Origins of the Privileges and Immunities of State Citizens under Article IV

Stewart Jay, University of Washington - Seattle Campus

Available at: https://works.bepress.com/stewart_jay/1/
Origins of the Privileges and Immunities of State Citizens under Article IV

Stewart Jay¹

The Privileges and Immunities Clause of Article IV provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” According to Alexander Hamilton, the clause was “the basis of the union,” which may seem odd given its minor significance in modern constitutional law. Part of the reason for its relative unimportance today is the development of constitutional doctrines unforeseeable in the eighteenth century: the invention of the Dormant Commerce Clause and the enactment of the Fourteenth Amendment, which prohibit much of the interstate discrimination that the clause was intended to prevent. However, a major explanation for the unseemly fate of the clause lies with early judges who were not faithful to its original purpose.

The clause had one overriding purpose: to assure that Americans were not treated as aliens when in states away from their place of citizenship. It was intended to preserve the benefit that Americans had as British subjects, to be treated the same as local residents anywhere in the country. The advantages of citizenship (or being a subject) were many, ranging from the protection of life, limb, and property to commercial advantages and access to public resources. The multifarious meanings of “privileges” and “immunities” in eighteenth-century writings show that these terms encompassed every kind of advantage that came from citizenship. This is why Hamilton could say the clause was “the basis of the union.” States were to treat all Americans like their own citizens.

In early cases, courts correctly understood the clause to be a comity provision, assuring that Americans would receive the same basic rights as local citizens in states away from their homes. Courts veered from following the original meaning of the clause by deciding that it did not cover all the rights that citizens of a state enjoyed, but only those that were considered by judges to be fundamental or essential to the preservation of the union. This interpretation was ahistorical and inconsistent with the text of the clause, which covers “all” privileges and immunities of citizens.

Judicial misinterpretations of the clause were compounded in the nineteenth century when courts concluded that access to publicly-owned natural resources was not a privilege of citizenship but a property right reserved to a state’s citizens. The Supreme Court also excluded corporations from coverage by the clause, leaving it inapplicable to much of the nation’s economic activity. Treating the corporation as the holder of its shareholders’ personal privileges as citizens of American states would be truer to the Framers’ purpose as well as more consistent with the Court’s interpretation of corporate rights in other constitutional settings.

No court interpreting the clause has ever undertaken a thorough examination of the rights associated with citizenship in the eighteenth century. The Supreme Court’s modern approach to the clause

© Stewart Jay 2011 All Rights Reserved.

¹ Professor of Law and William L. Dwyer Chair in Law, University of Washington School of Law. All spellings and grammatical uses in quoted documents have been left in their original form without a “sic” to mark a departure from modern use, except to indicate an apparent typographical error.

Revised draft: September 9, 2011
Alexander Hamilton wrote in *Federalist No. 80* that the Privileges and Immunities Clause of Article IV was “the basis of the union.”\(^2\) Unfortunately, he did not elaborate, and almost no one else mentioned it at the Constitutional Convention or during ratification, which at least indicates that the provision was not controversial. Courts would later hold that the clause guaranteed Americans the right to move about the country at will, buy property in all states, transact business in any place free of discriminatory taxes and regulations, use the courts everywhere, be protected by the writ of habeas corpus, as well as to enjoy other rights, all on the same terms as a state would afford its own citizens. In that way, it has served as a kind of equal protection provision for outsiders, requiring that states governments treat them the same as their own citizens. For this reason as well, it often is referred to as the Comity Clause.

A student of constitutional law today, however, would be forgiven for being puzzled by Hamilton’s remark. At best, a typical course casebook might devote a few pages to the clause, hardly what one would expect for the foundation of the nation. Part of the reason is that the Dormant Commerce Clause and section one of the Fourteenth Amendment forbid most of the types of discriminatory legislation that are covered by it.\(^3\) As a leading casebook states the current doctrine, “the modern function” of the Privileges and Immunities Clause “appears to be that of carving out an exception to the market-participant exception to the commerce clause.”\(^4\) This is not the fate one would anticipate from “the basis of the union”—an exception to a constitutional rule that no one in the eighteenth century remotely contemplated. Aside from the emergence of doctrines that could not have been predicted at the founding, there is

\(^2\) Alexander Hamilton, *Federalist No. 80*, reprinted in *The Federalist* 537 (Jacob E. Cooke, ed. 1961) [hereinafter “Federalist”].

\(^3\) See Baldwin v. Montana Fish & Game Comm’n, 436 U.S. 371, 379 (1978) (“Historically, it has been overshadowed by the appearance in 1868 of similar language in § 1 of the Fourteenth Amendment.”). The Supreme Court’s determination that the Dormant Commerce Clause forbids protectionist economic legislation overlaps substantially with the Privilege and Immunities Clause’s purpose of forbidding trade discrimination. See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 331 (2007) (citations omitted) (“Discriminatory laws motivated by ‘simple economic protectionism’ are subject to a ‘virtually per se rule of invalidity,’ . . . which can only be overcome by a showing that there is no other means to advance a legitimate local purpose.”); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) (“The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State.”); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985) (discriminatory taxes against businesses incorporated in other states “constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. [T]his Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening ‘the residents of other state members of our federation.’”).

another explanation for why the clause has receded in importance. Early judicial interpretations of the clause were almost certainly wrong in depicting the scope of the rights it was intended to protect.

The clause reads in full: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”5 The first judicial interpretations of the clause struggled with the word *all* in the clause, as judges somehow could not believe that it literally encompassed every right of citizens. In the most well-known of these explications, the 1823 federal circuit court decision, *Corfield v. Coryell*, Justice Bushrod Washington wrote that while the clause protected a lengthy list of “fundamental” privileges, it did not embrace “all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens.”6

Justice Washington’s inventory of the “privileges and immunities which are, in their nature, fundamental,” was expansive, encompassing the entitlements “which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”7 As to what they were in particular, he remarked that “it would perhaps be more tedious than difficult to enumerate” them, although he overcame indolence to list a fair number, along the lines mentioned in the opening paragraph.8 He even included one surprising to modern eyes, “the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.”9

---

5 U.S. Const., Art. IV, § 2, cl. 1 (emphasis added).
6 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823).
7 Id. at 551.
8 Id. Washington listed “some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental.” Id. at 552.

Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

Id. at 551-52.
9 Id. at 552. See Baldwin, 436 U.S. at 383 ("It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual’s identification with a particular State. . . . The same is true as to qualification for an elective office of the State.").
For all the breadth of Washington’s definition of privileges and immunities, he was candid in declaring that the clause could not literally mean what it says. It covered only “fundamental” rights of citizenship, those recognized by every state “at all times.” This conclusion was not only unsupported by the text of the Constitution, but mistook what the words “all Privileges and Immunities of Citizens” meant to the founding generation. These pages reconstruct the record carefully, by examining not only the drafting and ratifying history of the clause, but the deeper context offered by the political history, literature, and legal principles of the period. Taken together, there is compelling reason to conclude that the Privileges and Immunities Clause was intended to do precisely what Justice Washington denied—guarantee to Americans traveling or temporarily residing in another state, or doing business or owning property outside their home states, that they would be treated exactly like the local people, without exception, and regardless of whether the right was recognized by other states, including their own.

The clause was worded to be self-enforcing, neither requiring nor authorizing legislation for implementation. Unlike the Full Faith and Credit Clause, Congress was not expressly authorized to enact laws for the purpose of enforcing the guarantee. By default, its implementation depended on the judiciary. The only recorded effort at the Convention to involve Congress came in a suggestion by Edmund Randolph that each state be given an equal vote in the Senate for “regulating the rights to be enjoyed by citizens of one State in the other States.” Randolph’s proposal, which was designed to placate the small states, became moot after the delegates agreed on the Great Compromise.

10 Edmund Randolph, “Suggestion for Conciliating the Small States” (July 10, 1787), reprinted in 3 The Records of the Federal Convention of 1787, at 55 (Max Farrand, ed. 1911) [hereinafter “Const. Conv.”]. In Federalist No. 42, Madison alluded to the possibility of legislation related to the Privileges and Immunities Clause. He noted that under a similar provision in the Articles of Confederation, states could be obliged to extend “the rights of citizenship” and “the privilege of residence” to “aliens who had rendered themselves noxious.” Federalist, supra note 2, at 286. He then claimed that the new Constitution corrected this “defect of the confederation . . . by authorizing the general government to establish an uniform rule of naturalization throughout the United States.” Id. 286-87. See also William Rawle, A View of The Constitution of the United States of America 85 (Philadelphia, 2nd ed., 1829 (similar to Madison). More recently, it has been argued that the clause was meant to empower Congress “to protect American citizens in their privileges and immunities of citizenship, i.e., their natural, fundamental rights, against invasions by either states or individuals.” Chester James Antieau, Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 Wm. & Mary L. Rev. 1, 1-2 (1967). Like Madison and Rawle, Antieau offered no historical evidence for this conclusion, and it never has been judicially recognized. The Privileges and Immunities Clause was placed in Article IV, § 2, a section imposing obligations on states, not under the powers of Congress in Article I. The Naturalization Clause, Art. I, § 8, cl. 4, is the basis for Congress “establish[ing] a uniform rule of naturalization,” and it has never been interpreted as creating national legislative power over the rights of state citizenship or the obligation of states under Article IV. There is evidence that the first naturalization act, passed in 1790, was intended to create a single definition of “citizen” for both federal and state purposes. However, there was sharp disagreement in congressional debates over...
According to Charles Pinckney, who introduced the clause at the Convention, it was “formed exactly upon the principles” of a similar provision in the Articles of Confederation, with the purpose of “extending the rights of the Citizens of each State, throughout the United States.” The goal of the provision in the Articles was stated in its preamble: “The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union.” The part most like the Constitution provided:

[T]he free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce.

Protecting nonresident visitors or temporary inhabitants in a state from discrimination was a very old practice, especially as applied to merchants. William Blackstone noted that under no less than Magna Charta “all merchants (unless publickly prohibited beforehand) shall have safe conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandize, without any unreasonable imposts, except in time of war,” and even then merchants from the opposing belligerent were to be as “secure” as their country treated English traders. It was “somewhat extraordinary,” he allowed, that foreign merchants were safeguarded by “a mere insular treaty between the king and his natural-born subjects; which occasioned the learned Montesquieu to remark with a degree of admiration, ‘that the English have made the protection of foreign merchants one of the articles of their national liberty.’” Blackstone cleverly coupled that quote with another from Montesquieu, in which the French political theorist observed of the British that they knew whether the Naturalization Clause authorized federal legislation dictating the attributes of state citizenship. See text at notes 319-24 & note 321. infra.

11 Charles Pinckney, “Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia” (ca. Oct. 1787), reprinted in 3 Const. Conv., supra note 10, at 112. Pinckney noted that the Full Faith and Credit Clause, Art. I, § 1, and the Extradition Clause, Art. I, § 2, cl. 2, were also based “exactly on” provisions in the Articles. Id. The three were grouped together in Article IV, evidently because of their common purpose of facilitating interstate relations.


“better than any other people upon earth, how to value at the same time these three great advantages, religion, liberty, and commerce.”15

Americans of the eighteenth century were no different than the English in welcoming outside traders and investors, and the colonies and later the states protected visitors in varying ways—at least on paper. In 1641, for example, the Massachusetts colony enacted a code of liberties, providing: “Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, . . . without partialitie or delay.”16 As British subjects, American colonists had been able to move about the kingdom, establish a residence in England or another colony, transact business without discrimination, and own property anywhere in the realm, subject to restrictions applicable to all subjects.17 Poor laws, for example, could prevent indigents from relocating, which was the practice well into the nineteenth century.18 The Articles specifically relieved states of the obligation to

15 Id. at 253, quoting 2 Montesquieu, supra note 14, at 6 (bk. 20, ch. 6).
16 The Body of Liberties of the Massachusetts Collonie in New England (1641), reprinted in 1 The Founder’s Constitution 428 (Philip B. Kurland & Ralph Lerner, eds. 1987).
17 See text at notes 78, 151, 153 & 185-88, infra; Bogen, Case, supra note 12, at 817 (“As British subjects, colonists had rights to travel, to become members of another colony by moving there, and to be free of discrimination in trade, property ownership and other legal rights in other colonies.”); id. at 811 (“Immigration from England and intercolonial migration occurred throughout the colonial period. The common allegiance to the King meant that the colonist could travel to England or other colonies as freely as the English subject who lived in England. The right to travel was an established English liberty since the Magna Carta.”); id. at 861 (“Colonial inhabitants were all originally the King’s subjects, and no colony treated the inhabitants of other colonies as aliens.”). On colonists’ rights as British subjects, see id. at 796-817; Bogen, Privileges, supra note 12, at 1-6. There were proposals in the 1760s and 1770s to limit emigration to America in order to stem the alarming depopulation of parts of the British Isles, particularly Ireland and Scotland, but nothing came of these efforts. As Bernard Bailyn has written, “[t]here was in fact no agreement on whether or not the government could legally constrain movement of British subjects from one British territory to another. . . .”). Voyagers to the West: A Passage in the Peopling of America on the Eve of the Revolution 53 (1986); see Alison Games, “Migration,” in the British-Atlantic World 1500-1800 , at 47 (David Armitage & Michael J. Braddock, eds. 2002) (reporting that despite lobbying of Parliament by landowners for emigration restrictions, “migrants poured into colonial territories, as many as 221,500 to North American alone from 1760 to 1775. . . .”). Critics called such proposals “impossible and absurd,” objecting that they obstructed “the power of loco-motion,” which was” the undoubted privilege and birthright of every individual.” Bailyn, supra, at 53, quoting “An Essay on Emigration,” 2 Edinburgh Magazine and Review 512, 513 & 515 (July, 1774). In any event, no “such law could be enforced.” Id.
18 See John Cummings, Poor-Laws of Massachusetts and New York: With Appendices Containing the United States Immigration and Contract-Labor Laws: Preface, 4 Publ. Am. Econ. Assoc. 5, 11 (1895) (“Much of the poor-relief legislation in the United States has taken the form of restriction put upon the migration of paupers. The earlier settlement laws are attempts to regulate the migration of paupers from village to village; the later settlement laws, attempts to regulate interstate migration.”). See also Lawrence F. Ebb, Interstate Barriers in India and American Constitutional Experience, 11 Stan. L. Rev. 37 (1958) (“The colonial governments in seventeenth and eighteenth-century America, following the Elizabethan poor law concepts, rated paupers with convicts and imbeciles as wards of a particular community to which they ’rightfully’ belonged—their place of ‘settlement.’ Before the Constitution was adopted, the American States exercised the power of forcibly moving poor citizens within the state to the district of their settlement.”).
Privileges and Immunities of State Citizens

extend rights of citizenship to “paupers, vagabonds and fugitives from justice.” Article IV, by contrast, assured every state citizen “all Privileges and Immunities of Citizens in the several States.” This did not necessarily mean that the clause required states to admit every American to residency or citizenship, as poor laws attested. After studying in more detail the rights of citizenship that it protected, it will be evident that the clause often did not prevent states from treating nonresidents (whether citizens or not) differently from resident citizens, particularly in voting and office holding.

The proximate reason why the Framers included the clause among the obligations of states under the Constitution was their serious concern over deteriorating interstate trade relations. It was one of several measures they adopted to prevent discrimination by states in taxing and regulating interstate and international commerce. However, that was only the immediate concern. The larger purpose of the clause was to assure that Americans continued to enjoy what had been an important aspect of being a British subject, the right to live, work, and own property throughout the country without being treated as aliens. The clause meant nothing less than a guarantee that these advantages would not be lost even though the Revolution had formally left the states as separate sovereigns with the power to exclude anyone they wished. It was for this reason that Hamilton could think that the clause was “the basis of the union.”

The Problem on Interstate Trade Discrimination during the Confederation

With the conclusion of the Revolution, relations among the states deteriorated rapidly as the revolutionary esprit de corps dissipated. Boundary disputes, discriminatory trade legislation, and refusals of state courts to honor debt claims by citizens of other states became common occurrences, ultimately traceable to what Edmund Randolph termed “the jealousy of the states with regard to their sovereignty.” Hamilton complained at the Convention that the states “constantly pursue internal interests adverse to those of the whole.” By referring to “the whole,” Hamilton meant the thirteen states as a collective entity—a nation. To his thinking, the United States had a national public interest, one that stood distinct from the partial concerns of states or individuals. Madison held a parallel view, as he collected that “[e]xperience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions.”

---

19 U.S. Const., Art. IV, cl. 2 (emphasis added).
20 See text at notes 169-70, 272, 274-75, 296, 315 & 321, and notes 274-75 & 296, infra.
21 Alexander Hamilton, Federalist No. 80, reprinted in Federalist, supra note 2, at 537.
22 Edmund Randolph, 1 Const. Conv., supra note 10, at 19 (May 29, 1787).
23 Alexander Hamilton, id. at 284 (June 18, 1787).
24 James Madison, id. at 164 (June 8, 1787).
Trade declined sharply during the Revolution and remained feeble in the 1780s, owing in significant part to the British exclusion of American trade with the West Indies. Exports plummeted. Nevertheless, Americans imported large quantities of manufactured goods in the early 1780s, largely to replace what had been destroyed or depleted during the war. Despite lingering antagonism toward their erstwhile mother country, Americans still preferred to purchase British manufactured products, and by mid-decade they were running a sizeable balance of payment deficit with that country. This in turn “acted like a magnet to draw gold and silver from America to Britain.” Much of the deficit was financed with overseas debt, which had to be repaid in specie, not paper money. The consequence was that American “long-term credit had been stretched to the breaking point by late 1785,” as more and more buyers of imports “proved unable to pay dry goods importers their debts.” By then, the economy was in the midst of a commercial depression.

The disagreeable state of our commerce has been the effect of extravagant and injudicious importation. . . . What was the consequence? Those who made any payments made them chiefly in specie; and in that way diminished our circulation. Others made no remittances at all, and thereby injured our credit.


27 The health of the American economy in the 1780s has long been disputed by historians. There is general agreement that the commercial sectors of the economy were in depression by the mid-1780s. See John J. McCusker & Russell R. Menard, The Economy of British America, 1607-1789, at 373 (1985) (“[f] the results of current research stand future scrutiny, something ‘truly disastrous’ happened to the American economy between 1775 and 1790.”); Nettels supra note 25, at 62 (“By the spring of 1784, the glutted market, the scarcity of specie, and the overextension of credit all combined to produce a serious commercial depression.”) Merrill Jensen, however, concluded that “the period was one of extraordinary economic growth. . . . [T]here is no evidence of stagnation and decay in the 1780’s.” The New Nation A History of the United States During the Confederation 1781-1789, at 423-24 (1950). Jensen’s point was that Americans should not have been pessimistic given the economy’s upward direction and the country’s immense resources. He also noted that farmers who did not grow for export “were self-sufficient to a large extent.” Id. at 177. Most Americans lived subsistence lives. See James F. Shepherd, “British America and the Atlantic Colonies,” in The Economy of Early America: The Revolutionary Period 1763–1790, at 38 (Ronald Hoffman, et al., eds. 1988) (“subsistence production dominated early American economic activity.”). Nonetheless, ordinary Americans experienced sharply lower incomes than pre-war levels. See note 48, infra.

During the Confederation, Congress had no authority to regulate or tax foreign trade, and States pursued their own policies, which included tariffs on imports and exports, tonnage duties on trading vessels, bans or high duties on British imports and vessels, and embargoes of domestic products, among others. They had many legitimate reasons for enacting trade policies, not the least of which was to raise badly needed revenue from customs duties and tonnage charges. Protective tariffs and embargoes on imports were justified as means to promote local manufacturing and agriculture, retain scarce resources, and keep money from leaving the state. Tonnage fees, assessed on the weight of merchant vessels, paid for lighthouses and other navigation aids. Measures that discriminated against British trade were in retaliation against that country’s restrictive policies toward American commerce. These efforts were not coordinated, however, and policies varied from place to place. They also fluctuated unexpectedly, to the consternation of merchants and planters, who preferred stable regulations. In a recurring scenario, provisions imposed by one state, such as tariffs, would be exploited by others. Hugh Williamson, a North Carolina delegate to the Philadelphia Convention, wrote that if one state tried “to raise a little money by imports or other commercial regulations, [a] neighbouring state immediately alters her laws, and defeats the revenue by throwing the trade into a different channel. Instead of supporting or assisting, we are uniformly taking the advantage of one another.”

Writing to Jefferson in 1786, Madison bemoaned this situation:

The States are every day giving proofs that separate regulations are more likely to set them by the ears, than to attain the common object. When Massts. set on foot a retaliation of the policy of G. B.,[.] Connecticut declared her ports free. N. Jersey served N. York in the same way. And Delaware I am told has lately followed the example in opposition to the commercial plans of Penna.

Even when state trade policies were followed for the good reasons, the benefits gained by the enacting states usually came at the expense of Americans beyond their borders. States with naturally superior ports played their geographical upper hands to

---

29 See Thomas B. Colby, Revitalizing the Forgotten Uniformity Constraint on the Commerce Power, 91 Va. L. Rev. 249, 266 (2005) (“Lacking regulatory authority over commerce, Congress was powerless to strike back with a unified trade policy.”).

30 On the types of state trade policies and their rationales, see Albert Anthony Giesecke, American Commercial Legislation Before 1789, at 123-40 (1910); Matson, supra note 26, at 379-81. On discrimination against British trade, see Nettels, supra note 25, at 72; Brannon P. Denning, Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine, 94 Ky. L.J. 37, 45-48 (2005-2006); see id. at 46, citing Matson, supra, at 379 (“During this period, according to one count, six states passed imposts, nine states discriminated against British goods, seven states imposed duties on British ship entrances and British commodities, and three states forbade export of American goods in British ships.”).


the detriment of states without direct sea links. Massachusetts and New York, for example, raised large sums by imposts on imports, which in turn were passed on to customers in states such as New Jersey and Connecticut. Oliver Ellsworth put the point provocatively at the Connecticut ratifying convention, that “we pay a tribute” to Massachusetts. He further estimated that one-third of New York’s revenue from imposts came from goods consumed in Connecticut. Madison wrote to Jefferson in 1783 that the duties Pennsylvania and Maryland were imposing on Virginia trade amounted to “a tribute which if paid into the treasury of State would yield a surplus above all its wants.” Retaliation was sometimes the consequence of such policies, as occurred in 1787 when New York increased duties on foreign goods brought to New York from Pennsylvania, New Jersey, Connecticut, and Rhode Island, and raised port fees for coastal shipping. This action was taken in response to the pursuit of free trade policies by these other states that undercut New York’s tariffs. New Jersey retaliated by levying a large tax on a lighthouse operated on its coast by New York. Connecticut imposed a fee on coastal ships under twenty tons “bound either to the State of New-York or Rhode-Island.”

Some of the trade measures enacted by states amounted to “overt discrimination by one state against goods produced in or re-exported from a neighboring state.”

33 See Matson, supra note 26, at 380 (“States with major port cities, especially New York and Massachusetts, took advantage of their superior position in international commerce and in regional markets to pass discriminatory duties against neighboring states’ traffic at their ports, while weaker states tried to divert trade to themselves by abolishing duties altogether, thus setting parameters for intense interstate rivalries by mid-1785.”).  
34 Oliver Ellsworth, Ct. Ratifying Conv. (Jan. 4, 1788), 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 189 (Jonathan Elliot ed. 1863) [hereinafter Elliot’s Debates].  
35 Id. (one-third estimate).  
36 James Madison to Thomas Jefferson (Dec. 10, 1783), reprinted in 7 Madison Papers, supra note 32, at 401.  
37 An Act in Alteration of an Act, entitled, An Act for Regulating Fees, etc. (Oct. 2, 1787), Connecticut Acts, at 356. On the New York acts and subsequent retaliation, see E. Wilder Spaulding, New York in the Critical Period, 1783-1789, at 156-57 (1932); see id. at 156 (“New York in 1785 not only took her toll from imports passing through to her neighbor states, but taxed foreign articles which reached her after importation in foreign ships through neighboring ports.”).  
38 Denning, supra note 30, at 48. On trade discrimination by states during the Confederation, see id. at 39 (arguing that the concern over interstate “discrimination was not the product of the fevered imagination of nationalists bent on reining in the states, but that it really existed, and that it showed no signs of abating on the eve of the Philadelphia Convention.”); Matson, supra note 26, at 379-81 (describing discriminatory policies and their effects); Richard B. Morris, The Forging of the Union, 1781-1789, at 148-49 (1987); Giesecke, supra note 30, at 126-27 (“Although the reason for most of these acts was revenue, motives of discrimination and protection were prominent in those of the northern states, and to a less extent in the southern states.”); id. at 125-40 (examples of discriminatory laws); Albert S. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 448-49 (1941) (“[T]he states were using their imposts as weapons against each other, either offensively, as where the importing states imposed tariffs the ultimate incidence of which was calculated to fall on others not blessed by geography with as good and accessible harbors, or defensively, as by strengthening their tariff walls...”)
Maryland, for example, collected import and export duties on various commodities, but allowed substantial deductions for goods carried on vessels built in the state that were owned or navigated by its citizens. (Ostensibly this was to encourage ship building in Maryland.) Virginia levied tonnage charges and other duties on all vessels entering or leaving the state’s ports, but exempted those owned by its citizens.

The actual extent of the trade barriers that resulted from this interstate competition has long been a subject of debate among historians. In the late nineteenth century, John Fiske wrote that “the different states, with their different tariff and tonnage acts, began to make commercial war upon one another.” Revisionist historians subsequently took exception to this thesis, none more aggressively so than Merrill Jensen, who contended in an influential work that barriers to trade “were the exception rather than the rule.” Jensen and others made much of the fact that “[t]he general rule was that all American goods were exempted from state imposts.” Some economic historians also have doubted whether “either interstate or foreign trade was greatly hampered, or that the regional differences in recovery and adjustment to being outside the British Empire had much to do with this tariff system.” In rejoinder, defenders of the traditional view that discriminatory trade policies were a significant problem have pointed to laws in at least seven states that involved “some form of discrimination against the commerce of neighboring states,” most of which Jensen over-

39 See An Act To Impose Duties on Certain Enumerated Articles Imported Exported Into and Exported Out of this State, and on All Other Goods, Wares and Merchandise, Imported into this State, Laws of Maryland, ch. 84, § 16 (1784) (deductions from import duties for Maryland citizens); An Act to Amend the Act for Ascertaini

40 See An Act to Amend the Act of Amend and Reduce the Several Acts of Assembly for As-

41 John Fiske, The Critical Period in American History: 1783-1789, at 144-45 (Boston, 1888). Fiske’s conclusion now is generally regarded as an exaggeration of the actual degree of trade disputes among the states. See Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress 333 (1979). That does not deny, however, that the problem was real or that leading proponents of the Constitution regarded trade relations as urgently needing reform.

42 Jensen, supra note 27, at 340.


44 Shepherd, supra note 27, at 35.
Furthermore, the duties on foreign products that were then re-exported to states without port facilities had to be borne by merchants and consumers in those states.  

Regardless of who is correct about the actual significance of conflicting trade policies (Fiske and Jensen may be arguing the issue in the afterlife), the far more important point for constitutional history is that the Americans most responsible for bringing the Constitution to fruition were convinced that the problem of discriminatory legislation was real and they proclaimed this conviction as a central rationale for national control over trade.  Jensen contended somewhat cynically that these “supporters of centralized power used the few discriminatory laws as an argument for a new government.” It is true that the key proponents mostly were merchants and planters directly affected by the economic turmoil inasmuch as their fortunes were tied to trade, or they were lawyers who represented them, not the great mass of Americans whose livelihoods were based on subsistence farming.  Yet they did contend in earnest, publicly and privately, that there were serious conflicts between the states over trade regulations.  Madison wrote to Jefferson in Paris a few months before heading to Philadelphia that “[t]he necessity of harmony in the commercial regulations of the states has been rendered every day more apparent,” reiterating his earlier message that efforts to retaliate against British trade restrictions, “instead of succeeding have in every instance recoiled more or less on the states which ventured on the trial.” On his list of the dozen “vices” of the Confederation, Madison included “[t]he practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of for-

45 Denning, supra note 30, at 60.
46 See id. at 75.
47 Jensen, supra note 27, at 339.
48 That does not mean the economic problems of the 1780s were not dire or without consequence to the average person.  Although economic statistics are far from imprecise for the period, “the net effect of war was a sharp decline in individual income,” and the “painfully slow” recovery was years away when the Constitution went into effect.  John J. McCusker & Russell R. Menard, The Economy of British America, 1607-1789, at 366-67 (1985).
49 On perceptions during the 1780s of the trade problem, see Richard B. Collins, Economic Union as a Constitutional Value, 63 N.Y.U. L. Rev. 43, 53 (1988) (“Many writings at the time of the Convention condemned commercial exploitation of one state by another with respect to foreign trade.  Some discussed exploitation of weak states by stronger ones.  Others decried exploitation of favorable geography to tax goods passing through ports on the way to or from less favored states.”); Richard G. Albion, The Rise of the Port of New York 7 (1939) (“Interstate rivalry and the jumbled condition of the state currencies . . . seriously hampered the merchants—a depressed and at times desperate tone runs through their letter-books of those years.”); Matson, supra note 26, at 377 (“By the mid-1780s, . . . it was becoming clear to Americans concerned about international and interstate developments that distinct state policies often pitted some groups of Americans against others.”).
50 Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), reprinted in 8 Madison Papers, supra note 32, at 476.
eign nations.” Hamilton wrote in *Federalist No. 22* that “interfering and unneighborly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others.”

### Creating the Privileges and Immunities Clause

Charles Pinckney’s remark about the clause indicated that it was a comity provision with the same purpose as its predecessor in the Articles, notwithstanding that the texts of the two differed substantially. The counterpart in the Articles was much lengthier (148 words versus 19). One change corrected a drafting gaffe in the Articles, which provided that “the free inhabitants” of one state were entitled to the privileges and immunities of “free citizens” in other states. As Madison pointed out, that obliged states to grant visitors who were inhabitants but not citizens of other states “greater privileges than they may be entitled to in their own State.”

