NOTES

THE GENEALOGIES AND UNRESOLVED MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE

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In this Note I undertake a historical survey of the conceptual predecessors to the Fourteenth Amendment's Privileges or Immunities Clause, from the sixteenth century through the mid-nineteenth century. By doing so I present a different angle on the potential significance of this provision, which merits revisitation as a clause bearing meaningful judicially cognizable rights, despite its effective foreclosure under the Slaughter-House Cases*. Because of the open-ended and adaptive quality of this enigmatic phrase and its preceding variants, it bore a wide range of significances over the centuries. Indeed, as this Note also demonstrates, one can trace critical moments in early American history alongside varying uses of this phrase, further indicating its previously evolutionary quality. In its earliest forms, it implied the British Crown's support for the development of colonies in the New World, and soon thereafter, it served as a vehicle for establishing individual rights akin to those of the Magna Carta. It also generated newfound rights that provided justification for the American Revolution and was used to advance unity among the states of the new nation, especially for the sake of economic development.*

In the decades prior to the Civil War, its meaning was shaped by the pressing issue of slavery. Justice Bushrod Washington's limiting construction of the Privileges and Immunities Clause in Corfield v. Coryell*, I propose, was centrally informed by the debates leading to the Missouri Compromise, in which slaveholding as a protected right under privileges and immunities was a key point of contention. Because* Corfield *implicitly truncated the basis for asserting a right to slaveholding via privileges and immunities, the Court in* Dred Scott*, dominated by Southern justices, focused on excluding access to such rights based on immutable characteristics.*

The Southern preference for broad rights and narrow access, however, was definitively defeated through war. It is thus uncertain whether a historically informed meaning of the Privileges or Immunities Clause necessarily turns on the disputes in

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the decades immediately leading to the Fourteenth Amendment's ratification—which would suggest a fixed and narrow construction aligned with Corfield*—or whether the deeper, evolutionary history of privileges and immunities lends a meaningful gloss on the clause, counseling a broader and more expansive interpretation. The Fourteenth Amendment's legislative history is ambiguous at best, providing fodder for both possible readings.*

While confronting these uncertainties, this Note draws from a historical method not previously deployed for the purpose of grasping the fuller meaning of this constitutional provision: It undertakes a longue durée approach, accounting for the variations of this phrase's significance across time and as affected by a dynamic multiplicity of inputs. Most claims regarding the meaning of this clause tend to pinpoint one or several moments in its long history as the "true" origin point(s). A historical sense of privileges and immunities derived through this method, however, indicates that reaching a determination on the breadth of rights conveyed through this provision entails the resolution of a close call, requiring careful sifting of historical data, perhaps paired with other constitutional principles and policy considerations.

Introduction

Determining what rights are invoked by the enigmatic phrasing of privileges and immunities,[1] especially as it appears in the Fourteenth Amendment of the Constitution,[2] has been a longstanding challenge.[3] Indeed, by identifying the range of rights that have been established, protected, and disputed for centuries under variations of this phrase, one may simultaneously trace crucial developments of the American experiment from the earliest stages of colonization in the New World to the Civil War and Reconstruction.[4] If there has been one consistency to the significance of protections affiliated with privileges and immunities,[5] it is that of its continual and arguably chameleonic evolution, at least insofar as shifts in its meaning have historically tracked the pressing concerns of a given era. Legal scholars, practitioners, and jurists of wide-ranging ideological persuasions continue to discuss the Privileges or Immunities Clause of the Fourteenth Amendment as a possible route for establishing constitutionally protected rights—and there remains debate over what those rights may or may not encompass.

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[1] In this Note, "privileges and immunities" refers to the concept that predates or transcends either of the constitutional clauses. When I mean to specify one or the other clause, I use capital letters ("Privileges and Immunities" or "Privileges or Immunities").

[2] The Privileges or Immunities Clause of the Fourteenth Amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.

[3] Some have viewed this challenge as an insurmountable one. Robert Bork, for example, simply called the Privileges or Immunities Clause an "ink blot" and moved past it. *See* Robert H. Bork, The Tempting of America: The Political Seduction of the Law 166 (1990). But there must be a better way to understand a constitutional provision that underwent drafting, substantive discussion in both chambers of Congress, and ratification.

[4] I include colonial America as belonging to the American experiment with the view that the nation's development is inextricably intertwined with the country's prehistory under the British Empire, and in important respects—including the legal significance of the phrase privileges and immunities as traced in this Note—one finds profound continuities.

[5] It is a widely held understanding that "privileges or immunities" in the Fourteenth Amendment is a direct continuation of Article Four's "privileges and immunities." For example, as discussed in this Note, Jacob Howard expressed this view during the drafting of the Amendment, as did Justice Miller in the *Slaughter-House Cases* that provided the first judicial gloss on the clause. *See infra* Section II.D.

However, since it was effectively foreclosed by the *Slaughter-House Cases* of 1873, the significance of this clause has largely been a matter of theoretical discussion, rather than of judicial enforcement.[6] Writing for the *Slaughter-House* majority, Justice Miller viewed the rights encompassed by the Privileges or Immunities Clause of the Fourteenth Amendment as precisely identical to those existing under the Privileges and Immunities Clause in Article Four of the Constitution as articulated by Justice Bushrod Washington in *Corfield v. Coryell*.[7] However, in his dissent, Justice Field protested the reduction of this clause to a "vain and idle enactment" that "does not attempt to confer any new privileges or immunities upon citizens" and thus "accomplish[es] nothing,"[8] a point he revisited in his subsequent dissent in *O'Neil v. Vermont*, when he adopted a broader understanding of the rights that this clause protected.[9] For centuries now, there have been echoes outside the courtroom of Justice Field's sentiments, and, if one looks to dissents and concurrences, it is evident that his disagreement with Justice Miller continues to resonate actively in the Court's deliberations to the present day.

Some scholars say that Justice Miller was right. For example, standing on the foundation of now-Professor Nikolas Bowie's student Note,[10] Laurence Lessig portrayed the *Slaughter-House* holding as

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[6] The clause has only borne dispositive significance in Supreme Court holdings on two occasions beyond the *Slaughter-House Cases*, one of which was subsequently overturned. *See* Colgate v. Harvey, 296 U.S. 404 (1935) (holding that Vermont's taxation of its residents' incomes for loans from outside the state but not those from within the state is a violation of the Privileges or Immunities Clause), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940) (permitting a Kentucky statute that imposes differential tax treatments on bank deposits outside the state); Saenz v. Roe, 526 U.S. 489 (1999) (holding that the Privileges or Immunities Clause establishes a constitutional right to travel between states). As recently as 2021, the Court refused to engage with the Privileges or Immunities Clause by either overturning or clarifying *Slaughter-House*. *See* Courtney v. Danner, 801 F. App'x 558 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1054 (2021).

[7] *See* Slaughter-House Cases, 83 U.S. 36, 74–76 (1873). In *Slaughter-House*, the Court upheld a Louisiana law that restricted butchers from operating slaughterhouses around "the city of New Orleans and other parishes and boundaries named and defined," determining that the butchers did not have a claim under the Privileges or Immunities Clause to a right to practice their trade. *Id.* at 59, 78–79. Justice Miller wrote that the privileges and immunities tied to federal citizenship "are not intended to have any additional protection" under the Fourteenth Amendment. *Id.* at 74.

[8] *Id.* at 96.

[9] Justice Field opines in *O'Neil v. Vermont* that privileges and immunities in the Fourteenth Amendment are of "momentous import," noting it is "difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States" while suggesting they include the "first ten Amendments," and thus the unenumerated Ninth. 144 U.S. 323, 361 (1892).

[10] *See* Note, *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1208 (2015) (arguing that, after passing the 1866 Civil Rights Act, Congress "constitutionalized its power to define citizens' privileges and immunities in the Fourteenth Amendment" to avoid future challenges to its power to pass such legislation).

a "brilliant" act of judicial deference in which the Court effectively left "to Congress the obligation to articulate privileges beyond those enumerated" before it would judicially protect any "rights to be enforced against the states."[11] Others, however, considering it the Court's role to "say what the law is,"[12] regret the lack of doctrinal development under the Privileges or Immunities Clause, which was left to judicial interpretation through Constitutional amendment. Seeking to unearth original constitutional meaning, libertarian and conservative scholars such as Randy Barnett and Kurt Lash continue to argue for judicially cognizable significances of the clause, the former proposing a somewhat broader scope of encompassed rights than the latter.[13] Especially since *Dobbs*, when the Court took a major step toward constraining substantive due process rights while overturning *Roe* through the semi-originalist framework of the *Glucksberg* "history and tradition" test,[14] more left-leaning scholars have also taken an interest in articulating the "plausible originalist case for grounding a . . . right to abortion in the . . . Privileges or Immunities Clause."[15] Interests across the ideological spectrum thus align, at least to the extent that there is a shared desire to reconsider Justice Miller's opinion, written more than 150 years ago.

On the Court, the debate over the Privileges or Immunities Clause in recent years has thus far been held between more conservative jurists, with one curious exception in Justice Stevens's majority opinion in *Saenz*, in which he recognized a right to travel across states on the basis of this clause.[16] Justice Thomas, who dissented in *Saenz*,[17] now

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[11] Lawrence Lessig, *The Brilliance in* Slaughterhouse: *A Judicially Restrained and Original Understanding of "Privileges or Immunities,"* 26 U. Pa. J. Const. L. 1, 13, 28 (2023).

[12] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[13] A recent intervention by Randy Barnett and Evan Bernick characterizes the clause as inclusive of some unenumerated rights. *See* Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 Notre Dame L. Rev. 499 (2019). *But see* Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 Notre Dame L. Rev. 591 (2019). Unlike Barnett and Bernick, Lash understands the clause as limited to enumeration. *Id.* at 591.

[14] Washington v. Glucksberg, 521 U.S. 702, 703 (1997). Randy Barnett and Lawrence Solum describe that, from an originalist's perspective, *Glucksberg*'s history and tradition test is one that "limits and contains" substantive due process, which is itself "a departure from original meaning," and may thus be viewed as "second-best originalism." Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 449–50 (2023).

[15] Aaron Tang, *After* Dobbs: *History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 Stan. L. Rev. 1091, 1150 (2023).

[16] Justice Stevens's holding positions itself as building on *Slaughter-House*, rather than overturning or otherwise subverting it. *See* Saenz v. Roe, 526 U.S. 489, 502–03 (1999).

[17] In his dissent, Justice Thomas expresses his disappointment that "the Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House*

stands at the fore of the effort to recognize rights under Privileges or Immunities, and his interest in the clause well precedes his time on the bench. Notably, while serving as the Chairman of the United States Equal Employment Opportunity Commission, he penned an article published in a 1989 issue of the *Harvard Journal of Law and Public Policy* proposing a reengagement with the clause that bears "unenumerated" protections inherent to "natural rights and higher law."[18] On the bench, he wrote his most extensive opinion on Privileges or Immunities in his *McDonald* concurrence. Justice Alito, writing for the majority in *McDonald*, rejected the Petitioners' request that the Court overturn *Slaughter-House* and find Second Amendment rights inherently incorporated through Privileges or Immunities,[19] instead opting to protect the right to keep and bear arms through the Fourteenth Amendment's Due Process Clause.[20] But Justice Thomas, in his fifty-three page concurrence, expressed his preference for the Petitioners' proposal to revive an articulation of rights under the Privileges or Immunities Clause, which, in his view, would "enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed."[21] Though more briefly, he restated this view in his *Dobbs* concurrence, proposing a reframed consideration of "whether any of the rights announced in this Court's substantive due process cases," including *Griswold*, *Lawrence*, and *Obergefell*, "are 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment."[22] In *Timbs*, Justice Gorsuch also expressed some degree of accord with Justice Thomas, citing the *McDonald* concurrence to support his view that "the appropriate vehicle for incorporation

Cases" but he dissents from Justice Stevens's opinion because "[u]nlike the majority, I would look to history to ascertain the original meaning of the Clause." *Id.* at 521, 522. Justice Thomas further argued that Justice Stevens's approach "raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights." *Id.* at 528.

[18] *See* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63 (1989).

[19] In arguing for the overturning of *Slaughter-House*, petitioners in *McDonald* asserted, among other points, that it "contradicts history" and is "illogical" and "anachronistic." *See* Brief for Petitioner at 42–65, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521).

[20] *McDonald*, 561 U.S. at 791.

[21] *Id.* at 812.

