. According to Senator Morill:

The following are federal rights, namely, each state is entitled to two Senators—the legislatures shall choose them—they shall be privileged from arrest—each state shall appoint electors—the electors in each state shall meet on the same day and vote for two persons—the cognizance of controversies between two or more states—between a state and citizens of another state—between citizens of different states—between citizens of the same state, claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states.[] These are all secured to Missouri, and all other rights derived from the constitution of the United States.²²⁵

The national rights are all expressly named in the Constitution, some relating to the structural guarantees of federalism, others involving access to federal courts. Daniel Webster produced a slightly different list, but followed the same principle:

The obvious meaning therefore of [Article III] is, that the rights derived under the federal Constitution shall be enjoyed by the inhabitants of Louisiana in the same manner as by the citizens of other States. The United States, by the Constitution, are bound to guarantee to every State in the Union a republican form of government; and the inhabitants of Louisiana are entitled, when a State, to this guarantee. Each State has a right to two senators, and to representatives according to a certain enumeration of population pointed out in the Constitution. The inhabitants of Louisiana, upon their admission into the Union, are also entitled to these privileges.²²⁶

Webster and Morill both viewed federal rights and immunities as involving specific guarantees enumerated in the Constitution (thus bestowed "commonly")

223. Morill, *supra* note 218.

224. Rufus King, Observations on the Slavery Question (Nov. 22, 1819), in *CONN. J.* (New Haven), Dec. 21, 1819, at 1; *see also* Letter from Rufus King to R. Peters, Jr. (Nov. 30, 1819), in 6 *THE LIFE AND CORRESPONDENCE OF RUFUS KING* 235–38 (Charles R. King ed., Da Capo Press 1971) (1900).

225. Morill, *supra* note 218.

226. WEBSTER ET AL., *supra* note 214, at 15–16.

on all United States citizens), primarily involving the structural guarantees of federalism and access to federal courts. This did not involve any natural or common law liberties beyond those listed in the Federal Constitution, much less any rights or immunities derived from state law (such as the right to own slaves).

For their part, pro-slave-state advocates did not generally challenge the idea that slavery was a right derived from state law. Nor did they specifically disagree with the idea that Article III of the Louisiana Cession Act protected only federal rights. Their argument instead sought to tie slavery to ancillary federal guarantees, such as the right to republican self-government and the right of an entering state to equal status with the original states of the Union. According to Delaware Representative Louis McLane:

The most important of the *federal* advantages and immunities, consist in the right of being represented in Congress, as well in the Senate as in this House, the right of participating in the councils by which they are governed. These are emphatically the "*rights, advantages and immunities* of citizens of the U. States[.]" . . . Sir, the rights, advantages and immunities of citizens of the United States, and which are their proudest boast, are the rights of self government, first, in their state constitutions, and, secondly, in the government of the Union, in which they have an equal participation.²²⁷

Notice that McLane's argument echoes the general position of Morill and Webster: federal rights, unlike those conferred in provisions like Article IV, are derived from the Federal Constitution and involve the general federalist structure of government. The disagreement involved the most relevant source of federal rights and the scope of the rights conferred. Free-staters denied that the right to own slaves was a federal right, and they read the Constitution as conferring power to decide when and under what conditions to admit a new state. Slave-state advocates did not disagree that slavery was a right derived from state law but insisted that the federal right to republican self-government established the right of admitted states to decide the slavery issue for themselves, free from federal interference.

2. Distinguishing Article IV

Both sides in the Missouri debate distinguished the national rights, privileges, and immunities of Article III of the Louisiana Cession Act from the state-conferred rights, privileges, and immunities guarded under Article IV of the

227. Louis McLane, Speech of Mr. McLane, of Delaware, on the Missouri Question (Feb. 7, 1820), in AM. WATCHMAN (Wilmington, Del.), Mar. 29, 1820, at 2. McLane was arguing that the Louisiana Cession Act stipulated that "the *inhabitants* of the ceded territory shall be *incorporated* in the union of the *United States*, and *admitted* as soon as possible, according to the principles of the Federal Constitution, to the *enjoyment* of all the *rights, advantages* and immunities of citizens of the United States." *Id.* (quoting proposed language of Article III of the Act). This placed an obligation on Congress to admit a state as soon as it was possible to do so and meant that placing conditions on this admission violated the duties and rights secured by Article III.