Additional departures from the Articles were not explained at the time. For unstated reasons, the Convention omitted a clause from the Articles guaranteeing that “the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce.” One possible explanation for this deletion could be that “there was to be no constitutional right to travel,” that is, the Constitution did not guarantee interstate movement. No direct evidence supports this explanation, however, and it is hard to see how a provision that was “the basis of the union” could not have encompassed the right to enter states and engage in trade and commerce. When Americans were British subjects they could move throughout the empire, and it would be remarkable if the Constitution was meant to withdraw a freedom that they had provided for expressly in the Articles. All states permitted their citizens to enter and leave freely, and consequently the Framers most likely regarded the freedom of interstate movement as “implicit in article IV. Since the privileges and immunities clause grants a citizen rights in another state, any

---

51 James Madison, “Notes on Ancient and Modern Confederacies” (April-June, 1786), reprinted in 9 id. at 346.
52 Alexander Hamilton, *Federalist No. 7*, reprinted in Federalist, supra note 2, at 137.
54 James Madison, *Federalist No. 42*, reprinted in Federalist, supra note 2, at 286. It is possible, however, that “free inhabitants” was meant to be synonymous with “free citizens.” See text at notes 284-86.
56 Natelson, supra note 12, at 1183.
57 Alexander Hamilton, *Federalist No. 80*, reprinted in Federalist, supra note 2, at 537. The Court eventually held that Art. IV, § 2 “plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation.” *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871).
attempt by the origin or destination state to prevent interstate travel would deny the individual those rights.”\textsuperscript{58}

Another difference was that the Articles expressly provided that “the people of each state shall . . . enjoy” in “any other state . . . all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.”\textsuperscript{59} No similar provision was included in Article IV, and that has led some to conclude the clause was not about trade at all. Rather, its purpose has been said “to protect American citizens in their privileges and immunities of citizenship, i.e., their natural, fundamental rights, against invasions by either states or individuals.”\textsuperscript{60} There were other provisions of the Constitution that addressed the specific problems in trade regulation and taxation that had plagued the Confederation. Prohibiting state duties, imposts, and tonnage without congressional consent directly eliminated the most important sources of discrimination.\textsuperscript{61} Furthermore, Congress’ power over interstate commerce could be used to impose uniform rules for trade across borders. And the availability of federal courts for diversity action was expected to diminish discrimination in the judicial arena. In actuality, these other anti-discrimination provisions show only that the Framers were sufficiently concerned about centralizing control over trade and ending discriminatory taxes that they inserted multiple protections. States could very well engage in other forms of discrimination not covered by the Constitution’s direct prohibitions, such as closing markets to outsiders, differentially taxing the property of noncitizens, or imposing higher wharfage fees for vessels not owned or sailed by state citizens. There were many ways for states to discriminate with regard to property. In a 1788 Pennsylvania case, for example, the court described a Delaware law, “a narrow and contracted one indeed, which obliges executors or administrators to discharge the debts due from the deceased to his creditors within the state, in preference to every other.”\textsuperscript{62} Moreover,

\textsuperscript{58} Bogen, Case, \textit{supra} note 12, at 836.
\textsuperscript{60} Chester James Antieau, \textit{supra} note 10, at 2.
\textsuperscript{61} See U.S. Const., Art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress. No State shall, without the Consent of Congress, lay any Duty of Tonnage. . . .”). The Court in 1869 held that the Import-Export Clause applied only to trade with foreign nations, not interstate commerce. \textit{See} Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 133 (1869). There is a strong argument that \textit{Woodruff} was wrongly decided. \textit{See} Richard B. Collins, \textit{Economic Union as a Constitutional Value}, 63 N.Y.U. L. Rev. 43, 51 (1988) (“[I]t is odd that the framers would directly forbid state tariffs on foreign goods, but allow them on interstate shipments absent an act of Congress to the contrary. . . . [Woodruff’s] reasoning is inconsistent with much of the contemporaneous argument about the need for a new Constitution, argument that stressed interstate commercial rivalry.”).
\textsuperscript{62} Millar v. Hall, 1 Dal. 229, 232 (Pa. S. Ct. 1778). \textit{Millar} involved a claim by a Pennsylvania citizen that the discharge in bankruptcy by Maryland for one of its citizens was not binding in Pennsylvania. Defense counsel alluded to both the Full Faith and Credit Clause and Privileges
from the perspective of 1787-88, it was less than obvious how the commerce power could reach property not moving as trade across state lines.

Interpreting the term “Privileges and Immunities of citizens” as either not encompassing trade or being only limited to “natural, fundamental rights,” entirely neglects the breadth of meanings that these words had at the time, a subject explored in a moment.63 Neither position has any explicit support in statements by those involved in framing and ratifying the Constitution. Trading rights and the freedom to move about the empire were among the most important privileges that Americans had enjoyed as British subjects,64 and it is unlikely that many would want to diminish them. The relation of “privileges and immunities” to natural rights is more complicated, as we shall see,65 but they included rights based both on natural law and conventional sources such as statutes.

Once we examine the many usages of “privileges and immunities,” the likeliest explanation for the Convention’s excision of most of the related provisions in the Articles was that the Framers thought them redundant. Just as they trimmed many other clauses to the bare minimum over the course of the proceedings, they might have preferred the elegance of the more parsimonious version. Substantively, they could have worried about future construals of the clause. Had it explicitly protected ingress, regress, trade, and commerce, the implication could be that this was an exclusive listing of “privileges and immunities.” That could lead to unduly narrow interpretations of the clause, whereas “Privileges and Immunities of Citizens” had broad and familiar connotations for Americans, a point to be developed shortly. Madison also commented in Federalist No. 42 about the “confusion of language” in the omitted clause from the Articles, observing that the term “all the privileges of trade and commerce” could not “easily be determined.”66 Stripping “trade and commerce” from the clause still left it indeterminate, but the phrasing invited liberality of construction rather than a focus on specific subjects. (The Court many years later decided that there was no substantive difference between the two versions.67)
There was a close relationship between the federal judiciary and the Privileges and Immunities Clause. The states had ignored the similar provision in the Articles when they enacted discriminatory trade laws. At the Convention, Madison “instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens of other States are entitled to equality of privileges by the Articles of Confederation.”

William R. Davie similarly commented at the North Carolina Convention that “Maryland lately passed a law granting exclusive privileges to her own vessels, contrary to the Articles of the Confederation,” which had no means to stop even blatant discriminations. This proved to them that a guarantee of privileges and immunities was worthless without national judicial enforcement. State courts were known to treat outsiders with “evasion and subterfuge,” Hamilton said. The answer was the federal judiciary, which would have “no local attachments,” and thus could keep “inviolable . . . that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens.”

Even if the immediate impetus for adopting the Privileges and Immunities Clause was to thwart discrimination in commerce among the states, it had a larger purpose, one that both explains Hamilton’s salute to Article IV as the foundation of the union and the Framers’ choice of its sweeping, unrestricted language. The rupture with Great Britain ended all the rights Americans had possessed in common as British subjects. Under English law, a person became a subject upon birth within the kingdom or by naturalization, which required parliamentary authorization. Subjects were “under the king’s protection,” and in exchange they owed “natural allegiance” to the monarch as “a debt of gratitude,” arising from “an implied contract with the prince.” In short, “immediately upon their birth,” subjects possessed “a great variety of rights.” As noted, this included the privilege to do business and own property in any part of the kingdom. Hamilton observed in Federalist No. 7 that Americans had been “accustomed” since “the earliest settlement of the country” to commerce among the colonies “on the basis of equal privileges.” With independence, however, each state gained sovereignty over its territory, with the consequence that Americans no longer had rights of citizenship outside of their own states. Without the

---

68 James Madison, 1 Const. Conv., supra note 10, at 317 (June 19, 1787).
69 William R. Davie, N.C. Ratifying Conv. (July 24, 1788), 4 Elliot’s Debates, supra note 34, at 20.
70 Alexander Hamilton, Federalist No. 80, reprinted in Federalist, supra note 2, at 537.
71 Id.
72 1 Blackstone, supra note 13, at 357.
73 Id. at 358.
74 Id. at 357.
75 Id. at 358.
76 Id. at 357.
77 Id. at 359.
78 Alexander Hamilton, Federalist No. 7, reprinted in Federalist, supra note 2, at 40.
Privileges and Immunities Clauses of the Articles and Constitution, states would be able to treat citizens of other states as aliens. Those clauses assured the continuation of the common rights Americans possessed as British subjects.\(^{79}\)

Strictly speaking, Article IV did not define national citizenship rights or mandate that states continue to give their citizens the same rights they had as British subjects. The Constitution recognized Americans as being at once citizens of the United States and of particular states. The rights of Americans as national citizens were provided by the Constitution itself and statutes enacted pursuant to it. State law determined the privileges and immunities of state citizens, as well as who was a citizen. But by requiring that states extend to citizens from other states the same rights they gave their own, the result would be a large measure of uniformity in how Americans were treated around the union. There were common assumptions about the legal rights of citizens versus aliens that tended to minimize differences among the states. In nineteenth-century debates about the meaning of the clause, the argument would be made that it was intended to establish rights of national citizenship, rather than merely requiring equality of treatment for visitors. We leave that discussion for later, but note that courts and commentators in that era almost uniformly held it to be only a comity guarantee.\(^{80}\)

**Defining the “Privileges and Immunities of Citizens”**

What constituted “the Privileges and Immunities of Citizens”? At best, the Convention and ratification records left only clues. The few remarks that have been preserved in connection with the clause related almost entirely to unfair treatment of outsiders in state courts and in taxation and regulation of trade. However, those were the issues of the moment, which does not exclude broader coverage. The clause guaranteed not just some, but all the privileges and immunities of citizenship. In modern terms, it mandated both an economic common market in which trade restrictions were removed as well as political integration of the states by assuring Americans that they would be treated like local citizens wherever they went.

*The Various Meanings of “Privileges” and “Immunities” in the Eighteenth Century*

Whether taken as separate words or together in a phrase, “privileges” and “immunities” were used frequently in legal and political discourse in the eighteenth century and earlier. As discrete words, they could be synonyms in both everyday language and legal writing. Samuel Johnson defined each with the other word. Johnson

---

\(^{79}\) On the purpose of the Privileges and Immunities Clauses as replacing the rights of British subjects, see Bogen, Case, *supra* note 12, at 861 (“The privileges and immunities clause was intended to secure the former intercolonial privileges of movement, citizenship, and trade.”); Bogen, Privileges, *supra* note 12, at xvii-xviii & 11-17.

also stated that a “privilege” was a “[p]eculiar advantage” or an “[i]mmunity; right not universal,” which captured the core idea of a privilege: an advantage, benefit, or freedom from government that was restricted to certain people, entities or places. 81 Similarly, “immunity” was defined by Johnson as the “[d]ischarge from any obligation” or an “exemption from onerous duties.” 82 To have a privilege, in other words, meant that a person was allowed to do something or refuse to act in some way, and thus would have immunity—or freedom—from adverse consequences. In legal dictionaries used by American lawyers in the eighteenth century, a privilege typically was defined as a law that “exempted” “a private Person or Corporation . . . from the Rigour of the Common Law, or it is some Benefit or Advantage granted or allowed to any Person contrary to the Course of Law. [I]t is sometimes used for a place which hath a special Immunity.” 83 The common law recognized a “writ of privilege,” by “which a privileged Person brings to the Court” a claim “for his exemption, by reason of some Privilege.” 84

As with many dictionary definitions of legal terms, however, these were generalizations that did not entirely capture the varied meanings of privileges and immunities in Anglo-American legal and political history. Taking into account the range of printed material available to be public in the eighteenth century—newspapers, pamphlets, books, charters, grants, statutes, law cases, constitutions, and popular literature—there were thousands of references to privileges and immunities, either as separate terms, a pair of words, or part of a phrase including terms such as “right” and “liberty.” They took on very different meanings depending on the purpose of the writing. For Article IV and its predecessor in the Articles, the context was the privileges and immunities of state citizens. Many of the dictionary definitions are not entirely apposite to this setting and can even be misleading. Although the “peculiar advantages” that came from citizenship were “not universal” like natural rights, with some exceptions they applied to almost every free adult male in America (or to subjects in Great Britain), and at times to every free person. Often the privileges and immunities of citizens or subjects had nothing to do with relieving a person from the restrictions of the common law. For example, as will be developed, trial by jury was widely regarded as a privilege of citizenship, not an exemption from the common law (jury trials were part of the common law). Another privilege, habeas corpus, assured that the common law was applied to stop an unlawful detention.

82 Id. (entry for “immunity”); see The Student’s Law-Dictionary; or Compleat English Law-Expositor (unpaginated, entry for “immunities”) (London, 1740) (possessing an immunity meant “to be free from certain Burdens.”).
84 John Cowell, The Interpreter of Words and Terms (unpaginated, entry for “writ”) (London, 1701). Blackstone explained that a privileged person who was improperly arrested would be released “on motion” without need for a writ of privilege. 1 Blackstone, supra note 13, at iv (Supplement).
In ordinary legal usage, privileges and immunities ran the gamut from routine government permissions, “used much as the terms ‘license’ or ‘permit’ are used today,” to the entitlements of the aristocracy. Legislative grants of property frequently bestowed on the recipients the privileges and immunities of ownership. Various trades, occupations, and businesses were entitled by statute to special legal benefits, including exclusive rights to deal in specific products and to limited competition. In trading agreements with other nations, a provision might grant a country’s merchants “all the privileges and immunities which are granted to the most favoured nations.”

Legislative approvals of incorporation, Blackstone explained, created “artificial persons” with “privileges and immunities,” including ones that no natural person could possess, most importantly the ability to hold property in perpetuity—a corporation was “but one person in law, a person that never dies.” At that time in Great Britain and America (both before and after the Revolution), all corporations, whether for-profit or not, were created via special legislative enactments or royal decrees. These grants often gave the corporation a monopoly over a particular field or permitted it to operate with limited competition and subject to continuing regulation. A typical instance was a 1788 statute in South Carolina establishing a company for the purpose of opening certain rivers to navigation by erecting “locks, dams or canals.” The application for incorporation requested that the legislature invest the company “with ample powers, privileges and immunities for carrying their purpose into speedy effect.” In approving the application, the legislature authorized the company not only to build the requisite facilities, but to set and collect tolls up to a specified limit. Legislatures also incorporated religious societies, usually church congregations, vest-

---

85 Natelson, supra note 12, at 1140.
86 See 4 Blackstone, supra note 13, at 159 (describing “license or privilege” of monopoly as an allowance “by the king for the sole buying and selling, making, working or using, of any thing whatsoever, whereby the subject ion general is restrained from that liberty of manufacturing or trading which he had before.”); Stewart Kyd, A Treatise on the Law of Corporations 14-15 (London, 1793) (defining “franchise” as “a royal privilege” by which a subject “either receives some profit, or has the exclusive exercise of some right. . . .”). See, e.g., An Act for the Regulating of the Trade of Bay-Making, in the Dutch Bay-Hall in Colchester, 12 Chas., ch. 22, 170 (1660) (granting “Liberties, Privileges, Immunities,” to Dutch tradesmen in specific town with respect to baize).
88 1 Blackstone, supra note 13, at 455.
89 Id. at 456.
90 Id.
91 An Act to Establish a Company for Opening the Navigation of Broad and Pacolet Rivers (Feb. 29, 1788), Public Laws of the State of South-Carolina 458 (Philadelphia, John Fauchereaud Grímke, ed. 1790). See also An Act for Building a Bridge Across Ashley River (Mar. 13, 1788), id. at 490-91 (bridge proprietors authorized to collect tolls and enjoy “the several rights, privileges and immunities” granted in a prior law).
92 Id.
ing them with a range of powers, including the right to sue and be sued, receive charitable donations, own property, and operate schools. For example, when incorporating an Episcopal congregation in 1786, the Pennsylvania assembly granted it specific powers along those lines, and added a general investment of “such powers and privileges as are enjoyed by other religious and charitable Societies incorporated within this State.” A Maryland law in 1785 incorporated a charitable body to provide for the relief of widows and children of clergy, giving it a variety of legal powers, and “in general [to] have and exercise all such rights, franchises, privileges and immunities, as by law are incident and necessary to corporations of this kind.” Similar provisions appeared in university incorporations, as that for Harvard College, which was re-chartered in the Massachusetts Constitution of 1780, affirming that its president and fellows “in their corporate capacity . . . shall have, hold, use, exercise, and enjoy all the powers, authorities, rights, liberties, privileges, immunities, and franchises which they now have.”

Certain types of people and places were entitled to privileges and immunities under various statutes and the common law. Ambassadors from foreign countries (and their personal servants) possessed many, including immunity from most civil suits or criminal prosecutions. Blackstone wrote that “the rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions.” The common law and various statutes in Great Britain and America protected these rights in great detail inasmuch as their infringement could produce an international incident. Civil process executed against an ambassador, his property, or servants was “null and void,” Blackstone recounted, and anyone doing so “shall be deemed violaters of the law of nations” and subject to

93 An Act for Removing the Protestant Episcopal Chapel of St. Thomas, in Carnarvan township, and for Incorporating the Congregation Thereof, ch. 13, § 1 (Philadelphia, 1786), Laws Enacted in the Second Sitting of the Tenth General Assembly of the Commonwealth of Pennsylvania 40 (Mar. 6, 1786). See also An Act to Incorporate the Episcopal Congregation Belonging to St. Peter’s Church, ch. 13, § 3 (Mar. 4, 1786), id. at 38 (granting newly incorporated church with “all and singular like powers, authorities, rights, privileges and immunities” given by statute in 1783 to St. Paul’s Church in Philadelphia); An Act to Incorporate the Vestry and Church-Wardens of the Episcopal Parish of St. George’s, Dorchester, Preamble, Acts, Ordinances, and Resolves, of the General Assembly of South Carolina, Passed in March, 1789, at 29 (Mar. 7, 1789) (parish incorporated “and vested with all the powers, privileges and immunities which any of their sister churches enjoy.”).

94 An Act to Provide a Fund for the Relief of the Widows and Children of the Clergy of the Protestant Episcopal Church in the State, Ch. 78, § 4 (Jan. 22, 1785), 1 Laws of Maryland (Annapolis, 1799).


96 See generally The Rights, Privileges, and Office of Embassadors and Publick Ministers (London, 1790) (treatise describing “the Rights and Privileges” of ambassadors).

97 1 Blackstone, supra note 13, at 246.
criminal prosecution by statute. After independence, American states also enacted protective legislation of this sort, such as a Connecticut statute making it a crime to violate “the Immunities of Ambassadors, or other public Ministers, . . . under the Limitation allowed by the Laws and Usages of Nations.”

Churches and clergy both had “numerous privileges and immunities,” David Hume wrote in his History of England, which he thought accounted for why religious authorities were able to preserve “Roman learning” through the “barbarous ages.” The coronation oath for British kings, as described by Blackstone, required swearing “to preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain to them.” These were “Divine Rights or Privileges,” not derived from municipal law, Rev. John Turner argued in 1707, for the church was “the Household of God built on the Foundation of the Apostles and Prophets, Jesus Christ himself being the corner Stone.” Churches operated “ecclesiastical courts” that “decide[d] many questions which are properly of temporal cognizance,” Blackstone wrote. These included actions to compel payment of tithes, recover dues owed to clergy for their services, order repair of neglected church property, adjudicate “matrimonial causes” such as divorce and spousal maintenance, and determine inheritances. Cases in these courts were “regulated according to the practice of the civil and canon laws; or rather according to a mixture of both.” (The jurisdiction of common law courts in these areas often overlapped or even eclipsed church courts.) Individual clergy, and especially bishops, possessed an array of personal and property rights, such as income from benefices and tax exemptions, that were referred to as privileges and immunities, or similar terms. Bishops, who were entitled to sit in the House of

---

98 Id. at 248.
101 Id.
102 Id. at 296.
103 1 Blackstone, supra note 13, at 228.
105 Id.
106 3 Blackstone, supra note 13, at 99.
107 Id. at 88.
108 Id. 89.
109 Id. 91-92.
110 Id. at 93.
111 Id. at 94.
112 Id. at 96.
113 Id. at 100.
Lords, had “the same Privileges with Temporal Barons,” including the “Privilege of Hunting in the King’s Forests.”

“The privileges of parliament are likewise very large and indefinite,” Blackstone wrote, the greatest of which was the right of “parliament itself” to determine the extent of its privileges. The open-ended nature of parliamentary privileges was “in great measure” responsible for preserving “[t]he dignity and independence of the two houses.” However, two privileges stood out among the rest. First, under the English Bill of Rights, members were entitled to “privilege of speech,” meaning that what they said in debates and proceedings could “not be impeached or questioned in any ‘court or place out of parliament.’” Second, members of Parliament, as well as their personal servants and horses, could not be arrested for most crimes or subjected to civil suit during the legislative term and for a period thereafter, which were “immunities as antient as Edward the confessor” in the eleventh century. Assaulting a member or his servants was not just a crime, but “a high contempt of Parliament, and there punished with the utmost severity.” These protections were instrumental to the development of parliamentary independence. Blackstone wrote that they safeguarded legislators “not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown.”

---

115 Id. See also id. at 59 (special “Privileges” of Archbishop of Canterbury); (Rev.) John Adams, The Flowers of Modern History 45 (London, 1790) (“The Christian emperors had enriched the church. They had lavished on it privileges and immunities.”).
116 1 Blackstone, supra note 13, at 159.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id. at 160, quoting Eng. Bill Rgts., 1 W. & M., ch.2, § 9 (1689).
122 Id. at 160.
123 Id.
124 Id. at 159.
125 The Constitution provided that members of Congress were “privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same,” unless the charge was “Treason, Felony and Breach of the Peace.” Likewise, they “shall not be questioned in any other Place” regarding any Speech or Debate in either House.” Art. I, § 6, cl. 1. The Articles provided: “Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.” U.S. Art. Conf., Art. V, cl. 5. On the importance of these immunities to parliamentary independence, see Robert J. Reinstein & Harvey A. Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113, 1122-35 (1973).
Privileges and Immunities of State Citizens

The right to exploit government-owned or controlled resources was commonly termed a privilege in the eighteenth century. The term frequently appeared in treaties, grants and statutes (or commentaries about them), relating to the use of public resources such as fisheries; shore lands for catching bait, drying and processing fish; forests for hunting and cutting wood; pasturage for farm animals; and lands owned or controlled resources was commonly termed a privilege in the eighteenth century. The term frequently appeared in treaties, grants and statutes (or commentaries about them), relating to the use of public resources such as fisheries; shore lands for catching bait, drying and processing fish; forests for hunting and cutting wood; pasturage for farm animals; and lands

See, e.g., William Bolland, The Ancient Right of the English Nation to the American Fishery (London, 1764) (describing how the French had “direct[ed] its fisherman to proceed and fish upon the banks left to the English [by treaty], in order to support her pretensions, and make to themselves a privilege of fishing where they pleased by force of custom.”); id. at 82 (describing a treaty article granting “the privilege for the Spanish nation to fish upon the banks of Newfoundland.”); id. at 92 (referring to “the important privilege granted by” a treaty, whereby “under certain limitations and restrictions to the subjects of France for fishing and drying their codfish on a certain part of the banks of Newfoundland has not been refused by Great Britain . . . .”); John Rose, An Essay upon the British Fisheries 32-33 (Edinburgh, 1785) (describing “what value the Swedes put upon the privilege of fishing in our seas.”); William Pepperrell, An Accurate and Authentic [sic] Account of the Taking of Cape Breton, in the Year MDCCCLV 29 (London, 1758) (describing how the French had made “themselves a privilege as it were of fishing almost where they pleased” in the Newfoundland fishery); id. at 37 (“supposing the French entirely excluded this Fishery . . . . and allows them no longer any privilege at Newfoundland.”); Reasons Why the South Sea Company Should Not Now Endeavour to Regain the Whale Fishery (London(?), ca. 1725) (broadsides) (describing how a group of merchants had been given “the exclusive Privilege” of the Greenland whale fishery).

See, e.g., Griffith Williams, An Account of the Island of Newfoundland, with the Nature of its Trade, and Method of Carrying on the Fishery 23 (London, 1765) (describing a “Patent for a Man to have the sole Privilege of drawing Bait at a certain Beech . . . .”).

See, e.g., An Act for the Encouragement of the Fisheries Carried on from Great Britain, Ireland, and the British Dominions in Europe, and for Securing the Return of the Fishermen, Sailors, and Others Employed in the Said Fisheries, to the Ports Thereof, at the End of the Fishing Season, 15 Geo. 3, ch. 31, § 4 (1775) (clarifying “to whom the Privilege or Right of drying Fish on the shores of Newfoundland does or shall belong,” that it “shall not be held and enjoyed by any of his Majesty’s Subjects arriving in Newfoundland, from any other Country except from Great-Britain, or one of the British Dominions of Europe.”); Williams, supra note 127, at 16 (expressing view that “none but the Inhabitants of Great-Britain, Newfoundland, with Jersey and Guernsey . . . . should have the Privilege of being possessed of any Fish Rooms, or Plantations in the Island of Newfoundland.”).

See text at notes 453-56 & notes 453 & 456; William Douglass, A Summary, Historical and Political, of the First Planting, Progressive Improvements, and Present State of the British Settlements in North-America 200 (London, 1755) (describing an agreement with Indian nations granting them “the privilege of hunting, fowling, and fishing as formerly.”); An Act for Prevention of Misunderstanding between the Tributary Indians, and Other His Majesty’s Subjects of this Colony and Dominion (1705), reprinted in An Abridgement to the Publick Laws of Virginia, in Force and Use, June 10, 1720, at 91 (London, 2nd ed. 1728) (colonial act providing that “[t]he Indian shall likewise enjoy their wonted Convenience of Oystering and Fishing, and of gathering [various wild plants] on the Lands belonging to the English,” provided “neither are they to enjoy the above Privilege of Fishing, &c. without a Licence first had from a Justice of the Peace.”).

See, e.g., William Nelson, The Laws Concerning Game 251 (London, 6th ed. 1762) (describing a case in which a fine was imposed for cutting wood from a nobleman’s forest; the court rejected the “Claim of a Privilege to fell Wood in the Forest, without Licence or View of the Foresters . . . .”). See Thomas Pelham-Holles to Ricardo Wall (July 4, 1754) (original in British Museum), quoted in Lawrence Henry Gipson, British Diplomacy in the Light of Anglo-Spanish New World Issues, 1750-1757, 51 Am. Hist. Rev. 627, 640 (1946) (remonstrance from Duke of Newcastle, First Lord of the Treasury (Prime Minister), to the Spanish ambassador to Great Britain, about an attack by Spain on British woodcutting operations in Honduras, saying: “We are entitled to that Privilege by the Word & Meaning
Privileges and Immunities of State Citizens

for harvesting wild plants,\textsuperscript{132} mining,\textsuperscript{133} and obtaining salt.\textsuperscript{134} Treaties were specific in acknowledging that these privileges were to be enjoyed by the subjects of signatory nations.\textsuperscript{135}

These varied usages of privileges and immunities represented more than a list of individual and corporate rights. They illustrated a characteristic of Anglo-American law: an endless array of legal differentiations among people and their occupations that carried corresponding rights and duties. This was especially so in Great Britain, where hereditary distinctions and social rankings among subjects correlated with specific legal entitlements. A British commentator in 1776 referred to “the lords” as “[n]ext in rank to the king,” who had the “privilege of sitting in parliament in their own rights.”\textsuperscript{136} Everyone else in Great Britain had a rank with attendant privileges and immunities, often vastly greater than others. But some privileges belonged to all subjects.

The Privileges and Immunities of Subjects and Citizens in the Eighteenth Century

The privileges and immunities of subjects and citizens pertained to a very different context than most of the usages just considered. Because many applied to virtually all free persons, these rights were the opposite of the special benefits conferred on select people, institutions, or occupations within a state or nation. Indeed, in American of the Treaty of Utrecht.”).

\textsuperscript{131} An Act for Dividing and Inclosing Several Commons or Wastes, and also Several Common Fields, Meadows, Pastures, and Waste Grounds, Lying within the Manor of Wimeswould, in the County of Leicester, 30 Geo. 2, ch. 53, cl. 2 (1757) (private act granting certain individuals “an exclusive Right, Liberty, or Privilege, to turn and depasture their Beasts, Sheep, and commomable Cattle, upon the said several Commons, Fields, and waste Grounds. . . .”); James Anderson, Observations on the Means Of Exciting a Spirit of National Industry; Chiefly Intended to Promote the Agriculture, Commerce, Manufactures, and Fisheries, of Scotland 100 (Edinburgh, 1777) (“These large flocks of sheep have each, by law, a privilege of pasturage in certain districts. . . .”).

\textsuperscript{132} See, e.g., An Act for Prevention of Misunderstanding between the Tributary Indians, supra note 129, at 91.

\textsuperscript{133} See, e.g., Grant of New Hampshire and Masonia (April 22, 1635), reprinted in 29 N.H. State Papers 64 (Albert S. Batchellor, ed., 1896) (granting to John Mason title to “all mines minerals quarreys soyles & woods marshes rivers waters lakes fisheries hawking hunting & fowling & all other Royalties Jurisdic’ons priviledges preheminence proffitts com’odities & hereditaments w’soever.”).

\textsuperscript{134} See, e.g., Douglass, supra note 129, at 89 (referring to British [t]he privilege of making and carrying salt from the island of Salt Tortugas,” granted by the Spanish in a treaty); id. at 200 (describing an agreement with Indian nations granting them “the privilege of hunting, fowling, and fishing as formerly.”).

\textsuperscript{135} See notes 126 & 130, supra.