[22] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 333 (2022) (Thomas, J., concurring). *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the constitutional right to contraception); Lawrence v. Texas, 539 U.S. 588 (2003) (establishing constitutional protection from criminal prosecution for sexual activity between consenting adults of the same sex); Obergefell v. Hodges, 576 U.S. 644 (2015) (establishing the constitutional right to same-sex marriage).

may well be the Fourteenth Amendment's Privileges or Immunities Clause."[23]

Justices Alito and Scalia have taken a different view. In his majority opinion in *McDonald*, Justice Alito acknowledged the scholarly dispute over the soundness of Justice Miller's opinion,[24] but "decline[d] to disturb the *Slaughter-House* holding" because "[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment."[25] Justice Scalia, in his *McDonald* concurrence, noted his "acquiesce[nce]" to "substantive due process" despite issues with it "as an original matter," additionally noting his acceptance of "the Court's incorporation of certain guarantees in the Bill of Rights."[26] At oral argument, he presented his thoughts more explicitly, inquiring with Petitioners: "[W]hy are you asking us to overrule . . . 140 years of prior law . . . when you can reach your result under substantive due [process?]"[27] More recently, Justice Alito implicitly expressed a similar view in his *Dobbs* opinion, writing in a footnote that the right to an abortion is unprotected by the Fourteenth Amendment "regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause."[28] Justices Alito and Scalia effectively indicated that, in their views, to shift an inquiry into federally protected rights from substantive due process to Privileges or Immunities would be mere pedanticism, void of any pragmatic use.

In this Note, I argue that Justices Thomas, Gorsuch, and Stevens (insofar as he turned to this clause in *Saenz*), along with scholars from a range of ideological persuasions, are correct about the Privileges or Immunities Clause. For the Court to consider what rights it encompasses—and, if understood as an incorporation of the Bill of Rights, to consider whether this understanding includes those rights developed under the unenumerated Ninth Amendment—is anything but pedantic.[29] It is an open and unresolved question, ripe for direct

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23 Timbs v. Indiana, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring).

24 *McDonald*, 561 U.S. at 756–57.

25 *Id*. at 758.

26 *Id.* at 791. There is a great deal of literature on incorporation and the Privileges or Immunities Clause that has been generally construed in scholarship as "a reference (at a minimum) to constitutionally enumerated rights." Ilan Wurman, *Reversing Incorporation*, 99 Notre Dame L. Rev. 265, 267 (2023). For a recent reconsideration of the Fourteenth Amendment and the history of the Supreme Court's process of incorporation, see Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 BYU L. Rev. 1, 7–19 (2022).

27 Transcript of Oral Argument at 6–7, *McDonald*, 561 U.S. 742 (No. 08-1521).

28 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 n.22 (2022).

29 The Ninth Amendment of the Constitution reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

judicial deliberation, the outcome of which is highly uncertain. There are, as I will demonstrate, strong historical bases for both expansive and evolutionary as well as limited and fixed understandings of the rights protected under Privileges or Immunities. I do not take a position on which view is correct. Rather, I seek to demonstrate that there are fertile grounds for litigating and adjudicating this clause and for thus actualizing a legally binding understanding of the rights it provides. I do so by adopting the *longue durée* approach to historical analysis developed by the Annales School,[30] in which one may better understand a phenomenon—in this case, an elusive concept that came to be built into the Constitution—by considering its state and function over time.[31] Here this method effectively translates into a historical survey. Privileges and immunities has not previously been presented as one continuously developing concept that stretches from the beginnings of English settlement on the eastern coasts of the New World through Reconstruction. I provide this overview to achieve a fuller understanding of the genealogies and, thus, the potential meaning of the Fourteenth Amendment's Privileges or Immunities Clause.

To this end, the Note proceeds in three parts. In the first, I present the evolutionary history of privileges and immunities from 1578—when Queen Elizabeth granted letters patent to Sir Humphrey Gilbert—to 1787, when the Constitution, and thus Article Four's Privileges and Immunities Clause, was drafted and signed. In the second Part, I feature the antebellum contentions over privileges and immunities rights tied to slaveholding—to which I propose that Justice Bushrod Washington's *Corfield* opinion also belongs—and the potential influence of these debates on the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. In the third Part, I highlight a selection of issues that litigators might raise, and that judges might draw from, standing on the distinctively framed historical foundations presented in Parts I and II.

Before turning to the survey in Parts I and II, however, a brief note is needed on the variations of phrasing that this history will treat as direct sources for the concept of privileges and immunities. Readers may rightfully wonder whether earlier variations of wording, such as "all realties previledges powers prehemynences & authorities" granted to Sir Walter Raleigh,[32] are truly direct predecessors to the concept

U.S. CONST. amend. IX. If the Ninth Amendment were incorporated through the Privileges or Immunities Clause, it would imply an unenumerated and potentially expandible set of rights.

30 IAN BUCHANAN, A DICTIONARY OF CRITICAL THEORY 297 (2010).

31 *See* Fernand Braudel, *Histoire et Sciences sociales: La longue durée* [*History and the Social Sciences: The Long Duration*], 13 ANNALES 725, 727 (1958), translated in 32 REV. (FERNAND BRAUDEL CTR.) 171, 174 (Immanuel Wallerstein trans., 2009).

32 1 THE ROANOKE VOYAGES, 1584–1590: DOCUMENTS TO ILLUSTRATE THE ENGLISH VOYAGES TO NORTH AMERICA UNDER THE PATENT GRANTED TO WALTER RALEIGH IN 1584,

of privileges and immunities that was constitutionalized through this phrase in Article Four and the Fourteenth Amendment. In anticipation, I flag here a key turning point in this history to which this survey will return in its proper, chronological place: the First Continental Congress of 1774, which asserted that "all . . . immunities and privileges" were granted by the Crown to "our ancestors, who first settled these colonies," and proceeded to feature a history of "immunities and privileges" that closely parallels the one I lay out here.[33] At least by the late eighteenth century, and at the time of the American Founding, the varied phrases in this history were claimed as direct sources for the consolidated phrasing of privileges and immunities.

Moreover, and relatedly, readers might object to the idea that the evolving meaning of a constitutional provision is evidence that the drafters of that provision would have understood it to be inherently evolutionary. Indeed, the former does not necessarily prove the latter. I do not purport to resolve whether the Fourteenth Amendment's Privileges or Immunities Clause (or its Article Four predecessor, the Privileges and Immunities Clause) intentionally absorbed an inherently evolutionary disposition: Indeed, in Part III, I explore some of the historical data points that could support, and others that could weaken, arguments that the drafters intended to write fundamentally fixed or fundamentally changing rights into the Constitution. Nevertheless, the possibility that the phrase's evolutionary quality was knowingly constitutionalized is borne out by evidence drawn from the First Continental Congress, which consciously cites rights that evolved over time alongside historically specific preoccupations as the "immunities and privileges" they sought to assert in yet another set of newly emerging circumstances.[34] At least at the threshold of the Constitution's drafting and ratification, then, the intellectual leaders of the revolution and the new nation understood and utilized this phrase as an adaptable one.

I
A Brief History of the Evolving Rights Under Privileges and Immunities in Early America

The phrase privileges and immunities (and its variations) has been an integral part of American history from the earliest moments of its formation. Indeed, one can trace critical stages of this country's

at 128 (David Beers Quinn ed., 2010) [hereinafter 1 The Roanoke Voyages] (emphasis in original removed).

[33] *See* 1 Journals of the Continental Congress 1774–1789, at 68–69 (Worthington Chauncey Ford ed., 1904).

[34] *See id*.

trajectory alongside the development and assertion of rights protected by this phrase, from the right to explore and settle the New World to individual rights protected by the colonies, and from rights asserted against the British Crown to rights among the citizens of newly formed states to travel between and trade freely with other states in the fledgling American union. As Daniel Hulsebosch observed, "liberties, privileges, and rights were empty vessels into which people poured innumerable and changing hopes and interests."[35] As these hopes and interests changed, so did the rights that privileges and immunities came to protect. Here, I briefly address the specifically asserted rights that were developed under this phrase during each of these critical stages in colonial and eighteenth-century American history. I do not mean to overstate the role played by this dynamic legal concept by featuring its presence among significant moments in the twists and turns of these historical periods. Rather, I intend to show its elasticity in generating rights that suited the most pressing concerns of a series of eras, each accompanied by newfound preoccupations that called for previously unspecified protections under the broad and flexible umbrella that this phrase granted to those seeking protective refuge or assertive abilities.

A. Early Patents and Charters: Privileges and Immunities as Rights to Colonial Development in the New World in Affiliation with the Crown

Privileges and immunities began to take root on American soil alongside and as a result of the English attempt to establish their presence upon it. In contrast to Spain, which was swift and successful in its overseas expansion to the New World, England moved at a relatively slow pace.[36] Both countries initiated expeditions in the 1490s—Spain sending Christopher Columbus of Genoa and England sending John Cabot of Venice—but England "did nothing to develop its claim to North America" for "no less than fifty years" after Cabot's first contact with Newfoundland, Labrador, and Nova Scotia in 1497–98.[37] In the latter portion of the sixteenth century, while seeking economic development and fostering an emerging enmity toward the Spanish, the English began to take more aggressive steps under Queen Elizabeth's rule.[38]

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[35] Daniel J. Hulsebosch, *English Liberties Outside England: Floors, Doors, Windows, and Ceilings in Legal Architecture of Empire*, *in* The Oxford Handbook of English Law and Literature, 1500–1700, at 752 (Lorna Hutson ed., 2017).

[36] *See* Bernard Bailyn, David Brion Davis, David Herbert Donald, John L. Thomas, Robert H. Wiebe & Gordon S. Wood, The Great Republic: A History of the American People 18 (1977).

[37] *Id.*

[38] *Id.* at 20.

The first English attempt to develop colonies in the Western Hemisphere was in 1578, when Queen Elizabeth granted Sir Humphrey Gilbert "free libertie and licence from time to time, and at all times for ever hereafter, to discover, finde, search out, and view such remote, heathen and barbarous lands, countreys and territories."[39] The letters patent to Gilbert included an expectation that he would proceed "according to the order of the laws of England," and only required that Gilbert pay "fift part of all the oare of gold and silver, that from time to time, and at all times after such discoverie, subduing and possessing shall be there gotten."[40] Seeing the Spaniards' gold production in the Andes, which reached its peak in the mid-sixteenth century, and observing the Spaniards' developments of successful silver mining during these same years,[41] England expected that Gilbert, too, would produce precious metals upon reaching *some* part of the coast of the New World—though "it cannot be discerned what part of the American coast he was aiming at," Phillip Edwards observed, as his undertaking was such a "fiasco."[42] Because Gilbert's attempts were sufficiently unsuccessful, culminating in his death near the Azores,[43] the English retained the belief that precious metals awaited them on the eastern coast of the lands across the Atlantic.

In 1584, shortly after Gilbert's death, Queen Elizabeth transferred his patent to his half-brother, Sir Walter Raleigh.[44] Significant portions of the letters patent to Raleigh included language that was identical to that found

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[39] 1 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 49 (Francis Newton Thorpe ed., 1909) [hereinafter Federal and State Constitutions].

[40] *Id*. at 50.

[41] *See* Lyle N. McAlister, Spain & Portugal in the New World, 1492–1700, at 227 (1984) (describing the peak years of gold production in the region to be between 1541 and 1560, with silver mining production during the same period being "substantial" as well).

[42] Philip Edwards, *Edward Hayes Explains Away Sir Humphrey Gilbert*, 6 Renaissance Stud. 270, 271 (1992).

[43] Edward Hayes, who joined Gilbert in his voyages, wrote an account of Gilbert's failed attempts to establish a settlement in the New World, first printed by Richard Hakluyt in 1583. As far as Renaissance travel narratives are concerned, which blend fact and fiction and engage in varying degrees of mythologizing, Hayes's account was far from a full-throated celebration of Gilbert's undertakings. On truth and myth in Renaissance travel narratives, see Matthew Collins, *Dante in the Age of Exploration: Meetings of Fact, Fiction, and Cartography*, *in* The Early Printed Illustrations of Dante's Commedia (2024). Philip Edwards proposes that this narrative served "Hakluyt's need for an account of Gilbert's voyage," providing "the opportunity of disqualifying Gilbert" as he sought to maintain enthusiastic British support for colonial missions to the New World. Edwards, *supra* note 42, at 286. For a recent study of Gilbert, see generally Nathan J. Probasco, Sir Humphrey Gilbert and the Elizabethan Expedition: Preparing for a Voyage (2020).