Federal Constitution. A key contention of the free-state advocates was that the “rights, advantages and immunities” protected under Article III of the Louisiana Cession Act were legally distinct from the “rights, advantages, and immunities” conferred upon individuals as a matter of state law.²²⁸ Article III rights, advantages, and immunities of United States citizens, they argued, meant only “those privileges that are common to all the citizens of this republic, not those depending upon state laws. For these are different in different states.”²²⁹ As the Delaware Society put it,

[i]n the *character* of citizens of the United States, as members of the federal compact, slaves cannot be held. They can only be held only by citizens of some particular States, deriving their power solely from the State government. On this point of distinction between citizens of the United States, and citizens of particular States, your committee can perceive no ground for contrariety of opinion.²³⁰

Because the right to slavery involved state, and not federal, rights, the Delaware Society argued that “it would therefore be absurd to say, that being admitted to all the rights, advantages, and immunities of citizens of the United States . . . , would give to the inhabitants of [Missouri] the right of holding slaves.”²³¹

This argument presumes the reading of Article IV presented in cases like *Campbell* and *Livingston*—at the time, the two most influential decisions regarding Article IV.²³² According to this view, Article IV required states to provide sojourning citizens equal access to a set of state-conferred rights. The fact that some states banned slavery did not violate Article IV if the ban applied equally to in- and out-of-state citizens. As Marcus explained:

228. See, e.g., WEBSTER ET AL., *supra* note 214, at 15 (“The clause cannot be referred to rights, advantages and immunities, derived exclusively from the State governments, for these do not depend upon the federal Constitution. Besides, it would be impossible that all the rights, advantages and immunities of citizens of the different States could be at the same time enjoyed by the same persons. These rights are different in different States; a right exists in one State, which is denied in others, or is repugnant to other rights enjoyed in others.”).

At a certain level, of course, Article IV of the Constitution and Article III of the Louisiana Cession Act *did* cover the same territory, at least if one adopted the *Campbell* and *Livingston* reading of the Privileges and Immunities Clause of Article IV. According to this view, the protections of Article IV were, in fact, among the federal rights secured to citizens of the United States. However, that protection did not confer substantive rights but only guaranteed sojourning citizens the same rights as in-state citizens. “If the proposed amendment prevails,” Tallmadge explained, “the inhabitants of Louisiana or the citizens of the United States can neither of them take slaves into the state of Missouri. All, therefore, may enjoy equal privileges.” James Tallmadge, Jr., Speech of the Hon. James Tallmadge, Jun., in the House of Representative of the United States, on the Bill for Authorising the People of the Territory of Missouri To Form a Constitution and State Government, and for the Admission of the Same into the Union, in COM. ADVERTISER (N.Y.), Apr. 17, 1819, at 1.

229. MARCUS, *supra* note 194, at 17–18.

230. Report of a Committee of the Delaware Society, *supra* note 217, at 25.

231. *Id.* at 25–26.

232. As discussed, this was the consensus position prior to the 1823 decision of *Corfield v. Coryell*. See *supra* section III.A.

The militia officers of other states, when residing in New-York, are exempt from military duty, except as officers. In some other states this privilege is not granted. It is the privilege, and a great and glorious one, of a citizen of Massachusetts, that his security and comfort cannot be destroyed by a slave population. This privilege is denied to the citizens of Georgia. On this very subject the laws of different states grant different rights.²³³

In his *Memorial*, Daniel Webster agreed that Article IV only “applies to the case of the removal of a citizen of one State to another State; and in such a case it secures to the migrating citizen all the privileges and immunities of citizens *in* the State to which he removes.”²³⁴ The alternative, argued Webster, would be a disaster. If Article IV “gives to the citizens of each State all the privileges and immunities of the citizens of every other State, at the same time and under all circumstances,” then slave-holding states would be able to force slavery into every state in the Union.²³⁵ He explained:

[I]t would be in the power of that single State, by the admission of the right of its citizens to hold Slaves, to communicate the same right to the citizens of all the other States within their own exclusive limits, in defiance of their own constitutional prohibitions; and to render the absurdity still more apparent, the same construction would communicate the most opposite and irreconcilable rights to the citizens of different States at the same time. It seems therefore to be undeniable, upon any rational interpretation, that this clause of the Constitution communicated no rights in any State, which its own citizens do not enjoy; and that the citizens of Louisiana, upon their admission into the Union, in receiving the benefit of this clause, would not enjoy higher, or more extensive rights than the citizens of Ohio.²³⁶