\textsuperscript{136} Francis Stoughton Sullivan, Lectures on the Constitution and Laws of England 187 (London, 1776). Members of the British peerage had “many privileges,” including seats in the House of Lords and exemption from arrest mentioned in text, as well as the right to be tried for crimes only by the Lords. An Account of the Constitution and Present State of Great Britain 120 (London, ca. 1779).
ca, the notion of conferring special rights on subgroups of the population conflicted with republican conceptions of equality. Joseph Priestley wrote in 1788: “Personal privileges and immunities, which are not necessary for the good of the whole, are always justly offensive.”¹³⁷ Three early state constitutions included provisions against special privileges, particularly the type associated with hereditary rights. The Virginia Bill of Rights in 1776 provided: “That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.”¹³⁸

The rights of subjects under English law in the eighteenth century can be determined from two opposite perspectives. The first approach is negative: consider the legal treatment of aliens, those “born out of the king’s domains, or allegiance,” in contrast to subjects (or citizens in republics).¹³⁹ Americans had insisted prior to the Revolution on being treated as British subjects, not aliens, and consequently they would not want to be regarded as aliens when visiting or trading in other states. As Blackstone commented, though aliens were entitled by the common law or statutes to many of the rights held by British subjects, “their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove.”¹⁴⁰

Only “alien-friends, or such whose countries are in peace with ours,” had any “rights” or “privileges,” Blackstone wrote.¹⁴¹ “Alien-enemies” possessed none, “unless by the king’s special favour, during time of war.”¹⁴² Aliens could have no ownership rights in real estate, although they were permitted to rent a house for “habitation” or acquire “personal estate” that was “of a transitory and moveable nature.”¹⁴³ It was impossible for an alien to own land in Great Britain, Blackstone explained, because of the inherent tie between “a permanent property in lands” and “allegiance” to the king.¹⁴⁴ However, the king could declare an alien to be a “denizen,” with many of the rights of subjects, including the ability to purchase land.¹⁴⁵ Aliens were allowed to “trade as freely as other people,” although they could be “subject to higher duties at the custom-house.”¹⁴⁶ In the past, certain “alien artificers” had been forbidden “to

¹³⁷ Joseph Priestley, Lectures on History, and General Policy 258 (Dublin, 1788).
¹³⁸ Va. Bill Rgts., § 4 (June 12, 1776). See also N.C. Decl. Rgts., § 22 (Dec. 18, 1776) (“That no hereditary emoluments, privileges or honors ought to be granted or conferred in this State.”); Ky. Const., Art. XII, § 1 (Apr. 19, 1792) (“That all men, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community, but in consideration of public services.”).
¹³⁹ 1 Blackstone, supra note 13, at 361.
¹⁴⁰ Id. at 359.
¹⁴¹ Id. at 360-61.
¹⁴² Id. at 361.
¹⁴³ Id. at 360.
¹⁴⁴ Id.
¹⁴⁵ Id. at 362.
¹⁴⁶ Id. at 360.
work for themselves” in England, but those restrictions had been “virtually repealed” when Blackstone wrote in 1765.\textsuperscript{147} Aliens could “bring an action” in court “concerning personal property,” “make a will, and dispose of his personal estate”—but again, land was excluded.\textsuperscript{148} They could not serve on the king’s executive council or in Parliament, nor could they hold “any office of trust, civil or military, or be capable of any grant from the crown.”\textsuperscript{149} These were the “principal lines” of distinction between subjects and aliens, Blackstone wrote, but there were many other statutes either imposing constraints on aliens or granting them permission to do something otherwise restricted to subjects.\textsuperscript{150}

Subjects or citizens, by definition, possessed the privileges and immunities not granted to aliens. Thus, by considering everything that aliens were denied by English law, a corresponding list of rights belonging to subjects can be produced: “the right to travel and reside; the right to acquire, hold, and convey real estate, including the right to inherit and transmit by inheritance such property; the freedom from other trade and commercial restrictions customarily imposed on aliens; and the rights to elect and be elected to public office.”\textsuperscript{151} As we shall see, except for political rights, this inventory corresponds well with later judicial interpretations of the privileges and immunities of state citizenship. Nevertheless, it is incomplete in stating the rights possessed by a subject or a citizen. The rights extended generally to aliens also were the privileges and immunities of subjects or citizens. Subjects or citizens received them \textit{en masse} at birth or upon naturalization, along with a panoply of other rights. Aliens gained only those that were granted to them, and these fluctuated depending on policy considerations. For example, there generally were no barriers to aliens owning personal property in Great Britain, which Blackstone termed an “indulgence to strangers” that was “necessary for the advancement of trade.”\textsuperscript{152} British subjects had the right to reside and do business anywhere within the kingdom—not as an indulgence, but as a birthright. “Colonial inhabitants were all originally the King’s subjects, and no colony treated the inhabitants of other colonies as aliens.”\textsuperscript{153}

To determine the full range of privileges and immunities of either subjects or citizens, it is necessary to consider the affirmative depictions of those rights. This requires examining a variety of legal and political contexts in which privileges and immunities were recognized based on citizenship. Colonial charters, laws establishing municipalities and the rights of residents, and naturalization statutes all referred to privileges and immunities. Moreover, revolutionary literature, declarations, and early

\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 362.
\textsuperscript{150} Id. at 359.
\textsuperscript{152} 1 Blackstone, \textit{supra} note 13, at 360.
\textsuperscript{153} Bogen, \textit{supra} note 12, at 861.
state constitutions commonly invoked the rights and privileges of the people as either British subjects or citizens of the new American states.

Colonial charters were close analogues to the protections for privileges and immunities in the Confederation and the Constitution. A key component of these charters was the assurance that settlers and their children would be considered British citizens, not aliens or denizens, and thus receive all the attendant protections and benefits of English law. The first charter for Virginia, granted by James I in 1606, assured colonists that they would “have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.” The Maryland Charter, granted by Charles I in 1632, bestowed on colonists “all Privileges, Franchises and Liberties of this our Kingdom of England,” as if they “were born within our said Kingdom of England.” The charters for Connecticut and Rhode Island, granted in 1662 and 1663 by Charles II, provided that the colonies’ residents “shall have and enjoy all Liberties and Immunities of free and natural Subjects” in England. North Carolina’s charter in 1665 similarly entitled colonists to “all liberties, franchises, and privileges” of citizens in England, the same terms used in Delaware’s 1701 charter. William Penn’s Charter of Privileges in 1701 extended to inhabitants of Pennsylvania the “Liberties, Privileges and Benefits, granted jointly to them in this Charter,” which included religious freedom, an elected assembly, the right of criminal suspects to “the same Privileges of Witnesses and Council as their Prosecutors,” the determination of property rights by the “ordinary Course of Justice,” and even provisions for licensing and regulation of public houses. Although the terminology employed in these charters varied somewhat, there was no apparent difference in meaning among them. “Throughout the late eighteenth and early nineteenth centuries, one finds countless examples of the terms ‘rights,’ ‘advantages,’ ‘liberties,’ ‘privileges,’ and ‘immunities’ used interchangeably, and often

---

154 See id. at 800 (“These charter guarantees resemble the article IV provisions of the Constitution.”).
156 Md. Charter, § 10 (June 20, 1632).
157 Ct. Charter, ¶ 6 (Apr. 23, 1662); see Charter of R.I. & Prov. Plants., ¶ 10 (July 15, 1663) (colonists “shall have and enjoye all libertyes and immunityes of . . . naturall subjects . . . borne within the realme of England.”).
158 N.C. Charter, ¶ 7 (June 30, 1665) (Colonists granted “all liberties, franchises, and privileges, of this our kingdom, . . . as our liege people, born within the same.”).
159 Charter of Privileges Granted by William Penn to the Inhabitants of Pennsylvania and Territories, Art. VIII, ¶ 7 (Oct. 28, 1701); see also Del. Charter, Preamble (Oct. 28, 1701) (“I the said William Penn do declare, grant and confirm, unto all the Freemen, Planters and Adventurers, and other Inhabitants in this Province and Territories, these following Liberties, Franchises and Privileges. . ..”).
at the same time.” These charter provisions offered the reverse protection of the later Privileges and Immunities Clauses: those migrating to the colonies or born there retained the rights of English-born citizens. Nonetheless, the substance of the rights protected was similar. Just as English colonists thought themselves entitled to the protections of British law, so too visitors from one American state to another could expect to be treated like citizens for legal purposes. Both contributed to nation-building (or empire in the case of the British) by extending to citizens the same rights throughout the land.

In establishing municipalities, legislation enacted by Parliament and the American states used similar terms to depict the powers entrusted to the local governments being established and the rights of their residents. A typical example is a 1790 New York statute setting the new limits of two towns, which broadly provided that they “shall enjoy all the rights, privileges and immunities which are granted to other towns within this State.” The great majority of enabling statutes for municipalities, whether in America or England, followed this formula, building upon the unspecified preexisting laws for other cities and towns. Some statutes gave municipalities “peculiar immunities and privileges,” as did a 1784 New Jersey law establishing Perth-Amboy as a “commercial city . . . with such powers, privileges, jurisdictions and immunities, as shall conduce to the encouragement of commerce.” According to the act, “commercial cities require a peculiar mode of government, for maintaining their internal police, and commercial transactions require more expeditious and summary tribunals than others.” The legislation then set up a mayor-council form of government for the city, with specific powers relating to business, including a “commercial court” to adjudicate “all causes of a commercial matter “in the most summary

160 Kurt T. Lash, Origins of the Privileges or Immunities Clause, Part I: “Privileges And Immunities” as an Antebellum Term of Art, 98 Geo. L.J. 1241, 1252 (2010). See Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 64-65 (1986) (“rights, liberties, privileges, and immunities, seem to have been used interchangeably,”); see also id. (examples); Michael Kent Curtis, Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States, 78 N.C. L. Rev. 1071, 1094-98 (2000) [hereinafter “Curtis, Historical”] (examples); Akhil Reed Amar, The Bill of Rights 166-69 (1998) (numerous examples of synonymous uses of privileges, immunities, rights, and freedoms); id. at 169 (noting that Blackstone used “the words privileges and immunities . . . to describe various entitlements in the landmark English charters of liberty.”); Antieau, supra note 10, at 38 (“The American generations that ratified the Constitution . . . used the terms, ‘rights,’ ‘liberties,’ ‘privileges,’ and ‘immunities’ as virtual synonyms.”).

161 On colonial charters as antecedents to the Privilege and Immunity Clauses, see, Bogen, Privileges, supra note 12, at 1-2; Bogen, Case, supra note 12, at 796-810; Lash, supra note 160, at 1254-55.


164 Id.
way.” An Act for Incorporating the Inhabitants Residing Within the Limits Therein Mentioned (Apr. 22, 1785), 1 Laws of the State of New-York 197 (2d ed. 1798).

An Act for Appointing a Town on the . . . West Side of Matchapungo River (Mar. 6, 1728), A Collection of the Private Acts of the General Assembly of the State of North-Carolina 6 (Newbern, N.C., 1794) (new town of Woodstock created “with all the privileges and immunities, hereafter mentioned and expressed, for ever.”); An Act for Erecting the Lower Plantation at Housatonic into a Township, by the Name of Sheffield (May 30, 1733), Acts and Laws Passed by the Great and General Court or Assembly of . . . Massachusetts-Bay 499 (Boston, 1733) (granting “the Inhabitants” of new town “all Powers, Privileges, Immunities and Advantages which other Towns in this Province by Law, have and enjoy.”); An Act for Dividing the Town of Concord, and Erecting a New Town There by the Name of Acton (May 28, 1735), id. at 548 (“Inhabitants” of new town “hereby are vested with all the Powers, Privileges and Immunities that the Inhabitants of the other Towns within this Province are or by Law ought to be vested with.”); An Act for Establishing A Parish in Craven County by the Name of All Saints (Mar. 16, 1778), Public Laws of the State of South-Carolina, supra note 91, at 289 (establishing town and providing that “the inhabitants thereof shall use, exercise and enjoy all the rights, privileges and immunities, that the inhabitants of any other parish” possess “by the laws of this state.”); An Act for an Addition to Georgetown, in Montgomery County (Nov. 1784), 1 Laws of Maryland, ch. 45 (Annapolis, William Kitty, ed. 1799) (addition of land to existing town “entitled to . . . all the immunities, privileges and advantages, which do or shall pertain to the said town.”); An Act to Establish a Town in the County of Bourbon (Dec. 11, 1787), Acts Passed at a General Assembly of the Commonwealth of Virginia, ch. 91, at 45 (Richmond, 1788) (“The purchasers of lots in the said town, so soon as they have built upon the same, . . . shall . . . have and enjoy, all the rights, privileges, and immunities which the freeholders and inhabitants of other towns in this state, . . . hold and enjoy.”); An Act for Establishing a Town, and An Inspection of Tobacco (Nov. 13, 1788), Acts Passed at a General Assembly of The Commonwealth of Virginia, ch. 11, at 8 (Richmond, 1789) (same provision for new town as Act of Dec. 11, 1787, supra); An Act for Establishing a Town on the Lands of William Anderson in the County of Botetourt (Nov. 15, 1788), id., ch. 16, at 11 (same provision for new town as Act of Dec. 11, 1787, supra); An Act for Establishing a Town on the Lands of Willoughby Tebbs, in the County of Prince William (Nov. 27, 1788), id., ch. 26 (same provision for new town as Act of Dec. 11, 1787, supra); An Act for Incorporating Part of the Town of Stratford (Oct. 9, 1800), Acts and Laws . . . of Connecticut 535 (Hartford, 1800) (borough created from existing towns; inhabitants of those towns who held “real Estate” or did “regular business” in new borough “entitled to all the privileges of Freemen of said Borough). On colonial charters providing for incorporation of towns, see, e.g., Carolina Charter (June 30, 1665) (empowering the creation of ports “with such jurisdictions, privileges and franchises, unto the said ports belonging, as . . . shall seem most expedient.”); Md. Charter, Art. XIV (June 20, 1632) (granting to Lord Baltimore and his heirs the right to create towns “with suitable Privileges and Immunities, according to the Merits of the Inhabitants, and Convenience of the Places.”).
one reading the laws would know the substance of these rights, which predated independence.

In the same fashion as these laws recognizing the rights of municipal residents, states enacted naturalization statutes providing that new citizens would be treated equally with existing ones. A South Carolina statute in 1789 was typical: it granted citizenship to ten men and their descendants, giving them “all the rights, privileges and immunities which the naturel born citizens of the state . . . do enjoy.” General naturalization statutes in that state and others used similar language. A Maryland law granted new residents who took an oath or affirmation of citizenship “all the immunities, rights and privileges, of a natural born subject of this state,” except for a seven-year waiting period before the person was eligible for a “civil office” or elected position. South Carolina required both an oath and affirmation as well as a year’s residency before a person was “entitled to all the rights, privileges, and immunities” of state citizenship. Pennsylvania passed a law in 1786 providing that inhabitants who had “omitted or neglected to take the oaths or affirmations” to the state during the war, and thereby had “deprived themselves of the privileges of citizenship,” could do so before a justice of the peace.

Benjamin Rush complained in 1784 about the rig-

---

168 An Act for Naturalizing Richard Wrainch, et al. (Mar. 13, 1789), Acts, Ordinances, and Resolves, of the General Assembly of the State of South-Carolina 48 (Charleston, 1789). See, e.g., An Act to Admit Certain Person Therein Named to the Rights of Citizenship (Feb. 13, 1786), Ga. Sess. Laws (Savannah, 1786) (six men “admitted to all and singular the rights and privileges of citizenship”); An Act for the Relief of John Galloway (1783), ch. 3, Laws of Maryland (Annapolis, 1784) (named man “entitled to all the privileges and immunities of a free citizen of this state”); An Act for Naturalizing Thomas Robinson (June 30, 1784), ch. 11, Mass. Sess. Laws 148 (Boston, 1784) (named man entitled to take oath of allegiance and be “entitled to all the rights, liberties, and privileges of a free citizen of this Commonwealth”); An Act Naturalizing Michael Walsh (Feb. 7, 1786), ch. VII, Mass. Sess. Laws 392-93 (Boston, 1786) (named man authorized to take oath of allegiance and be “entitled to all the rights, liberties, and privileges of a natural-born citizen”); An Act to Naturalize Lucas Van Beverhoudt (Nov. 17, 1785), ch. 98, Acts of the Tenth General Assembly of the State of New Jersey 203 (Trenton, 1785) (French citizen and his heirs residing in New Jersey declared “a natural liege Citizen and Subject of this State,” and “entitled [to] enjoy the same Laws, Liberties, Rights and Privileges, as any other Citizen or Subject,” except one year must elapse before being eligible for legislative office); An Act for Naturalizing Mr. John Stanford (Mar. 1789), R.I. Sess. Laws 3 (Providence, 1789) (named man “naturalized, and declared a Citizen of this State,” and upon taking an oath of allegiance shall “be entitled to all the Rights, Liberties, Privileges and Immunities, of a free-born Citizen thereof”); An Act for Naturalizing Richard Champion, and his Descendants, and Hugh Alexander Nixon (Mar. 27, 1787), Acts, Ordinances, and Resolves, of the General Assembly of the State of South-Carolina 50 (Charleston, 1787) (named individuals, natives of England and Ireland resident in state, entitled to take oaths of allegiance and “be vested with all the rights and privileges to a free citizen belonging”).

169 An Act for Naturalization (July 1779), 1 The Laws of Maryland (Annapolis, William Kilty, ed. 1799).


171 An Act for Securing to this Commonwealth the Fidelity and Allegiance of the Inhabitants Thereof, and for Admitting Certain Persons to the Rights of Citizenship, ch. 11 (Mar. 4, 1786), Laws Enacted in the Second Sitting to the Tenth General Assembly of the Commonwealth of
our of the existing Pennsylvania loyalty act, which gave “male white inhabitants of the state” only a few weeks to take an oath or affirmation of allegiance, on pain of being “for ever . . . deprived of the privileges and benefits of a citizen who complied,” which included “electing or being elected into, or holding any office or place of trust within the government.”

None of these statutes defined “privileges” or “immunities,” or distinguished them from “rights.” Rather, they extended all the benefits of citizenship equally.

Revolutionary literature was replete with complaints about the British administration denying Americans their “privileges,” often coupling that term with “rights,” “liberties,” or comparable words. In 1776, for example, the Continental Congress stated in a letter to the citizens of Canada that “we have been forced” to take up arms “for the defence of our dearest privileges.” Several of the rebelling states employed similar terms in their first constitutions to justify breaking ties with Great Britain. New Hampshire’s Constitution, promulgated in 1776, declared that an independent government was justified by the “many grievous and oppressive acts of the British Parliament, depriving us of our natural and constitutional rights and privileges.” The Declaration of Rights of the First Continental Congress resolved that the colonists were “entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England,” as well as “to all the immunities and privileges granted & confirmed to them by royal charters.” In 1768, the Massachusetts house of representatives informed the Earl of Shelburne, one of king’s principal secretaries of state, that “exclusive of any consideration of their Charter,” the colonists were “entitled to the Rights and Privileges of the British constitution in common with their fellow subjects in Britain.”

Pennsylvania 35 (Philadelphia, 1786). The opposite of naturalization also occurred in enactments stripping Loyalists of their citizenship rights in a state or community. The town meeting of Worcester, Massachusetts, for example, passed several resolutions against Loyalists who had fled during the Revolution, including a declaration that that “this town cannot conceive it to be their duty, or their interest, ever to provide for the return of such ingrates, to naturalize them, or admit them to the privileges and immunities of citizens.” Public Advertiser (London), Tuesday, July 22, 1783, reprinting Massachusetts Spy (May 19, 1783) (reporting resolutions of town meeting).

Benjamin Rush, Consideration upon the Present Test-Law of Pennsylvania 4 (Philadelphia, 1784). See also Minutes of the First Session of the Tenth General Assembly of the Commonwealth of Pennsylvania 33 (Philadelphia, 1785) (petition from “inhabitants” of a town complaining that only “three freemen” there had been able to comply with the test law and thus most had lost “all those privileges which every citizen of a virtuous commonwealth should . . . enjoy,” particularly being “qualified to execute the different offices,” which resulted in “assessors, collectors, &c.” being “sent among them from other places. . . .”).


Id. at 69.

mon law, . . . as well as sundry Acts of Parliament” dating to Edward III. Earlier, during the Stamp Act dispute in 1765, the Virginia House of Burgesses resolved that the first colonists “brought with them, and transmitted to their posterity, . . . all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of Great Britain.” In addition, Virginia claimed that by their colonial charters the inhabitants of the colony were entitled to “all Liberties, Privileges, and Immunities” of those “abiding and born within the Realm of England.” During the same period, the Pennsylvania assembly resolved: “That the inhabitants of this Province are entitled to all the Liberties, Rights and Privileges of his Majesty’s Subjects in Great-Britain.” Most importantly, it was “the inherent Birth-right, and indubitable Privilege, of British Subject, to be taxed only by his own Consent, or that of his legal Representatives.” Shortly thereafter, the Stamp Act Congress memorialized in 1765 that the colonists were “entitled to all the inherent rights and privileges of his natural born subjects born within the kingdom of Great Britain.”

In all of these writings, the operative words were highly general, but evidently their authors expected readers to comprehend their meaning. Even an American with relatively limited education would likely understand the basic elements of their rights as subjects. Nor was precision called for by the context. Their central demand against the British was to receive all of the rights of subjects, the denial of which provoked Americans to take up arms. The most-recognized authority on the rights of subjects was Blackstone, who alternately used the terms rights, liberties, privileges, and immunities to describe the protections afforded British citizens by their constitution. His depiction of the British constitution was conventional and widely accepted

178 Id. See also Letter from the Massachusetts House of Representatives to the Earl of Chatham (Feb. 2, 1768), reprinted in id. at 2 (asserting that under the colonial charter the inhabitants were granted “all the rights, liberties, privileges and immunities of his natural subjects, born within the realm.”).


180 Id. See also Virginia Resolves on the Stamp Act, Virginia House of Burgesses (May 29, 1765), reprinted in id. at 360 (colonists were entitled to “all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of Great Britain,” as declared by their charters with James I).

181 Resolves of the Pennsylvania Assembly (Sept. 21, 1765).

182 Id.

183 Resolves of the Stamp Act Congress (Oct. 19, 1765), reprinted in Journal of the First Congress of the American Colonies, in Opposition to the Tyrannical Acts of the British Parliament 28 (New York, 1845). See, e.g., Declaration and Resolves of Boston Town Meeting (Sept. 13, 1768), reprinted in 16 A Report of the Record Commissioners of the City of Boston 261 (Boston, 1886) (charter granted colonial inhabitants “all Liberties and Immunities of free and natural Subjects, . . . as if they and every of them, were born within the Realm of England.”). Other state constitutions, such as New York’s in 1777, condemned “the many tyrannical and oppressive usurpations of the King and Parliament of Great Britain on the rights and liberties of the people of the American colonies,” with no substantive difference from those complaining about loss of “privileges.” N.Y. Const., Preamble (Apr. 20, 1777).
Privileges and Immunities of State Citizens

on both sides of the Atlantic. “The absolute rights of every Englishman, . . . which, taken in a political and extensive sense, are usually called their liberties,” Blackstone wrote, were “founded on nature and reason.”184 Blackstone organized the absolute rights into three divisions. First, there was “[t]he right of personal security,” that is, “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”185 Second, “the law of England regards, asserts, and preserves the personal liberty of individuals,” which meant “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place of one’s own inclination may direct; without imprisonment or restraint.”186 Moreover, this liberty had “[a] natural and regular consequence, . . . that every Englishman may claim a right to abide in his own country so long as he pleased; and not to be driven from it unless by the sentence of the law.”187 Third, there was the “the sacred and inviolable rights of private property,”188 “which consists in the free use, enjoyment, an disposal” of a person’s “acquisitions, without any control or diminishment, save only by the laws of the land.”189

The term “absolute rights”190 may suggest to a modern reader that these liberties could not be altered even by legislation enacted for the public good. Blackstone meant no such thing: all of these absolute rights could be regulated and defined by Parliament. Every right, including to life itself, was subject to control “by due course of law,”191 which referred to two things. First, rights could be limited by standing laws applicable to everyone—“the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without express warrant of law.”192 Second, the application of the these established rules, whether derived from the common law or parliamentary action, could only occur “by due process of law,” which required regular judicial procedures.193 This was one of the most important concessions from King John in Magna Charta. “To bereave a man of life, or by violence to confiscate his estate, without accusation or trial,” Blackstone wrote, “would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom.”194

184 1 Blackstone, supra note 13, at 123.
185 Id. at 125.
186 Id. at 130.
187 Id. at 133.
188 Id. at 135.
190 1 Blackstone, supra note 13, at 123.
191 Id. at 130.
192 Id. at 129.
193 Id. at 130.
194 Id. at 131-32.
The absolute rights themselves were but a “dead letter,” Blackstone continued, without a means “to secure their actual enjoyment.”\footnote{Id. at 136.} To assure that “the three great and primary rights, of personal security, personal liberty, and personal property” were respected, “certain other auxiliary subordinate rights of the subject” had been “established” by British law. By his count, there were five such “subordinate rights” recognized by the constitution. All of them were privileges or immunities of subjects. They were not natural rights in themselves, but concessions gained from the crown that enabled subjects to realize the liberties they were entitled to by natural law and customary practice.\footnote{Id.}

The first subordinate right identified by Blackstone was the “[t]he constitution, powers, and privileges of parliament.”\footnote{Id. at 142.} It was through Parliament that the people prevented the executive from “[e]nact[ing] tyrannical laws, and execut[ing] them in a tyrannical manner.”\footnote{Id.} Second, “the king’s prerogative” powers—his ability to act without legislative assent—were limited “by bounds so certain and notorious, that it is impossible he should exceed them without the consent of the people.”\footnote{Id. at 137.} Prerogative powers could threaten the liberties of the subjects, for example if the King tried to expand his traditional sources of revenue by intruding on Parliament’s control over taxes and appropriations. By Blackstone’s account, the people were protected by well-known limits on prerogative power. The “third subordinate right of every Englishman” was “that of applying to the court of justice for redress of injuries.”\footnote{Id. at 138.} This was the essence of Magna Charta’s promise that the people could not be “put out of the protection and benefit of the laws, but according to the law of the land.”\footnote{Id. at 138-39.} The king may have been entitled to “erect new courts of justice; but then they must proceed according to the old established forms of the common law.”\footnote{Id. at 139.} Should “the ordinary course of law” prove “too defective to reach” an “uncommon injury,” “or infringement of the rights beforementioned,”\footnote{Id. at 139.} a citizen could exercise a fourth right, “petitioning the king, or either house of parliament, for the redress of grievances.”\footnote{Id. at 139.} The fifth of the “auxiliary right[s] of the subject” consisted “of having arms for their defence, suitable to their condition and degree, and such as are allowed by law.”\footnote{Id. at 139.}

Although Blackstone and other Anglo-American constitutional commentators regarded the absolute liberties of the people as grounded in natural law, they nonethe-
less were “defined by . . . several statutes.” Those parliamentary measures expressed the basic rights of the people, which were none other “than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.” The statutes Blackstone referenced were not commonplace acts of Parliament, nor were the rights they conferred minor advantages. Rather, Blackstone said that they consisted of the “great charter of liberties,” principally Magna Charta in 1215 and “subsequent corroborating statutes,” the Petition of Right extracted from Charles I in 1628, the Habeas Corpus Act enacted under Charles II in 1679, the Bill of Rights passed by Parliament in 1689, and the Act of Settlement of 1701. Other treatises on the British constitution likewise equated the rights of Britons with these statutes, sometimes adding others to the list, such as several laws defining (and limiting) the crime of treason. Works such as British Liberties or the Free-born Subject’s Inheritance, published in 1766, consisted largely of commentaries on these milestone enactments. Although ultimately laws like Magna Charta were intended to preserve personal freedoms, and they did recognize certain individual rights, for the most part they established the powers of Parliament, the supremacy of its statutes under English law, and the independence of the judiciary.

These laws served “the principal aim of society,” Blackstone wrote, “to protect individuals in the enjoyment of those absolute rights, which are vested in them by the immutable laws of nature.” Over the course of English history, there had been occasions when these natural rights were “depressed by overbearing and tyrannical princes,” yet “the vigour of our free constitution has always delivered the nation from these embarrassments.” This delivery did not come by courts declaring laws unconstitutional, but by popular resistance to royal rule that resulted in the adoption of additional written protections. Most of all, English liberties were thought secured by the rise of parliamentary power as a counterweight to arbitrary monarchical rule.

---

206 Blackstone, supra note 13, at 125. See Petition of Right, 3 Car. 1, ch. 1 (1638), reprinted in 5 Statutes of the Realm 23-24 (London, 1819); Habeas Corpus Act, 31 Cha. 2, ch. 2 (1679), reprinted in id. at 935-38; Bill of Rights, 1 W. & M., sess. 2, ch. 2 (1688), 1 W. & M, c. 36 (1689), reprinted in 6 id. at 142-45; Art. 4 Act of Settlement, 12 & 13 Will. 3, c. 2 (1701), reprinted in 7 id. at 636-38.

207 Id. at 125.

208 Id. at 123.

209 British Liberties or the Free-Born Subjects Inheritance (London, 1766); see also A Guide to the Knowledge of the Rights and Privileges of Englishmen (London, 1771) (discussing statutes from Magna Charta to the Act of Settlement); Henry Care, English Liberties, or the Free-Born Subject’s Inheritance (4th ed. London 1719) (predecessor edition to British Liberties, supra).

210 Id. at 120.

211 Id. at 123.

212 Id.
The most “Fundamental Privilege” of the people, according to numerous English authorities throughout the century, was choosing “Members to represent them in Parliament,” even if this glossed over the fact that only a small minority of the populace was eligible to vote due to property requirements and exclusion of women from the polls. The absence of American representation in Parliament lay at the heart of revolutionary complaints, for as the Continental Congress claimed, “the foundation of English liberty” was the “right in the people to participate in their legislative council.” The English were “a Free People,” the Connecticut General Assembly wrote in a 1764 protest to Parliament against the Stamp Act, precisely because they held “this general Privilege, that ‘No Laws can be made or abrogated, without their Consent, by their Representatives in Parliament.’” Numerous authorities likewise referred to voting as a privilege.