[44] Bailyn et al., *supra* note 36, at 23.

in the grant to Gilbert: Raleigh too was given "free libertie and licence from time to time, and at all times for ever hereafter, to discover, finde, search out, and view such remote, heathen and barbarous lands, countreys, and territories," and he was again expected to provide a fifth part "of all the oare of gold and silver."[45] Alongside this grant, the English House of Commons passed an "acte for the confermacion of the Quenes maiesties Lettres Patentes graunted to Walter Ralegh" on December 14, 1584.[46] Though "free libertie and licence"[47] is the language that comes closest to approximating privileges and immunities in the patents to Gilbert and Raleigh, the English legislature recognized that the Queen's letters contained "grauntes Liberties priviledges & other thinges," permitting him to "[h]aue holde & enjoye the saide Land so discouerd with all realties previledges powers prehemynences & authorities menconed."[48] One can therefore infer that the rights provided by the Queen to both Gilbert and Raleigh were, effectively, privileges and immunities.

Raleigh was only somewhat more successful than his half-brother upon receiving his grant. In 1585, under his direction, a first group of voyagers arrived on Roanoke Island, only to return to England the next year with Francis Drake, low on food and in bad relations with the tribes they encountered.[49] In 1586, a second group arrived and was slaughtered by Native Americans, and in 1587 a third wave landed;[50] this group would become the infamous curiosity known as the lost colony of Roanoke.[51] As it was for Gilbert, the English provision of privileges and immunities to Raleigh was ultimately fruitless.

Several decades later, in 1606, King James granted a charter to the Virginia Company of London "to deduce a colony of sundry of our People into that part of *America* commonly called Virginia, and other parts and Territories in *America*," to be "called the *first Colony*."[52] Within the charter, James declared that "all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions . . . ."[53] The chartered Virginia Company, which was centered in Jamestown, suffered

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45 1 Federal and State Constitutions, *supra* note 39, at 53–54.

46 1 The Roanoke Voyages, *supra* note 32, at 126 (emphasis in original omitted).

47 1 Federal and State Constitutions, *supra* note 39, at 53.

48 1 The Roanoke Voyages, *supra* note 32, at 128 (emphasis in original omitted).

49 Bailyn et al., *supra* note 36, at 23.

50 *Id.*

51 A recent popular press book demonstrates the continued fascination with Roanoke. *See* Andrew Lawler, The Secret Token: Myth, Obsession, and the Search for the Lost Colony of Roanoke (2018).

52 7 Federal and State Constitutions, *supra* note 39, at 3783–84 (emphasis in original).

53 *Id*. at 3788.

"many disappointments,"[54] and dissolved in 1624, but nevertheless enjoyed far greater success than its forerunners, representing the start of more permanent English settlement in the New World. Grants from the Crown for further colonial settlements soon followed in the wake of the Virginia Company, perennially including phrasing from which privileges and immunities took form. For example, the 1620 Charter of New England granted "divers Liberties, Priveliges, Enlargements, and Immunityes,"[55] the 1639 Grant of the Province of Maine included "Rights Jurisdiccons Priviledges Prerogatives Royalties Liberties Immunityes Franchises Preheminences and Hereditaments,"[56] and the 1632 Charter of Maryland provided "ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights . . . ."[57] Similar phrasing was used in charters as late as 1732, as "all liberties, franchises and immunities" were provided for settlement in Georgia.[58]

A common characteristic of the rights tied to privileges and immunities in its American legal lineage is that they are left unspecified, and these early instances are no exception. Often, one must infer through context what specific rights are invoked via deployments of the phrase. In David Bogen's analysis, variations on this phrasing through these charters centrally "involved surrender rather than exercise of royal power," and they represented a promise "that the Crown would not use its prerogative powers in the colonies to deprive subjects of life, liberty, or property in ways impermissible in England."[59] In other words, slightly reframed, during the earliest English engagements with the New World, privileges and immunities assured the crown's support for the successful development of colonies in America. The privileges and immunities granted to colonial undertakings played a role in creating a landscape of legal rights that enabled the gradual flourishing of English colonies on the new continent.

B. Laws of the Colonies: Privileges and Immunities as Individual Rights and as Assurances of Governmental Stability and Protection

As the English colonial settlements took hold in America, privileges and immunities as implied support from the Crown for

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54 Wesley Frank Craven, The Virginia Company of London, 1606–1624, at 1 (1957).

55 3 Federal and State Constitutions, *supra* note 39, at 1828.

56 *Id.* at 1627.

57 *Id.* at 1679.

58 2 Federal and State Constitutions, *supra* note 39, at 773.

59 David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 Case W. Rsrv. L. Rev. 794, 803 (1987).

initiating endeavors in the New World became less centrally pressing. The development of colonial governance, though, led to considerations of individual rights for those governed in the colonies, and these, too, were framed as protections under privileges and immunities. Given the English legal tradition of such rights, rooted in the Magna Carta,[60] this emerging dimension of privileges and immunities is unsurprising. It did not, however, emerge overnight. The first set of colonial laws was written in 1611 for the Virginia Company's colony in Jamestown, entitled *Lawes Divine, Politique, and Martiall*.[61] They were, as Edmund Morgan succinctly summarized through quip, "mostly martial,"[62] best analogized to rules for "a military expedition."[63] Not once does the word *privilege* or the word *immunity* appear in the Jamestown laws, and neither does the word *right* in the sense of legal entitlement. The laws in other colonies largely took a different direction than those of the Virginia Company. For example, in 1639, an Act for the Liberties of the People was proposed by the settlers of Maryland,[64] deemed by Bernard Schwartz "the first American Bill of Rights."[65] The Act sought to grant "all the Inhabitants of this Province being Christians [Slaves excepted]" the enjoyment of "all such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England . . . ."[66] Drawing from the Magna Carta, the Act specified that Maryland's inhabitants would not be "imprisoned nor disseissed or dispossessed of their freehold goods," nor "[e]xiled or otherwise destroyed fore judged or punished then according to the Laws of this province . . . ."[67] This 1639 Act was never passed,[68] but in

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60 The Magna Carta includes fundamental rights, such as due process of law, freedom from arbitrary imprisonment, and trial by a jury of peers. Akin in some ways to evolutions of privileges and immunities, "[e]ach generation has reinterpreted Magna Carta in light of intellectual currents of its own time . . . ." RALPH V. TURNER, MAGNA CARTA: THROUGH THE AGES 6 (2003).

61 *See* WILLIAM STRACHEY, FOR THE COLONY IN VIRGINEA BRITTANNIA: LAWES DIVINE, MORALL AND MARTIALL, at ix (David H. Flaherty ed., 1969).

62 Edmund S. Morgan, *The Labor Problem at Jamestown, 1607–18*, 76 AM. HIST. REV. 595, 607 (1971).

63 *Id.* at 608–09.

64 *See* Charles A. Rees, *The First American Bill of Rights: Was It Maryland's 1639 Act for the Liberties of the People?*, 31 U. BALT. L. REV. 41, 42, 57–61 (2001) (describing the Act and whether it was merely proposed or enacted, ultimately concluding that it was never enacted).

65 BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 33 (1977). Charles Rees takes issue with Schwartz's claim but leaves the honor to Maryland via another 1639 statute in the state. *See* Rees, *supra* note 64, at 61–66.

66 1 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 41 (William Hand Browne ed., 1883).

67 *Id.*

68 *See* Rees, *supra* note 64, at 57–61. On this point, however, there is some scholarly disagreement: Bernard Schwartz descibes the 1639 Act as having been "approved" by the

that same year a general Bill for the Government of the Province of Maryland was successfully enacted as law, drawing from the language of the Act and referencing the same legal source, stating: "The Inhabitants of the Province shall have all their rights and liberties according to the great Charter of England."[69]

Other colonies followed in Maryland's wake, passing proto bills of rights that contained individual protections existing under the umbrella of privileges and immunities. A noteworthy example in the latter portion of the seventeenth century was the New York Assembly's 1683 "provincial statute masquerading as a great royal charter."[70] Entitled the "Charter of Liberties and Privileges," it too drew from the Magna Carta's tradition of protecting individual rights while also fleshing out those protections in far greater detail than Maryland's legislation; it also bears a structure that is increasingly familiar to one looking backward through the lens of state and federal American Constitutions.[71] Sections one through twelve of the charter largely concern the workings of government, from the designation or determination of executive and legislative authority to practicalities of legislating, including the "Times of meeting dureing [the Representatives'] sessions."[72] Section thirteen then shifts to individual rights, using the familiar phrasing that "[n]oe freeman shall be taken and imprisoned or be disseized of his ffrehold or Libertye or ffree Customes or be outlawed or Exiled or any other wayes destroyed nor shall be passed upon adjudged or condemned But by . . . the Law . . . ."[73] The New York Charter then proceeds to detail additional rights, including those of protection from taxation without consent in section fourteen, trial by jury in section seventeen, indictment and trial in criminal cases in section eighteen, bail in section nineteen, and toleration for "any Difference in opinion or Matter of Religious Concernment," at least among those who "professe ffaith

General Assembly and, without arriving at a firm conclusion on the matter, appears to assume it was enacted. *See* SCHWARTZ, *supra* note 65, at 33.

69 *Id*. at 83.

70 Hulsebosch, *supra* note 34, at 765.

71 Even the preamble of the New York Charter of Liberties and Privileges "is quite similar, at least, in spirit, to the preamble to our Constitutions," as Charles Lincoln observed. 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK FROM THE BEGINNING OF THE COLONIAL PERIOD TO THE YEAR 1905, SHOWING THE ORIGIN, DEVELOPMENT, AND JUDICIAL CONSTRUCTION OF THE CONSTITUTION 95 (1906). The New York preamble established its purpose as assuring that "Justice and Right may be Equally done to all persons" while the United States Constitution represents that its purpose is to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . . . ." *Compare id.*, *with* U.S. CONST. pmbl.

72 LINCOLN, *supra* note 71, at 95–100.

73 *Id.* at 100.

in God by Jesus Christ," in section twenty-seven.[74] Laws concerning property, including inheritances and dowries, occupy sections twenty-one through twenty-six.[75]

Given that the title of the 1683 charter represents a terminological predecessor to privileges and immunities, one could argue that under this iteration of the phrasing, the reach of rights exceeded the enumerated individual protections articulated as rights under this umbrella. Here, the structures and operations of government, as assurances of stability to the colony's inhabitants, were also considered privileges and immunities of sorts. This implication underlying the title of the New York Charter is in good keeping with common sense: Without well-defined and properly operating powers, guarantees of individual liberties provide little meaningful certainty.[76]

C. New Rights and Asserted Protections in the Colonies: Privileges and Immunities as Impositions on the English and as Foundations for Revolution

As preoccupations in the colonies shifted, assertions of new rights under privileges and immunities likewise evolved beyond individual protections rooted in the Magna Carta. One noteworthy example of a "wilful appropriation[]" of the phrase in the British colonies took shape in Jamaica,[77] where "benefits, privileges, advantages and immunities" were promised in 1655 to those who would inhabit the island being wrested from the Spanish, just as they would be enjoyed by "any of the Natives or People of England born in England . . . ."[78] Within years, however, tensions developed between the Jamaican Assembly and the King's Privy Council across the Atlantic, as the Crown understood the liberties and privileges bestowed upon those moving to the Caribbean island as mere grants, while those in the colony—like those in other colonies in the New World under the English—understood them as

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74 *Id.* at 100–02, 105.

75 *Id.* at 103–05.

76 Hamilton also recognizes this point in the first paper in *The Federalist*, noting that "the vigour of government is essential to the security of liberty . . . ." THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Terrence Ball ed., 2003). One finds an intellectual predecessor in Montesquieu, who observed that political liberty "consists in security." MONTESQUIEU, THE SPIRIT OF LAWS 183 (Thomas Nugent trans., Colonial Press rev. ed. 1900).

77 Hulsebosch, *supra* note 34, at 765–70. Like other British colonies in the New World, including portions of Canada, Jamaica did not join the thirteen American colonies in their rebellion against the crown, but these legal dynamics between the British and their Jamaican colony represent a broader trend of which the thirteen colonies of the forthcoming American union were also a part.

78 *Id.* at 765–66 (referencing Oliver Cromwell's promise in 1655 to those intending to move to Jamaica).

rights.[79] Hence, the Jamaican Assembly struggled for decades with the Council until they successfully claimed domestic English liberties and privileges through which they could independently form flexible protections for themselves.[80] But rights under the umbrella of privileges and immunities were not only won on the Caribbean island: They evolved into protections that were successfully imposed back upon the English, even on their own soil. In particular, when waves of English citizens, sufficiently enriched through Jamaican plantations, began to return to England, they sought to bring enslaved people back with them. The courts, regardless of their complicated view on the legality of slavery in the country at the time,[81] recognized these returning planters' rights to slaveholding because "the colonies had English law . . . so whatever was law there had to be considered consistent with English law," and hence, "slave property was protected in England."[82]

By *Somerset's Case* in 1772, the British Empire had changed course, rejecting slaveholding as an evolved right under privileges and immunities that were developed in the colonies and imposed back upon England. Lord Mansfield declared in this case that James Somerset, enslaved and purchased in Jamaica by Charles Stewart and brought back by Stewart to England, "must be discharged" from enslavement, adding that "[t]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political," being "so odious[] that nothing can be suffered to support it, but positive law."[83] In addition to being an influential case on the trajectory of slavery in Anglo-American law, the holding also represented a shift of attitudes in which "an insulated and superior England" sought to claim tighter controls over its colonies and their asserted rights.[84]

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79 *See id.* at 768.