Although these arguments took place midway between the Founding and Reconstruction, they had a life that extended well beyond the debates over the Missouri Question. Daniel Webster’s *Memorial*, for example, was republished

233. MARCUS, *supra* note 194, at 18.

234. WEBSTER ET AL., *supra* note 214, at 16.

235. *Id.*

236. *Id.* at 16–17. According to Pennsylvania Representative Joseph Hemphill:

If the right to hold slaves is a federal right and attached merely to citizenship of the United States, it could maintain itself against state authority, and on this principle the owner might take his slaves into any state he pleased, in defiance of the state laws, but this would be contrary to the constitution, and even the broad language that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states does not produce this effect, as is plainly manifested by the article which directs that persons escaping from labor shall be delivered up to the party to whom the labor is due, this shows that if slaves are intentionally taken into a state to reside, the state can deny to the master any right to hold them as slaves within its jurisdiction.

Hemphill, *supra* note 216, at 16.

in 1854 as part of a pamphlet discussing the Nebraska Question.²³⁷ It was published *again* in 1857 as part of a collection of famous American speeches.²³⁸ In the Thirty-ninth Congress, John Bingham repeatedly and expressly relied upon the constitutional and political theory of Daniel Webster in crafting his arguments in favor of the Fourteenth Amendment.²³⁹

3. Aftermath—The Significance of *Dred Scott*

Although Tallmadge's amendment was never passed (Tallmadge voluntarily retired from the House), the resulting compromise presumed that Congress did in fact have power to regulate slavery in the territories, including areas carved out of the former Louisiana territory north of parallel 36°30'.²⁴⁰ According to the congressional Act accompanying the compromise, "in all that territory ceded by France to the United States . . . which lies north of thirty-six degrees and thirty minutes north latitude . . . slavery and involuntary servitude . . . shall be, and is hereby, *forever prohibited*."²⁴¹ By passing this Act, a majority of Congress signaled that they agreed with (or acquiesced to) the proposition that the federal rights, advantages, and immunities of United States citizens under Article III did not include the state-conferred right to own slaves.

Chief Justice Taney, of course, rejected this understanding of federal power in *Dred Scott*. But he did so under the assumption that slavery remained a state-conferred property right, simply insisting that Congress had to respect this right in the territories as a matter of due process. Nothing in Taney's opinion for the Court challenged the traditional distinction between the state-conferred rights of Article IV and the federal rights of United States citizens. In fact, Taney's conclusion *required* such a distinction: just because one state conferred citizenship upon resident blacks did not make blacks citizens of the United States who could invoke the jurisdiction of federal courts under Article III.²⁴²

237. See DANIEL WEBSTER ET AL., A MEMORIAL TO THE CONGRESS OF THE UNITED STATES, ON THE SUBJECT OF RESTRAINING THE INCREASE OF SLAVERY IN NEW STATES TO BE ADMITTED INTO THE UNION (1819), reprinted in THE NEBRASKA QUESTION 9, 9–12 (N.Y., Redfield 1854).

238. See DANIEL WEBSTER ET AL., A MEMORIAL TO THE CONGRESS OF THE UNITED STATES, ON THE SUBJECT OF RESTRAINING THE INCREASE OF SLAVERY IN NEW STATES TO BE ADMITTED INTO THE UNION (1819), reprinted in THE POLITICAL TEXT-BOOK, OR ENCYCLOPEDIA 601, 601–04 (M.W. Cluskey ed., Wash., D.C., Wendell 1857).