Paralleling the importance of legislative representation was “[t]he great and fundamental privilege of trials by juries,” Thomas Mortimer claimed in a 1780 tract. Blackstone called trial by jury “the glory of the English law,” “the most transcendent privilege which any subject can enjoy,” one that had “secured the just liberties of this nation for a long succession of ages.” Americans viewed the institution as indispensable to popular control of government—and hence home rule for the colonies—because juries effectively controlled the operation of the law by their authority to issue general verdicts that resolved both the factual and legal issues in the case. Forrest McDonald has written that on an “everyday” basis American “juries were the government, and it was upon them that the safety of all rights to liberty and property depended.” The New York Assembly sent a petition to George III in 1775, declaring in part that transporting Americans outside their colonies for trials without juries in

---


216 On voting as a privilege, see Natelson, supra note 12, at 1156-57 (“Suffrage and representation were characterized as ‘privileges’ in state constitutions, the state ratifying conventions, and in publications such as The Federalist.”). See text at notes 253, 258-61, 266-68, 287-92 & 310-33. infra.


218 3 Blackstone, supra note 13, at 379.

admiralty courts was “grievous and destructive of our rights and privileges.” Trial in the vicinage—the place where the crime occurred—was “the grand security and birthright of Englishmen.” Among the specific assertions of the Continental Congress was that the colonies were “entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.” In resolving to take up arms against the British in 1775, one of the grievances cited by the Continental Congress was “depriving us of the accustomed and inestimable privilege of trial by jury.” The Declaration of Independence accused the British of “depriving us in many cases, of the benefits of Trial by Jury,” and “transporting us beyond Seas to be tried for pretended offences.”

The steady application of standing rules by courts was essential to preserving the rule of law, according to Blackstone and many other jurists. The various procedures associated with judicial processes frequently were termed privileges. Most important of all was the one inserted in the Constitution, habeas corpus, a common feature of state constitutions and widely referred to as among the most important of privileges: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” This “great and efficacious writ,” Blackstone explained, authorized a common law court to determine whether a person was illegally detained by the government, and if so, to command the prisoner’s release. Any number of other judicial processes also were routinely

---

220 Petition of New York General Assembly to George III (March 25, 1775), reprinted in Pennsylvania Gazette, April, 26, 1775, Postscript, at 2.
221 Id.
223 Declaration of the Causes and Necessities for Taking Up Arms (July 6, 1775), 2 id. at 145.
224 U.S. Decl. Ind. (18th & 19th grievances). For other references to trial by jury as a “privilege,” see, e.g., An Act for Altering the Place of Holding the Inferior Court of Common-Pleas, and Court of General Quarter-Sessions of the Peace, in and for the County of Bergen (June 25, 1781) § 16, Acts of the Council and General Assembly of the state of New-Jersey 210 (1784) (“every Person shall have the same Privilege of Appeal and Jury.”); An Account of the Constitution and Present State of Great Britain (London, ca. 1779) (“the privilege of being tried by their peers [was] enjoyed by the meanest subject.”); An Appeal to the Public; Stating and Considering the Objections to the Quebec Bill 34 (London, 1774) (“our Privilege of trial by jury.”); Obadiah Hulme, An Historical Essay on the English Constitution 169 (London, 1771) (“this great privilege of the English people of trial by Jury”); Henry Fielding, A Charge Delivered to the Grand Jury at the Sessions of the Peace Held for the City and Liberty of Westminster (June 29, 1749) 6 (Dublin, 1749) (“the Subject” had “that great Privilege of being indicted and tried by a jury of their countrymen.”); Thomas Salmon, “The Trial of John Gibbons . . . for High Treason” (July 18, 1651), in A Critical Review of the State Trials 24 (London, 1735) (“the Privilege of a Trial by a Jury, according to the antient Laws of England.”).
225 U.S. Const. art. I, § 9, cl. 2.
226 3 Blackstone, supra note 13, at 131. Habeas corpus frequently was referred to as a privilege in early constitutions, writings, and public statements; see Natelson, supra note 12, at 1163 & nn. 238-41.
termed privileges. According to a modern study, “the procedures repeatedly referred to as ‘privileges’” included

trials, trials by jury, challenges to empaneling biased jurors, appeal processes, procedures granting criminal defendants the same access to witnesses and counsel that the prosecution enjoyed, confrontation by an accused of the accusers and of the witnesses against him, the opportunity to call for evidence on one’s own behalf, and the limitation on forfeiture to the life of the criminal.\(^\text{227}\)

Other liberties described as privileges or immunities in the eighteenth century were substantive protections of individuals, including ones that a number of writers considered natural rights. This is apparent from some of the examples already given, such as Blackstone’s list of British “rights,” which included “those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.”\(^\text{228}\) Freedom of press, for example, was referred to by prominent writers like Noah Webster in 1787 as a “fundamental privilege,”\(^\text{229}\) the same term used decades earlier by the great English opposition writer Algernon Sidney, who said that freedom of the press was “one of the most fundamental Privileges of the Subject.”\(^\text{230}\) When introducing the Bill of Rights in Congress, Madison extolled “the freedom of the press and rights of conscience” as “those choicest privileges of the people.”\(^\text{231}\)

\(^{227}\) Natelson, supra note 12, at 1164-65. See, e.g., Ga. Const., Art. LVII (Feb. 5, 1777) (“This is not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause.”); N.J. Const., Art. XVI (July 2, 1776) (“That all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to.”).

\(^{228}\) 1 Blackstone, supra note 13, at 125.

\(^{229}\) Noah Webster, An Examination into the Leading Principles of the Federal Constitution 32 (Philadelphia, 1787).

\(^{230}\) 1 Algernon Sidney, Of the Use and Abuse of Parliaments 127 (London, 1745).

The New Jersey Constitution of 1776 provided “[t]hat no person shall . . . be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience.”232 It also guaranteed adherents of any “Protestant sect . . . every privilege and immunity, enjoyed by . . . their fellow subjects.”233 The sanctity of the home from unwanted intrusions was closely associated with the natural liberty to possess property, yet the right often was called a privilege or immunity. Blackstone said that “the law of England has so particular and tender a regard to the immunity of a man’s house, that it styles it his castle, and will never suffer it to be violated with impunity.”234 In 1761, James Otis argued in a Massachusetts court against the constitutionality of writs of assistance—general search warrants issued without “good Grounds of suspicion”—because they infringed on “the Priviledge of House,” one of “the fundamental Principles of Law.”235

Freedom of speech also frequently was termed a privilege, as when Blackstone wrote that members of Parliament were afforded “privilege of speech” by statute as one of the “liberties of the people.”236 In this context, the right of speech was an exceptional liberty, because eighteenth-century law in England and America gave very weak legal protections for speech of the citizenry (and scarcely better for the press).237 The safeguards for speech by the populace were indirect, such as the Constitution’s requirement that the crime of treason against the United States consist of acts rather than words—“in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”238 Or free expression was allowed, but restricted to specifically authorized channels, the most important of which was the privilege of petitioning for redress of grievances—Blackstone’s fourth subordinate right, referred to variously by writers as a privilege or natural right of subjects or citizens. Junius chided the government in 1770 for creating an atmosphere that “threatens to punish the subject for exercising a privilege, hitherto undisputed, of petitioning the Crown.”239 A political association in Great Britain calling for parliamentary reform in 1781 urged that “[t]he right to petition Parliament for a redress of grievances, is a fundamental

---

232 N.J. Const., Art. XVIII (July 2, 1776).
233 Id., Art. XIX.
234 4 Blackstone, supra note 13, at 223.
236 Blackstone, supra note 13, at 160.
right of the British people,” the exercise of “which is prohibited by no positive statute,” and thus could not “be unlawfull.”

As Leonard Levy has written, the eighteenth-century witnessed a transformation in the popular understanding of free expression in both Great Britain and America. While the law formally continued to regard freedom of speech as a “privilege of parliamentarians,” increasingly it was referred to in political writings and declarations as a “personal right of citizens . . . based on natural rights.” Regardless of the limited legal protections for free expression, American republicans agreed with John Trenchard and Thomas Gordon, the authors of the famed Cato’s Letters, who wrote more than fifty years before the Revolution, that “all Liberty depends upon Freedom of Speech, and Freedom of Writing, within the Bounds of Manners and Discretion.” Yet Trenchard and Gordon also described free speech as a “sacred Privilege . . . essential to free Governments.” A Philadelphia newspaper published an essay by one Tacitus in 1767, who felt “fortunate to live in these blessed Times, when we are happy in the unlimited Enjoyment of that most Precious Privilege, ‘of thinking what we

240 Address of the Committee of Association for the County of York (Jan. 4, 1781), reprinted in Sound Reason and Solid Argument for a Reform in Parliament 72 (London, ca. 1795). On other references to speech as a privilege for legislators, see, e.g., Junius, Letter No. 44 (Apr. 22, 1771), reprinted in id. at 232 n.* (“[I]n all the addresses of new-appointed Speakers to the Sovereign, the utmost privilege they demand is liberty of speech.”); 5 Hume, supra note 100, at 225 (paraphrasing Peter Wentworth, a leading Puritan member of Parliament, in 1576, “that freedom of speech in that house [of Parliament was] a privilege, so useful both to sovereign and subject.”); Francis Plowden, Jura Anglorum. The Rights of Englishmen 456 (London, 1792) (“Some however of the more notorious privileges of the members of either house are privilege of speech, of person, of their domestics, and of their lands and goods.”); John Trusler, A Concise View of the Common Law and Statute Law of England 24 (ca. 1781) (“speech” was one of the “principal” “privileges” of Parliament); 9 The Parliamentary or Constitutional History of England 102 (London, 1753) (quoting Francis Seymour, member of Parliament in 1640, that “the greatest Privilege is Liberty of Speech.”). On other references to petitioning as a right or privilege, see, e.g., London Corresponding Society, Conclosury Address, reprinted in The Correspondence of the London Corresponding Society Revised and Corrected 82 (1795) (“Has it not always been . . . the right of Britons to petition for a Redress of their Grievances?”); Samuel Horsley, A Sermon, Preached before the Lords Spiritual and Temporal 21 (Jan. 30, 1793) (London, 1793) (“the private Citizen” possessed “the Right of petition for redress of grievances.”); Johann Wilhelm von Archenholz, A Picture of England: Containing a Description of the Laws, Customs and Manners of England 19 (Dublin, 1790) (describing the “privilege of public remonstrances”); Address of the Committee of Association for the County of York (Jan. 4, 1781), reprinted in Sound Reason and Solid Argument for a Reform in Parliament; And the Abolition of Bribery, Corruption, Rotten Boroughs, and Other Abuses (London, ca. 1795) (“The right to petition Parliament for a redress of grievances, is a fundamental right of the British people.”); The History of the War in America, Between Great Britain and Her Colonies 400 (Dublin, 1779) (“All of the assemblies on the continent . . . asserted the right of the subject to the petition for the redress of grievances.”).


243 Id. at 97.
Privileges and Immunities of State Citizens

"please, and of speaking what we think." 244 By the time the Constitution was written, many Americans believed that the freedoms of press and speech were natural rights. Patrick Henry complained about the absence of protections for the press in the proposed Constitution, telling the Virginia ratifying convention that publishing was among “the rights of human nature” and a “palladium of liberty.” 245 It was not uncommon to refer to freedom of press and speech as being privileges based on natural law. A Baltimore essayist named Uncus wrote in 1787 that “liberty of the press” was “what the people . . . look upon as a privilege, with which every inhabitant is born;—a right which Nature, and Nature’s God, has given.” 246 A supporter of ratification, Uncus defended the absence of a press clause in the Constitution on the ground that it was “too sacred to require being mentioned.” 247 Popular attitudes like these translated into the refusal of juries to convict fellow citizens for criticizing the government. 248

The popular understanding of “privileges and immunities” in relation to subjects or citizens paralleled these legal usages, as references to the totality of advantages a person gained from that status. In a fashionable English novel published in 1771, the author posed a character imploring another to “at least allow, that by the union the Scots were admitted to all the privileges and immunities of English subjects; by which means multitudes of them were provided for in the army and navy, and got fortunes in different parts of England, and its dominions.” 249 Catherine Macaulay, the eighteenth-century English historian and supporter of radical causes, wrote in a 1775 tract about the plight of “[t]he poor Canadians,” who “instead of being put in possession of all the privileges and immunities of English subjects,” had found their “civil and religious rights” subject to the “indulgence” of the crown, leaving the colonists “in a more abject state of slavery than when they were under the French government.” 250

In summary, both the Privileges and Immunities Clauses of the Articles and the Constitution were efforts to continue an important right that Americans enjoyed as British subjects: to be treated the same as local people throughout the country. State were not to treat Americans from other states as aliens. At a minimum, “privileges and immunities” signified the rights of travel, residency, property, equal commerce, voting, and holding office. But they encompassed much more: all of the benefits a state granted its people. The natural rights to life, limb, liberty and property were ab-

244 Tacitus, Pennsylvania Gazette, April 23, 1767, at 2.
245 Patrick Henry, Va. Ratifying Conv. (June 14, 1778), 3 Elliot’s Debates, supra note 34, at 449.
246 Uncus, Maryland Advertiser (Baltimore), Nov. 9, 1787, at 2.
247 Id.
250 Catherine Macaulay, An Address to the People of England, Scotland, and Ireland, on the Present Important Crisis of Affairs 16 (Bath, 1775).
Privileges and Immunities of State Citizens

stractions; what counted were the actual enforcement of those rights through the institutions of government. For that reason, Blackstone could say that the “rights and liberties” themselves were “defined by these several statutes.”251 They either were natural liberties “not required by the laws of society to be sacrificed to public convenience” or they were “civil privileges” provided “in lieu of the natural liberties so given up by individuals” upon entering society.252

Political Rights as Privileges and Immunities

Interpreting Article IV as protecting all of the rights and advantages afforded by a state to its citizens may produce one seemingly anomalous result. If states must treat outsiders exactly as they would their own, would that apply to voting and holding state offices? As mentioned, the franchise commonly was referred to as a privilege of the people—voting for members of Parliament was “the first Fundamental Privilege of the Commons of England.”253 Holding government offices likewise was a privilege of citizens. Gouverneur Morris made this point when proposing that a person must be a citizen of the United States for fourteen years before becoming a Senator. Foreigners visiting the United States enjoyed numerous “privileges,” he said, but there were necessary limits, such as “being eligible to the great offices of Government.”254 The Convention agreed to a nine-year residency requirement for Senators and seven years for Representatives, while also limiting the presidency to “natural born” citizens or citizens “at the time of the Adoption of this Constitution.”255 Article IV, by contrast, made no distinction among privileges—it covered “all” of them.

Would noncitizens be entitled by Article IV to cast a ballot in another state’s elections or stand for election there? (The modern answer is resoundingly no.256) During the Revolution, states enacted various constitutional and statutory requirements for voting and holding public offices, including taking oaths of allegiance to the state that were badges of citizenship.257 In what was likely the first general account of the

251 1 Blackstone, supra note 13, at 125.
252 Id.
253 Mackworth, supra note 213, at 186.
254 Gouverneur Morris, 2 Const. Conv., supra note 10, at 238 (Aug. 9, 1787).
255 See U.S. Const., Art. I, § 2, cl. 2 (seven years for Representatives); id., § 3, cl. 3 (nine years for Senators); Art. II, § 1, cl. 4 (President must be “natural born”).
256 See note 9, supra.
257 See, e.g., Del. Const., Art. XXII (Sept. 10, 1776) (legislators and officers must take oath or affirmation of allegiance); Ga. Const., Art. XIV (Feb. 5, 1777) (voters must take oath or affirmation of allegiance); id., Art. XV (oath of allegiance for representatives); Md. Const., Art. XVIII (Nov. 11, 1776) (electors of senators must take oath of allegiance); id., Art. XXVIII (senators and assembly delegates required oath of allegiance); id., Art. XLIII (voters for legislators and sheriffs to take oath of allegiance); id., Art. LV (holders of “any office of trust or profit” must take oath); Mass. Const., Pt. I, Ch. VI, Art. I (June 15, 1780) (governors, lieutenant-governors, councillors, senators, and representatives must take oath of allegiance); N.Y. Const., Art. VIII (April 20, 1777) (electors must take oath or affirm allegiance); N.C. Const., Art. XII (Dec. 18, 1776) (legislators and holders of “to any office or place of trust” must “take an oath to the State”); id., Art. XL (Dec.
Privileges and Immunities of State Citizens

privileges of citizenship, David Ramsay wrote in 1789 that “oaths of fidelity to the states were respectively administered soon after the declaration of independence, to all above a certain age. By these oaths, a compact was established between the state and the individuals; and those who took them acquired or confirmed their citizenship,” and thereby “acquired a right to the privileges and protection of citizens.” Ramsay also contended that “[c]itizenship confers a right of voting at elections, and many other privileges not enjoyed by those who are no more than inhabitants.” And therein lay the problem. Thomas Burke, a North Carolina delegate to the Continental Congress, worried in 1777 that under the proposed Articles “the Inhabitants of our Neighboring States [would] have the privileges of Citizens in ours [to] insist upon the right of voting for members of our Legislature.” Burke regarded this as a “political absurdity,” urging that an amendment was necessary to avoid such a consequence. Yet North Carolina agreed to the Articles, and not a single person echoed Burke’s concern, either in connection with the Confederation or Article IV.

Whether the Privileges and Immunities Clause was intended specifically to require states to permit voting and office holding by citizens of other states cannot be determined with certainty from the meager record, and as a practical matter it never became more than a theoretical issue. As the discussion here will show, however, there is a plausible case for concluding that these political rights were regarded by many as attributes of citizenship, and as such were covered by Article IV. From the available evidence, however, it appears that no one concerned with drafting and adopting the Constitution considered the question at any great length. Moreover, it should not be assumed, as some modern commentators do, that there was a consensus answer to the question. Prior to 1776, the question did not arise—a person living in America either was a British subject or not. With independence, that construct vanished in an instant. During the few years of peace that passed between the war and adoption of the Constitution, no theory of state citizenship emerged that can be relied on as a definitive account. In any event, the various state regulations on voting and office holding that were promulgated during this period were not directed at the Privi-

---

258 David Ramsay, A Dissertation on the Manners of Acquiring the Character and Privileges of a Citizen 5 (1789).
259 Id. at 3.
260 Thomas Burke, “Notes on the Proposed Articles” (Nov. 1777), reprinted in America’s Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance 869 (Jon L. Wakelyn, ed. 2006).
261 Id.
leges and Immunities Clauses of either the Articles or the Constitution. The latter was enacted years after the state provisions were adopted. Not a word was recorded at the Philadelphia Convention or in the state ratifying conventions to show that anyone focused on political rights when considering the clause. Regardless, a review of the evidence offers important insights into what Americans at this time thought were the attributes of state citizenship.

Delegates at Philadelphia referred to the citizens of states numerous times, and in every instance they meant the people of a state as a whole, just as they were referring to the collective body of the American people when discussing the citizens of the United States. James Wilson remarked, for example, that “it was necessary to observe the twofold relation in which the people would stand,” first “as Citizens of the Genl. Govt.,” and second, “as Citizens of their particular State.” This consistent usage reinforces the conclusion that the “Privileges and Immunities of Citizens in the several States” referred to those benefits shared collectively by the people of a state. That does not mean, however, that literally every person in a state must have been entitled to exercise a right for it to count as a privilege or immunity of citizenship. Some privileges undeniably associated with citizenship were restricted to a portion of the population, such as entering into contracts, owning property, operating businesses, and using the civil courts, which were prohibited by law to minors and severely restrained for married women. Far from being peripheral, these business-related rights were the focus of attention in regard to the clause.

---

262 See, e.g., William Pierce, 1 Const. Conv., supra note 10, at 137 (June 6, 1787) (arguing for “an election by the people as to the 1st. branch & by the States as to the 2d. branch; by which means the Citizens of the States wd. be represented both individually & collectively.”); James Wilson, id. at 180 (June 9, 1787) (“Are not the Citizens of Pena. equal to those of N. Jersey?”); James Madison, id. at 357-58 (June 21, 1787) (“A citizen of Delaware was not more free than a citizen of Virginia: nor would either be more free than a Citizen of America.”); Oliver Ellsworth, id. at 406 (June 25, 1787) (“Whoever chooses the member, he will be a citizen of the State he is to represent. . . .”); William Samuel Johnson, id. at 461 June 29, 1787) ([I]n some respects the States are to be considered in their political capacity, and in others as districts of individual citizens. . . .”); Alexander Hamilton, id. at 466 (June 29, 1787) (“[W]ill the people of Del: be less free, if each citizen has an equal vote with each citizen of Pa.[?]”); Charles Pinckney, 2 id. at 510 (July 2, 1787) (“[T]he large States would feel a partiality for their own Citizens. . . .”).

263 See, e.g., Charles Pinckney, id. at 403 (June 25, 1787) (“[T]here is one, but one great & equal body of citizens composing the inhabitants of this Country. . . .”); George Read, id. at 424 (June 26, 1787) (“[W]e should become one people as much as possible, that State attachments shd. be extinguished as much as possible, that the Senate shd. be so constituted as to have the feelings of citizens of the whole.”); Elbridge Gerry, id. at 425 (June 26, 1787) (“There were not 1/1000 part of our fellow citizens who were not agst. every approach towards Monarchy.”).

264 James Wilson, id. at 405 (June 25, 1787).

265 See Yvette Joy Liebesman, No Guarantees: Lessons from the Property Rights Gained and Lost by Married Women in Two American Colonies, 27 Women’s Rts. L. Rep. 181, 182 (2006) (“Colonial American jurisprudence did not allow married women to buy or sell property, run or manage a business, sue or be sued, or have ownership of even the clothes they wore.”).
According to some authorities, the franchise could not have been a privilege of citizenship inasmuch as no state allowed all of its citizens to vote.\textsuperscript{266} (It could be added that in England only a very small percentage of the people voted, despite suffrage being characterized as the preeminent privilege of the people.) On this view, voting was a “privilege,” but “not a privilege incident to citizenship.”\textsuperscript{267} Yet no evidence has been produced to show that anyone made this distinction at the time the Constitution was being considered. Indeed, the argument is flatly inconsistent with the most important grievance of revolutionary Americans, that they were taxed and regulated without representation in Parliament. During the 1790 debates in the House of Representatives on the first federal naturalization act, John Laurence, a Federalist congressman from New York, asked why resident “foreigners” should not be allowed “to vote in our elections. Will they not have to pay taxes from the time they settle amongst us? And is it not a principle that taxation and representation ought to go hand in hand?”\textsuperscript{268} The revolutionary protests over representation were made in the name of the people generally, based on their status as British subjects, despite the fact that only a minority actually would vote if representation was granted.\textsuperscript{269} Furthermore, as just noted, the privileges associated with contracting and property were not available to all citizens. Whatever the answer, it cannot be as simple as the pat rejection of voting as a privilege of citizens because not all were given the franchise.

The word “citizen” was used only occasionally in state constitutions from the founding period, and usually not directly in connection with voting or office holding. The 1780 Massachusetts constitution, for example, depicted “the body politic” as “a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good.”\textsuperscript{270} Pennsylvania’s declaration of rights in 1776 provided that no “man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship.”\textsuperscript{271} In North Carolina, “every foreigner” who came “to settle in this State having first taken an oath of allegiance to the same,” was “after one year’s residence . . . deemed a free citizen.”\textsuperscript{272} Georgia denied the right to vote and office to anyone “who holds any title of nobility,” but upon relinquishing that status “he shall be entitled to a vote . . . and enjoy all the other benefits of a free citizen.”\textsuperscript{273}

\textsuperscript{266} Natelson, supra note 12, at 1157. See also Bogen, Privileges, supra note 12, at 14 (“Either voting was not a privilege or immunity, or the nature of the privilege was to vote for one’s own representative, which would only apply to the representative of the state of residence.”). However, the fact that voters chose representatives from their locales does not contradict the idea that they were doing so as citizens.

\textsuperscript{267} See Natelson, supra note 12, at 1157.


\textsuperscript{269} See text at notes 173-83, supra.

\textsuperscript{270} Mass. Const., Preamble (June 15, 1780).

\textsuperscript{271} Pa. Dec’l. Rights, Art. II (Sept. 28, 1776).

\textsuperscript{272} N.C. Const., Art. XL (Dec. 18, 1776).

\textsuperscript{273} Ga. Const., Art. XI (Feb. 5, 1777).
State constitutions commonly reserved voting[^274] and office holding[^275] to “freemen,” “inhabitants,” or “residents,” combined with requirements of minimum age, property ownership, and sometimes tax payments. The term “freeman” did not itself equate with “citizen,” although citizens necessarily were freemen. A law dictionary at the time defined a freeman as “one distinguished from a Slave, that is born of made Free; and these have divers Privileges beyond others.”[^276] The same distinction was made by Samuel Johnson, who also stated that a freeman was a person “partaking of rights, privileges, or immunities.”[^277] A Boston political writer, Benjamin Austin, ...

[^274]: On constitutional voter qualifications, see Ct. Charter, ¶ 2 (1662) (“Freemen of the respective Towns, Cities, and Places” elected assembly); Del. Const., Art. V (Sept. 10, 1776) (“[R]ight of suffrage in the election of members for both houses shall remain as exercised by law at present.”); An Act for Regulating Elections (1733), ch. LXI, § 1, 1 Laws of Delaware 147 New Castle, 1797) (“[F]reemen and inhabitants of the respective counties” were to meet and choose assembly Representatives; Ga. Const., Art. IX (Feb. 5, 1777) (“All male white inhabitants” meeting property and tax requirements); Md. Const., Arts. II & XIV (Aug. 14, 1776) (Suffrage for “freemen” over 21 years; Mass. Const., Pt. I, Art. IX (June 15, 1780) (“[I]nhabitants . . . have an equal right to elect officers.”); id., Pt. II, Ch. 1, § 2, Art. I (“[F]reeholders and other inhabitants” elect “councillors and senators”); id., Art. IV (Town “residents” with minimum property elect representatives); N.J. Const., Art. IV (July 2, 1776) (“[I]nhabitants” with minimum estate “entitled to vote for Representatives” and public officers); N.Y. Const., Art. VII (Apr. 20, 1777) (“[E]very male inhabitant of full age” with specified “freehold” and tax payment “entitled to vote for representatives.”); N.C. Const., Arts. VII (Dec. 18, 1776) (“[F]reemen” of 21 years who were “inhabitants of any one county” with 50 acres of land elected senators; id., Art. VIII (“[F]reemen” of 21 years who were “inhabitants of any one county” and paid taxes voted for house representatives); Pa. Const., § 6 (Sept. 28, 1776) (“[F]reemen” of 21 years who paid taxes and their sons “shall enjoy the right of an elector.”); R.I. Charter, ¶ 5 (July 15, 1663) (“[F]reemen of the respective towns or places” elected assembly); S.C. Const., Art XIII (Mar. 19, 1778) (“[E]very free white man” who had “been a resident and an inhabitant” of state and owned property and paid taxes could vote for representatives and senators; Va. Const., Ch. I, Art. IX (July 8, 1777) (“[A]ll free men” with “sufficient evident common interest with, and attachment to the community” had “right to elect officers.”); Va. Bill of Rights, § 6 (June 12, 1776) (“[A]ll men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage.”); Va. Const., § 27 (June 29, 1776) (“[R]ight of suffrage in the election of members for both Houses shall remain as exercised at present.”); An Act for the Prevention of Undue Election of Burgesses, Va. Acts of 1699, 3 Hening’s Statutes, 172 (“[F]reeholders in the respective county or towne” could vote for House of Burgesses.; Election of Burgesses by Whome, Va. Acts of 1669-70, 2 Hening’s Statutes, 280 (“[F]reeholders” entitled to vote).

[^275]: On constitutional qualifications for office, see Mass. Const., Pt. I, Art. IX (June 15, 1780) (“inhabitants . . . have an equal right . . . to be elected, for public employments”); id., Pt. II, ch. 1, Arts. III & V (“inhabitants” of electoral districts for minimum period with certain property eligible for house and senate); N.C. Const., Arts. VI (Dec. 18, 1776) (house members must be “inhabitants” of county of election and own minimum land there; R.I. Charter ¶¶ 4-5 (July 15, 1663) (officers reserved to “freemen” of colony); S.C. Const., Art XIII (Mar. 19, 1778) (house members must be Protestant and state resident for 3 years).

[^276]: Giles Jacob, supra note 83 (unpaginated, entry for “freeman”). See Timothy Cunningham, 1 A New and Complete Law-Dictionary, or General Abridgment of the Law (London, 1789) (unpaginated, entry for “freeman”) (freeman “[i]s one distinguished from a slave, who is born or made free.”).

[^277]: 1 Johnson, supra note 81 (unpaginated, entry for “freeman”).
wrote in 1786 that “[a]s freemen, they ALL feel the privileges of a citizen.”

An “inhabitant,” according to Johnson, was merely “one that lives or resides in a place,” and “resident” meant “dwelling or having abode in any place.” These were English sources, a country where “subject” was used to depict a member of the national polity (“citizen” often referred to an inhabitant of a particular city). As we have seen, under English law a person was a subject upon birth within the realm. By parallel reasoning, those born within an American state at independence would be citizens of that place, if they were not slaves. This explains why the statutes noted earlier distinguished between natural-born and naturalized citizens. After the Revolution, the contractual relationship between the individual and government was transferred to the new American states. When the state constitutions were promulgated, there were millions of living Americans, the majority of whom were native born or long-term immigrants. As mentioned, constitutions often required oaths of allegiance to the state as a prerequisite for voting or holding office. Further, every state passed loyalty laws that “required oaths of allegiance and renunciation of fealty to the king.”

The failure to take an oath was penalized by, among other things, “suspension from office, imprisonment, disfranchisement, [and] barring from political office.” Consequently, “inhabitants” and “residents” had the attributes of citizenship if they took an oath of allegiance. Historians have argued that even those residents not taking an oath “accepted the protection of the new government, and have owed it allegiance” by choosing to “remain on the soil.” George Bancroft thought that this was the reason why the “free inhabitants” and “citizens” were “convertible terms” in the years after 1776. This perhaps is the reason why the Articles granted “the free inhabitants of each of these states . . . all privileges and immunities of free citizens in the several states.”