80 *See* Jack P. Greene, *Liberty and Slavery: The Transfer of British Liberty to the West Indies, 1627–1865*, *in* Exclusionary Empire: English Liberty Overseas, 1600–1900, at 56–57 (Jack P. Greene ed., 2010) (describing the process by which the Crown acquiesced to an acknowledgement that all English law applied in Jamaica).

81 The slave trade under the British Empire did not end until 1807, a year prior to its constitutionally pre-ordained end in America. Views on the acceptability of slavery on English soil evolved within the country, but by *Somerset's Case* of 1772, "English schoolboys had for a long time been taught . . . that their kingdom had too pure an air for a slave to breathe." Daniel J. Hulsebosch, Somerset's Case *at the Bar: Securing the "Pure Air" of English Jurisdiction Within the British Empire*, 13 Tex. Wesleyan L. Rev. 699, 699–700 (2007). Nevertheless, Lord Mansfield, who decided *Somerset's Case*, *see id.* at 699, later constrained the holding and declared that it went "no further than that the master cannot by force compel [an enslaved person] to go out of the kingdom." R v. Inhabitants of Thames Ditton (1785) 99 Eng. Rep. 891, 892 (KB).

82 Hulsebosch, *supra* note 35, at 769.

83 Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510 (KB).

84 Hulsebosch, *supra* note 35, at 770.

Such shifts in the British attitude toward its colonies and the rights that were developing among them under privileges and immunities, however, came too late—at least as it concerns those colonies that would soon claim independence as a confederation of American states. Episodes from the final decades before the American Revolution—including canonically recounted moments from this period of history—demonstrate the extent to which "the colonists determined what English liberties meant,"[85] which proved to be a peril to continued British control. A salient example is the American colonial reaction to the British Stamp Act, which imposed taxes upon a wide variety of printed materials produced on stamp paper. The Act inspired intense ferment by "ordinary colonists" whose reactive activities "in the streets had astounded, dismayed, and frightened their social superiors."[86] It also produced a more legally articulated reaction from the Virginia House of Burgesses, which rejected the Act while citing the history of privileges and immunities since the English landed in its territory: "[T]he first adventurers and settlers of . . . [the] dominion brought with them, and transmitted to their posterity, and all other his Majesty's subjects since inhabiting . . . all the privileges, franchises, and immunities that have at any time been held, enjoyed, and possessed by the people of *Great Britain*."[87] As a "taxation" from England that those living in the country "themselves" were not "affected by," and as "taxes and impositions upon the inhabitants of this colony" that the Virginians declared permissible only if levied by their own General Assembly, they asserted under claimed "privileges, liberties, and immunities" that the crown had violated their rights.[88]

The Virginia House of Burgesses's reaction to the Stamp Act foreshadowed further collective colonial efforts to proclaim rights against English impositions. During the First Continental Congress of 1774, a Declaration and Resolves was issued,[89] asserting protections that included individual rights rooted in entitlements to "life, liberty, & property."[90] It further emphasized that "our ancestors, who first

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85 *Id.*

86 Gary B. Nash, The Unknown American Revolution: The Unruly Birth of Democracy and the Struggle to Create America 59 (2005).

87 Journals of the House of Burgesses of Virginia, 1761–1765, at lxiv (John Pendleton Kennedy ed., 1907). The House of Burgesses mimicked phrasing from the earliest charters in their assertion of rights, including reference to the "adventurers" who went to Jamestown, the same word used in the 1606 charter to describe those who participated in the Virginia Company's settlement. *See* 7 Federal and State Constitutions, *supra* note 39, at 3783 (using the word "adventurers" to describe the colonists at Jamestown).

88 Journals of the House of Burgesses of Virginia, 1761–1765, *supra* note 87, at lxiv–lxv.

89 *See* Bogen, *supra* note 59, at 808.

90 1 Journals of the Continental Congress 1774–1789, *supra* note 33, at 67.

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," and these protections included "a right in the people to participate in their legislative counsel" and "free and exclusive power of legislation in their several provincial legislatures . . . in all cases of taxation and internal policy . . . ."[91] It is hardly clear that the privileges and immunities granted by the Crown to the colonists' ancestors included protections such as taxation contingent on representation—something that towns in England as large as Manchester and Birmingham lacked around the time this complaint was levied, as Soame Jenyns, a member of the English Parliament,[92] was keen to emphasize.[93] Nevertheless, such an evolved right was available as an assertion in the view of these colonists, assembled on the cusp of revolution. Moreover, the Declaration and Resolves added that "his majesty's colonies" were not only "entitled to all the immunities and privileges granted & confirmed to them by royal charters," but also to those rights developed and "secured" by "their several codes of provincial laws."[94] Thus, all of the protections that had evolved over two centuries under this phrase came to serve, alongside natural "unalienable Rights," as part of the legal case against English rule and thus as the basis for revolution. Suffering the violations of their rights under "a long train of abuses and usurpations," including those enumerated in the Declaration of Independence, the Americans initiated their move toward self-governance.[95]

D. Rights Between the States: Privileges and Immunities to Encourage Trade and Discourage Disunion

American independence was accompanied by tremendous uncertainty in international and interstate relations, further exacerbated by financial instability and the burden of severe war debt. On the international front, diplomatic strategies were driven in noteworthy part by the sense that self-sustenance as a new nation was critically dependent on foreign trade and credit: It was no coincidence that, around the same time the Continental Congress prepared to declare independence, it also approved John Adams and Benjamin Franklin's

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91 *Id.* at 68.
92 James H. Potts, Our Thrones and Crowns 501 (1887).
93 *See* 2 The Works of Soame Jenyns 192 (Charles Nalson Cole ed., 1790).
94 1 Journals of the Continental Congress 1774–1789, *supra* note 33, at 69.
95 The Declaration of Independence para. 2 (U.S. 1776).

Model Commercial Treaty that would foster crucial relations abroad.[96] The existential importance of foreign economies extended to reliance on the British, as evidenced by the 1783 Treaty of Peace in which continued lines of credit were secured through promises to repay pre-war debt, whereas real property that had been confiscated from the British during the war would not necessarily be returned.[97]

In the early days of the new nation, relations between newfound states were themselves cast, at times, as international in nature in the sense that they were understood as thoroughly distinct governing bodies. Such an understanding is embodied in the phrasing within the Articles of Confederation, the country's first constitution that was ratified in 1781, which referred to the conglomeration of states as "a firm league of friendship."[98] A sense of urgency concerning international trade relations for the success of the country was thus also reflected in endeavors to establish diplomacy between the states who had developed, in the words of James Madison, "a constant tendency . . . to infringe the rights and interests of each other . . . ."[99]

In the Articles of Confederation, privileges and immunities thus centrally represented a solution to what John Fiske referred to as a "commercial war" that states waged "upon one another."[100] This phrase was intended to resolve tensions between states in a manner reminiscent of its deployment between rival nations. For example, in a treaty of

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96 *See* Daniel J. Hulsebosch, *Confiscation Nation: Settler Postcolonialism and the Property Paradox*, 33 YALE J.L. & HUMANS. 227, 234 (2022) (describing how the Model Commercial Treaty was meant to foster trade relations by disrupting the English monopoly on trade with the colonies).

97 *See id.* at 235. As to real property, confiscated during the war, Article Six of the Treaty only assured that "there shall be no *future* confiscations made . . . ." Definitive Articles of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., art. VI, Sept. 3, 1783, 8 Stat. 80 (emphasis added). On the seizure of British property during the revolution as a means to incite colonists' fuller commitment to the cause, see HOWARD PASHMAN, BUILDING A REVOLUTIONARY STATE: THE LEGAL TRANSFORMATION OF NEW YORK, 1776–1783, at 60–85 (2018).

98 ARTICLES OF CONFEDERATION OF 1781, art. III.

99 2 THE PAPERS OF JAMES MADISON 822 (Henry D. Gilpin ed., 1842). Disputes and infringements between the states included claims to territory and rights to water navigation. Gordon Wood suggests that the resolution of one such dispute between Virginia and Maryland over access to the Chesapeake Bay and Potomac River, resolved in 1785 beyond the walls of Congress, set in motion the 1786 Annapolis Convention that in turn led to the Constitutional Convention in Philadelphia. *See* GORDON S. WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 62 (2021).

100 JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783–1789, at 144–45 (1888). During the Constitutional Convention, Governor Randolph used similar language regarding state relations: "Are we not on the eve of war, which is only prevented by the hopes from this convention[?]" DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 925 (Charles C. Tansill ed., 1927) (providing James McHenry's report of Governor Randolph's opening speech at the convention).

1642 between the British and Portuguese, it was agreed that "English merchants and other subjects of the King of Great Britian shall enjoy the same, and as great privileges and immunities . . . as have been, or shall be for the future granted to any Prince or people in alliance with the King of Portugal."[101] In this same spirit, the Fourth Article granted "the free inhabitants of each" state entitlement "to all privileges and immunities of free citizens in the several States" and ensured that "the people of each state . . . shall enjoy . . . all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . ."[102] Privileges and immunities thus took on a different dimension in the face of these new challenges. In this context, the phrase included assurance of free relations, in trade and otherwise, between the citizens of the different states.

The Constitution, seeking to establish "a more perfect Union" than the Articles of Confederation provided, uses the same phrase in a similar context of interstate relations.[103] However, the Privileges and Immunities Clause in the Articles of Confederation is far more specific than it is in the Constitution.[104] In the Articles, the privileges and immunities provision was accompanied by an explanation of its purpose—"to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union"—while the Constitution's is not.[105] The provision in the Articles specified the right to travel—"the people of each state shall have free ingress and regress to and from any other state"—while, again, the Constitution's does not.[106] And unlike the Constitution, the Articles applied privileges and immunities to the specific context of trade. Drawing from a clause of 148 words in the Articles of Confederation, the Constitution leaves only

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101 2 A Collection of Treaties Between Great Britain and Other Powers 265 (George Chalmers ed., 1790).

102 Articles of Confederation of 1781, art. IV, para. 1.

103 U.S. Const. pmbl., art. IV, § 2.

104 Prior to the interventions of the Committee on Style, the Constitution's Privileges and Immunities Clause was likewise far sparser. Originally, there was some debate over express reference to the treatment of enslaved people as property for comity purposes, but the issue was separately resolved by the Fugitive Slave Clause. *See* 2 The Records of the Federal Convention of 1787, at 443 (Max Farrand ed., 1911). By the time the Clause reached the Committee on Style, it was quite similar to its current wording. The only change made by the Committee was a preposition: Prior to this intervention, the text read: "The citizens of each State shall be entitled to all privileges and immunities of citizens *of* the several states." *Id*. at 577 (emphasis added). Evidently, the Committee changed *of* to *in*. Here, I am following Bogen's work, which I believe catches and resolves a discrepancy in Farrand's account. *See* Bogen, *supra* note 59, at 838 n.108.

105 Articles of Confederation of 1781, art. IV, para. 1.

106 *Id.*

nineteen: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[107]

There can be little doubt that a similar comity concern informed the orientation of the phrase as it appears in Article Four of the Constitution. This much is clear from the text and context of the clause, as well as its drafting history. The text is expressly focused on relations between the states' citizens, and it appears in the context of Article Four, which details the relations between the states. Moreover, in defense of the clause, Charles Pinckney indicated that it was "formed exactly upon the principles" of its predecessor.[108] As compared to the clause in the Articles, however, this pared-down phrasing of the Privileges and Immunities Clause "invited liberality of interpretation."[109] Further, in Alexander Hamilton's view, this clause as it appears in Article Four is "so fundamental a provision" that it "may be esteemed the basis of the union."[110] As Stewart Jay proposes, such a strong statement by Hamilton hardly pairs with Bushrod Washington's view in *Corfield* that these rights are limited to those that are "fundamental."[111] Rather, Hamilton seemed to indicate that "*all* privileges and immunities" assured state citizens' equal access to the rights provided by another state.[112] As to what those rights might be, however, the text supplies no further direction. By removing the guardrails of specifying language that appeared in the Articles of Confederation, the fourth article of the Constitution opened the door to a potentially more expansive understanding of constitutionally protected rights under the Privileges and Immunities Clause.