239. See Lash, *supra* note 8.

240. See WILENTZ, *supra* note 203, at 232. A majority of slaveholding states supported the Compromise, even voting on its individual provisions. See GRABER, *supra* note 149, at 124. Mark Graber reports this may have been due in part to a belief that the Compromise was a "boon for slave states" due to the fact that the northern territories were considered uninhabitable. *Id.*

241. Missouri Enabling Act, ch. 22, § 8, 3 Stat. 545, 548 (1820) (repealed 1854) (emphasis added).

242. According to Taney:

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a

Nor did the dissenting justices challenge this distinction between local and national privileges and immunities. Justice McLean argued that Congress had power to regulate slavery in the territories, and he refused to accept the proposition that slaves were mere property that owners could carry with them into the territories—if this were true, they would have the same right to carry them into free states as well.²⁴³ Justice Curtis rejected Taney’s argument that one could be a citizen of a state without necessarily being a citizen of the United States.²⁴⁴ However, Curtis expressly distinguished the privileges that accompany the status of United States citizenship from the political and “civil rights” that were wholly dependent on state law.²⁴⁵ Embracing the consensus *Campbell* reading of Article IV, Justice Curtis explained that the rights of national citizenship were altogether different from the privileges and immunities of citizens in the states—privileges that involved state-conferred rights subject to

citizen in any other State. . . . Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, as *recognized in Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872).

243. In Justice McLean’s words:

Allowing to my brethren the same right of judgment that I exercise myself, I must be permitted to say that it seems to me the principle laid down will enable the people of a slave State to introduce slavery into a free State, for a longer or shorter time, as may suit their convenience; and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State.

Id. at 559 (McLean, J., dissenting).

244. Curtis stated: “And my opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.” *Id.* at 576 (Curtis, J., dissenting). Curtis goes on to argue that Article IV implicitly recognizes that citizens in the states are, thereby, citizens of the United States. *Id.* at 581; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (containing Representative Bingham’s remarks that the privileges and immunities clause contains an ellipsis that protects the privileges and immunities of citizens (of the United States) in the several states).

245. According to Curtis:

The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

Dred Scott, 60 U.S. at 583. Curtis’s point was to reject the idea that if blacks were considered citizens of the United States then, under Article IV, they would necessarily have equal political rights with white citizens in the several states. *Id.*

whatever restrictions the states choose to impose on their own citizens.²⁴⁶ As controversial as the *Dred Scott* opinion was in regard to the citizenship status of blacks and the right to carry slavery into the territories, the case broke no new ground on the accepted meaning of Article IV or the basic legal distinction between state-conferred privileges and immunities and federal privileges or immunities.²⁴⁷

D. SUMMARY

Attorney General Bates correctly noted that as of 1862, neither courts nor commentators had precisely defined the substantive content of the privileges and immunities of United States citizens.²⁴⁸ On the other hand, some of the most important aspects of the law of national privileges and immunities were relatively clear and doctrinally stable. To begin with, the privileges and immunities of United States citizens involved a wholly different set of rights than those understood to be embraced by the Privileges and Immunities Clause of Article IV. Article IV privileges and immunities involved a certain set of state-conferred rights that, as a matter of comity, states must equally extend to sojourning citizens from other states. Privileges and immunities of citizens of the United States, on the other hand, involved those rights conferred by the national Constitution and that United States citizens held as citizens of the United States. This was not a common law theory of rights emerging out of an aggregation of state-conferred liberties. Instead, the national rights of United States citizens were those conferred by the Federal Constitution itself. During the Missouri debates, the examples most often cited involved the political guarantees of federal representation for all United States citizens residing in admitted states (for example, the right to two senators) and the right to invoke the diversity jurisdiction of the federal courts under Article III of the Federal Constitution.

246. According to Curtis:

Besides, this clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State, by reason of the operation of causes other than mere citizenship, are not conferred. Thus, if the laws of a State require, in addition to citizenship of the State, some qualification for office, or the exercise of the elective franchise, citizens of all other States, coming thither to reside, and not possessing those qualifications, cannot enjoy those privileges, not because they are not to be deemed entitled to the privileges of citizens of the State in which they reside, but because they, in common with the native-born citizens of that State, must have the qualifications prescribed by law for the enjoyment of such privileges, under its Constitution and laws. It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State by force of the Constitution.

Id. at 583-84.

247. As far as the particular holding in *Dred Scott* was concerned, Congress simply ignored the Court's decision and, during the Civil War, proceeded to ban slavery in the territories. See GRABER, *supra* note 149, at 21 n.40.