---

278 Honestus [Benjamin Austin], Observations on the Pernicious Practice of the Law 42 (Boston, 1786).

279 Id. (unpaginated, entries for “inhabitant” and “resident”).

280 See id. (unpaginated, entry for “subject”) (“One who lives under the dominion of Another.”); Giles Jacob, supra note 83 (unpaginated, entry for “citizens”) (“Of London, are either Free-men, or such as reside and keep a Family in the City.”).

281 See text at notes 169-69 & note 168, supra. Recent immigrants from Britain at the time of the Revolution were among those most likely to be Loyalists and to have departed after the British defeat. See Wallace Brown, The Good Americans: The Loyalists in the American Revolution 45-46 (1969).

282 Id. at 37; see Claude H. Van Tyne, The Loyalists in the American Revolution 129-45 (1959).

283 Brown, supra note 282, at 126; see Van Tyne, supra note 283, at 192 (“On the ground that only citizens should be allowed the right to vote, and that those who had not taken an oath of allegiance were not citizens, the Tory was early deprived on his vote in every state.”).


285 Bancroft, supra note 285, at 201 (“free”).

The rhetoric describing suffrage in this period depicted it as a right attached to the people as a whole or as essential to protecting the liberties of the populace. In Federalist No. 60, for example, Hamilton argued that “the great body of the people” would not tolerate election rules that infringed “so fundamental a privilege . . . without occasioning a popular revolution.”\(^{287}\) At the Massachusetts convention, Thomas Dawes claimed that “the right of electing representatives in the Congress, as provided for in the proposed Constitution, will be the acquisition of a new privilege by the people . . . . The people will then be immediately represented in the federal government; at present they are not. . . .”\(^{288}\) Another delegate, Charles Jarvis, asserted that “[t]he right of election, founded on the principle of equality, was . . . the basis on which the whole superstructure was erected; this right was inherent in the people; it was unalienable in its nature. . . .”\(^{289}\) In Virginia, Richard Henry Lee said at the state convention that “[a]s long as the privilege of representation is well secured, our liberties cannot be easily endangered.”\(^{290}\) Charles Pinckney asked in South Carolina whether there was, “at this moment, a nation upon earth that enjoys this right, where the true principles of representation are understood and practised, and where all authority flows from, and returns at stated periods to, the people? I answer, there is not.”\(^{291}\) He was convinced that “these inestimable privileges” depended on “[o]n the firmness, on the power, of the Union to protect and defend them.”\(^{292}\)

From a modern point of view, a right available to less than half of the adult population hardly would seem to be one that attached to citizenship, as evidenced by commentators who have rejected voting as encompassed by Article IV with scarcely an argument. However, Americans now view suffrage through the lens of the Equal Protection Clause of the Fourteenth Amendment, which commands universal suffrage save in those instances when a person loses the right as a penalty for committing a crime or lacks the mental capacity to vote intelligently. The same is true for office holding—disqualifying a person for not owning property or paying taxes is offensive to the modern ideals of equality. But if we consider the purpose of restrictions on voting and office holding from the perspective of eighteenth-century attitudes about representation, it is evident why these political rights nonetheless would be regarded as privileges of the people. Voting was a privilege of citizens in the sense that citizens voted, but more crucially because elected officials represented the entire citizenry.

The purpose of restricting suffrage to property owners who had resided in a locale for a minimum period was to assure an independent electorate interested in protecting

\(^{287}\) Alexander Hamilton, Federalist No. 60, reprinted in Federalist, supra note 2, at 404.

\(^{288}\) Thomas Dawes, Mass. Ratifying Conv., 2 Elliot’s Debates, supra note 34, at 5-6 (Jan. 14, 1788).

\(^{289}\) Charles Jarvis, id. at 29.

\(^{290}\) Richard Henry Lee, Va. Ratifying Conv., 3 id. at 185 (June 9, 1788).

\(^{291}\) Charles Pinckney, S.C. Ratifying Conv., 4 id. at 331 (May 14, 1788).

\(^{292}\) Id.
the community—especially private property. A man without property was regarded as beholden to others, as were women, children and slaves.293 The Virginia bill of rights was specific on this point, declaring that “all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage.”294 Similarly, the Maryland declaration of rights stated that “every man, having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage.”295 In addition to property ownership and payment of taxes, all states had some type of residency requirement for voting and office-seeking, including Thomas Burke’s state, North Carolina.296 South Carolina’s constitution imposed a ten years’ residency requirement for election as governor or commander-in-chief, five years’ residency for election to its privy council and senate, and three years to the House; voters must have been in residence for one year.297 Maryland had residency requirements varying from one to three years for certain civil and political offices.298

293 See Bernard Bailyn, The Ideological Origins of the American Revolution 162-63 (1967) (“[R]equiring local residency or the ownership of local property as a qualification for election” was one of several ways that “local communities bound their representatives to local interests in every way possible.”); John Phillip Reid, The Concept of Representation in the Age of the American Revolution 36 (1989) (“Property was independence; lack of property was servility, even servitude. A man without independent wealth could easily be bought or bribed. A man of property had a will of his own.”); Gordon S. Wood, The Creation of the American Republic 168-69 (1969) (property qualifications were regarded as a means to assure the independence of representatives from influence). That these justifications now are offensive underscores the ideological gulf between early America and today.

294 Va. Bill of Rights, § 6 (June 12, 1776).
296 N.C. Const., Art. V (Dec. 18, 1776) (one years’ residency for Senate election); Art. VI (same for house of commons); Art. XV (Dec. 18, 1776) (five years’ residency to be governor). Robert Natelson asserts that “voting could be disconnected from citizenship in another way: the North Carolina Constitution permitted certain property-holding noncitizens to vote.” Natelson, supra note 12, at 1158. The provision in question allowed “all persons possessed of a freehold in any town in this State . . . to vote for a member to represent such town in the House of Commons . . . .” N.C. Const. of 1776, art. IX (Dec. 18, 1776). This neglects is a separate article providing that voting for the House of Commons was open to “all freemen, of the age of twenty-one years, who were inhabitants of any one county “within the State twelve months immediately preceding the day of any election and possessed of a freehold within the same county of fifty acres of land for six months next before, and at the day of election.” The first provision, in other words, was a residency requirement for voting in elections for the town’s representative. A North Carolina inhabitant also would have been obliged to swear loyalty to the state as a condition of voting. The state constitution further provided that foreigners who took an oath of allegiance would “be deemed a free citizen” after a year’s residence. See text at note 272, supra.

297 S.C. Const., Art. XII (Mar. 19, 1778) (seven years’ residency for senate election); Art. XIII (voters for senate and house of representatives must have been “a resident and inhabitant” for one year, own property and pay taxes; three years’ residency for election to house). See also Del. Const., Art. IV, § 1 (June 12, 1792) (two years’ residency to vote for governor or legislators); Ga. Const., Art. IX (Feb. 5, 1777) (six months’ residency for voting); Vt. Const., ch. II, § 6 (July 8, 1777) (one year residency for voting).

298 Md. Const., Art. II (Nov. 11, 1776) (one year residency in county and property ownership for suffrage and election to House of Delegates); id., Art. VI (same for Senators); id., Art. XXVI
As to legislative representation, the key principle among Americans of the revolutionary era was that delegates must mirror the actual interests and views of their constituents, serving as the literal agents of the voters who sent them to the assembly.\(^{299}\) John Adams reflected common republican wisdom when he wrote in 1776 that a legislative assembly should be “in miniature, an exact portrait of the people at large. It should think, feel, reason and act like them,” by which he meant that the various interests of society should receive “equal representation.”\(^{300}\) Elected officials were among the first to be required to take loyalty oaths to their states, which evidenced their fealty to the people of the state rather than the crown.\(^{301}\) Requiring representatives to live, own property, and pay taxes in the district from which they were elected likewise served to assure that they would act in furtherance of their constituents’ interests. Representatives should personally feel the burdens of the laws they enacted, and hence it made sense that they must be property owners and taxpayers. The same applied to the voters who chose legislators.\(^{302}\) “Liberty and life stand in much less need of protection of laws than property,” a Pennsylvania commentator wrote in 1784. “It is absurd therefore for any man to dispose of his neighbour’s property, who has no property himself.” The same writer protested against giving “strangers . . . all the privileges of citizens after only two years residence among us,” by which he meant suffrage and “the power and offices of our republic.”\(^{303}\) Furthermore, a longstanding practice was for communities to issue written instructions to their representatives on how to vote in the legislature. Originally “a tool of political opposition” in England, in America “the revolutionary crises spread the practice of instruction into all parts of the continent.”\(^{304}\) In New Hampshire, the Portsmouth town meeting declared in 1766 that “giving Instructions to Representatives in Affairs of public Concern” was “a Privilege which must be highly valued by every true Patriot, as giving each Representative an Opportunity of knowing the Minds of his Con-

---


(\(^{300}\) John Adams, *Thoughts on Government* 9 (Philadelphia, 1776).)

(\(^{301}\) See Van Tyne, * supra* note 283, at 131.)

(\(^{302}\) See Reid, * supra* note 293, at 31-62.)

(\(^{303}\) One of the Majority, * A Candid Examination of the Address of the Minority of the Council of Censors to the People of Pennsylvania* 26 (Philadelphia, 1784).)

(\(^{304}\) Reid, * supra* note 293, at 97. On the common practice of instructing representatives, see *id.* at 96-109; Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 246-49 (1980); Wood, * supra* note 293, at 189-96. The only issue was whether instructions were binding, and the better “constitutional case by far was against their binding force.” *Id.* at 104. Still, representatives disobeyed at peril. See Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law,* 48 J. Pol. 51, 61 (1986) (“The power to give such instructions was enshrined in constitutions, and legislators took these instructions quite seriously.”).
Privileges and Immunities of State Citizens

 constituents, to which he ought to pay great Regard.” ^305 A related practice, also with roots in England, was for assemblies to postpone decisions in order to allow representatives to consult their constituents, sometimes printing the text of a proposed bill in newspapers. ^306

Considering not just restrictions on voting and office holding, but also the background attitudes about the purpose of voting and the nature of representation that informed them, it is easy to see why the theoretical possibility that citizens from other states might exercise political rights as a consequence of Article IV would generate no controversy. A person who lived for several years in a state, owned property there, and paid local taxes almost certainly would be considered a citizen. Even if they were not formally citizens (perhaps because they had sworn loyalty to another state), these were the attributes of responsible voters and representatives. In the Continental Congress, there were at least a few examples of delegates who represented states other than their own. ^307 Furthermore, there was an arguable case that all taxpayers should be entitled to vote, as John Laurence contended. ^308

By viewing political rights as protecting the people generally, the phrase “Privileges and Immunities of Citizens in the several States” takes on a meaning at odds with the modern idea of rights as inherently individual. Rights could be personal in that individuals possessed them, yet their exercise served communal ends. ^309 Even the trade-oriented rights that were the subjects of discriminatory legislation were ones that affected entire states, as evidenced by the bitter complaints over the “tributes” paid on account of duties imposed by states with port advantages. The privileges of

---

^305 Portsmouth Instructions, Dec. 23, 1765, reprinted in Boston Evening-Post, Jan. 6, 1766, at 2, col. 3, quoted in Reid, supra note 293, at 99-100. The Boston Town Meeting in 1766 told its delegates to the assembly that “the right” of giving them instructions, “whenever we think fit,” was “sacred and unalienable.” Instructions of Boston Town Meeting (1766), reprinted in 16 A Report of the Record Commissioners of the City of Boston 182 (Boston, 1886).

^306 See Reid, supra note 293, at 85-95.

^307 Madison remarked at the Convention: “During a considerable period of the War, one of the Representatives of Delaware, in whom alone before the signing of the Confederation the entire vote of that State and after that event one half of its vote, frequently resided, was a Citizen & Resident of Penna. and held an office in his own State incompatible with an appointment from it to Conga. During another period, the same State was represented by three delegates two of whom were citizens of Penna. and the third a Citizen of New Jersey.” 1 Const. Conv., supra note 10, at 319-20 (June 19, 1787).

^308 See text at note 268, supra.

^309 The communal nature of early American voting is evidenced by the widespread practice of viva voce voting, particularly as practiced in town meetings, which is entirely at odds with the modern idea of suffrage as a secret expression of personal sentiments uncontrolled by others. See Alexander Keyssar, The Right to Vote 24 (2009) (“In come locales, particularly in the South, voting was still an oral and public act,” in which “men assembled before election judges, waited for their names to be called, and then announced which candidates they supported.”); G. Edward White, Reading the Guarantee Clause, 65 U. Colo. L. Rev. 787, 796-97 (1994) (on viva voce voting as an aspect of deferential politics).
choosing representatives and instructing them on how to vote may have been directly exercised by a minority, but they safeguarded the community at large.

The debates in Congress during 1790 on the first naturalization act also cast considerable light on how Americans viewed the relationship between citizenship, voting, and holding office. Initially, the bill would have granted “all the rights of citizenship” to “all free white persons” who had resided in the United States for one year, “except being capable of holding office under the State or General Government, which capacity they are to acquire after a residence of two years more.” 310 An amendment was proposed to strike the one year requirement, expressly for the purpose of allowing “aliens [to] come in, take the oath, and hold lands without any residency at all,” but requiring three years of residence “to hold an office under Government.” 311 This touched off several days of vigorous debate in which various opinions were advanced on the connection between citizenship and the privileges of voting and office holding, in addition to a dispute over Congress’ authority under the Naturalization Clause to dictate the rules on these subjects to the states. Under the wording of the proposed amendment, Rep. Thomas Hartley of Pennsylvania pointed out, an alien would become a citizen merely by taking an oath of allegiance, making him “entitled to join in the election of your officers at the first moment he puts his foot on shore in America.” Hartley and a number of other congressmen thought it a terrible idea to allow “a man . . . all the privileges of a citizen without any residence at all.” 312 Even if the freshly-minted voter was “qualified by a knowledge of the candidates, . . . we have no hold on his attachment to the Government.” 313

Despite these varying views expressed in these debates, there was consensus that the conferral of citizenship entailed receiving the privileges of voting and holding office, unless the law was expressly qualified to avoid those effects. On the merits, the prevailing position was that some period of residence should be required before these political privileges were bestowed. Rep. George Clymer, who had been a Pennsylvania delegate at the Constitutional Convention, argued “that foreigners ought to be gradually admitted to the rights of citizens; and that a residence for a certain time should entitle them to hold property; but that the higher privileges of citizens, such as electing, or being elected into office, should require a longer term.” 314 Rep. Hartley pointed out that state constitutions “admit[ted] aliens to the privilege of citizenship, step by step; they generally require a residence for a certain time, before they are admitted to vote at elections, and “none . . . render[ed] a foreigner capable of being elected to serve in a legislative capacity, without a probation of some years.” 315 A South Carolina representative, William Loughton Smith, thought that “as for the

310 1 Annals of Cong. 1147 (Feb. 3, 1790) (naturalization bill).
312 Rep. Thomas Hartley, id. at 1148.
313 Id.
314 Rep. George Clymer, id. at 1159-60 (Feb. 4, 1790).
privilege of electing, or being elected, he conceived a man ought to be some time in the country before he could pretend to exercise it. What could he know of Government the moment he landed? Little or nothing. . . .”

On the other hand, some doubted whether it was legally possible to impose limits on these privileges once citizenship was conferred. Rep. Elias Boudinot of New Jersey argued “that after a person was admitted to the rights of citizenship, he ought to have them full and complete, and not be divested of any part.” Nonetheless, he was not in favor of immediately granting political privileges to newcomer. The answer, he thought, was to require two years of residency before citizenship could be obtained. Others disagreed that citizenship must be all or nothing. Rep. Smith explained that in South Carolina “they give citizenship for certain purposes at first, extending them afterwards as the person is fitted to receive them.” In like vein, Rep. Tucker “had no doubt the Government had a right to make the admission to citizenship progressive,” noting that in the Constitution “different ages and terms of residence [were] annexed to the right of holding a seat in this House and in the Senate, and of being chosen President.”

Still others questioned Congress’ authority to set the terms for the exercise of political privileges in the states. Rep. Michael Jenifer Stone from Maryland did not “doubt but an alien might be admitted to the rights of citizenship, step by step,” yet “questioned the power of the House to say . . . what shall be the effect of that naturalization, as it respects the particular states.” Rep. John Laurance of New York similarly believed that “Congress had power to say on what terms aliens should be admitted to the rights of citizenship,” but “the law of the United States could not vary any of the effects of that citizenship in the State to which he belonged.”

New York, he pointed out, allowed a person to vote for representatives in the state assembly after six months’ residency, and Congress could not alter this right.

Congress ultimately rejected the amendment, adopting a solution along the lines Boudinot proposed. The statute provided that “any alien, being a free white person,” would “be considered as a citizen of the United States” after two years residence in the country and living one year in a state where he applied for citizenship before a court, proved his “good character,” and took an oath “to support the Constitution of the United States.” No mention was made of office-holding, voting, or any effect of the law on the person’s status as a state citizen. This resolution sidestepped what Madison referred to on the House floor as “a question of some nicety,” which was

---

321 See id. at 1158. See also Rep. Joshua Seney, id. at 1160-61 (contending that “Congress had no right to intermeddle with the regulations of the several States, while prescribing a rule of naturalization.” Once “the General Government . . . admitted a foreigner to citizenship, he did not believe that they were authorized to except him, for two years more, from being capable of election, or appointment to any office” under state law.).
“how far we can make our law to admit an alien to the right of citizenship, step by step.” Rep. James Madison, id. The question did not need to be answered, he thought, as “there is no doubt we may, and ought to require residence as an essential” to obtaining citizenship. No one disputed the point made by Rep. Smith, “that an uniform rule of naturalization would extend to make a uniform rule of citizenship pervade the whole Continent, and decide the right of a foreigner to be admitted to elect, or be elected, in any of the States.” In other words, the Naturalization Clause gave Congress the power to determine the standards for granting citizenship for both the United States and the states, which could include a period of residency before obtaining it. Left unresolved was whether Congress could place additional qualifications on voting and office holding after citizenship was conferred.

Regardless of how these unsettled questions might be answered, the debates show unmistakably that representatives with a wide range of political outlooks thought that voting and office holding were privileges of citizenship. Even those who believed the privileges of citizenship could be granted in steps acknowledged that these political rights were ones that all male citizens eventually would be eligible to obtain.

Congress was not addressing the relevance of the naturalization act to the Privileges and Immunities Clause. In the House, only one congressman, Alexander White of Virginia, brought up the subject, albeit obliquely. White, who had been a delegate at the Virginia ratifying convention, reminded the House that “the rights and privileges of citizens in the several States belong to those States; but a citizen of one State is entitled to all the privileges and immunities of the citizens in the several States.” Consequently, he continued, “in the case of elections, if the constitution of a particular State requires four, five, or six years residence, before a man is admitted to acquire a legislative capacity, with respect to the State Government, he must remain there that length of time,” regardless of whether Congress provided for a lesser period. Congress must “confine themselves to an uniform rule of naturalization, and not to a general definition of what constitutes the rights of citizenship in the several States,” which was the province of the Privileges and Immunities Clause. The same principle, he added, applied to “the privilege of holding real estates.” White’s point was that the Constitution imposed only one obligation on the states regarding the privileges and immunities of citizenship, which included political rights, and that was Article IV’s requirement of equal treatment. On the Senate side, the debates on naturalization were

323 Id.
324 Rep. William Loughton Smith, id. at 1162
325 Rep. Alexander White, id. at 1152 (Feb. 3, 1790).
326 Id.
327 Id.
328 Id.
Privileges and Immunities of State Citizens

not formally recorded, although Senator William Maclay made a few entries about them in his journal. Maclay reported, with disapproval, that Senator Oliver Ellsworth wanted “the rights of electors, being elected, etc. . . . described in the act of naturalization,” adding that he “was so absurd as to suppose, if a man acquired the right of suffrage in one State, he had it in all, etc.”

Maclay, whose views often were idiosyncratic, did not say why Ellsworth, a leading member of the Convention and future Chief Justice, was so wrong in his supposition.

No case ever arose testing the political rights of noncitizens under the clause, but as we shall see, early courts reached opposite conclusions about the question in dicta. At a time when people did not relocate often or travel back and forth between states with frequency, the likelihood of the issue surfacing was nil. Requirements of residency, tax-paying, and property ownership would eliminate abuses, which may explain why the Framers chose not to create an exception to the Privileges and Immunities Clause for voting and office-holding, and why Burke’s concern did not produce any stir of opposition. Just as the Framers decided to jettison the Article’s exception for “paupers, vagabonds and fugitives,” they may have concluded that states had ample means to deal with the issue without tainting the ideal stated in the clause: unqualified equality. During the 1790 congressional sessions on naturalization, several members worried that without a fairly lengthy residence requirement, elections could be carried by fraud. Aedanus Burke of South Carolina imagined that without a durational residency requirement, “[i]n large cities, like Boston, New York, or Philadelphia, an election may be carried by the votes of the body of sailors who happened to be in port.” Rep. James Jackson of Georgia told the story of a Philadelphia election in which the crews of ships had taken an oath of allegiance, “paid half a crown tax to the Collector, as the Constitution required, then went and voted, and decided the contest of the day.” For his part, Rep. White was concerned that “[f]oreign merchants and captains of vessels,” by taking an oath that they intended to reside in America, “might by this means evade the additional duties laid on foreign vessels.” These apprehensions did not occasions doubts about voting being a privilege of citizenship. All of these speakers concluded that a residency requirement would solve the problem.

---

330 See text at note 9, supra (Corfield v. Coryell) & text at note 423, infra (Campbell v. Morris).
331 Rep. Aedanus Burke, 1 Annals of Cong. 1160 (Feb. 4, 1790). “If the French fleet was here at such a time,” Burke continued, and a spirit of party strongly excited,” a candidate might persuade the crews to qualify as voters “by taking an oath of no definite meaning, carry them up to the hustings,” and thereby be elected “contrary to the voice of nine-tenths of the city.” Id. See also Rep. Thomas Hartley, id. at 1151-52 (Feb. 3, 1790) (“If, at any time, a number of people emigrate into a seaport town, for example, from a neighboring colony into the State of New York, will they not, by taking the oath of allegiance, be able to decide the fate of an election contrary to the wishes and inclinations of the real citizens?”).
332 1 Annals of Cong. 1161 (Feb. 4, 1790). For this reason, Rep. Jackson supported a residency requirement before a person could become a citizen and vote. See id.
Privileges and Immunities of State Citizens

Whether the Privileges and Immunities Clause was regarded by early proponents of the Constitution as applying to political privileges cannot be ascertained definitively for the simple reason that the question did not arise. There is fairly strong evidence to support the conclusion that voting and office holding were widely considered to be attributes of citizenship. This was true in two senses. First, states limited both of these political privileges to citizens. Second, and more importantly, republican representation entailed that citizens elected legislators who in turn were supposed to advance the actual interests of the people. Neither of these points proves conclusively that the clause was intended to give American citizens political privileges in every state. That depends on the purpose of the clause, which we know was intended to forge the bonds of the union by eliminating the possibility that Americans would be treated as aliens outside their home states. Logically, that would include political privileges. Whether that logic actually was accepted at the time the Constitution was formed is what we do not know for certain.

The Relation of the Privileges and Immunities of Citizenship to Natural Rights

The fact that both the terms privileges and immunities were applied to all sorts of liberties belonging to the people, including natural rights like freedom of conscience, does raise a question about word usage. Why would the Framers employ “privilege” to describe a God-given liberty such as the right of free conscience, when to eighteenth-century speakers the word implied something granted by a government? Several commentators recently have argued that the “Privileges and Immunities” referred to in Article IV and the Articles were entirely distinct from natural rights. According to this view, privileges and immunities were “legal benefits granted to citizens or groups by official grace,” and thus “represented a very different juristic category from natural rights,” which “were inherent in one’s humanity.” Whereas “privileges and immunities were . . . bestowed,” “[n]atural rights, to the extent their exercise did not harm others, were inalienable.” A 1765 pamphlet, written by Stephen Hopkins (the Rhode Island governor and a future signer of the Declaration) has been cited to support this interpretation, as he concluded that “the British subjects in America, have equal rights with those in Britain; that they do not hold those rights as a privilege granted them, nor enjoy them as a grace and favor bestowed; but possess

334 Natelson, supra note 12, at 1166.
335 Id. at 1168.
336 Id. at 1174.
337 Id. at 1166. See also Lash, supra note 160, at 1254 (arguing that “privileges and immunities” meant “specially conferred rights”).
them as an inherent indefeasible right. For this reason, it has been contended, the Framers deliberately did not include the words “liberties” or “rights” in Article IV. In the debates over the Articles, Congress considered and rejected a draft, probably by John Dickinson, that would have provided: “The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies.”

Congress also chose “privileges and immunities,” rejecting the familiar alternative, “rights and privileges.” This occurred in 1776-77, a decade before the Philadelphia Convention, and no record was left to explain the choice.

The argument that the “privileges and immunities” protected by Article IV did not encompass natural rights has serious flaws, starting with the absence of direct evidence to support it. No one from the framing period has been quoted saying that Article IV did not protect any natural rights. As the various references already discussed show, the terms “privileges” and “immunities” were used to signify the most important rights attached to citizenship. They included representation in legislatures, equal protection of the laws, access to courts, trial by jury, freedom of press, and state protection of life, limb, and property. Many of the privileges and immunities associated with British citizenship were considered as either natural rights themselves—conscience, for example—or essential to the exercise of natural liberties, as with juries and habeas corpus. However, privileges and immunities also could be more pedestrian, as where a state granted trading advantages to its citizens, which under Article IV would have to be extended to other Americans doing business within its borders.

There were several reasons why the words privileges and immunities would be employed by eighteenth-century speakers in reference to natural rights. One was traditional usage, reflecting a past in which rights had been wrested from the crown and were defined by positive law. The term may also have connoted the reservation in Cato’s Letters, that liberties like free speech were privileges must be exercised “within the Bounds of Manners and Discretion.” The likeliest explanation, however, is


339 Articles of Confederation and Perpetual Union (John Dickinson’s proposed draft July 12, 1776), art. VI, reprinted in 5 Journals of the Continental Congress, supra note 173, at 547, quoted in Natelson, supra note 12, at 1168-69. For unknown reasons, Congress omitted the quoted provisions in the next draft of the Articles. See 5 id. at 676 (Aug. 20, 1776) (This draft struck the comity proposals in the Dickinson draft entirely, probably because Congress was working on an alternative.); 9 id. at 899 (Nov. 13, 1777) (Congress adopted “privileges and immunities,” rather than “rights and privileges,” without explanation). Hopkins’ pamphlet was reprinted in London in 1766 under the title, The Grievances of the American Colonies Candidly Examined.


341 Trenchard & Gordon, supra note 24, at 254.
that privileges and immunities were familiar terms used by eighteenth-century writers to depict the advantages of being a citizen or subject. In political literature, the words “rights” and “privileges” often had the same meaning, as in several examples given above from state constitutions and congressional resolutions. We have seen that one important use of the terms was as to summarize colonists’ claims against the British, namely that they were entitled to the same legal protections and advantages as subjects residing in England.\footnote{\citelow{342}See text at notes 173-83, \textit{supra}.}

The decisive question, then, is what Americans understood to be the rights of citizenship, rather than the precise labels that were used to describe them. The status of citizen or subject was tied to the mythic social contract between the government and the people, in which individuals entered society in order to protect their personal liberties and property. The Vermont Constitution of 1777 reflected this philosophy: “That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community;\footnote{\citelow{343}Vt. Const., Art. VI (July 8, 1777).} . . . That every member of society hath a right to be protected in the enjoyment of life, liberty and property. . . .”\footnote{\citelow{344}Id., Art. IX.} Above all, citizens were entitled to the rule of law and its established processes. The Massachusetts Constitution of 1780 was one of several providing that “no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law.”\footnote{\citelow{345}Mass. Const., Pt. I, Art. XII (June 15, 1780).} Government officials were charged with assuring the protection of their people. The Georgia Constitution in 1777 required the governor to take an oath promising to “use my utmost endeavors to protect the people thereof in the secure enjoyment of all their rights, franchises, and privileges.”\footnote{\citelow{346}Ga. Const., Art. XXIV (Feb. 5, 1777).} Pennsylvania legislators likewise were obliged to swear not to “lessen or abridge” the “rights and privileges” of the people, “as declared in the constitution of this state.”\footnote{\citelow{347}Pa. Const., Plan or Frame of Government, § 10 (Sept. 28, 1776).}

Being a citizen or subject thus entailed that the government was obligated to respect and protect that person’s rights. The close association between the protections that went with citizenship and the liberties ultimately being protected may be the reason why writings of the period usually did not distinguish the two. In introducing the
subject of natural “rights and liberties,” Blackstone wrote that they “consist in a number of private immunities,” as defined “by these several statutes.” Both legal and popular writers used the terms as all-encompassing depictions of the rights of subjects or citizens. For legal documents, terms like “privileges and immunities” were boilerplate expressions signifying that everything was included, as in the various charters and grants already discussed. State constitutions also did not always distinguish carefully between the natural and positive sources of rights and privileges. Georgia’s constitution provided that “Americans, as freemen,” were asserting “the rights and Privileges they are entitled to by the laws of nature and reason,” the last three words of which were lifted straight from Blackstone. Drafters also knew how to qualify such terms with limiting words, as in Vermont’s 1786 constitution: “The declaration of the political rights and privileges of the inhabitants of this State, is hereby declared to be a part of the Constitution of this Commonwealth; and ought not to be violated on any pretence whatsoever.” Article IV’s coverage was qualified only by its requirement that the rights be ones that attached to state citizenship.