II

Further Evolutions from the Fourth Article to the Fourteenth Amendment in Antebellum America

Prior to deliberations over the Reconstruction Amendments, including those concerning the Privileges or Immunities Clause of the Fourteenth Amendment, the meaning of privileges and

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107 U.S. Const. art. IV, § 2.

108 1 American Eloquence: A Collection of Speeches and Addresses, by the Most Eminent Orators of America 364–65 (Frank Moore ed., 1858).

109 Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship under Article IV*, 45 Loy. U. Chi. L.J. 1, 18 (2013).

110 The Federalist No. 80, at 388, 389 (Alexander Hamilton) (Terrence Ball ed., 2003).

111 *See* Jay, *supra* note 109, at 3–4 (contrasting Hamilton's expansive interpretation of the clause with Washington's assertion that it only protects "fundamental" rights); Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

112 As Jay also details, though, "the clause did not prevent states from treating nonresidents . . . differently from resident citizens" in certain respects, including "eligibility to vote and hold public office." Jay, *supra* note 109, at 8.

immunities—now as a Constitutional provision—continued along its trajectory of evolving significances that engaged with the most pressing concerns of the time. The phrase appeared prominently in two contexts in the early- to mid-nineteenth century, which were also major foci of the nation during this period: cessation treaties, as America acquired land and extended westward,[113] and slavery, as it struggled with the immorality of this system and with the rights (or lack thereof) to which Africans brought against their will to its soil—and their descendants born on it—had access. These two areas on which privileges and immunities were concentrated in the first half of the nineteenth century met in the Missouri Compromise, which shaped the still-controlling interpretation of the Privileges and Immunities Clause in *Corfield* that in turn shaped the Southern legal strategy for sustained racial inequality as embodied in *Dred Scott*. Justice Taney's opinion in *Dred Scott* further aggravated the tensions that led to the Civil War, a point well exemplified in the Lincoln-Douglas debate in which the future President Lincoln rejected *Dred Scott* as valid law and vowed to "overthrow" it.[114] Taney's holding, and the Civil War fought around that which it represented, was followed by deliberations over and the ratification of a second constitutional provision of privileges and immunities that provided a federal protection to all American citizens, regardless of race or national origin. Here, I trace in further detail each of these turns. This second Part, together with Part I, provides a fuller view of the historical meaning of the Privileges or Immunities Clause.

A. Slavery and the Missouri Compromise: Debating What Rights Are Protected by Privileges and Immunities and Who Enjoys Those Protections

Missouri was among the territories acquired through the Louisiana Purchase of 1803. Roughly a decade and a half later, the Missouri Territory was positioned to achieve statehood as "the second state carved out of the Louisiana Purchase."[115] An "enabling act" for this purpose was brought before Congress in 1819,[116] and a noteworthy portion of that population consisted of enslaved people: 10,000 individuals,

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[113] For example, in 1821, the inhabitants of the lands of Florida, newly acquired from Spain, were assured by treaty of "the enjoyment of all the privileges, rights, and immunities of the Citizens of the United States." Treaty with Spain (Feb. 22, 1819), *in* 20 NILES' WEEKLY REGISTER 39 (Hezekiah Niles ed., 1821).

[114] THE LINCOLN AND DOUGLAS DEBATES 10–11 (Archibald Lewis Bouton ed., 1905).

[115] Sean Wilentz, *Jeffersonian Democracy and the Origins of Political Antislavery in the United States: The Missouri Crisis Revisited*, 4 J. HIST. SOC'Y 375, 379 (2004).

[116] DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT 147 (2007).

constituting fifteen percent of the total populace.[117] It was largely assumed that Missouri would be admitted as a slaveholding state, given the practice of slavery on the lands included in the Louisiana Purchase, and given the sizable presence of enslaved people already laboring there.[118] James Tallmadge of New York, however, sparked a debate in the House on February 13, 1819 when he proposed that "the further introduction of slavery or involuntary servitude be prohibited . . . and that all children born within the said State, after admission thereof into the Union, shall be free at the age of twenty-five years."[119] According to Representative John Taylor of New York, Henry Clay, the Speaker of the House from Kentucky, responded to Tallmadge's proposal by asserting a right to slaveholding under the Privileges and Immunities Clause, a right he argued would "be violated by the condition proposed [by Tallmadge] in the Constitution of Missouri."[120] Taylor retorted that to "keep slaves—to make one portion of the population the property of another, hardly deserves to be called a privilege, since what is gained by the masters must be lost by the slaves."[121] A similar debate ensued in the Senate over the admission of Missouri, as Senator James Wilson of New Jersey conveyed his state legislature's view that "to admit the Territory of Missouri as a State into the Union, without prohibiting slavery there, would . . . be no less than to sanction this great political and moral evil."[122]

The scope and extensibility of rights under privileges and immunities thus became a central issue of debate as pro-slavery advocates, such as Clay, asserted slaveholding as a protected right while those from the north, such as Fuller, argued for a narrower construction of the constitutionalized phrase. Moreover, this debate over the meaning of privileges and immunities was not limited to the halls of Congress. For example, in December 1819, a group of Bostonians led by Daniel Webster—then in between stints in the House of Representatives—prepared their own remarks on the Missouri question, which included their gloss on the clause in Article Four. They opposed the view that it "gives to the citizens of each State all the privileges and immunities of the citizens of every other State," claiming that this interpretation would culminate in an "absurdity" in which a "single State, by the admission of

117 Wilentz, *supra* note 115, at 379.

118 *Id.*

119 33 Annals of Cong. 1170 (1819).

120 *Id.* at 1182. Other pro-slavery representatives, including the later Speaker of the House Philip Pendleton Barbour, also argued for slaveholding as a right under the Privileges and Immunities Clause. *Id.* at 1186.

121 *Id.* at 1182.

122 35 Annals of Cong. 235 (1820).

the right of its citizens to hold Slaves" could "communicate that same right to the citizens of all the other States."[123] For Webster and many others who aligned with him, within the halls of Congress and beyond it, this was no matter of mere technical legal analysis: The wrong outcome, a "false step," would aid in "the progress of [the] great evil" that was slavery.[124] In 1820, a compromise between deeply held views and deeply entrenched interests was reached in Congress in which Missouri would be admitted as a slaveholding state alongside the free state of Maine and slavery would be prohibited in other Louisiana territories north of the 36°30′ parallel. However, the disputes resolved through the Missouri Compromise continued to reverberate. Speeches within and beyond Congress around slaveholding, including the disagreements over the relevance of the Privileges and Immunities Clause, were printed and reprinted until the Civil War began.[125]

Slavery did not only create newfound interpretative fissures concerning the meaning of privileges and immunities in early nineteenth century America, it also created targeted uncertainty over who should have access to the rights this phrase provided. During the so-called second Missouri Compromise, "the focus of privileges and immunities disputes" shifted "from *what* to *who*."[126] Debate centered on a draft of the Missouri Constitution that would have obligated the state's general assembly to pass laws to "prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever."[127] Some recognized this explicit racial exclusion as a clear violation of comity principles under the Privileges and Immunities Clause, recalling the plain text of its predecessor in the Articles of Confederation that permitted "free ingress and regress to and from any other state."[128] Senator James Burrill of Rhode Island thus deemed it "entirely repugnant to the Constitution."[129] In debating the legality of Missouri's attempt to prohibit entrance into their state based on race, the same division arose between the northern and southern members of Congress, but with the opposite orientation as to the scope of privileges and immunities. The northerners argued for greater access to a narrower scope of rights, while pro-slavery members preferred to determine more

123 Daniel Webster et al., A Memorial to the Congress of the United States on the Subject of Restraining the Increase in New Slavery in the New States to be Admitted into the Union 16 (1819).

124 *Id.* at 3.

125 Lash, *supra* note 13, at 601.

126 Philip Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61, 83 (2011).

127 Mo. Const. art. III, § 26.

128 Articles of Confederation of 1781, art. IV.

129 37 Annals of Cong. 47 (1820).

stringently who had access to a broader scope of rights, importantly including that of slaveholding. Because the privileges and immunities of Article Four are granted only to the "citizens of each state," the question of who merited the status of state citizenship relatedly took on newfound importance.[130] Here, I focus on discourse and decision-making on the national level, but at the same time that Congressmen and those in similar spheres of federal influence in Antebellum America debated what was encompassed under privileges and immunities, in more local spheres free African Americans and abolitionist allies developed their own strategies for asserting rights.[131] Martha Jones, for example, has carefully documented such developments in Baltimore, where by "petitioning, litigating, and actions in the streets" they "won rights by acting like rights-bearing people."[132] This multifaceted intersection between the Privileges and Immunities Clause and slavery, as it emerged on the national level from the debates in the legislature around Missouri's admission to the Union, set the stage for two key decisions by the judiciary that further defined the contours of privileges and immunities in Antebellum America: *Corfield* and *Dred Scott*.

B. Determining the Scope of Privileges and Immunities in Corfield*: How Slavery Affected Restrictions on Gathering Oysters in New Jersey*

The debates leading to the first and second Missouri Compromises put new pressures on the meaning of privileges and immunities. In previous stages of its history, resistance to evolutions of significance came principally from England. As a spoil of victory, the genealogies of rights under privileges and immunities as developed in the colonies—up to and including the revolutionaries' use of the phrase—maintained their validity in the new nation. This time, however, the dispute was internal, and it focused on whether to shrink the scope and adaptive efficacy of the clause that Hamilton understood to provide "the basis for the union." Three years after the meaning of privileges and immunities was debated around the question of slavery in Missouri and beyond—a dispute that the aging Jefferson recognized as "a fire-bell in the night"

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130 Kate Masur, Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction 44 (2021).

131 As Masur recounts, "the Missouri conflict cast citizenship in a new light," but there were some antecedents in local pockets, such as Pennsylvania where "Quaker allies" worked with "Black Philadelphians" to assert their status as citizens. *Id.* at 45–46. The federal debate over Missouri also led "state governments" to take up "questions of state citizenship in new ways," as Masur traces. *Id.* at 55–60.

132 Martha S. Jones, Birthright Citizens: A History of Race and Rights in Antebellum America 10 (2018).

and the "knell of the Union"[133]—a legal controversy concerning the meaning and scope of the Privileges and Immunities Clause came before Supreme Court Justice Bushrod Washington, nephew of George Washington, while he was riding circuit and sitting in the Eastern District of Pennsylvania. Though a circumstantial inference, it is all but unimaginable that Washington's decision-making was not affected by the newfound weight that the Missouri Compromise had imposed upon this clause when he heard argument in *Corfield* during the October Term of 1824.[134] As far as I am aware, however, only once has *Corfield* been recognized as a case shaped by the Missouri debates in the legislature and beyond, and this point was made in relative passing by Philip Hamburger.[135] The judicially determined meaning of the Privileges and Immunities Clause, via Washington's holding that has now controlled for more than two centuries, and which is "probably the most famous constitutional decision not issued by the Supreme Court,"[136] was, I argue more emphatically, a direct result of the intersection of slavery and privileges and immunities.

On the surface, *Corfield* concerned a right to rake oysters in New Jersey. The state had passed an act in 1820 that, among other things, prohibited "any person, who is not, at the time, an actual inhabitant and resident of [New Jersey], to gather oysters in any of the rivers, bays, or waters in this state."[137] A violation would result in a fine of ten dollars and the forfeiture of "the vessel employed in the commission on such offence, with all the oysters, rakes, &c. belonging to the same."[138] The plaintiff, Corfield, a citizen of Delaware who owned a fishing boat that was seized for violation of the act, argued that the law was unconstitutional under both the Commerce Clause and the Privileges and Immunities Clause. As to the latter, Washington wrote "[w]e feel no hesitation in confining" the rights provided through the clause "to those privileges and immunities which are, in their nature, fundamental."[139] He added that "[w]hat these fundamental principles are, it would perhaps be more tedious than difficult to enumerate,"[140] while proceeding to list core protections, such as "the enjoyment of life and liberty, with the

133 Jefferson made these comments in a letter to John Homes on April 22, 1820. The Best Letters of Thomas Jefferson 234 (J.G. de Roulhac Hamilton ed., 1926).

134 *See* Corfield v. Coryell, 6 F. Cas. 546, 550 (C.C.E.D. Pa. 1823) (No. 3,230).

135 As Hamburger put it, "of course, it had a context." Hamburger, *supra* note 126, at 93.

136 Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 Notre Dame L. Rev. 701, 701 (2019).

137 *Corfield*, 6 F. Cas. at 550.

138 *Id.*

139 *Id.* at 551.