248. See *supra* notes 181-86 and accompanying text.

The decision in *Dred Scott* suggested that provisions in the first eight amendments could also be considered as naming certain privileges and immunities of United States citizens. This idea was not unique to Chief Justice Taney's treatment of the Fifth Amendment's Due Process Clause. In fact, as other scholars have pointed out, in the years prior to the adoption of the Fourteenth Amendment, a growing number of people began to believe that the Bill of Rights represented privileges belonging to all American citizens.²⁴⁹ In fact, in 1857, the rights of the First Amendment were expressly described to be among "the privileges and immunities of citizens of the United States": When the people of Arkansas met in convention to propose a Bill of Rights, the Jackson Administration denied the assembly had authority to draft a constitution but nevertheless conceded that

[t]hey undoubtedly possess the ordinary privileges and immunities of citizens of the United States. Among these is the right to assemble and to petition the Government for the redress of grievances. In the exercise of this right, the inhabitants of Arkansas may peaceably meet to gather in primary assemblies, or in conventions chosen by such assemblies, for the purpose of petitioning Congress to abrogate the territorial government, and to admit them into the Union as an independent State.²⁵⁰

Examples like the above do not prove that the members of the Thirty-ninth Congress believed that the Privileges or Immunities Clause incorporated the Bill of Rights. That question has been well-explored by others and will be addressed in the subsequent articles of this series. At this point, it is important only to note that in the period between the Founding and Reconstruction, the phrase "privileges and immunities of citizens of the United States" was consistently used as a reference to federally conferred rights and privileges such as those listed in the Bill of Rights as well as certain guarantees in Articles I, III, and IV. These rights were "common to all" not because they were found in numerous state statute books but because they were bestowed by the Constitution upon all United States citizens. Even if there is not enough evidence to suggest a common consensus regarding the full and complete meaning of national privileges and immunities, their general nature under antebellum law seems clear enough.

CONCLUSION

The final version of Section One of the Fourteenth Amendment declared that "[a]ll persons born or naturalized in the United States . . . are citizens of

249. See CURTIS, *supra* note 16, at 25.

250. See Stephen A. Douglas, Speech on the President's Message (Dec. 9. 1857), in SPEECH OF SENATOR DOUGLAS OF ILLINOIS ON THE PRESIDENT'S MESSAGE, DELIVERED IN THE SENATE OF THE UNITED STATES 8 (Wash., D.C., Towers 1857); see also AMAR, *supra* note 1, at 168.

the United States and of the State wherein they reside.”²⁵¹ This overruled *Dred Scott*’s holding that one might be born in a free state yet somehow not be a United States citizen.²⁵² The next sentence of Section One announced that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”²⁵³ Countless scholars have poured over the debates of the Thirty-ninth Congress seeking clues to what the framers believed they were doing when they proposed adding this language to the Federal Constitution. Most have concluded that the Republican members of the Reconstruction Congress sought to nationalize the common law state-conferred rights of Article IV.²⁵⁴ Mention of “privileges and immunities” in both Article IV and Section One of the Fourteenth Amendment has been enough for some to claim that the text of Section One itself explicitly establishes a link between the Privileges and Immunities Clause and the Privileges or Immunities Clause. Justice Miller’s failure, or refusal, to grasp this obvious textual link justifies treating his opinion as among the worst ever produced by the Supreme Court—and one of the Court’s precedents most deserving of being overruled. So, at least, most scholars have concluded.²⁵⁵

The evidence presented in this Article calls into question this common criticism of Justice Miller and the *Slaughter-House* majority, at least as a matter of how those terms were understood in antebellum legal and political debate. As of Reconstruction, the jurisprudence of Article IV was remarkably stable and reflected a broadly held consensus that the Clause protected a limited set of state-conferred rights. This view was expressly adopted by one of the most important anti-slavery state court decisions decided just prior to the Civil War, *Lemmon v. The People*, and was reaffirmed by the Supreme Court in 1868—with a single citation to *Lemmon*. The privileges and immunities of citizens of the United States had stable jurisprudential roots every bit as deep as Article IV. Beginning with the Louisiana Cession Act of 1803, the phrase “rights, advantages and immunities of citizens of the United States” was read as being no different than a declaration of the “immunities and privileges of citizens of the United States” and was consistently defined as referring to a set of national rights conferred by the Constitution itself—rights “common to all” who shared the status of United States citizens. Once again, it was the advocates of abolition, men like Rufus King and Daniel Webster, who insisted that these rights were wholly separate and distinct from the state-conferred rights of Article IV.

251. U.S. CONST. amend. XIV.

252. AMAR, *supra* note 155, at 380.

253. U.S. CONST. amend. XIV, § 1 (emphasis added).

254. *See supra* notes 3–4.