To counter the many examples of privileges and immunities used to depict natural rights, one commentator has argued that a shift in definitions was underway, starting during the agitation of the 1760s that eventually led to the Revolution, whereby “liberty” began to be “applied exclusively to natural liberty,” while “right” could either mean a natural right or legal privilege. “After Independence, people routinely distinguished between rights and privileges.” Aside from the Hopkins quotation above, which predated the Revolution, the only example offered of such a distinction was from an 1805 book by Mercy Warren, in which she wrote that the “principles” of the American Revolution were grounded in the “rights of men, the privileges of Englishmen, and the claim of Americans.” Neither of these writers was addressing whether that the “Privileges and Immunities of Citizens” could include rights that ultimately were based on natural law. Rather, as will be explained more fully, they were making broad claims about the validity under natural law of the colonists’ demands or the Revolution itself.

As the earlier discussion demonstrated, there were many instances during and after the Revolution in which Americans referred to natural rights as privileges and conventional freedoms as liberties. When the Continental Congress asserted that

348 1 Blackstone, supra note 13, at 125.
349 Id.
350 Ga. Const., Preamble (Feb. 5, 1777). See also N.H. Const., Preamble (Jan. 5, 1776) (British had deprived Americans “of our natural and constitutional rights and privileges.”). On Blackstone’s identical phrasing, see text at note 184, supra.
351 Vt. Const., Ch. II, § 39 (July 4, 1786) (emphasis added).
352 Natelson, supra note 12, at 1141-42.
353 Id. at 1142.
Americans were fighting for “our dearest privileges,” they had in mind the entire constellation of rights owed to British citizens, including property rights. Moreover, during the ratification debates for the Constitution and in the First Congress, the terms “rights,” “privileges,” and “immunities” often were used synonymously.

Consider property rights. These rights were universally referred to in the Anglo-American world as natural liberties, “sacred and inviolable,” as Blackstone said, not benefits given by grace. The title to all real property in America might theoretically run backward to the king, but that did not make ownership dependent on the continued indulgence of the crown or the successor states (especially not ownership of personal property). “For it is a part of the liberties of England . . . that the King may not enter upon or seise any man’s possessions upon bare surmises without the intervention of a jury.” If Article IV did not protect property rights, it would mean that the rights of American citizens venturing into sister states would be inferior to aliens under British law, who at least were allowed (by official indulgence) to own personal property while on British soil. But the clause must have extended to property rights of all types (as courts consistently have held), for otherwise Americans would have the status of aliens while venturing into other states.

Property rights illustrate why Americans and Britons could refer to them both as privileges of citizenship guaranteed by the state and as natural liberties. The underlying right was based on natural law; the privilege was the entitlement of citizens or subjects to own property in the state and have it protected by the government. Tench Coxe, a well-known public figure and author on political economy who had been a member of the Continental Congress and served in the Washington administration, wrote in 1795 that Pennsylvania granted “foreigners” “[a] privilege, almost peculiar to this state,” namely “that of buying and holding lands and houses within this commonwealth, without relinquishing their allegiance to the country in which they were born.” The privilege, in other words, was the right to purchase and possess property in the state, which usually was reserved for citizens. Once the property was owned by someone, that person had a natural right to keep it and the government was obligated to protect that ownership as a privilege of citizenship.

The right of conscience similarly was recognized widely as an inherent natural

---

355 Letter to the Inhabitants of the Province of Canada (Jan. 24, 1776), supra note 173, at 85.
356 See Curtis, Historical, supra note 160, at 1098-1104.
357 1 Blackstone, supra note 13, at 135.
358 Robert Natelson has contended that “[u]nder English law, tenure of land was a privilege because all land nominally belonged to the Crown.” Natelson, supra note 12, at 1165. None of the sources he cites terms property ownership a privilege. As explained in text, the privilege was the right of citizens to own property within the state, but the underlying right to ownership of the property was a natural right of persons. See text at note 360, infra.
360 Tench Coxe, A View of the United States of America 56-57 (Dublin, 1795).
right, and expressly protected by some state constitutions, and it would be surprising to find anyone saying that it could be denied to a visitor. In order to “guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind,” New York’s constitution “declare[d], that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind.” Georgia’s constitution provided: “All persons whatever shall have the free exercise of their religion.” These were typical of state conscience clauses. Other rights delineated as inalienable by state constitutions almost always were described as belonging to all persons.

361 See, e.g., Del. Dec’l. Rgts., § 2 (Sept. 11, 1776) (“That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings.”); Ga. Const., Art. VI (Feb. 5, 1777) (Ky. Const., Art. XII, § 3 (Apr. 19, 1792) (“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.”)); Md. Const., Art. XXXIII (Nov. 11, 1776) (“[I]t is the duty of every man to worship God in such manner as he thinks most acceptable to him”); N.H. Bill Rgts., Art. V (June 2, 1784) (“Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason.”); N.Y. Const., Art. XXXVIII (Apr. 20, 1777); N.C. Const., Art. XIX (Dec. 18, 1776) (“That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.”); Pa. Decl Rgts., Art. II Art. II (Sept. 28, 1776) (“That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding.”); Pa. Const., Art. IX, § 3 (1790) (“That all men have a natural and indefeasible right to worship Almighty god according to the dictates of their own consciences.”); Vt. Decl. Rgts., Art. III (July 8, 1777) (“That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding. . . . And that no authority can . . . interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.”); Vt. Decl Rgts., Art. III, Art. III (July 4, 1786) (substantially the same as Art. III of 1777 constitution); Va. Va. Bill Rgts., Art. XVI (June 12, 1776) (“[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . .”).


364 See note 361, supra.

365 See Ky. Const., Art. XII, § 1 (Apr. 19, 1792) (“That all men, when they form a social compact, are equal. . . .”); id., Art. XII, § 2 (“[T]he people “have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.”) Mass. Const., Pt. I, Art. I (June 15, 1780) (“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”); N.H. Bill Rgts., Pt. I, Art. II (June 2, 1784) (“All men have certain natural, essential, and inherent rights, among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.”); Pa. Decl. Rgts., Art. I (Sept. 28, 1776) (“That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”); id., Art. V (“And that the community hath an indefutible, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.”); Pa. Const., Art. IX, § 1 (Sept. 2, 1790) (substantially same as Articles I and V of 1776 declaration of rights); Vt. Decl. Rgts. (July 8, 1777), Art. I (“That all men are born equally free and independ-
Yet the rights of conscience were also described as privileges of the people. Again, this makes sense as a matter of historical usage: the abstract natural right of conscience was implemented through constitutions and charters. A majority of early state constitutions went beyond declaring freedom of conscience as a principle to expressly protecting the right of all individuals to “worship” or to the “free exercise of religion.” Some forbade or regulated specific practices: official establishments or compelled support of religion, forcing people to attend religious services outside their faith, requiring religious tests to hold public office, or otherwise depriving a person of civil rights on account of religious belief. The Constitution likewise
barred religious tests for federal offices and specified that affirmations could be given instead of oaths, the latter being offensive to some religions. All of these items reflected a specific history of religious discrimination, of hard-fought privileges. The delineated privileges were what really counted, not natural rights protected in the abstract. Privileges were specific undertakings by the state, which often were commitments to act in ways that would safeguard or at least not interfere with the realization of natural rights. They were not uniform or even constant, as the varying and evolving state provisions attested.

American thinking about the nature of government underwent profound change in the course of the Revolution, but not in ways that would affect the meaning of Article IV. The break from England did not greatly alter the substance of individual rights that Americans claimed or even the means for their protection. On both sides of the Atlantic the rights to life, limb, liberty, and property were regarded as founded on natural law, rather than being the products of social convention. However, Americans adopted the radical view that some—but not all—of these natural rights were inalienable, that is, not subject to legislative abrogation. Still, when it came to protecting those rights, the means were all privileges of citizenship.

When the statements of Adams, Hopkins, Warren and others in a similar vein are examined in context, they were asserting that the British had broken their contract with Americans, which they were obligated to honor as a matter of natural law. Adams posited that the king had “enter[ed] into a contract with his subjects, and stipulate[d] that they should enjoy all the rights and liberties of Englishmen forever, in consideration of their undertaking to clear the wilderness, propagate Christianity, pay a fifth part of ore, &c.” If the king abrogated “the contract of state,” he continued, the people “were released from their allegiance as soon as he deprived them of their liberties.” The colonists would then “recruit to nature,” and reconstruct society by consent of the people. Hopkins, in referring to the “inherent indefeasible right” of Americans, meant that the they “and their ancestors, were free-born subjects, justly and naturally intituled to all the rights and advantages of the British constitution,” which he also termed its “privileges and advantages.” He could not understand why, given all the sources of revenue available to Parliament, it would choose “to

372 Art. VI, cl. 3 (no religious tests); Art. I, § 3, cl. 6 (Senate “shall be on Oath or Affirmation” in impeachment trials); Art. II, § 1, cl. 7 (President shall take specified “Oath or Affirmation”); Art. VI, cl. 3 (Senators and Representatives to give an “Oath or Affirmation, to support this Constitution”).
373 John Adams, Novanglus, or A History of the Dispute with America (VIII), Boston Gazette (Mar. 6, 1775), reprinted in 4 The Works of John Adams 126 (Charles Francis Adams, ed. 1851).
374 Id.
375 Id.
abridge the privileges, and lessen the rights of the most loyal and dutiful subjects . . . who have long enjoyed, and not abused or forfeited their liberties.”

Hopkins based his argument partly on natural law. The Stamp Act and related excise laws, he explained, were regarded by colonists as “a manifest violation of their just and long enjoyed rights,” because “they who are taxed at pleasure by others, cannot possibly have any property, can have nothing to be called their own; they who have no property, can have no freedom, but are indeed reduced to the most abject slavery.”

This was precisely the point of the famous Massachusetts Circular Letter of 1768, in which the house of representatives of the colony asserted “an essential, unalterable right, in nature, engrafted into the British constitution, as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own.”

In these statements, the natural right of property was linked with a privilege owed to all British citizens, representation in the body that taxed them. “The position, that taxation and representation are inseparable, is founded on the immutable laws of nature,” the Massachusetts legislature wrote in a 1768 letter to the British Chancellor. Whatever its ultimate justification, the principle that a person could not be taxed without consent was firmly rooted in the history of successful parliamentary protests against the king’s efforts to extract taxes or other revenue impositions by his own authority. David Hume, in his history of England, described the attempts by Charles I to raise funds “without consent of parliament, and even increasing them at pleasure,” as “such an incongruity in a free constitution, where the people, by their fundamental privileges, cannot be taxed but by their own consent,” that it “could no longer be endured by these jealous patrons of liberty.”

The result was the Petition of Right, in which Charles I agreed to Parliament’s demand not to compel “any Guift, Loane, Benevolence, Tax, or such like Charge, without comon consent by Acte of Parliament.” Parliament grounded its claims on “their Rights and Liberties according to the Lawes and Statutes of this Realme.” Blackstone noted that a subsequent statute enacted under William and Mary strengthened Parliament’s claim by providing that it was “illegal” for the crown to impose levies for money “by pretence of prerogative, without grant of parliament.”

Essayists and public councils throughout America proclaimed that there were “unalienable rights,” over which “the supreme power hath no controul”—as a con-

---

377 Id. at 22.
378 Id. at 16.
379 Massachusetts Circular Letter (Feb. 11, 1768).
381 6 Hume, supra note 100, at 392.
383 Id.
384 1 Blackstone, supra note 13, at 136.
vention of delegates considering a proposed Massachusetts constitution declared in 1778. State constitutions likewise delineated some, but not all natural rights as inalienable. “Among the natural rights,” the New Hampshire bill of rights declared in 1784, “some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.” In making such claims, Americans recognized the difference between entitlements based on legal rights (such as those contained in charters and statutes) and natural rights, which existed irrespective of positive enactments. In a 1775 essay, John Adams asked the question: “How, then, do we New Englandmen derive our laws?” Answering himself, Adams contended that colonial laws came “not from parliament, not from common law, but from the law of nature, and the compact made with the king in our charters.”

These references to natural law invoked highly abstract principles—the rights of consent to legislation and to property. When it came to specific grievances, however, what Adams and others demanded was nothing other than the legal rights they traditionally enjoyed as British subjects. This is why “rights and liberties,” or similar expressions, were used by Americans as summations of their claims against the British. Adams wrote that “[t]he patriots of this province desire nothing new; they wish only to keep their old privileges.” The Connecticut assembly resolved in 1764 that Americans had “a Right, to the general and essential Privileges of the British Constitution, as well as the rest of their Fellow-Subjects,” and with regard to the colony of Connecticut in particular, to the “general Privileges and Immunities . . . granted and declared” in its charter. The Stamp Act, an internal tax imposed without the consent of the colonies, would “take way Part of our Antient Priviledges,” wrote Thomas Fitch, Connecticut’s elected governor. The New York Assembly pled to George III in 1775 that “we wish only to enjoy the rights of Englishmen, and to have that share of liberty, and those privileges secured to us, which we are entitled to upon the principles of our free and happy Constitution.” Being treated as a British subject meant...

---

385 Result of the Convention of Delegates Holden at Ipswich in the County of Essex 10 (Newbury-Port, Mass., 1778) [hereinafter “Essex Result”] (The Essex Result, drafted by Theophilus Parsons, later the Chief Justice of Massachusetts, was the resolution of delegates from Essex County, Massachusetts, at a 1778 county convention to consider a proposed state constitution.).

386 N.H. Bill Rgts., Art. II (June 2, 1784) (June 2, 1784).


388 Id. at 131.

389 Reasons Why, supra note 215, at 655.


391 Petition of New York General Assembly to George III (March 25, 1775), reprinted in Pennsylvania Gazette, April, 26, 1775, Postscript, 2. See also Virginia Resolves on the Stamp Act (May 29, 1765) (colonists were entitled to “all the privileges and immunities that have at any time been held, enjoyed, and possessed by the people of Great Britain.”).
receiving the protection and advantages of English law, regardless of the source of that law.

All of the liberties of the people were protected by statute or charter, and hence were concessions of the King, theoretically subject to modification. “The famous English Magna Charta is but an act of parliament,” Roger Sherman pointed out in an essay during the ratification debates of 1787, “which every subsequent parliament has had just as much constitutional power to repeal and annul, as the parliament which made it had to pass it at first.” Nevertheless, it was these statutes that defined the “private immunities” of Britons; they embodied the “residuum of natural liberty” not sacrificed by individuals entering society. Blackstone stated that the political or civil liberties “of a member of society” were “no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.” It was unlikely in the extreme that these laws would be repudiated, or that charters would be repealed. They were the law of the land, and Americans were demanding that the crown and Parliament respect them.

Long after the Constitution went in effect, American courts began to distinguish between “constitutional rights” and mere “privileges” from the government—the difference between what the government must grant and what it may bestow at discretion. In American law, that distinction was understandable as courts recognized the Constitution as a freestanding basis for legal claims, dependent on no statute for their authority. British constitutionalism, as explained, did not distinguish the two when it came to determining a person’s rights—all rights were protected by statute or common law. Americans thus eventually needed to make a determination unnecessary in British law, whether a claim was valid as a matter of constitutional right, as opposed to being based on statutory or common law—a “privilege” in that it was revocable. The right-privilege distinction would cause enough grief for later generations, but it did not befoul Article IV. The purpose of the clause was not to differentiate between constitutionally-mandated rights and benefits given to citizens by the grace of the state. Rather, its function was to assure that visitors from other American states would be treated like local citizens, not as aliens. And those citizens lived under state constitutions that protected their rights, some of which were based on natural law.

392 Roger Sherman, Letters of a Countryman (II), New Haven Gazette (Nov. 22, 1787), reprinted in Essays on the Constitution of the United States, Published During its Discussion by the People, 1787-1788, at 219 (Paul Leicester Ford, ed. 1892).
393 1 Blackstone, supra note 13, at 125.
394 Id.
395 Id. at 121. Blackstone followed conventional social contract theory: “But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase.” Id. See N.H. Bill Rgts., Art. III (June 2, 1784) (“When men enter into a state of society, they surrender up some of their natural rights to that society, in order in insure the protection of others; and, without such an equivalent, the surrender is void.”).
In the context of Article IV, it made no difference whether a “privilege and immunity” was a universal right of humankind or one only for the citizens of a specific state. If the right at issue was based on natural law, a state presumably would extend it to the visitor as a human right—the same treatment given to state citizens. This was reflected in wording of state constitutional provisions protecting rights that were identified as natural and inalienable. They declared the rights to be inherent in “mankind,” belonging to “all persons,” or similar words denoting universality of coverage. And since the privileges and immunities of citizenship included access to courts and entitlement to equal treatment under the law, Article IV would require that any natural right that a state recognized for its own citizens be extended to all other Americans. In this manner, Article IV protected the property and personal liberties of nonresident traders or investors, by giving them the same status as state citizens before the law.

To read Article IV as not protecting natural rights would mean that states were required to extend mere government-created benefits to non-citizens but not the most cherished human rights. This is an implausible interpretation considering the demands for equal rights of citizenship in myriad revolutionary documents. Americans had claimed that all of their grievances would be satisfied if they were treated the same as other British subjects. Independence required a reformulation of the basis of their political system, but it was unlikely that Americans wanted to diminish the rights they had possessed as Britons. Those rights included residing, owning property, or doing business in any part of the kingdom. To lose these rights would make Americans aliens everywhere outside their own states. Against this background, it is highly doubtful that a constitutional measure meant to assure the equivalence of rights for visiting Americans excluded the most fundamental of liberties. It is even less probable that such an interpretation could have prevailed without anyone noticing or protesting.

Omitting natural rights from the ambit of privileges and immunities also would have produced intractable interpretive problems. As noted above, natural rights were divided into two types, “the alienable and unalienable rights of mankind.” There was broad agreement among Americans at the time about existence of inalienable rights and their origin in natural law. The “alienable” natural rights were ones that could be “surrender[ed] WHEN THE GOOD OF THE WHOLE REQUIRES IT,” according to a typical resolution. Public interest could trump all but the most “sacred and irrevo-

397 See text at notes 362-63 and notes 361 & 365, supra.
398 Essex Result, supra note 385, at 10.
400 Essex Result, supra note 385, at 14.
cable” of rights, the Massachusetts Circular Letter contended.\textsuperscript{401} Only a few rights were by consensus deemed natural and inalienable—conscience, property, and the freedom to reform, alter, or abolish the government\textsuperscript{402} With the exception of liberty of conscience, the rights usually cited as inalienable corresponded to the absolute rights detailed by Blackstone. The Declaration of Independence identified “life, liberty, and the pursuit of happiness” as “among” the “unalienable rights” that were “endowed by their Creator.”\textsuperscript{403} State bills of rights, where they existed, were similar in identifying inalienable rights, with several adding a provision that the people had the right “to reform, alter, or abolish government.”\textsuperscript{404}

As to alienable rights, there was much less concurrence about whether particular ones were based on natural law, common law, or some other conventional source. The dramatic events of the last quarter of the eighteenth century—the return of the American colonies to a state of nature followed by adoption of written constitutions by thirteen sovereignties—created “a peculiar confusion in the American mind about the nature of law,” Gordon Wood has written.\textsuperscript{405} Constitutions—written instruments with prescriptive force—were in one way decidedly modern—they had the force of law “as the command of a sovereign will,” while at the same time they were intended to establish natural justice, an ancient concept rooted in religious precepts.\textsuperscript{406} Similarly, the common law was an exercise in gradually recognizing, over a course of generations, the commands of natural law. Jurists would sometimes use the terms natural and common law interchangeably; they also equated natural law with the law of nations. State constitutions did not differentiate between natural and positive rights, except in declaring that inalienable rights were natural or inherent. They also varied greatly in the rights they covered. The federal Bill of Rights likewise did not identify rights by their pedigree. Following the pattern of state constitutions, the various protections in the Bill of Rights were either labeled “rights” (e.g., “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”\textsuperscript{407}) or no descriptor was used (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”)\textsuperscript{408} Some of the provisions of the Bill of Rights protected rights often regarded as natural and inalienable, such as free exercise of religion and liberty of press. Most of its guarantees, however, were ones commonly referred to as privileges, even if the Bill of Rights labeled them “rights.” Examples include the “right” of trial by jury in civil and criminal cases, as well as some of the procedural protections.

\textsuperscript{401} Massachusetts Circular Letter (Feb. 11, 1768).
\textsuperscript{402} See text at notes 361-65 and notes 361 & 365, supra.
\textsuperscript{403} U.S. Decl’l. Ind.
\textsuperscript{404} Pa. Decl. Rgt’s., Art. V (Sept. 28, 1776). For other examples of state-declared inalienable rights, see notes 361 & 365, supra.
\textsuperscript{405} Wood, supra note 293, at 292.
\textsuperscript{406} Id.
\textsuperscript{407} U.S. Const., Amend IV.
\textsuperscript{408} Id., Amend. I.
for criminal suspects (e.g., “the right to a speedy and public trial.”).

When debating the proposed bill of rights in Congress, Madison commented that its purpose was “securing the rights and privileges of the people of America.”

If the coverage of Article IV turned on whether a right was natural or conventional, that determination would have to be made in every case. There was no authoritative source to answer this question. State judicial decisions would provide little guidance since the distinction was irrelevant to legal disputes. People had opinions about which rights were natural, but they were expressed in different contexts than discerning the privileges and immunities protected by Article IV. For practical purposes, such as in drafting a bill of rights, there was no point in labeling a right to be natural or not, so long as it was recognized as a constitutional guarantee.

Consider liberty of press, which some writers referred to as a natural right while others called it a privilege (and some used both words). State constitutions equivocated on its status. Some referred to press rights generally, as when Georgia declared in 1789 that “[f]reedom of the press shall remain inviolate.” Others stated that “the people” were entitled to liberty of press, which could imply that it was limited to members in the polity. Only Delaware, in its 1792 constitution, specifically limited press rights to state citizens. The different wording for the press provisions from those for expressly declared inalienable rights could stem from uncertainty over their status as natural rights. In any event, ascertaining whether these press protections were meant to secure natural rights or conventional privileges would be challenging, and it is hard to imagine that the coverage of the Privileges and Immunities Clause

---

409 See U.S. Const., Amend VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”); id., Amend. VII (“the right of trial by jury shall be preserved” in common law cases for more than twenty dollars).
411 See Helmholz, supra note 399, at 413 (A “definitive list” of natural rights did not exist, “neither in the cases nor in the treatises.”).
412 Art. IV, § 3 (May 6, 1789). See also Md. Dec’l. Rghts., Art. XXXVIII (Nov. 11, 1776) (“That the liberty of the press ought to be inviolably preserved.”); N.H. Bill Rghts., Art. XXII (June 2, 1784) (“The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved.”); N.C. Dec’l. Rghts., Art. XV (Dec. 18, 1776) (“That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained.”); S.C. Const., Art. XLIII (Mar. 19, 1778) (“That the liberty of the press be inviolably preserved.”); Va. Bill Rghts., § 12 (June 29, 1776), (“That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.”).
413 See Pa. Dec’l. Rghts., Art. XII (Sept. 28, 1776) (“That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”); Vt. Dec’l. Rghts., Art. XIV (July 8, 1777) (“That the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not be restrained.”).
414 See Del. Const., Art. I, § 5 (June 12, 1792) (“The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty.”).
was meant to depend on that determination. Writers frequently published books and pamphlets outside their home states, and articles were reprinted in newspapers up and down the coast as well as across the sea. Later generations of Americans worried about the writings of outside agitators, notably in the Southern resistance to Northerners mailing abolitionist literature to their states. But this was not an issue in the 1780s (and, in any event, Southern states would not allow abolitionist writings by their own citizens).

Another example of the difficulty in distinguishing natural and conventional rights would be the right to bear arms. Blackstone termed it an auxiliary right, “a public allowance, under due restrictions, of the natural right of resistance and self-preservation.” The English Bill of Rights provided that “the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.” Only a minority of states provided constitutional guarantees for the right to bear arms, and these mainly concerned militia service, and none said the right was inalienable. Some provisions for bearing arms actually were obligations of citizenship. New York’s Constitution of 1777 made it the “duty” of every man “to be prepared and willing to defend” the state, and then declared that the militia must be “armed and disciplined, and in readiness for service.” Should the liberty to possess and use firearms be characterized as a privilege, inasmuch as it was “a public allowance” and regulable by law? Or was it a natural right based on its purpose of protecting personal security? Answering that question would be unavoidable if “privileges” under Article IV could not be natural rights. Yet the right to bear arms was both rooted in natural law and considered a privilege (if not a duty) of citizenship.

---

415 See Jay, supra note 237, at 805-07.
417 1 Blackstone, supra note 13, at 139.
419 On early state constitutional provisions for the right to bear arms, see Mass. Const., Pt. I, Art. XVII (June 15, 1780) (“The people have a right to keep and to bear arms for the common defence.”); N.Y. Const., Art. XL (Apr. 20, 1777) (“And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; . . . the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.”); N.C. Decl. Rgts., Art. XVII (Dec. 18, 1776) (“That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace.”); Pa. Const., Art. IX, § 21 (Sept. 2, 1790) (“That the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned.”) (The 1776 version provided: “That the people have a right to bear arms for the defence of themselves and the State.” Pa. Decl. Rgts., Art. XIII) (Sept. 28, 1776); Vt. Decl. Rgts., Ch. I, Art. XV (July 8, 1777) (“That the people have a right to bear arms for the defence of the themselves and the State.”) (the same provision appears in Vermont’s 1786 constitution, as Ch. I, Art. XVIII); Va. Bill Rgts., § 13 (June 12, 1776) (“That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State.”).
The “Privileges and Immunities of Citizens” most likely was intended and understood as a shorthand expression for all the rights a state afforded its citizens, regardless of their origin. This interpretation avoids the messy interpretive tangles that would follow if natural rights were excluded from their protection. It also explains why the Framers did not include the word “rights” in Article IV—it would have been redundant in this context. (One of the dictionary definitions of “right” in the eighteenth century was “privilege.”) The “Privileges and Immunities” of citizenship were not inalienable human rights per se, but the entitlement to the protection of those rights that arose from citizenship.

**Original Error: Early Judicial Interpretations of Privileges and Immunities**

Notwithstanding the clause’s seemingly unrestricted coverage of rights attended to citizenship, courts drew distinctions from almost the beginning between the citizens of a state and residents whose primary attachment was to another state. In an early decision interpreting the clause, a Maryland court concluded in 1797 that the words “privileges and immunities” had “a particular and limited operation.” Judge Jeremiah Townley Chase wrote for the court that the two words were “synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege.” Judge Chase reported that all of the lawyers involved in the case agreed that the clause did not encompass “the right of election, the right of holding offices, the right of being elected.” This observation was irrelevant to deciding the dispute, which was about a Maryland law that allowed attaching a

420 See 2 Johnson, supra note 81 (unpaginated, entry for “right”) (“immunity” and “privilege” as alternative meanings for “right”); James Barclay, *A Complete and Universal English Dictionary on a New Plan* (entry for “right”) (London, 1782) (“privilege” as one definition of “right”).

421 Campbell v. Morris, 3 H. & McH. 535, 554 (Md. Gen’l Ct. 1797), rev’d on other grounds, 3 H. & McH at 576 (Md. Ct. App. 1800). The General Court was a prestigious body but not the highest court in the state, as sometimes has been asserted; its decisions could be appealed to the Court of Appeals, as occurred in Campbell. See The Supreme Court Justices: Illustrated Biographies 83 (Clare Cushman, ed., 2nd ed. 1995).

422 Id. at 553. The author of Campbell was identified by the reporter as “Chase, J.,” which caused many in later years to think that this was Justice Samuel Chase, who had been chief judge of the General Court from 1791 to 1796. See, e.g., Oregon v. Mitchell, 400 U.S. 112, 187 n.56 (1970) (Harlan, J., concurring & dissenting); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding* (entry for “right”) (2 Stan. L. Rev. 5, 13 (1949); Upham, supra note 151, at 1493 n. 74 (“most scholars have concluded (or assumed) that the author was Justice Samuel Chase”); id. at 1499 (“The author of the opinion was Samuel Chase, Justice of the U.S. Supreme Court, who at the time was also serving on the courts of his home state.”). But Chase was confirmed as a Justice by the Senate on January 27, 1796, and received his commission the same day, long before Campbell was decided. He was succeeded by Gabriel Duvall, who was on the Campbell panel. See The Supreme Court Justices, supra note 421, at 83. The author thus must have been Judge Jeremiah Townley Chase, the cousin of the Justice, who also served on the General Court. See Jane Shaffer Elsmere, *Justice Samuel Chase* 36 & 44 (1980).

423 Id. at 554.
noncitizen’s property at the outset of litigation and condemning it for failure to appear. Chase continued:

The court are of opinion it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. It means, such property shall not be liable to any taxes or burdens which the property of the citizens is not subject to. It may also mean, that as creditors, they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights.\footnote{\textit{Id.}}

Chase, who was sitting with one other judge, went on to hold that attaching the assets of an out-of-state debtor did not deny him a privilege, even though a citizen’s property was not similarly subject to seizure and sale. The purpose of the attachment statute was to force debtors in other states to answer a creditor’s lawsuit. State citizens could be compelled to appear through a separate process that obliged them to post bail pending trial on pain of arrest. If the noncitizen defendant appeared and gave bail, the property would be released from attachment, and hence Chase reasoned that he “would be in the same situation with any citizen of this state” who was forced to post bail to assure their appearance. Moreover, citizens who absconded also could have their property attached and condemned.\footnote{\textit{Campbell v. Morris, 3 H. & McH. at 555.}}

\textit{Campbell v. Morris} typified future interpretations of the clause and would be cited frequently, including by the Supreme Court as recently as 2010.\footnote{See \textit{McDonald v. City of Chicago}, 130 S.Ct. 3020, 3068 (2010), \textit{citing} \textit{Campbell v. Morris}, 3 H. & McH. 535; \textit{Lash, supra note 160, at 1260 (\textit{Campbell v. Morris} was “the most influential interpretation of the privileges and immunities clause of Article IV for the next sixty years.”).}} First, the court understood that the clause required Maryland to put citizens of other states on the “the same footing” as its own citizens.\footnote{\textit{Campbell v. Morris, 3 H. & McH. at 554.} Kurt Lash noted that “[s]ome scholars have suggested Judge Chase in \textit{Campbell} read Article IV to protect a set of substantive fundamental personal rights, such as property rights, regardless of whether the rights had been protected under state law.” \textit{Lash, supra note 160, at 1261 n.103, citing} Douglas G. Smith, \textit{The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment}, 34 San Diego L. Rev. 809, 845 (1997); \textit{Upham, supra note 151, at 1501-02; see also} \textit{Antieau, supra note 10, at 8.} Further, “[a]t least one abolitionist pressed this reading of Chase at the time of the Civil War.” \textit{Lash, supra, at 1261 n.103, citing See 2 John Codman Hurd, \textit{The Law of Freedom and Bondage in the United States} 343 (Boston, 1862).} However, no court read \textit{Campbell} in this manner. \textit{See Lash, supra, at 1271.}} Second, the equivalence requirement only applied to “peculiar”\footnote{\textit{Campbell v. Morris, 3 H. & McH. at 553.}} rights of citizenship, which included property rights, equal
protection in the state’s courts, and the protection of “personal rights.” Finally, while confidently asserting that these “peculiar advantages and exemptions” could “be ascertained, if not with precision and accuracy, yet satisfactorily,” Chase did not purport to provide a comprehensive list or a methodology for deciding what rights were included. By adding that the clause also “secures and protects personal rights,” he signaled that it was open-ended.