140 *Id*.

right to acquire and possess property of every kind."[141] At the end of his list of "some of the particular privileges and immunities of citizens," he curiously "added" the "elective franchise."[142]

Bushrod Washington was slow to arrive at his relatively constraining construction of the Privileges and Immunities Clause. As revealed through Gerard Magliocca's recent archival excavation of Washington's notes on *Corfield*, he was "initially inclined" to hold the New Jersey law "unconstitutional under the Privileges and Immunities Clause."[143] The case reporter, which includes comments that precede the opinion itself, also provides a clear indication that Washington took his time and had a change of heart. It notes that "after stating to the jury the great importance of many of the questions involved in this cause," Washington "recommended to them to find for the plaintiff."[144] But the reporter also implies that he further mulled over his views "until April term 1825" when the "opinion was delivered," with a holding that was directly contrary to his jury recommendation.[145] Washington's notebook unveils the basis for his proposal to the jury, which had favored a broad interpretation: He initially viewed "the meaning of this article" to be "that the citizens of each State shall within every other State have *equal* privileges or rights as the citizens of such State have[,] the words *all privileges of citizens* being equivalent to equal privileges."[146] There is no explicit "indication of why the Justice changed his stance" in his notebooks or elsewhere.[147] However, had he maintained a view that Article Four created an equality of privileges—potentially laying foundations for rights effectively protected on a national level through their development in any given state—his holding could have contributed to what Webster had recently labeled an "absurd[]" interpretation by the pro-slavery members of Congress who claimed that the privileges and immunities in one state, including slaveholding, could be brought with them into another.[148] Moreover, Washington's emphasis on a narrow scope of rights under the Privileges and Immunities Clause invalidated the arguments raised in the Missouri debates that slaveholding was a constitutionally protected right. We cannot be sure why he took this approach. Perhaps it was rooted in a moral quandary over slavery, a continuation of the complicated sentiments held by his uncle George

141 *Id.*
142 *Id*. at 552.
143 Magliocca, *Rediscovering* Corfield, *supra* note 136, at 702–03.
144 *Corfield*, 6 F. Cas. at 549.
145 *Id*. at 550.
146 Magliocca, *Rediscovering* Corfield, *supra* note 136, at 718.
147 *Id.* at 719.
148 Webster et al., *supra* note 123, at 16.

and aunt Martha whose Mount Vernon estate he inherited.[149] Or perhaps it was because of a national awareness akin to Jefferson's that the Missouri Compromise foreshadowed a divided country.[150] Or it may have been some combination of both. In any case, after an evidently fraught deliberation over this case about oyster farming in New Jersey, he arrived at a conclusion that dealt a harsh blow to pro-slavery factions.[151]

C. Determining the Scope of Access to Rights in Dred Scott

Though *Corfield* foreclosed further claims that this phrasing in Article Four protected slaveholding as a right, those favoring slavery could still draw from the provision by focusing on who had access to privileges and immunities, thus excluding select individuals from protections on racial grounds. While *Corfield* resolved what rights were protected in alignment with the narrowing abolitionist argument, in *Dred Scott*, "the Southern justices—a majority on the Court—boldly decided to use the case as a vehicle to constitutionalize the position of the slave states on the issue of slavery in the territories."[152] Part of their strategy was to focus on the other live dimension of the Privileges

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149 *See* Gerard N. Magliocca, Washington's Heir: The Life of Justice Bushrod Washington 1–2 (2022).

150 The Best Letters of Thomas Jefferson, *supra* note 133, at 234.

151 Philip Hamburger's analysis of Washington's *Corfield* opinion—the only other instance when this case has been analyzed in the context of the Missouri Compromise and its aftermath—is the opposite of mine. For Hamburger, the case bore "racist implications for excluding blacks from privileges and immunities." Hamburger, *supra* note 126, at 67. His argument is that "the genealogy" of privileges and immunities "runs from the aftermath of the second Missouri Compromise," in which the question around this phrase was not *what* rights it conveyed but *who* had access to those rights. *Id.* at 116. Honing in on the curious reference to the right to vote as one that was protected as fundamental, Hamburger argues that Washington's purpose for including this detail was to limit the groups of people who had access to rights under Privileges and Immunities, just as limited groups had access to voting at the time. *Id.* at 79–80. Perhaps Washington was engaging in a multidimensional calculation through his surprising reference to the voting franchise—though others, such as Magliocca, view the reference as a "powerful aspirational statement[]." Magliocca, *Rediscovering* Corfield, *supra* note 136, at 720, 721–22. Regardless of Washington's motive, and even if we presume the worst, *who* has rights was no doubt the central issue in the second Missouri Compromise, and it is certainly one of the genealogies of meaning that developed in this period. But it seems unfathomable that the debate over *what* rights were protected by the phrase would so quickly fade in importance. Indeed, it does not square with the fact, previously noted, that speeches made within and beyond Congress leading to the first Missouri Compromise, including discussion of *what* rights the Privileges and Immunities Clause protected, were printed until the Civil War begin. Washington's narrow holding aligned quite squarely with the anti-slavery position. If *Corfield* bore "racist implications," it did so at most by half.

152 Earl M. Maltz, Dred Scott and the Politics of Slavery 2 (2007).

and Immunities Clause, featured in the second Missouri Compromise, evading the argument that Justice Washington's opinion had foreclosed.

In this case, "twice argued" before the Supreme Court in 1855 and again in 1856,[153] Dred Scott sought freedom for himself, his wife Harriet, and their daughters Eliza and Lizzie, because Dr. John Emerson, the man who claimed him as property, brought him north of the 36°30′ parallel for four years to military posts in Illinois and "the territory known as Upper Louisiana . . . north of the State of Missouri."[154] Because they all spent extensive time in lands where slavery was prohibited, Scott brought a case "to assert the title of himself and his family to freedom."[155] He first litigated in the Missouri state court system, then in federal court in "the Circuit Court of St. Louis county," where his case "went before a jury" that was instructed "that upon the facts in this case, the law is with the defendant."[156] Scott appealed the decision to the Supreme Court, where "two leading questions" were considered: first, whether Scott was a citizen, permitting the "Circuit Court of the United States jurisdiction" over the case, and second, if "the judgment it has given" was "erroneous."[157]

For Chief Justice Taney, who authored the opinion, the first question was dispositive. He framed the question as follows: "Can a negro . . . become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to citizens?"[158] He wrote that, "whether emancipated or not," people of African descent "had no rights or privileges" beyond those that state governments gratuitously "might choose to grant them."[159] Being granted rights by a state, however, was—according to Taney—different from being "a citizen in the sense in which that word is used in the Constitution of the United States."[160] As a purported non-citizen, Scott was not "entitled to sue" in a federal court of the United States, nor was he entitled "to the privileges and immunities of a citizen in the other States."[161] In dissent, Justice Curtis explained, contrary to the majority's assertions, that citizens "of the United States at the time of the adoption of the Constitution can have been no other

153 Dred Scott v. Sandford, 60 U.S. 393, 399 (1856).
154 *Id.* at 397.
155 *Id.* at 400.
156 *Id.* at 398–99.
157 *Id*. at 400.
158 *Id.* at 403.
159 *Id.* at 405.
160 *Id.*
161 *Id*.

than citizens of the United States under the Confederation," and that individuals "descended from African slaves" were citizens of states including New Hampshire, Massachusetts, New York, New Jersey, and North Carolina at the time of ratification.[162] As such, they had rights "on equal terms with other citizens."[163] However, Chief Justice Taney's was the majority holding, joined by six justices of the Court. While slaveholding may not have been a protected right under Justice Washington's construction of the Privileges and Immunities Clause, an enslaved person's right to achieve freedom from bondage under the clause—which, whatever the scope of rights that it provided, would surely be a "fundamental" one—was left unprotected. Chief Justice Taney's construction was corrected by war.

D. The Ambiguous Meaning of Privileges or Immunities in the Fourteenth Amendment's Legislative History

After the Civil War ended in April 1865, and after Congress and the states abolished slavery by ratifying the Thirteenth Amendment that December, Congress again confronted the meaning of privileges and immunities as it drafted, debated, and ultimately passed the Fourteenth Amendment. The first part of Section One of this amendment dealt a permanent blow to *Dred Scott*'s attempt to legally exclude access to rights by limiting citizenship based on race. It affirmed citizenship status, federally and in a state of residence, for "[a]ll persons" who were "born or naturalized in the United States."[164] Section One additionally provided three protections from potential state misbehavior by, first, forbidding any abridgment of citizens' "privileges or immunities," as well as prohibiting the deprivation of anyone's "life, liberty, or property, without due process of law," and the denial to any one of the "equal protection of the laws."[165] As to the first of these newly minted constitutional protections, perceptions of its meaning expressed by the members of Congress who ratified it demonstrate that this phrase's enigmatic and evolving protection of rights remained elusive up to this

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162 *Id.* at 572–73.

163 *Id*. at 573.

164 U.S. Const. amend. XIV, § 1.

165 *Id*. Of note, the Privileges or Immunities Clause provides protection to a smaller group of people than the Due Process and Equal Protection Clauses—namely, it protects citizens. Because racially discriminatory exclusion from citizenship was curbed by the same amendment, there was no risk of a resurgence of a limiting construction like that in *Dred Scott*. The narrower scope of Privileges or Immunities here more likely indicates Congress's understanding of this provision's power, such that it would seek to curb non-citizens' access to the expansive rights that it can provide. If the determination of rights under substantive due process were treated instead under Privileges or Immunities, there would be a material difference in scope, as access to these rights would be limited to citizens.

second occasion of its constitutionalization. The perceptions of two key members of Congress, to which I now turn, only affirm a sustained uncertainty of significance for privileges and immunities as ratified in the Fourteenth Amendment.[166]

Representative John Bingham of Ohio drafted the amendment and proposed a resolution for its consideration as early as December of 1865.[167] His articulated understanding of the Privileges or Immunities Clause, as he presented it on the House floor, provides some potential basis for an incorporation-driven meaning. It would assure that all federal citizens were "entitled to all the privileges and immunities of citizens of the United States in the several states," which he equated to "the provisions in the Bill of Rights."[168] In today's parlance, this would seem a clear enough reference to the first ten amendments. In the nineteenth century, however, it could have meant something broader or something narrower. In some instances, reference to "the bill of rights" was a gesture toward "the first eight or nine amendments," and it could, even, imply "something prior to and greater than the first ten amendments."[169] But as a phrase bearing less than fixed meaning, there are reasonable grounds for arguing that Bingham could have had a more constrained and specific set of protections in mind when invoking a "bill of rights" centered on due process and comity, which were the points of focus leading up to his use of that phrase in his comments.[170] Because "bill of rights" did not have as defined a meaning in the mid-nineteenth century, potentially taking on its present significance as late as the New

166 I focus here on Bingham as the drafter, and Howard as the member who introduced the amendment to the Senate, who tend to be the most frequently cited sources for the meaning of the Privileges or Immunities Clause to the extent one could intuit it from legislative history. Given their roles, it seems reasonable enough to grant special weight to these members. But Leonard Levy's objection to this habit at least merits acknowledgement: "[T]here is no reason to believe that Bingham and Howard expressed the views of the majority of Congress." Leonard W. Levy, Judgments: Essays on American Constitutional History 77 (1972). Ilan Wurman channeling Judge Leventhal on this habit of focus on Bingham and Howard also merits acknowledgment: "[P]icking and choosing statements from the legislative history" to determine legal meaning is akin to "looking over a crowd and picking out your friends." Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment 5 (2020). These would also be valid objections, however, when turning to floor statements from other members of Congress during deliberations on legislation. To the extent that the tendency to focus on Bingham and Howard gives greater weight to members with more intimate relations to the amendment, there is a degree of good cause for doing so, even if it bears inevitable limits.

167 Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 57 (1986).

168 Cong. Globe, 39th Cong., 1st Sess. 1090 (1866).

169 Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 Geo. J.L. & Pub. Pol'y 593, 594 (2017).

170 Wurman, *supra* note 166, at 111.

Deal or World War II,[171] it is less than clear what rights Bingham had in mind, and whether he intended to sweep in the unenumerated rights contained within the Ninth Amendment or make a similar gesture toward open-ended meaning.