255. Sources criticizing the majority decision in *The Slaughter-House Cases* are too many to cite. For just a brief taste, see AMAR, *supra* note 1, at 213 (stating that the *Slaughter-House* decision “strangl[ed] the privileges or immunities clause in its crib”); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 55 (1997) (claiming that the *Slaughter-House* decision is “probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court”).

It is possible, of course, that this long-standing distinction between Article IV privileges and immunities and the privileges and immunities of citizens of the United States was abandoned at the time of the Civil War. For example, the members of the Thirty-ninth Congress may have viewed such a distinction as part of the problem they hoped to remedy through the adoption of the Fourteenth Amendment. This seems to be the understanding of a great many Fourteenth Amendment scholars who argue that the drafters of the Fourteenth Amendment understood the Privileges or Immunities Clause as somehow federalizing Justice Washington's list of "fundamental" rights that he described in *Corfield v. Coryell*.²⁵⁶

Whether these previously separate strands of law merged at the time of Reconstruction is a matter for the subsequent articles of this series on the origins of the Privileges or Immunities Clause. For now, it is worth pointing out that at least one of the key players in the adoption of the Fourteenth Amendment shared Justice Miller's view that Article IV and Section One of the Fourteenth Amendment protected entirely different sets of "privileges and immunities." In 1871, John Bingham explained to the House of Representatives his understanding of Section One:

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, *as contradistinguished* from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.

....

Mr. Speaker, that decision in the fourth of Washington's Circuit Court Reports [*Corfield*], to which my learned colleague . . . has referred is only a construction of the second section, fourth article of the original Constitution, to wit, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." In that case the court only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own.

....

Is it not clear that *other and different privileges and immunities* than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?²⁵⁷

Bingham could not have been clearer: "*other and different privileges and immunities*" were protected by Section One of the Fourteenth Amendment than

256. See *supra* notes 3–4.

257. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (emphasis added).

had been protected under Article IV. This leaves us with a conundrum: given the evidence of antebellum law and legal commentary, as well as the statements of John Bingham himself, why have so many Fourteenth Amendment scholars embraced the idea that Section One of the Fourteenth Amendment refers to the same privileges and immunities as those originally guarded under Article IV?

The answer to this puzzle probably lies in the debates of the Thirty-ninth Congress and John Bingham's *two* drafts of Section One of the Fourteenth Amendment. Bingham's *original* version of Section One used the language of Article IV word-for-word, and he insisted that the amendment authorized Congress to enforce the privileges and immunities of Article IV.²⁵⁸ Bingham later withdrew his initial draft and replaced it with a version that closely tracked the language of the Louisiana Cession Act. Most scholars treat Bingham's discussion of his original draft (which used the language of Article IV) as reflecting his views regarding the *final* draft (which did not). As *Part II* explains, this is a mistake. At some point during the debates over the Fourteenth Amendment, John Bingham had an epiphany—one that altered his original views of Article IV and that caused him to completely rewrite his proposed amendment. Bingham's ultimate position regarding the basic distinction between Article IV and the privileges and immunities of citizens of the United States is the same distinction maintained at law prior to Reconstruction.

For modern originalists, this is an extremely important point. Unlike earlier theorists, originalists today are not focused on the private intentions and motivations of the members of the Thirty-ninth Congress. The effort is to recover the likely public understanding of the text that the Thirty-ninth Congress presented for ratification. Understanding the antebellum use of terms like "privileges and immunities of citizens of the United States" is thus important not only because it helps us understand the use of terms and phrases by the members of the Thirty-ninth Congress but also because it illuminates how the public likely understood the language of the final submitted text.

But even if the language of Section One would have been understood as protecting wholly different rights than those protected under Article IV, this does not tell us what John Bingham, or the public at large, believed were the rights of citizens of the United States that the Fourteenth Amendment now protected against state action. This too is a subject explored in the next article, *Part II*. As we shall see, John Bingham insisted that Section One protected the rights listed in the first eight amendments to the Constitution. Part of his epiphany, I shall argue, involved his realization that the initially drafted words of Article IV would not accomplish his goal of protecting the Bill of Rights in the States. Protecting the national Bill of Rights required language that declared the national privileges *of citizens of the United States*.

258. See CONG. GLOBE, 39th Cong., 1st Sess. 1088–91 (1866).