Like many later cases construing the clause, *Campbell v. Morris* gave scarcely any explanation for why some rights were protected and others—such as voting and office-holding—were excluded. In describing a privilege as a “peculiar advantage,” Chase evidently was relying on a dictionary definition similar to those reviewed earlier—and ignored the words “of Citizens” in the clause. Averring to the parallel provision in the Articles, he thought it “must occur to every person” that “one of the great objects . . . was . . . enabling the citizens of the several states to acquire and hold real property in any of the states.” In the Confederation, he explained, the clause was “deemed necessary, as each state was a sovereign independent state, and the states had conferred only for the purposes of general defence and security, and to promote the general welfare.” This was a kind of “everyone knows” argument—that it was common knowledge the purpose of the corresponding clause in the Articles had been to allow citizens to own property in all states. That was an accurate statement as far as it went, but nonetheless wanting as a method of judicial reasoning. Judges in later generations would not have such firsthand information—no way of knowing what other “great objects” were generally understood to be covered. To compound the problem, the court went on to add that none of the specific obligations imposed on the states in the Constitution “comprehend the subject under consideration: the power of regulating process for the more effectual recovery of debts.”

*Campbell* ultimately justified narrowing the clause’s coverage on federalism grounds: that the states retained all powers not granted to the national government, and the power in question was not listed among the rights they had relinquished in the Constitution. According to Chase, a ruling in favor of the defendant that the attachment was invalid under the clause necessarily would afford debtors anywhere in the country the same protection, allowing them to evade valid claims. Such a result could not have been contemplated by the Constitution, Chase thought, particularly when only two provisions called for uniform laws, the clauses giving Congress power to enact uniform rules for naturalization and bankruptcies. In setting up the federal

---

429 *Id.*
430 *Id.*
431 *Id.*
432 *Id.*
433 *Id.* at 555.
courts, Congress had not imposed a standard “mode of proceeding” on the federal circuit courts, but rather provided that they would use the local state rules, which included provisions for attaching property to compel appearances.

These arguments about uniformity pressed by Chase were curious not only because the Privileges and Immunities Clause had nothing to do with Article I’s grants of legislative authority to Congress. In Campbell, the defendant was demanding only to be treated like a Marylander, not that the same rule be applied nationwide. The state could rectify the disparity in process by allowing attachment of property owned by Maryland citizens. Campbell’s fixation on state autonomy most likely reflected the larger constitutional dispute that arose in the 1790s over whether the federal government had implied powers or was restricted to those expressly provided for in the Constitution: “A restriction of the power of the state legislatures to establish modes of proceeding for the recovery of debts, is not to be inferred from the clause under consideration,” Chase wrote. He had been an Antifederalist who voted against the Constitution as a delegate to the Maryland Ratifying Convention, although one authority suggests that he had Federalist leanings in the 1790s. The second judge in Campbell was Gabriel Duvall, destined to succeed Samuel Chase on the Court in 1811, where he served 23 years. Duvall had been a Democratic congressman before becoming chief judge on the Maryland court and served as a presidential elector in 1796 and 1800 (Jefferson appointed him Comptroller of the Treasury). Madison sent him to the Court. These may have been learned and distinguished men, but they were not reliable arbiters of what obligations the Privileges and Immunities Clause was meant to impose on states when it was written a decade earlier. In any event, they

---


435 Campbell v. Morris, 3 H. & McH. at 555. Jeremiah Chase voted against ratification on the ground “the proposed form of national government [w]as very defective, and that the liberty and happiness of the people will be endangered if the system be not greatly changed and altered.” Md. Ratifying Conv. (Apr. 18, 1788), 2 Elliot’s Debates, supra note 34, at 555 (statement of minority, including Chase). Chase and other Antifederalists proposed numerous amendments favoring states’ rights and individual liberties, but these were rejected by the Maryland Convention. 2 Elliot’s Debates, supra, at 555-56 (Apr. 18, 1788). The issue of whether the national government had implied powers was one of the main sources of division between Federalists and Republicans in the 1790s. See Stewart Jay, Origins of Federal Common Law: Part Two, 33 U. Pa. L. Rev. 1231, 1243-50 (1985).

436 See Elsmere, supra note 422 at 128 (stating “it was clear to all that his sympathies rested with the Federalists”). Jeremiah Chase, however, “disclaimed connection with any party.” Id. Jeremiah Chase was not blatantly partisan like his cousin Justice Samuel Chase, another convert from Antifederalism who had voted against ratification in Maryland. See Stewart Jay, The Rehabilitation of Samuel Chase, 41 Buff. L. Rev. 273 (1993).
Privileges and Immunities of State Citizens

gave only superficial scrutiny to that question.\textsuperscript{437}

And so the pattern began for interpreting the Privileges and Immunities Clause, with a nod to its origins but no serious consideration of how the terms historically were used. Courts have been faithful to the original purpose of the clause as a device for assuring that states extended comity to citizens of other states residing or owning property within their jurisdictions. Leading commentators and many courts in the early nineteenth century recognized that the clause was not intended to be the source of rights as such; rather, it was to be a vehicle for equally applying those that existed.\textsuperscript{438} Chief Justice James Kent of New York, one of the most important jurists of the era, wrote in an 1812 opinion that the clause “means only that citizens of other states shall have equal rights with their own citizens, and not that they shall have different or greater rights,” noting that “the provision itself was taken from the articles of the confederation.”\textsuperscript{439} The questionable aspect of \textit{Campbell} and cases following in its wake was the assertion that the clause protected only some of the rights enjoyed by citizens.\textsuperscript{440} This ignores the text’s command to extend “\textit{all} Privileges and Immunities

\textsuperscript{437} On Justice Duvall, see \textit{The Supreme Court Justices}, supra note 421, at 83.

\textsuperscript{438} Some scholars, as well as nineteenth century politicians, contended that the clause had a much broader purpose, to protect a uniform national body of rights. \textit{See}, e.g., \textit{Antieau, supra note 10}, at 10 (endorsing view that “[t]he privileges and immunities were not those of the state from which the individual came, nor rights given by the second state where litigation occurred—they were privileges or rights common in all the states.”); Kimberley C. Shankman & Roger Pilon, \textit{Re-viving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government,} 3 Tex. Rev. L. & Pol. 1, 9-10 (1998) (“[T]he clause must be read not simply as an equal protection clause, devoid of content, but as a guarantee of substantive rights, much like similar clauses in those other documents.”); \textit{Upham, supra note 151}, at 1529 (“This provision thereby served as a kind of bill of rights, at least for out-of-state citizens. These citizens were positively entitled to certain absolute rights, notwithstanding state laws to the contrary; they had a right to exemptions from laws imposed by a state on its own citizens.”)). Most of these studies make no effort to examine the historical purpose of the clause or the eighteenth-century understanding of “privileges” and “immunities.” Typically, they assume that because some rights protected by the clause were based on natural law, such as property rights, this must mean that it guaranteed universal rights. \textit{See}, e.g., \textit{Antieau, supra note 10}, at 7; \textit{Shankman & Pilon, supra, at 10-11}; \textit{Upham, supra, at 1497-98}. No eighteenth-century authority made any claim that the clause created or recognized national rights, unless one tortures their words, which Antieau in particular did with abandon. Moreover, as explained in text, this argument misunderstands the relationship between natural rights and the rights of citizens that prevailed in the eighteenth century. People were entitled, in the abstract, to natural rights, but their enforcement required government protection, which occurred through positive pronouncements such as bills of rights and statutes, as well as judicial enforcement of common law rights. States—and nations—varied both in their interpretation of the substance of personal rights and in how they went about protecting them. The purpose of the clause was to require states to extend the same protections to citizens of other states as they did to their own.

\textsuperscript{439} Livingston v. Van Ingen, 9 Johns. 507, 577 (N.Y. 1812).

\textsuperscript{440} \textit{See} Earl M. Maltz, \textit{Fourteenth Amendment Concepts in the Antebellum Era}, 32 Am. J. Legal Hist. 305, 336 (1988) (“[M]ost courts concluded that the concept of privileges and immunities did not encompass all rights which were associated with citizenship in a particular state; rather,
of Citizens,” as well as historical usage, which show the clause was intended to cover every right that a state government guaranteed its citizens.

_Corfield v. Coryell_, in 1823, did not cite _Campbell_, but Justice Washington’s opinion was similar in denying that the clause included all the rights of citizenship. His list of rights differed—Washington, for example, thought voting was a privilege of citizenship. Unlike _Campbell_, Washington at least offered a methodology for discerning which rights were protected. That is, they had to be “fundamental” in the sense of “at all times” being “enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”

However, he gave no explanation at all for why that should be the definition of “the Privileges and Immunities of Citizens,” and the term did not have such a constrained meaning in the eighteenth century. His list was not confined to natural rights, as some commentators and judges erroneously claimed, but included items such as only those rights which were in some sense ‘fundamental’ were viewed as protected.”). See, e.g., Baldwin, 436 U.S. at 388 (elk hunting not a “fundamental” right under the clause).

_Corfield_ has been read by some commentators as having recognized a national body of natural rights. As Earl Maltz has written, “is certainly susceptible to an interpretation which supports the absolute rights theory of privileges and immunities.” Maltz, _supra_ note 440, at 337-38. For claims that _Corfield_ recognized a body of uniform natural rights, see, e.g., Laurence H. Tribe, _American Constitutional Law_ 1252 (3rd ed. 2000) (“_Corfield_ can best be understood as an attempt to import the natural rights doctrine into the Constitution by way of the Privileges and Immunities clause of Article IV.”); Hague v. Committee For Industrial Organization, 307 U.S. 496, 511 (1939) (Roberts, J., concurring) (“At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as ‘natural rights’; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington [in _Corfield_].”). Nineteenth-century courts and commentators generally held that it was a comity provision limited to protecting against discrimination. For examples of early states cases interpreting Article I, § 2 as a comity provision, see, e.g., Lemmon v. New York, 20 N.Y. 562, 608 (1860) (Art. IV, § 2 means “that in a given State, every citizen of every other State shall have the same privileges and immunities— that is, the same rights— which the citizens of that State possess); Haney v. Marshall, 9 Md. 194 (1856) (requiring nonresident to give security for costs in legal action not a violation of Art. IV, § 2); Rhode Island v. Medbury, 3 R.I. 138, 142-43 (1855) (Art. IV does not grant “the citizens of each State, all the privileges and immunities which the citizens of the several States enjoy,” but “the rights and powers of the citizens of a State. . . . They are not to be deemed aliens. They are not to be accounted as foreigners, or as persons who may become enemies.”); Fire Dep’t of the City of New York v. Noble, 3 E.D. Smith 440, 450 (N.Y.C.C.P. 1854) (sustaining tax on agents of non-New York insurance companies because it applied equally to all agents, in-state or not); Abbot v. Bayley, 6 Pick. 89, 92 (Mass. 1827) (“The privileges and immunities secured to the people of each State in every other State, can be applied only in case of removal from one State into another. . . . They shall have the privileges and immunities of citizens, that is, they not be deemed aliens, but may take and hold real estate, and may, according to the laws of such State, eventually enjoy the full rights of citizenship without the necessity of being naturalized.”); Amy v. Smith, 11 Ky. (1 Litt.) 326, 335 (1822) (No Article IV violation when law “operates as well upon citizens of this state, as upon those of any other.”). See Thomas Sergeant, _Constitutional Law_ 393-94 (Philadelphia, 2nd ed. 1830) (The clause “means only, that citizens of other States shall have equal rights with the citizens of a particular
habeas corpus, the right to bring civil suits, and freedom from discriminatory trade laws, all of which were privileges in eighteenth-century usage.\textsuperscript{443}

Justice Washington’s limitation of the clause to “fundamental” rights of citizenship did not have any basis in the text of Article IV or its history. The clause not only covered “all” of the privileges and immunities, it referred to them as belonging to “Citizens in the several States,”\textsuperscript{444} which was an odd way to say that it protected only those rights recognized by every state. More importantly, for the reasons already discussed, the idea behind the clause was to assure equality of citizenship, as measured by the actual practices of each state. Washington’s list and its accompanying rhetoric may merely reflect that a great many of the advantages of citizenship were essentially the same everywhere. Nonetheless, Americans were aware that state laws gave many advantages to citizens at the expense of outsiders, and these privileges varied from place to place. Moreover, the means used by states to uphold the natural rights of their citizens depended on statutes and common law practices that were not uniform. It was the purpose of the Privileges and Immunities Clause to eliminate such citizenship distinctions, to provide that no citizen of one of the states would be treated as an alien in another.

**What Might Have Been**

At this point in history, one is tempted to shrug off these early misinterpretations of the Privileges and Immunities Clause as irrelevant inasmuch as \textit{Corfield’s} enumeration covered most forms of discrimination that states might practice against outsiders. Moreover, the Fourteenth Amendment and Dormant Commerce Clause now outlaw state economic protectionism. Further, because the Court long ago decided that corporations were not “citizens” for purposes of the clause, its utility has diminished as more and more enterprises have taken the corporate form. Nevertheless, many cases could have been decided differently had the Court followed an approach more faithful to original intent. A brief glimpse at the current methodology used by the Court for analyzing claims under the clause will be enough to reveal basic flaws in its approach from an originalist perspective. This is not the place, however, for a complete analysis of the effect of applying a proper understanding of the clause’s original purpose to modern cases, nor is it to recommend that the Court upend its jurisprudence about privileges and immunities. But it is irresistible to mention some tantalizing possibilities, if for no other reason than to illuminate how the clause was meant to operate.

In \textit{Baldwin v. Fish & Game Commission of Montana},\textsuperscript{445} the Court in 1978 sus-

\textsuperscript{443} See note 8, supra (\textit{Corfield’s} list of privileges and immunities).

\textsuperscript{444} Art. IV, § 2, cl. 1 (emphasis added).

tained a state license fee for elk hunting that was substantially lower for Montana citizens than other Americans. After taking account of the state’s investment in developing its elk population and observing that hunting the animals was “a recreation and a sport,” Justice Blackmun concluded that “[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union.” He then took inspiration from the “I know it when I see it” school of jurisprudence: “Whatever rights or activities may be ‘fundamental’ under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.”

Considering the line of cases starting with *Corfield* on hunting and fishing privileges, this was an understandable conclusion. *Corfield* had held that commercial oystering in state waters could be restricted to citizens because the harvesting was not a privilege of citizenship—rather, it was taking “the property of all” state citizens.

Until 1948, the Court followed *Corfield* in holding that “the common property of the citizens” was “a property right, and not a mere privilege or immunity of citizenship,” and allowed states to restrict access by noncitizens to public resources such as fisheries and game.

* Baldwin overlooked that hunting and fishing on public lands, along with other extractive uses of natural resources, had long been regarded as privileges at the time Article IV was drafted. This included recreational pursuits or other personal uses. In England, for example, access to the king’s forests (the equivalent of public property today) for hunting and cutting wood were jealously restricted privileges, and poaching from these lands was severely punished. Blackstone described how hunting had “ever been esteemed a most princely diversion and exercise,” and for much of early English history “sportsmen” who were nobles or gentry had access to the royal forests for this pastime. Eventually permission was severely limited, and to kill a “beast of chase . . . within the limits of the forest, was as penal as the death of a man.”

---

446 *Id.* at 388.
447 *Id.*
448 *Corfield v. Coryell*, 6 F. Cas. at 552.
452 *See id.* (The forests had “plenty of game, which our royal sportsmen reserved for their own diversion. . . ”). *See Nicholas Cox, The Gentleman’s Recreation, in Four Parts. Viz. Hunting, Hawking, Fowling, Fishing* (London, 6th ed. 1721) (“Hunting is a Game and Recreation. . . ”).
453 2 Blackstone, *supra* note 13, at 416. William Nelson, an eighteenth-century English legal commentator, described how the kings had once given “free Liberty to the Nobility and Gentry to hunt in their woods,” but that access had been withdrawn through “arbitrary Procedure,” causing “great Complaints for Want of a Law to ascertain the King’s Prerogative and the People’s Privilege in this Case.” *The Laws Concerning Game*, *supra* note 130, at x. *See also A Sportsman, Essays on the Game Laws, Now Existing in Great Britain; and Remarks on Their Principal Defects: Also, Proposals for the Better Preservation of the Game in this Kingdom* (London, 1770) (recom-
of “the immunities of carta de foresta,” by which “many forests were . . . stripped of their oppressive privileges.”454 “Fugatio” was the Latin term used by jurists for “[h]unting, or the liberty or privilege to hunt.”455 Relatively, English law recognized the “privilege” of “warren,” which was the right to raise and hunt game on one’s property, which could be retained even if ownership of the land was alienated.456

England, of course, was one country with sovereignty over all its soil, whereas each state had sovereign control over its own public lands. Moreover, the privileges associated with natural resources in England often were confined to certain classes of people. In America, such class divisions evaporated with independence, and all citizens had the same privilege of access to public resources. The Vermont constitutions of 1777 and 1786 provided that state “inhabitants” had the “liberty, in seasonable times, to hunt and fowl on the lands they hold, and on other lands not enclosed; and in like manner to fish in all boatable and other waters, not private property, under proper regulations, to be hereafter made and provided by the general assembly.”457

mending that to suppress poaching tenant farmers should be given “some privileges that may make it in their interest, to use their best endeavours, to prevent this cause of the decrease of game,” specifically by allowing them to be “Gameskeepers of their own farms” and “Sportsmen”;

Timothy Cunningham, A New Treatise on the Laws for the Preservation of the Game (London, 1766) (subtitle of book describes its purpose as informing “the Gentleman . . . how far his Privilege extends” with respect to hunting game); The Game-Law. Part II. Being an Explanation of the Acts of Parliament Recited in the First Part, for Preservation of the Game of this Kingdom 3-4 (London, 2nd ed. 1718) [“hereinafter “The Game-Law”] (describing how the royalty was “so careful of their Prerogatives and Privileges” regarding hunting “that it was quasi a Sacrilege to infringe them,” punishable “in some Cases” as a “Felony”); The Game Law: or, A Collection of the Laws and Statutes Made for the Preservation of the Game of this Kingdom 1 (London, 1714) (defining a “forest,” which was “the Principal and most Noble Conservatory of Game” as a place “privileged by Royal Authority”).

454 2 Blackstone, supra note 13, at 416.

455 2 Cunningham, supra note 276 (unpaginated, entry for “fugatio”); Giles Jacob, A New Law-Dictionary supra note 83 (unpaginated entry for “fugacia”) (“fugatio” defined as “Hunting, or the Privilege to hunt”).

456 See Cunningham, supra note 453, at 34-35 (describing privilege of warren); The Game-Law, supra note 453, at 78 (defining a “warren” as “a Place privileged either by Prescription, or Grant from the King, to keep Beasts and Fowl of Warren [hares, conies, partridges, and pheasants]”).

457 Vt. Const., Ch. II, § 37 (July 4, 1786); see Vt. Const., Ch. II, § 39 (July 8, 1777). See also Pa. Const., § 43 (Sept. 28, 1776) (“The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property.”). The Pennsylvania provision continued a similar guarantee from its colonial frame of government. See Frame of Government of Pennsylvania, Art. XXII (Feb. 2, 1683) (“that the inhabitants of this province” shall have “liberty to fowl arid hunt upon the lands they hold, and all other lands therein not inclosed; and to fish, in all waters in the said lands, and in all rivers and rivulets in, and belonging to, this province and territories thereof, with liberty to draw his or their fish on shore on any man's lands, so as it be not to the detriment, or annoyance of the owner thereof.”). On the privilege of hunting on public lands, see text at notes 115, 454-56 & notes 129, 133-34, supra.
After the Court retreated from the notion that the people of states literally owned the natural resources within their borders, it recognized that denying access to outsiders solely to advantage their own citizens deprived them of a protected privilege.\textsuperscript{458} Although some earlier cases called the “common ownership” principle into question, the decisive break did not come until the 1948 decision, \textit{Toomer v. Witsell}.\textsuperscript{459} For all the years following Justice Washington’s misdirection, courts in effect had allowed states to hoard publicly-owned resources for their own citizens. (Natural resources from privately-owned land were another story, as the Court held that once extracted they became items of commerce that a state could not block from leaving the state under the Dormant Commerce Clause.\textsuperscript{460}) However, the Court has never denied that the states actually do own all sorts of natural resources, such as forests, lakes, and minerals under public lands, or that this fact carried weight in deciding whether they could favor their own citizens in access. In \textit{Toomer}, the Court called the common ownership theory “a fiction,” because it was “legal shorthand [for] the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”\textsuperscript{461} That merely restated the problem, however, and did not indicate how courts were to determine when a state had exceeded its powers. Moreover, Chief Justice Vinson’s opinion emphasized that the state was not attempting to preserve the shrimp “for the use of its own people,” which kept alive the nineteenth century cases holding that a state could forbid exporting “public” resources such as wild game in order to meet its home needs.\textsuperscript{462}

Subsequent decisions were not much clearer on the extent to which states could reserve public resources for their own people. In the 1977 case, \textit{Hicklin v. Orbeck}, the Court found a violation of the Privileges and Immunities Clause in an Alaska law that required all contracts related to the exploitation of state-owned oil and gas to contain a clause giving an absolute employment preference to qualified Alaska residents over all others.\textsuperscript{463} There was a one-year residency requirement before the preference applied. Alaska contended that it could favor residents because the state was conditioning access to state-owned resources. Justice Brennan responded with another version of \textit{Toomer}’s hazy precept: “We do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause.”\textsuperscript{464} Rather than being a decisive fact, “a State’s ownership of

\textsuperscript{458} See \textit{Toomer v. Witsell}, 334 U.S. 385, 396 (1948) (“It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.”).
\textsuperscript{459} \textit{Id}.
\textsuperscript{460} See, e.g., \textit{West v. Kansas Natural Gas Co.}, 221 U.S. 261, 254-55 (1910) (states could not embargo from interstate commerce products such as coal, timber, and minerals taken from private lands). \textit{West} emphasized that the case did not involve publicly-owned resources, such as game. \textit{Id.} at 253.
\textsuperscript{461} \textit{Toomer}, 334 U.S. at 402.
\textsuperscript{462} \textit{Id.} at 405.
\textsuperscript{464} \textit{Id.} at 528.
the property with which the statute is concerned is a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause.”465 After uttering these vagaries, Brennan skewered the law for overreaching because it covered numerous businesses with which the state had “no proprietary interest.”466 That left open the question whether the state could impose such a rule in hiring for public employment or selling natural resources from state lands.

_Hicklin_ also relied on another aspect of _Toomer v. Witsell_, in which Chief Justice Vinson created a new methodology for analyzing cases under the clause. This “modern”467 approach, which has prevailed ever since, emphasized that a state’s disparate treatment of noncitizens was only objectionable under the clause “where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.”468 Furthermore, Vinson wrote, “it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.”469 Invoking federalism, he added that “[t]he inquiry must also, of course, be conducted with due regard for the principal that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.”470 Consequently, the question for each case was whether there existed “something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed.”471

Applying the new test, the _Toomer_ invalidated a licensing fee for shrimp boats that was vastly higher when owned by nonresidents ($2500 v. $25), which as a practical matter closed the fishery to anyone from outside the state. The state urged that it was only conserving a scarce resource, but Vinson in effect said a shrimper was a shrimper regardless of citizenship—there was no proof that those from out-of-state posed additional costs for conservation enforcement, and if they did, alternatives less onerous than total exclusion were available. Bottom line: the state could enact conservation measures for shrimp, but they could not discriminate against noncitizens in accessing the available stocks.

In _Hicklin_, Brennan followed the same approach as _Toomer_, finding that non-Alaskans were not “a peculiar source of the evil” of unemployment in the state, which he concluded was the consequence of poor education and geographic isolation.472 And, even if outsiders were to blame, Alaska’s solution was not “closely tai-

465 Id. at 529.
466 Id. “Alaska Hire extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State.” Id. at 530.
467 1 Tribe, _supra_ note 442, at 1255.
468 _Toomer v. Witsell_, 334 U.S. at 396.
469 Id.
470 Id.
471 Id. at 398.
472 Id. at 526.
lored to aid the unemployed the Act is intended to benefit.” The law gave the same preference to an Alaskan regardless of their circumstances: “A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program.” Putting aside the unfortunate stereotype in that example, Brennan’s argument ignored that the law was perfectly attuned to the state’s interest in finding jobs for its people. And for that purpose, what difference did it make if one was an “unskilled, habitually unemployed Arctic Eskimo” so long as he or she was qualified to do the job? The out-of-staters were the source of the evil in that they took jobs Alaskans otherwise would have filled.

The issues surrounding states favoring their own citizens in dealing with public property become even more convoluted when the state goes beyond selling or licensing access to raw natural resources “which by happenstance are found” inside its borders, and either operates a business enterprise or consumes goods and services from the market. Most of these cases have not involved the Privileges and Immunities Clause because corporations were the claimants, but it would be easy to imagine an individual bringing the same suit. In Reeves, Inc. v. Stake, a 1980 case, the Court found no Dormant Commerce Clause problems with a South Dakota-owned cement plant that would only sell to state residents when the product was in scarce supply. Justice Blackmun explained that the state was acting as a “market participant,” and thus outside of the Dormant Commerce Clause entirely. Confronted with the argument that the state was hoarding its cement supply, Blackmun answered that cement was “not a natural resource, like coal, timber, wild game, or minerals,” but “the end product of a complex process whereby a costly physical plant and human labor act on raw materials.” South Dakota had built the plant in 1919 due to chronic shortages of this critical building material, as well as to circumvent monopolistic pricing by private suppliers. As far as Blackmun’s slim majority was concerned, the state had shown foresight in not relying on the private market to supply its citizens. A “healthy regard for federalism” added the capstone to Blackmun’s analysis. Forcing a state to grant Americans from other states equal access to state-developed resources “would interfere significantly with a State’s ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government

473 Id. at 528.
474 Id. at 527.
475 Why was it necessary to mention Eskimos, as opposed to simply “unskilled, habitually unemployed” people?
477 Id.
478 See id. at 436-40.
479 Id. at 443-44.
480 See id. at 430-31 & 431 n.1.
481 Id. at 441.
largesse." Evidently he thought that states would be much less likely to spend taxpayers’ money to develop expensive programs and facilities if in doing so they were obliged to share them with citizens from other states, particularly if the state was subsidizing their operation.

When states or their subdivisions act as consumers, either purchasing things or employing people to carry out public works, it has been common for them to favor their own residents in the process. Often this occurs at the local level. Camden, New Jersey, for example, had such a policy, whereby a minimum of forty percent of the employees on public works contracts had to live in the city. This policy did not violate the Dormant Commerce Clause because the city was acting as a market participant in hiring workers. Nonetheless, the city might have violated the Privileges and Immunities Clause, Justice Rehnquist wrote, because “the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.”

The purpose of the clause was different than the “implied restraint upon state regulatory powers” in regulating interstate commerce, which was intended to reinforce Congress’ “superior authority” over commerce. “The Privileges and Immunities Clause,” by contrast, “imposes a direct restraint on state action in the interests of interstate harmony. . . . It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce.”