The proposed amendment was introduced to the Senate by Jacob Howard of Michigan, though only because the Chairman of the Joint Committee, Senator William Pitt Fessenden, had fallen ill.[172] His comments nevertheless carried weight, as he was a well-respected statesman with a "long and distinguished career" of service in a variety of state and federal capacities.[173] Howard indicated a more definitive view of the Privileges or Immunities Clause as an incorporation of the Bill of Rights against the states,[174] at least in part, declaring that it includes "the first eight amendments of the Constitution," which he proceeded to list one by one.[175] But he also prefaced that statement by acknowledging the ill-defined and expansive nature of the provision, noting that the clearer meaning of the first eight amendments is "added" to further the significance of "these privileges and immunities, whatever they may be."[176] The rights protected by this phrase, he further opined, "are not and cannot be fully defined in their entire extent and precise nature,"[177] a potential gesture to their ever-evolving disposition. However, he also acknowledged that "we may gather some intimation *of* what probably will be the opinion of the judiciary" regarding the meaning of the Privileges or Immunities Clause by looking to Justice Washington's opinion in *Corfield*, which he quoted at length.[178] Though not necessarily tethering his understanding of rights existing under privileges and immunities in the Fourteenth Amendment to Justice Washington's construction of the Fourth Article's clause, Howard's interest in *Corfield* as an important source for meaning is a constraining counterbalance to his gestures toward a less reducible set of implied rights. Like Bingham's comments, Howard's added further ambiguity as

171 Gerard N. Magliocca, *The Bill of Rights as a Term of Art*, 92 Notre Dame L. Rev. 231, 233–34 (2017).

172 Curtis, *supra* note 167, at 87.

173 *Id.*

174 Indeed, as Wurman highlights, Howard was the only member of Congress "that directly mentioned the first eight Amendments of the Constitution in the context of the privileges or immunities clause." Wurman, *supra* note 166, at 111.

175 Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

176 *Id.*

177 *Id.*

178 *Id.*

much if not more than they helped define the rights under the Privileges or Immunities Clause.[179]

III
Diverging and Competing Paths to Determining a Historically Informed Meaning of the Privileges or Immunities Clause

Rights encompassed by privileges and immunities have been an integral part of America since the moment the English initiated their colonial endeavors in the New World. Parts I and II of this Note could approximately mirror a selective survey of American history from the late-sixteenth through the mid-nineteenth century, because many of the major issues and events that arose during these years intersected with this lively yet enigmatic legal phrase. The principal reason for the continual presence of privileges and immunities in phase after phase of American history was its inherently evolutionary quality. However, after providing a fluidity of rights in ever-changing contexts for hundreds of years, this longstanding tendency was adjusted upon direct confrontation with the darkest blot on this country that was built, intellectually, on liberal Enlightenment principles that oppose the enslavement of human beings.[180] In the years leading up to the Civil

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[179] To note yet another dimension of potential meaning, now-Judge Jay Bybee proposed that the "Privileges or Immunities Clause protects classes of people rather than classes of rights." Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1611 (1995). Drawing from John Harrison's work, he means that the clause sought to protect equal access to state-defined rights among citizens within each state regardless of their race. *See id.*; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1421 (1992); *see also* William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 116–17 (1988).

[180] The phrase "all men are created equal," for example, did not include everyone when it was written in 1776. The Declaration of Independence para. 1 (U.S. 1776). However, the concept became an increasingly actualized reality and was used to that end in both aspirational literature and legal argumentation. One example of "how optimistic some African Americans were about the possibility of achieving universal freedom and justice based on the principles of the Revolution" is seen in Prince Hall. Vincent Carretta, *The Emergence of an African American Literary Canon, 1760–1820*, *in* The Cambridge History of African American Literature 62 (Maryemma Graham & Jerry W. Ward, Jr. eds., 2011). Seven other Black men also highlighted this language from the Declaration of Independence in their 1777 petition to the Massachusetts legislature to end slavery in the state. *Id.* Several decades later, during the debates leading to the Missouri Compromise, Timothy Fuller seized on this same language, arguing that if "men have equal rights" then the "principles of a free Government" cannot allow for the exclusion of "men of a certain color from the enjoyment of 'liberty and the pursuit of happiness.'" 15 Annals of Cong. 1181 (1819). President Lincoln repeated the language yet again in his Gettysburg Address. Abraham Lincoln, The Gettysburgh Address (1863). And in 1848, Elizabeth Cady Stanton used this language in the context of the women's rights movement, declaring "all men and women are created

War, the meaning of privileges and immunities was centrally shaped by arguments around slavery, which consisted of targeted advocacy for either broader or narrower sets of rights. As the country emerged from this phase of its history, during which slavery was a central animating issue underlying the meaning of privileges and immunities, Congress again used this phrase in the Fourteenth Amendment.

Given its moment of enactment, and in view of the varying genealogical strands one could trace as its source of meaning, what rights are encompassed by the Privileges or Immunities Clause? Litigators could argue, and the Court could find, a range of possible significances. I briefly sketch some of the key points that might be developed along two competing lines of argument that would yield vastly different legal outcomes.

A. The Case for Expansive and Evolving Rights

There are strong bases for arguing that the Privileges or Immunities Clause, in its historically informed meaning, is both evolutionary and expansive in nature. As to its evolutionary quality, such a view is most consistent with its centuries-long deployment in America: The phrase was continually given new and innovative meaning, creating rights that aligned with the everchanging sets of issues preoccupying the polity.[181] For example, the Crown had no interest in providing the colonies a legal basis for declaring themselves independent when granting various privileges and immunities in the New World, but by the late eighteenth century, that is how the phrase functioned. Nor was this phrase necessarily intended to confer a right for one person to enslave another—a point twice disputed in its evolving history, first regarding whether Englishmen in the colonies could bring enslaved people back across the Atlantic, and second, as an assertion by the southern states during the Missouri Compromise debates.[182] As further evidence of evolving meaning, in each of those instances the phrase cut in both directions, permitting this asserted right in England until *Somerset*, and permitting it in the United States under privileges and immunities until, by implication, *Corfield*.[183] When accounting for the full history of the phrase, it is difficult to imagine that its evolutionary quality would cease at the very moment it was given new life by being deployed for a second time in the Constitution.

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equal." PROCEEDINGS OF THE NATIONAL WOMEN'S RIGHTS CONVENTION 71 (T.C. Leland ed., 1854).

181 *See supra* Parts I and II.

182 *See supra* Sections I.C and II.A.

183 *See supra* Sections I.C and II.B.

The language and context of this phrase as it appears in the Fourteenth Amendment could give further credence to an evolutionary view. The meaning of the Privileges and Immunities Clause in Article Four bore implications of broader significance than its source in the Articles of Confederation because of the omission of constraining words that would direct the provision of rights to specific circumstances—and the Fourteenth Amendment appears even less constrained than Article Four. Still, the Privileges and Immunities Clause carries an evident comity concern regarding state relations.[184] The Privileges or Immunities Clause, however, simply grants rights to citizens of the country—"whatever [those rights] may be" per Senator Howard—as a protection against state interference.[185] Of the three occasions when a privileges and immunities clause was constitutionalized in the United States, accounting for its appearance in the Articles of Confederation as the first American Constitution, the clause in the Fourteenth Amendment is the least contextually constrained, potentially inviting continued evolutions in the articulation of rights.

As for the expansive potential of the Privileges or Immunities Clause, the strongest argument against such an outlook is that the most recent debates around its meaning produced a constrained significance. Regarding the right to hold slaves, *Corfield* effectively overrode broader interpretations of Article Four that had reached national consciousness because of the Missouri Compromise.[186] As for *Dred Scott*'s race-based restrictions on access to the rights that privileges and immunities provide, the Civil War effectively ended this line of argument. Each of these pro-slavery uses of this phrase were then constitutionally repudiated in the Reconstruction Amendments. The Thirteenth Amendment prohibited slaveholding,[187] and the first portion of the Fourteenth Amendment assured that all those "born or naturalized in the United States," regardless of ancestry, "are citizens of the United States."[188] There was thus no longer a need for a narrow scope of privileges and immunities rights that would resist legal support for the system of slavery. It could bear expansive potential yet again.

Some signs during the congressional deliberation that led to the Fourteenth Amendment point toward allayed concern over a broader scope of rights under the Privileges or Immunities Clause. Though uncertain, if Representative Bingham had in fact meant to include the

184 *See supra* Section I.D.

185 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

186 *See supra* Section II.B.

187 U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

188 U.S. CONST. amend. XIV, § 1.

Ninth Amendment in his reference to the "bill of rights" as the set of protections that the clause covered, he would have implicitly gestured toward an unenumerated and expansive reading.[189] Moreover, though complicated by his reference to *Corfield*, when Senator Howard interpreted the rights that Privileges or Immunities would encompass, he too gestured toward something beyond the first eight amendments, asserting that these rights "are not and cannot be fully defined in their entire extent and precise nature."[190] In the Court's first engagements with the Privileges or Immunities Clause, Justice Field—albeit in the minority—also implied a broader set of rights, first in his *Slaughter-House* opinion, and more broadly, by implication, in *O'Neil*.[191]

A distinct but related line of argument favoring a revival of the Privileges or Immunities Clause, understood as evolutionary and expansive in disposition, concerns the line of jurisprudence under the Fourteenth Amendment's Due Process Clause, which could correspond to a sounder development of rights under this phrase that uses more clearly relevant language. Perhaps John Hart Ely was correct that "'substantive due process' is a contradiction in terms,"[192] and perhaps Judge Posner, in a similar vein, was correct in characterizing it as an "oxymoron."[193] Indeed, substance is not process. Regardless, only thirty-two years after *Slaughter-House* truncated judicial engagement with the Privileges or Immunities Clause, substantive due process made its first appearance in its Lochner Era guise, beginning with the case from which this period derives its name.[194] It could well be that the Court has simply acquiesced to an articulation of rights under this alternative provision, and if such a doctrine had not emerged relatively soon after Justice Miller's opinion, perhaps the Court would have rigorously revisited the Privileges or Immunities Clause and we would have a more well-developed doctrine that fleshes out its meaning. Justice Thomas, among others, may thus be correct that adjudication of federally protected rights under the Fourteenth Amendment is still awaiting establishment and development under the proper clause because of Justice Miller's opinion and the shift to substance due process soon after.

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189 *See* Cong. Globe, 39th Cong., 1st Sess. 1090 (1866).

190 *Id.* at 2765.

191 Slaughter-House Cases, 83 U.S. 36 (1872); O'Neil v. Vermont, 144 U.S. 323 (1892).

192 John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 18 (1980).

193 *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982). James W. Ely Jr. attributes the origination of the frequently used descriptor of "oxymoron" to Posner. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315, 315 n.2 (1999).

194 Lochner v. New York, 198 U.S. 45 (1905).

As for the issue implicitly raised by Justices Scalia and Alito regarding the effective pedanticism and anti-pragmatic nature of a return to the clause clearly calling for articulations of rights,[195] it is not necessarily true that proper categorization would lead to equivalent doctrinal development. Here, articulating the evolutionary and expansive position: The Privileges or Immunities Clause might align more clearly with the substantive due process cases bearing broader readings, beginning with Justice Douglas's recognition of unenumerated Ninth Amendment rights in *Griswold*.[196] Just as Justice Douglas considered a "zone of privacy" as one of the "fundamental constitutional guarantees" under substantive due process, so might one find that Privileges or Immunities provides a similar set of protections.[197] Of curious note, to determine the scope of protection, which is less than fully articulated in both *Corfield* and in this substantive due process line, one must clarify what it means for a right to be "fundamental," as this same word is central to both analyses. In some sense, one might argue that Justice Washington's constraining view on "fundamental" rights in the early nineteenth century may not be quite as limiting as it first appears. Just as privileges and immunities bore evolutionary implications, so could the understanding of what rights merit description as "fundamental." While a common perception of fundamental rights today may still be "more tedious than difficult to enumerate," such an enumeration may well differ significantly from a list that Justice Washington would develop.[198] *Griswold* exhibits such a change in perception: Privacy was not among the fundamental rights that Justice Washington named, but it was salient in Justice Douglas's lexicon.[199]

With an evolutionary understanding of Fourteenth Amendment rights, we would not have a mere xerox copy of substantive due process doctrine, as there would be less compelling reason to introduce the limiting principle of "history and tradition" derived from *Glucksberg*.[200] This test, also deployed in Second Amendment jurisprudence under *Bruen*, seeks to align the legal significance of constitutional provisions with historical context.[201] However, an appreciation of the history of

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195 *See supra* pp. 128–129.

196 Griswold v. Connecticut, 381 U.S. 479 (1965).

197 *Id.* at 485.

198 Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230). Although, as Evan Meisler thoughtfully quipped in his feedback on this point, certain socially charged issues may in fact be more difficult than tedious to enumerate.

199 *Griswold*, 381 U.S. at 485.

200 *See* Washington v. Glucksberg, 521 U.S. 702, 740 (1997).

201 *See* New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 22 (2022) ("We assessed the lawfulness of [the] handgun ban [in *District of Columbia v. Heller*] by scrutinizing whether it comported with history and tradition."). Some debate whether *Bruen* properly

privileges and immunities in early Antebellum America suggests that there would be little compelling ground upon which to stand for establishing a singularly definable historical meaning for privileges and immunities. It had been inherently evolutionary, was deeply disputed in the decades leading up to the Fourteenth Amendment's ratification, and statements by key figures in the amendment's legislative process only served to escalate a sense of ambiguous meaning.[202] While the Court could develop other means for constraining the scope and power of the Privileges or Immunities Clause, its very history would counsel against a reliance upon historically contemporary sources of interpretation as the basis for such constraint.

B. The Case for Narrow and Fixed Rights

If the Court were to meaningfully revive the adjudication of federally protected rights under the Fourteenth Amendment as intended by the Privileges or Immunities Clause, it would find that there are also strong bases in the historical record for reading it to imply a narrower and more fixed set of constitutional rights. Indeed, this has tended to be Justice Thomas's outlook on Privileges or Immunities.[203] The understanding of substantive rights under Article Four's Privileges and Immunities Clause that won out during the antebellum years was constraining in its scope and in its potential for evolution. For this very reason, the *Dred Scott* majority found another way to use privileges and immunities in support of slavery, distinct from deploying it to unlock an expansive set of rights that would encompass slaveholding.[204] While one could construct some degree of an evolutionary potentiality in *Corfield* because Justice Washington left the rights that it contains partially unenumerated, this would almost certainly not square with the largely restricting orientation of the opinion that the Court subsequently recognized. In the immediate wake of the Missouri Compromise, in

encapsulated the historical context of the Second Amendment. *See, e.g.*, Adam M. Samaha, *Is* Bruen *Constitutional? On the Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. Rev. 1928, 1933 (2023) (describing how "may-issue" licensing regimes predated the "shall-issue" regimes that the *Bruen* Court favored, while both materialized during post-founding periods that the Court deemed constitutionally insignificant).

202 *See supra* Section II.D.

203 In his *McDonald v. City of Chicago* concurrence, Justice Thomas argued that "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights." 561 U.S. 742, 837 (2010) (Thomas, J., concurring). This seems to suggest that Justice Thomas's view on this clause evolved away from the more expansive one he expressed in *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, published twenty-one years prior to *McDonald*. *See* Thomas, *supra* note 18.

204 *See supra* Section II.C.

which an expansive view of privileges and immunities was promoted by the pro-slave South, it was almost certainly no coincidence that Justice Washington narrowed the range of rights available under this provision: He was inevitably aware that his opinion on oyster farming bore implications for slavery and its potential to divide the union.[205] Chief Justice Taney inferred as much and avoided any confrontation with the holding. In just over one decade after the *Dred Scott* Court implicitly acquiesced to Justice Washington's constrained reading, privileges and immunities was reasserted as a protection for all federal citizens. Given that the scope of rights encompassed by the phrase leading to the Fourteenth Amendment's ratification was accepted as narrow by the Court, it could reasonably be understood as the congressionally intended meaning.

The deliberations preceding the Fourteenth Amendment's ratification provide further support for this narrower outlook. As Justice Thomas highlighted in his *Saenz* dissent, Justice Washington's limited construction had been presented as an interpretive source and "no Member of Congress refuted the notion that . . . *Corfield* undergirded the meaning of the Privileges or Immunities Clause."[206] This *ex silentio* argument holds some weight, as *Corfield* was the predominating interpretation of the clause, and because Senator Howard featured the opinion while introducing the clause to the Senate. Howard's additional comments regarding the scope of rights under privileges and immunities, "whatever they may be," provide slippery footing at best for arriving at a clear meaning.[207] Combined with his references to the first eight amendments—notably excluding the ninth—and the language in Justice Washington's opinion, the Senator's words could be construed to imply a limited scope of significance. Comments by Representative Bingham, as the drafter, could likewise be understood narrowly. It is quite possible that he intended to invoke fewer than the first ten amendments when referencing the "bill of rights," given that the meaning of this phrase was less well defined in the nineteenth century.[208] Moreover, even if Representative Bingham had intended to include unenumerated Ninth Amendment rights in his understanding of the proposed clause, and even if Senator Howard meant to gesture toward a similar concept when noting that privileges and immunities "cannot be fully defined,"[209] Justice Washington may also have sought to gloss

205 *See supra* Section II.B.
206 Saenz v. Roe, 526 U.S. 489, 526 (1999) (Thomas, J., dissenting).
207 Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).
208 *See id.* at 1090.
209 *Id.* at 2765.

the scope of such rights by characterizing them as "more tedious than difficult to enumerate."[210] Perhaps Justice Washington was implying that non-enumeration serves as a catchall for a relatively narrow set of protected rights that need not fill pages with their obviousness. Non-enumeration, in other words, is not carte blanche.

Yet another historical perspective supporting a constrained reading of the Privileges or Immunities Clause intersects with a policy consideration regarding the role of the judiciary that has been a preoccupation since the country's founding. Even prior to the ratification of the Constitution, some Americans—above all those of more anti-Federalist leanings—worried about giving judges the ability to disregard the will of the people, which could include judicial decrees on their rights or lack thereof. A colorful example is the 1784 case of *Rutgers v. Waddington*, in which Alexander Hamilton successfully argued that patriot-widow Elizabeth Rutgers did not have a lawful claim to five years' rent from Benjamin Waddington, a British merchant who occupied and used her brewery while the city was under the Crown's control during the war.[211] New York legislators were outraged by Judge (and former Mayor) James Duane's decision, as they had passed a statute expressly allowing for such recovery and believed the people should have the "privilege" of "free citizens of New-York . . . " to pass binding laws.[212] For the court to effectively exercise judicial review by determining that international law superseded and invalidated the act was, in their view, an exercise of "judicial tyranny" that was "threatening to the liberties of the people."[213] Hamilton would reengage with these same underlying concerns of undemocratic interventions while advocating for the Constitution's Article Three powers in Federalist 78, in which he emphasized that the judicial branch is the "least dangerous," its strength limited to "mere[] judgement."[214] Though the Federalists' view of the judiciary was largely victorious,[215] including the function of

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

211 *See* JOHN C. MILLER, ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION 105–07 (2017). For more on this case's international dimension, foreshadowing of the Constitution's outward-looking qualities, and how it split Federalists and Anti-Federalists, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 961–70 (2010).

212 Melancton Smith et al., An Address from the Committee Appointed at Mrs. Vandewater's 2 (Sept. 13, 1784) (transcript available at the New York Historical Society) (expressing discontent with the *Rutgers* outcome in pamphlet form).

213 *Id.* at 6, 14.

214 THE FEDERALIST No. 78, at 378 (Alexander Hamilton) (Terence Ball ed., 2003).

215 The most significant compromise was congressional oversight in the development of "inferior" federal courts. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER

judicial review as borne out in *Marbury*, concerns of an unconstrained judiciary were and remain prevalent in American legal discourse. It is no accident that, to the present day, it remains a refrain by both liberal and conservative justices dissenting from majority holdings that unelected judges are impermissibly enacting undemocratic legislation through their decision-making.[216]

Preference for a narrowing construction, rooted in struggles over the rightful scope of judicial power, which in the privileges and immunities context could imply a quasi-legislative capacity to create rights, aligns with Nikolas Bowie's unique outlook on the intended meaning of Privileges or Immunities. Bowie mines Representative Bingham's earlier drafts of the Fourteenth Amendment, in which he proposed that "Congress," specifically, "shall have power . . . to secure . . . all privileges and immunities."[217] Though the final draft bore the same "self-enforcing" wording as the Privileges and Immunities Clause,[218] implicitly leaving it to the judiciary to determine its legal significance, the departmentalist implication of the prior draft may at least lend some insight into Congress's views. Bowie buttresses his argument by highlighting the fact that the phrase privileges and immunities was "often used in reference to legislation, suggesting that contemporaries considered legislatures responsible for their definition and protection."[219] While broadly true, it was not uniquely the case that legislative bodies controlled the meaning of this phrase in American history, especially in the decades leading to the Fourteenth Amendment's ratification, when *Corfield* and *Dred Scott* established the judicial view on the Privileges and Immunities Clause in two dimensions. However, as a matter of policy, rooted in longstanding separation of powers concerns over judicial overreach that may have informed Representative Bingham's more constraining draft proposal, Bowie's view might lend some perspective. Indeed, the still-recent *Dred Scott* holding would provide Congress good reason to fear an arrangement in which the Court held too much power to

& David L. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System 8–9 (7th ed. 2015).

216 For example, in Chief Justice Roberts's dissent in *Obergefell*, he writes that the Founders "would never have imagined yielding . . . a question of social policy to unaccountable and unelected judges." Obergefell v. Hodges, 576 U.S. 644, 709 (2015) (Roberts, C.J., dissenting). And in Justice Sotomayor's dissent in *Students for Fair Admissions*, she writes "the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like . . . ." Students for Fair Admissions v. President and Fellows of Harvard Coll., 600 U.S. 181, 353 (2023) (Sotomayor, J., dissenting).

217 Note, *supra* note 10, at 1206 (quoting Cong. Globe, 39th Cong., 1st Sess. 1088 (1866)).

218 *See* Jay, *supra* note 109, at 5 (analyzing the text, structure, and history of the Privileges and Immunities Clause).

219 Note, *supra* note 10, at 1208.

determine rights in the country. Such a policy-based hesitation might also resonate with other concerns regarding the delegation of arguably legislative power, including the Non-Delegation and Major Questions Doctrines, as the principles of standardless or oversized directives to the executive could just as well restrict delegation to the Court to determine the rights held by the citizens of the United States.

Conclusion

The Privileges or Immunities Clause would present a unique challenge for the Court if it were to undertake an original-meaning analysis. Because the clause's historical roots gesture toward inherent evolutionary qualities and a potential for expansion, fixing a limited historical range from which to draw clues would be an arguably ahistorical method for analyzing this peculiar phrase. But the clause also carries genealogies of meaning that counsel a more restricted set of rights, particularly in light of evidence from the decades immediately preceding the Fourteenth Amendment's ratification. Most scholarship on the Privileges or Immunities Clause has pinpointed developments during the antebellum period: for example, for Philip Hamburger, the clause is specifically rooted in the Second Missouri Compromise,[220] and for Randy Barnett, *Corfield* and Senator Howard's introduction of the Fourteenth Amendment are keys to understanding its meaning.[221] A *longue durée* treatment of the legal meaning of privileges and immunities, however, seems a necessary counterpart to such pinpointing arguments, providing a more balanced consideration of this unique legal provision that has run alongside major developmental stages in American governance. The implications of an unbroken yet everchanging link between the earlier meanings of privileges and immunities and those that predominated in the antebellum era should not be ignored. The overwhelming tendency among scholars staking claims on the true original meaning of the Privileges or Immunities Clause, principally focused on the antebellum period, could be right—and Justice Thomas, who largely suggests a similar outlook, would therefore be right as well. But fuller accounting of history indicates that arriving at the clause's meaning should, at least, be a closer call.

If the Court were to revisit Privileges or Immunities with the intent of accounting for its rich and multifaceted history, the risk runs

220 *See supra* note 151 and accompanying text.

221 Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 Harv. J. L. & Pub. Pol'y 1, 1 (2020). The third key for him is the Civil Rights Act of 1866, a predecessor to the Fourteenth Amendment.

high of "law-office history," in which parties—and potentially judges—selectively engage with a broad palette of historical sources.[222] And yet, as a necessary element of common law adjudication, parties bring arguments, calling "to the court's attention the appropriate precedents," while directing judges when necessary "to the principal historical sources" and "important secondary" literature that would aid in arriving at a legal decision.[223] Establishing the law of the Privileges or Immunities Clause would require careful historical analysis, perhaps paired with other reflections on policy and constitutional principles. It is uncertain how the Court might expound the clause's meaning, and there would be an inevitable need for honing its significance through a building of precedent. The longer this portion of the Fourteenth Amendment is left undeveloped, the more unfortunate it is, as a fuller understanding of the rights held by citizens of the United States under the Constitution remains unresolved.

[222] *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (1965).

[223] Young v. Hawaii, 992 F.3d 765, 785 (9th Cir. 2021) (presenting a careful historical analysis of the Second Amendment). In *Young*, the Ninth Circuit upheld Hawaii's licensing regime because it aligned with "longstanding prohibitions" in "early English and American" law and was thus not a constitutional violation. *Id.* at 773. Hawaii had required residents to demonstrate "urgency or . . . need" for carrying a firearm openly in public, along with demonstrations of good moral character and a specific need to protect life or property. *Id.* *Young*, however, was vacated by the Supreme Court under *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 18–19 (2022).