Having brought Camden’s hiring policy under the focus of the Privileges and Immunities Clause, which required making the historically-dubious determination that a city was a “state” for purposes of the clause, Rehnquist declined to decide

---

482 Id.
483 Blackmun did not elaborate, but a footnote in the opinion discussed the origins of the cement plant as a Progressive Era program to combat the “monopolistic prices” of outside manufacturers and to provide a consistent supply for South Dakotans. Id. at 431 n.1.
484 United Bldg. and Const. Trades Council of Camden County & Vicinity v. Mayor & Council of City of Camden, 465 U.S. 208, 210 (1984). By the time the case reached the Supreme Court, the city had changed the 40% requirement from a “strict ‘quota’ to a ‘goal’ with which developers and contractors must make ‘every good faith effort’ to comply.” Id. at 214.
485 Id. at 213, citing White v. Massachusetts Council of Const. Employers, 460 U.S. 204 (1983) (upholding Boston quota requiring 50% of workers on city-funded construction projects to be residents against Dormant Commerce Clause challenge). See id. at 210 (“If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation.”).
486 Id. at 219.
487 Id. at 220.
488 Id.
489 See id. at 215 (“a municipality is merely a political subdivision of the State from which its authority derives”). There is no evidence that anyone in 1787-88 considered municipalities as the source of rights based on citizenship. Residents of towns and cities enjoyed various privileges and immunities as a consequence of their residency, but not on account of state citizenship. See text at notes 162-67 and note 167, supra. Moreover, none of the discriminatory acts in the 1780s that concerned the Framers emanated from local governments.
whether it was unconstitutional. He took note of the city’s position that nonresidents were a “source of the evil at which the statute is aimed,” inasmuch as “they ‘live off’ Camden without ‘living in’ Camden.”\textsuperscript{490} Unlike Alaska, Camden did not try to impose the hiring restriction beyond those working on city contracts; rather, it was “merely setting conditions on the expenditure of funds it controls.”\textsuperscript{491} Still, the Court would not resolve the dispute on the merits because no trial had been held to develop a factual record. Consequently, the case was remanded to the state supreme court to determine “the best method for making the necessary findings,” surely one of the least informative directions ever given to a lower court.\textsuperscript{492} Rehnquist offered little, if any, direction as to what facts needed to be resolved. As best can be discerned from the opinion, the lower court was to investigate Camden’s contention that the city’s worsening unemployment, middle-class flight, business closures, and declining property values would be ameliorated by the hiring preference. After that, it had to decide whether the policy would succeed “without unreasonably harming nonresidents, who still have access to 60% of the available positions.”\textsuperscript{493}

In reality, this offered no guidance whatsoever to the lower court. It was highly unlikely that the city’s plight stemmed in significant measure from spending public funds on workers who lived outside its boundaries. The nonresidents were not the “evil” besetting the city. On the other hand, the city unquestionably was on solid ground in asserting that putting a portion of its funds into the pockets of Camden residents would have a positive economic effect for the city. To be sure, it would “harm” nonresidents in that they had fewer job possibilities, and possibly that would impair interstate harmony. Yet how would a court measure the extent of that effect beyond the apparent economic consequences? Does it depend on the number of out-of-state citizens affected, given that state residents are not protected by the clause? Camden lies on the border with Pennsylvania—would the case be different if the city was several hours from a border? One hour? How would a court balance harms to outsiders versus benefits to city residents, whose taxes contributed at least a portion of the funds?

The questions left open by \textit{Camden} never have been answered—the case disappeared from the reports after the remand. Nor will the Court ever find an answer that is anything more than another legal fiction. Making the constitutionality of a state policy depend on whether it interferes with “interstate harmony”\textsuperscript{494} or “would frus-

\textsuperscript{490} \textit{Id.} at 222.
\textsuperscript{491} \textit{Id.} at 223.
\textsuperscript{492} \textit{Id.}
\textsuperscript{493} \textit{Id.} at 222.
\textsuperscript{494} \textit{Id.} at 218 (Court “must determine whether an out-of-state resident’s interest in employment on public works contracts in another State is sufficiently ‘fundamental’ to the promotion of interstate harmony’ as to violate the clause.”)
trate the purposes of the formation of the Union."^{495} It does not provide any kind of definitive standard. Rather, it is an invitation for subjective balancing. Many state policies cause frictions with neighbors—how much is too much? Nor does it help to ask whether the noncitizen is “a source of the evil” that the state is trying to alleviate.^{496} The outsiders always are such a source, either in that they cause a problem to the state (such as depleting shrimp stocks) or interfere with solving some social ill (as in the hiring preference cases or South Dakota’s cement plant).

Interstate harmony was the objective of the clause, not the test for a law’s constitutionality. The clause sets out means to accomplish this end that are straightforward and countenance no balancing of benefits to the state versus harms to outsiders. States must grant citizens of other states whatever privileges and immunities they bestow on their own people, on the same terms. Neither the wording of the clause nor its history sanctions weighing a state’s interests against those of Americans who reside outside its borders.

A consideration of the clause’s historical purpose readily resolves all the cases that the Court has decided under it, sometimes with different results, but always with a much simpler explanation. Access to publicly-owned natural resources, we saw earlier, commonly was regarded as a privilege of the people.^{497} The North Carolina Bill of Rights stated that “[t]he property of the soil, in a free government” was “one of the essential rights of the collective body of the people….”^{498} Treaties often specified that the subjects of other nations would have the privilege of using those resources.^{499} Usually these were profit-making ventures, but as hunting on royal lands showed, privileges and immunities were not limited to protecting activities that made money or to safeguarding private property. Many privileges have nothing to do with business or employment (e.g., habeas corpus, jury trials, court procedures).

From the standpoint of the eighteenth-century understanding of privileges, a state would violate the Privileges and Immunities Clause by reserving publicly-owned resources exclusively to its own citizens. Regulation of privileges associated with resources could occur, but not on a discriminatory basis. Hoarding of resources from state-owned property would deny a privilege because it prevented Americans from accessing a state-owned resource on the same terms as citizens. As explained above, states imposed embargoes to retain scarce resources for their own people, a form of trade barrier that inevitably impacted Americans living elsewhere. During the Confederation, states were sovereign entities in the same way that foreign countries were, except as they expressly had consigned power to the United States, which was analog-

---

^{495} Baldwin, 436 U.S. at 387 (clause prohibits state laws that “would frustrate the purposes of the formation of the Union”).
^{496} Toomer v. Witsell, 334 U.S. at 398.
^{497} See text at notes 126-35 & 451-56 & notes 451-56, supra.
^{498} N.C. Bill Rgts., Art. XXV (Dec. 18, 1776).
^{499} See text at notes 126, 129 & 130 and notes 126, 129 & 130.
gous to how treaties worked. Due to the concession of Privileges and Immunities Clause (and courts willing to enforce it), states could not close their borders to other Americans for any reason, which would include access to public resources.

What about a state-developed resource, such as a medical center, a university, a park, rail line, cement plant, or any other enterprise in which the state would be a market participant for Dormant Commerce Clause purposes? It was not usual for eighteenth-century Anglo-American governments to be market participants in the modern sense, but there were corollaries to today’s practices. For example, forests in England were highly regulated by law and tended by official gamekeepers.500 Wharves could be publicly-owned, as was true of many built by New York City and leased to private operators, and discrimination did occur in wharfage rates during the Confederation.501 Another example of a public investment was the famous Pennsylvania Hospital promoted by Benjamin Franklin to provide free medical care to the underprivileged from throughout the colony. The hospital was incorporated by special act of the provincial assembly, which specified the institution’s governance structure and provided for public funding to match private donations to build and operate it.502 Governments also had employees (albeit in tiny numbers compared to today), and it was not unusual to find positions—particularly elected ones—restricted to citizens or residents.503 In 1791, Congress chartered the Bank of the United States, a quasi-federal entity that was partly owned by the government and whose structure and operating limits were dictated by statute.504 Directors of the bank were required by law to be American citizens. Recall that under British law aliens were excluded from government positions and royal grants. Consequently, when states limit public employment or grants to their own citizens they treat other Americans as aliens,


502 See An Act to Encourage the Establishing of an Hospital for the Relief of the Sick Poor of this Province and for the Reception and Cure of Lunatics. Pa. Stat. at Large, ch. 390, at 128 (May 11, 1751); id., § 1, at 129 (dictating governance structure); id. (incorporating hospital); id., § 2, at 130 (providing for £2000 matching funds); id., § 2, at 130 (specifying that care be given “free of charge”); id., § 4, at 131 (providing that if managers were not appointed to operate the hospital, the assembly would do so); Howell V. Williams, Benjamin Franklin and the Poor Laws, Soc. Serv. Rev. 77, 89 (1946) (describing Franklin’s role and the funding of the hospital).

503 For examples of citizenship and residency requirements for office-holding, see note 254, supra. See also S.C. Const. (Mar. 18, 1778), Art. XXVIII (“nor shall any person be eligible as sheriff in any district unless he shall have resided therein for two years previous to the election”); Maryland Const., Art. XLII (Nov. 11, 1776) (“No person to be eligible to the office of Sheriff for a county, but an inhabitant of the said county above the age of twenty-one years, and having real and personal property in the State above the value of one thousand pounds current money.”).

504 See An Act to Incorporate the Subscribers to the Bank of the United States, 1 Stat. 191 (1791).

505 See text at note 149, supra.
which the clause was meant to prohibit. 506

In another modern case, the Court held that a state was acting as a market participant for purposes of the Dormant Commerce Clause when it offered bounties to encourage recycling junk autos inside the state. 507 Eighteenth-century Americans were familiar with government bounties. States paid bounties to encourage production or importation of scarce goods, but they also acted as trade barriers because they benefitted one state’s residents to the detriment of other Americans. 508 Bounties also were paid by states to encourage enlistment in the Continental Army in order to meet their quotas, a practice Hamilton deplored in Federalist No. 22: "It gave birth to a competition between the States, which created a kind of auction for men. In order to furnish the quotas required of them, they outbid each other, till bounties grew to an enormous and insupportable size." 509

All of these early examples, whether they involved access to natural or state-developed resources, involved privileges of citizenship because that status was a prerequisite for eligibility. An objection may be raised, however, that despite the extensive references in eighteenth-century writings to privileges and immunities as encompassing these specific legal benefits, this does not prove that Americans regarded them as attributes of citizenship. When rebelling Americans insisted on the privileges of British subjects, they were not focusing on oysters or state-developed medical facilities. Nor did the interstate discriminations of the 1780s involve denial of access to these resources. Needless to say, however, the absence of disputes over these specific resources does not disprove the claim that access to them were privileges of citizenship. Rather, it means that controversies regarding them did not arise in this period. Consequently, their status as privileges and immunities must be determined from other sources. In doing so, the point of the inquiry should be kept in mind. The contention advanced in these pages is that all of the advantages that states afforded their people as citizens were regarded by Americans to be the privileges and immunities of citizenship. There is abundant evidence, already produced here, that these terms had

506 Id., § 7 (III), at 193.
508 See, e.g., Alexander Hamilton, Report on Manufactures (Dec. 5, 1791), reprinted in 10 Papers of Alexander Hamilton 338 (Harold C. Syrett ed. 1966) (recommending to Congress the creation “a fund for paying the bounties” to encourage economic development); Alexander Hamilton, The Continentalist No. 5 (Apr. 18, 1782), reprinted in 3 id. at 79 (Harold C. Syrett & Jacob E. Cooke, eds. 1962) (In proposing a national customs duties, Hamilton recommended that “all the duties whether for regulation or revenue, raised in each state, be credited to that state, and let it in like manner be charged for all the bounties paid within itself for the encouragement of agriculture, manufactures, or trade.”). The British also had paid bounties in the colonial period. See Matson, supra note 26, at 365 (Due to the Revolution, “Americans lost British bounties on indigo and naval stores, and shipbuilding suffered because of the loss of cordage, sail cloth, and specialized hardware that was essential to the enterprise.”).
509 Alexander Hamilton, Federalist No. 22, reprinted in Federalist, supra note 2, at 137; see Letters from the Federal Farmer (No. 17), reprinted in 2 The Complete Anti-Federalist 333 (Herbert J. Storing ed., 1981) (claiming that the cost to states of requisitions from Congress and “the bounties given for men required of the states” was “about 36 million dollars. . . .”).
comprehensive connotations.

The word “citizens” meant the people of a state, either those who were born there or who had otherwise established a permanent connection with that place. Although the privileges and immunities of citizens certainly included all of the legal mechanisms associated with preserving natural rights, they also encompassed more prosaic advantages, especially those associated with trade. The disputes of the 1780s that gave impetus to the Privileges and Immunities Clause were not the rights of British subjects that underlay revolutionary demands. Instead, they involved discriminatory trade regulations. That the proponents of the Constitution would view such bias as denials of privileges and immunities is proof of a basic point: that the clause was intended to give Americans the same rights they had as members of the British empire. They were to be treated not as aliens when in other states but as fellow citizens. Further, in ordinary language at the time, a reference to the privileges and immunities of citizens or subjects meant all of the advantages that flowed from being a member of the polity. American republican ideology added an element not present in British constitutionalism: forbidding special privileges for classes of people. Republican citizenship was premised on equality, David Ramsay emphasized: “Each citizen of a free state contains, within himself, as much of the common sovereignty as another.” Consequently, to claim that a government-controlled resource that was made available to the people of a state was not a privilege or immunity of citizenship at least requires a theory to explain why that would be so. A glib denial will not do.

The Framers might not have been thinking about oysters, but they did have in mind fisheries, particularly the vast resources of the North Atlantic that had been effectively closed during the Revolution. When Americans were still British subjects, the harvesting of fish and whales from this region were referred to as “the original right of the English nation,” protected by “British naval power,” and diminished only “by royal grants, encroachments and cessions.” These were the concerns of treaties already alluded to, which treated access to fisheries as rights afforded to the subjects of signatory states. In late 1781, not long after the decisive victory at Yorktown, the Boston town meeting turned its attention to fisheries with a lengthy instruction to its legislative representatives. Emphasizing “how vast an importance the preservation of this trade is to every part of the Commonwealth,” the instructions asserted that “the Fishery,” which “uninterruptedly enjoyed by our Ancestors from time immemorial,

510 Ramsay, supra note 258, at 3.
512 Instructions of Boston Town Meeting 1, ¶ 4 (Dec. 14, 1781) The Charter of Massachusetts Bay in 1691 granted access to various “Fishings” to the governing council of New England, along with “Lands Soiles Grounds Havens Ports Rivers Waters . . . Mines and Mineralls as well Royall Mines of Gold and Silver as other Mines and Mineralls Pretious Stones Quaries and all and singular other Comodities Jurisdiction Royalties Privilidges Franchises and Preheminences both within the said Tract of Land upon the Main and alsoe within the Islands and Seas adjoyning.”
and secured to them by charter,” was “an ancient privilege, and one of those liberties, for the security of which, that firm league of friendship was entered into by the Thirteen States.”\textsuperscript{513} To preserve this privilege, the representatives were told to demand that Congress “give positive instructions to their Commissioners for negotiating a peace to make the right of the United States to the FISHERY an indispensable article of treaty.”\textsuperscript{514} Article three of the Treaty of Paris accomplished this end, as it was agreed that “the People of the United States shall continue to enjoy unmolested the Right to take Fish of every kind” off of Newfoundland and “at all other places in the Sea where the Inhabitants of both Countries used at any time heretofore to fish.”\textsuperscript{515} Somewhat more limited privileges also were given to “American Fishermen . . . to dry and cure Fish” on specified British territories.\textsuperscript{516}

At the Philadelphia Convention, the subject of fisheries came up in several contexts. In arguing for proportionate representation in Congress by population, Madison argued that the large states had no reason to enter into dangerous combinations, saying that that “[t]he Staple of Mas[achusetts] was fish,” whereas Pennsylvania and Virginia depended on grains and tobacco.\textsuperscript{517} Charles Pinckney tried unsuccessfully to require a two-thirds vote in Congress for commercial regulations, noting that there were “five distinct commercial interests” in the country, the first being “the fisheries & W. India trade, which belonged to the N. England States.”\textsuperscript{518} He added that “States pursue their interests with less scruple than individuals,” and “would be a source of oppressive regulations if no check to a bare majority should be provided.”\textsuperscript{519} On a different topic, Gouverneur Morris spoke in favor of a simple Senate majority for ratifying peace treaties, claiming that if two-thirds must agree, then “the Legislature will be unwilling to make war . . . on account of the Fisheries or the Mississippi, the two great objects of the Union.”\textsuperscript{520} Eldridge Gerry, on the other hand, thought that “in treaties of peace a greater rather than less proportion of votes was necessary, than in other treaties,” because in peace treaties “the dearest interests will be at stake, as the fisheries, territory &c.”\textsuperscript{521}

During ratification, the issue of fisheries arose both in the context of interstate tensions and as one of the areas of international relations that called for coordinated national authority. John Jay warned in \textit{Federalist No. 4} that “[w]ith France and with Britain we are rivals in the fisheries,” which could lead to war, as Amer-

\textsuperscript{513} Instructions of Boston Town Meeting, \textit{supra} note 513, at 2, ¶6.
\textsuperscript{514} \textit{Id.} at 2, ¶7.
\textsuperscript{516} \textit{Id.} at 153-54.
\textsuperscript{517} James Madison, 1 Const. Conv. (June 28, 1287), \textit{supra} note 10, at 447.
\textsuperscript{518} Charles Pinckney, 2 \textit{id.} at 449 (Aug. 29, 1787).
\textsuperscript{519} \textit{Id.}.
\textsuperscript{520} Gouverneur Morris, \textit{id.} at 548 (Sept. 8, 1787).
\textsuperscript{521} Elbridge Gerry, \textit{id.} at 541 (Sept. 7, 1787).
ica was able to “supply their markets cheaper than they can themselves, notwithstanding any efforts to prevent it by bounties on their own, or duties on foreign fish.”

Hamilton echoed this point, referring to “the fisheries” as presenting “rights of great moment to the trade of America,” and “of the utmost moment to” the French and British. At several of the ratifying conventions, especially in Massachusetts, the fisheries were offered as examples of vital objects of trade that cried out for national direction, both to deal with foreign competition and interstate rivalries. By imposing “extravagant duties,” the British were “ruining our fishery,” Thomas Thacher complained in Massachusetts, echoing Nathaniel Gorham, who bemoaned the “feeble power” of American negotiators vis-à-vis the British: “They prohibit our oil, fish, lumber, pot and pearl ashes, from being imported into their territories, in order to favor Nova Scotia, for they know we cannot make general retaliating laws.”

While the British had “a design in Nova Scotia to rival us in the fishery . . . our situation at present favors their design.” Other states were not helping the situation, Thomas Dawes remarked, as a British ship receives “as hearty a welcome with its fish and whalebone at the southern ports, as though it was built, navigated, and freighted from Salem or Boston.”

These “commercial competitions” were “causes of quarrel between the other states and us,” Edmund Randolph said in Virginia, worrying “that controversies may arise concerning the fisheries, which may terminate in wars.” At the same convention, Antifederalist Grayson observed that “[t]he Eastern States hold the fisheries, which are their cornfields, by a hair. They have a dispute with the British government about their limits at this moment.”

The fisheries referred to by these authorities lay largely outside of the maritime jurisdiction of American states, unlike the oyster beds at issue in Corfield v. Coryell. Nevertheless, the attention paid to them in the process of drafting and ratifying the Constitution bears on the meaning of privileges and immunities of state citizens. In every instance, they were discussed not as resources per se, but objects of commerce, sometimes in the same breath that speakers referred to other natural resources, such as timber and fur. As the instructions from the Boston town meeting indicate, access to the North Atlantic fishery and the resulting trade

---

522 John Jay, Federalist No. 4, reprinted in Federalist, supra note 2, at 19.
523 Alexander Hamilton, Federalist No. 11, reprinted in id. at 69-70.
524 Thomas Thacher, Mass. Ratifying Conv., 2 Elliot’s Debates, supra note 34, at 143 (Feb. 4, 1788).
525 Nathaniel Gorham, id. at 106 (Jan. 25, 1788).
526 Id. See also Fisher Ames, id. at 158 (Feb. 5, 1788) (“Can we protect our fisheries, or secure by treaties a sale for the produce of our lands in foreign markets? Is there no loss, no danger, by delay?”).
527 Thomas Dawes, id. at 58 (Jan. 21, 1788).
528 Edmund Randolph, Va. Ratifying Conv., 3 id. at 76 (June 6, 1788).
529 William Grayson, id. at 278 (June 11, 1788). Grayson’s point was that Massachusetts could not afford to leave the union: “Is not a general and strong government necessary for their interest?” Id.
were regarded as privileges of the state’s people, granted to them by their colonial charter. In consequence of the Revolution, Americans lost the trade benefits that British law provided to subjects with respect to these fisheries. They also urged that the American diplomats at the Paris peace talks act to preserve the privilege, in the same manner that other treaties recognized the rights of a country’s nationals to exploit resources. Interstate discrimination over exploiting these natural assets may not have been a problem of the day, but there were tensions among the states over the issue, on the same par as the momentous question of using the Mississippi for trade. At a minimum, this evidence demonstrates that no one excluded such natural assets from the advantages that came with being a citizen of a state. But considering the overall legal framework for determining the rights of citizens or subjects, it proves much more. Thomas Jefferson, referring to the whale fishery, wrote in 1788 that “by the late revolution” Americans “became aliens in great Britain,” and thus “became subject to the alien duty” on whale oil.530 This duty was so high that “they were obliged to abandon the fishery.”531 The whole point of the Privileges and Immunities Clause was to prevent American citizens from being treated as aliens by other states, particularly in regard to trading privileges.

Although the meaning of “Privileges and Immunities of Citizens” encompassed all the legal advantages of citizenship, this did not entail that states were powerless to deal with the concerns raised by Justice Blackmun over outsiders taking advantage of “government largesse.” Durational residency requirements were a potent tool, as we saw in the instance of voting, and they could be enhanced by limiting a privilege to those who owned property and paid taxes. Government offices also were restricted in some instances to persons who had resided in the state or county for a minimum period. South Carolina, for example, required sheriffs to have lived in the district they served for two years prior to their election.532 As to eleemosynary efforts by states intended for their own people, such as the Pennsylvania Hospital, there were several ways to prevent noncitizens from overwhelming their charity. Using poor laws, for example, states could force indigents to return to their place of origin.533

One of the basic mistakes the Court has made about the clause is to equate residency with citizenship, as if merely living in the state was the same thing as being a citizen. People in the eighteenth century readily distinguished citizens or subjects from residents or inhabitants who owed no allegiance to the state. As several examples have shown, laws sometimes required both citizenship and a prescribed period of residency in order to exercise a privilege. More fundamentally, there was the well-established category of foreigners—alien-friends—who enjoyed numerous privileg-

531 Id.
533 On poor laws limiting mobility, see text at note 18 & n.18, supra.
es, including the right to reside and trade in the country. 534 Under Article IV, § 2, Americans were not to be treated as alien-friends when in other states, but as citizens. The modern rule “that the terms ‘citizen’ and ‘resident’ are ‘essentially interchangeable,’” entirely overlooks this distinction, and consequently fails to see that residency was a permissible qualification for exercising a privilege. 535 Of course, durational residency requirements and restrictions on interstate migration now are subject to challenge under section one of the Fourteenth Amendment, an enactment the Framers certainly did not anticipate. 536

A final historical peculiarity in the Court’s development of the clause has been its exclusion of corporations from protection. In the 1869 case, Paul v. Virginia, the Court held that corporations were “the mere creation of local law, [and] can have no legal existence beyond the limits of the sovereignty where created.” 537 If another state allowed them to do business inside its borders, “such assent may be granted upon such terms and conditions as those States may think proper to impose.” 538 On the surface, this seems a sensible conclusion, and it followed rulings by state courts. 539 Blackstone described corporations as “artificial persons,” and corporate bodies were not referred to as citizens or subjects. 540 Chief Justice Marshall declared in 1809 that

---

534 See text at notes 141-50, supra.
535 Hicklin, 524 n.8, quoting Austin v. New Hampshire, 420 U. S. 656, 662 n.8 (1975); see Toomer, 420 U.S. at 397. A durational residency requirement to gain a privilege such as voting or office-holding was not the same as a state giving out benefits based on the length of residency. Alaska’s policy of calibrating the annual dividend it paid to residents from petroleum tax revenues on the basis of length of residency violated the Equal Protection Clause because the “statute creates fixed, permanent distinctions between an ever increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State.” Zobel v. Williams, 457 U.S. 55, 59 (1982). The same conclusion could be reached under the Privileges and Immunities Clause. The dividend permanently qualified the privilege of a citizen to receive a state benefit. See id. at 73-75 (O’Connor, J., concurring).
538 Id.
539 For early state cases denying that a corporation could be a citizen under Article IV, see, e.g., Ducat v. Chicago, 48 Ill. 172 (1868), aff’d, 77 U.S. (10 Wall.) 410, 415 (1871) (corporations entering another state to do business are not “citizens” under Article IV, and may be taxed at different rates than domestic corporations of the same character); Phoenix Ins. Co. v. Commonwealth, 68 Ky. (5 Bush) 68 (1868) (corporation not citizen under Art. IV); Fire Dep’t of Milwaukee v. Helfenstein, 16 Wisc. 136, 145 (1862) (state may impose “may impose such restrictions and conditions as it sees fit” on nonresident corporations); Slaughter v. Commonwealth, 54 Va. (13 Gratt.) 767 (1856) (nonresident corporation not “citizen” protected by Article IV, § 2); New York v. Imlay, 20 Barb. 68 (S.C.N.Y. 1855) (corporation not a “citizen” under Art. IV); Fire Dep’t of the City of New York v. Noble, 3 E.D. Smith 440 (N.Y.C.C.P. 1854) (nonresident corporations could be prevented from bringing action in state altogether).
540 1 Blackstone, supra note 13, at 455.
a corporation was “certainly not a citizen.” Nevertheless, corporations had many legal privileges, as previously discussed, including the right to sue and be sued in a corporate name. They also “consist[ed] of many persons united together in one society, . . . kept up by a perpetual succession of members,” all of whom were citizens of some state. In other constitutional contexts, the Court recognized that corporations could be counted as citizens or persons by acknowledging that individuals owned these entities. In the 1809 case just quoted, Marshall held that corporations were “citizens” of a state for purposes of federal diversity jurisdiction under Article III. In so ruling, Chief Justice Marshall gave a rationale that equally applied to the privileges and immunities of citizens: “For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.” In 1886, the Court ruled that corporations were “persons” entitled to protection under the Equal Protection Clause of the Fourteenth Amendment. No explanation was given for this ruling. Chief Justice Waite informed counsel prior to the oral argument that the Justices did not “wish to hear argument on the question,” as they were “all of opinion” that corporations were protected by the Equal Protection Clause. This conclusion must have been based on the view that a corporation was the embodiment of individuals who possessed rights. A corporation was no more a “person” than a “citizen.”

Treating corporations as citizens under the Privileges and Immunities Clause is much more consistent with its original purpose than the Court’s resolution, that states have total discretion in limiting the privileges and immunities of citizens. It is il-

---

542 See text at notes 88-95, supra. See Stewart Kyd, supra note 86, at 295-308 (describing forms of process for suits by and against corporations).
543 1 Blackstone, supra note 13, at 457.
544 Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) at 91-92. See also Louisville, Cincinnati & Charleston R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844) (“A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state.”); Marshall v. Baltimore & Ohio R. Co., 57 U.S. (16 How.) 314, (1853) (“presumption” was “conclusive” that the state of incorporation was “the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it.”); St. Louis & S.F. Ry. Co. v. James, 161 U.S. 545, 563 (1896) (“the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary”).
545 Id. at 91.
547 Id. at 396.
548 Cf. Roe v. Wade, 410 U.S. 113, 157 (1973) (reviewing the use of “person” in the Constitution, and finding that “in nearly all these instances, the use of the word is such that it has application only postnatally.”).
549 See Paul v. Virginia, 5 U.S. (8 Wall.) at 181 (States “may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for
logical that owners of business entities operated as corporations can have their rights subjected to the whims of states when they would enjoy numerous privileges and immunities if they operated them as sole proprietorships or partnerships. (The same is true of non-profit corporations.) The discriminatory trade laws of states in the 1780s would not have been any less a source of interstate tension if applied to businesses run as corporations. There would be just as much reason to “pierce the veil” of corporations for purposes of the Privileges and Immunities Clause as for diversity jurisdiction, equal protection, and due process. Marshall concluded that corporations needed diversity jurisdiction to the same extent as individuals in order to circumvent the prejudice of state courts.\footnote{550} It seems anomalous that a corporation would have First Amendment rights but not the privileges and immunities enjoyed by individual owners of businesses.\footnote{551}

In the eighteenth century, incorporation was not the typical business model. Corporations were created by special legislative enactments as general corporation laws did not exist. This perhaps explains why no one in the founding generation discussed whether corporations were covered by the Privileges and Immunities Clause—and why it did not arise in debates over diversity jurisdiction. Likewise, the grant of jurisdiction to federal circuit courts in the Judiciary Act of 1789 over cases involving citizens from different states did not indicate whether corporations were included.\footnote{552} In allowing corporations to sue in their own names based on the diversity of citizenship of their owners, Marshall placed substance over form. The “citizens of different states” were no “less susceptible to these apprehensions” over biased state courts merely “because they are allowed to sue by a corporate name.”\footnote{553}

Conclusion

The Privileges and Immunities Clause of Article IV has developed through judicial interpretations that with both a disregard for its plain text and amnesia about the rights of citizenship in the eighteenth century. The Court has not entirely forgotten the past regarding the clause. The immediate origins of the provision in the interstate tensions of the Confederation have long been discussed in opinions. Moreover, the

\begin{flushright}
\footnote{550} Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87(1809) (“Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name.”).
\footnote{551} First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978) (“We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation. . . .”).
\footnote{552} Judiciary Act of 1789, § 11, 1 Stat. 73, 78 (Sept. 24, 1789) (jurisdiction over original diversity actions); \textit{id.}, § 12, at 79 (removal jurisdiction for diversity cases).
\footnote{553} Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) at 87.
\end{flushright}
Courtr correctly understood it to be a comity provision, assuring that Americans visiting or temporarily residing in other states would receive the same basic rights as their citizens. But the Court veered from following the original meaning of the clause by deciding that it did not guarantee all the rights that citizens of a state enjoyed, but only those that were fundamental or essential to the preservation of the union. The misinterpretation grew when the Court concluded that access to publicly-owned natural resources was not a privilege of citizenship but a property right reserved to a state’s citizens. Finally, by excluding corporations from coverage by the clause, the Court left it inapplicable to much of the nation’s economic activity. Treating the corporation as the holder of its shareholders’ personal privileges as citizens of American states would be truer to the Framers’ purpose as well as more consistent with the Court’s interpretation of corporate rights in other constitutional settings.

The clause had one overriding purpose: to assure that Americans were not treated as aliens when in states away from their place of citizenship. It was intended to preserve the benefit that Americans had as British subjects, to be treated the same as local residents anywhere in the country. The advantages of citizenship (or being a subject) were many, ranging from the protection of life, limb, and property to political rights, commercial advantages and access to natural resources. The multifarious meanings of “privileges” and “immunities” in eighteenth-century writings shows that they encompassed every kind of advantage that came from citizenship. This is why Hamilton could tout the clause as “the basis of the union.” States were to treat all Americans like their own.\footnote{Alexander Hamilton, Federalist No. 80, reprinted in Federalist, supra note 2, at 537.}