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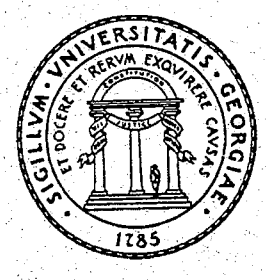

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THE ORIGINAL MEANING OF THE PRIVILEGES AND IMMUNITIES CLAUSE

*Robert G. Natelson**

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All translations from Latin to English in this Article are mine.

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I. INTRODUCTION[1]

[1] *Bibliographical Note*: This footnote collects alphabetically most secondary sources cited more than once in this Article. The sources and short-form citations used are as follows:

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THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[2]

A. THE PUZZLING INTERPRETIVE HISTORY OF THE PRIVILEGES AND IMMUNITIES CLAUSE

In the 2008 decision *Boumediene v. Bush*,[3] the Supreme Court addressed the scope of what the Constitution's Suspension Clause[4] calls the "Privilege" of the writ of habeas corpus. Justice Kennedy's opinion for the Court speculated as to why the Framers characterized the Great Writ as a privilege rather than a right: "The word 'privilege' was used, perhaps, to avoid mentioning some rights to the exclusion of others."[5] Justice Kennedy cited no authority for this dictum, although he did add that "the only mention of the term 'right' in the Constitution, as ratified, is in its clause giving Congress the power to protect the rights of authors and inventors."[6]

Although the word "right" appears in the original Constitution only once, "privilege" occurs three times. It occurs first in the Suspension Clause; second, in the provision assuring members of

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CONSTITUTION (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891) [hereinafter Elliot's DEBATES].

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[2] U.S. CONST. art. IV, § 2, cl. 1.

[3] 128 S. Ct. 2229 (2008).

[4] *See* U.S. CONST. art. I, § 9, cl. 2 ("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.").

[5] 128 S. Ct. at 2246.

[6] *Id.*

Congress "privilege[ ] from Arrest";[7] and, finally, in Article IV. The Article IV provision reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[8] That sentence customarily is called the "Privileges and Immunities Clause" or the "Comity Clause." In this Article, I shall use both names interchangeably.

From the Constitution's repeated use of "privilege," one might deduce that it was a common word in eighteenth-century jurisprudence. One so deducing would be correct: "Privilege" was a legal term of art with a clear definition, elucidated by a large body of Anglo-American case law and commentary.[9] The same was true, in varying degrees, of "immunity" and the other words appearing in the Comity Clause.[10]

Courts and commentators generally have neglected this law and commentary, preferring to speculate about the Comity Clause—just as Justice Kennedy speculated about the Suspension Clause in *Boumediene*. There is a vague sense that the Comity Clause limits discrimination by states against citizens of other states, but not much consensus beyond that.[11]

The speculation about the real meaning of the Comity Clause has persisted for many years. The most famous instance occurred in 1823, when Associate Justice Bushrod Washington,[12] then on circuit, issued his famous dictum in *Corfield v. Coryell*:[13]

> The inquiry is, what are the privileges and immunities of citizens in the several states? We [meaning Washington alone] feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments . . . . Protection by

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[7] U.S. CONST. art. I, § 6, cl. 1.

[8] U.S. CONST. art. IV, § 2, cl. 1.

[9] *See infra* Part II.A.

[10] *See infra* Part II.B.

[11] CHEMERINSKY, *supra* note 1, at 469.

[12] For a brief biography of the Associate Justice, see W. Hamilton Bryson, *Washington, Bushrod*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE (John A. Garraty & Mark C. Carnes eds., 2000), http://www.anb.org/articles/11/11-00897.html.

[13] 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

> 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 . . . 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.[14]

Justice Washington cited no supporting authority for this statement. Moreover, the dictum suffered from a number of blatant shortcomings. For example, although Justice Washington said that the Comity Clause encompassed only "fundamental"[15] privileges of the kind that "belong, of right, to the citizens of all free governments,"[16] items such as "exemption[s] from higher taxes or impositions than are paid by the other citizens of the state"[17] certainly do not fit that category. Justice Washington included habeas corpus as one of the rights belonging to the citizens of all free governments.[18] But, of course, habeas corpus was no such thing: it was uniquely a product of Anglo-American legal development, not necessarily replicated in other legal systems.[19]

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[14] *Id.* at 551–52.

[15] The Supreme Court agrees that a privilege must be "fundamental" before it is protected. CHEMERINSKY, *supra* note 1, at 466; 2 ROTUNDA & NOWAK, *supra* note 1, § 12.7(ii).

[16] 6 F. Cas. at 551.

[17] *Id.* at 552.

[18] *Id.* at 551–52.

[19] *See* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12–62 (1980) (discussing development of habeas corpus in English common law).

Justice Washington included the electoral franchise as a privilege of citizenship.[20] But it was not. Both in Washington's time and during the Founding Era, most citizens were denied the vote.[21] Finally, Justice Washington's version of the Clause included the benefits that "belong, of right, to the citizens of all free governments"[22]—presumably including what the Founders would have considered natural rights. But the Privileges and Immunities Clause makes no mention of rights.[23]

Nevertheless, many have overlooked the obvious defects in the dictum. The late Professor Chester James Antieau, for example, celebrated it as an accurate statement of the law, worthy of having been cited by courts and commentators "hundreds of times."[24] The dictum's attraction seems to lie in its apparent embrace of natural rights, with the prospect that the Clause could justify states, and perhaps the federal government, enforcing such rights.[25]

There is little evidence, however, that anyone in the Founding Era shared Justice Washington's interpretation. A 1788 Pennsylvania Supreme Court decision based on the predecessor

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[20] 6 F. Cas. at 551–52.

[21] Minors, persons adjudged not competent, and felons all are and have always been citizens, but minors, incompetent persons, and many or most felons were, and still are, excluded from the franchise. *See* James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 520 (1999) (listing exclusions from franchise). Women were, of course, widely excluded from the franchise until adoption of the Nineteenth Amendment. *See* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). During the Founding Era, moreover, property requirements excluded many from voting. *See infra* notes 206–09 and accompanying text.

[22] 6 F. Cas. at 551.

[23] The *Boumediene* Court suggested that this was "perhaps, to avoid mentioning some rights to the exclusion of others," but offered no support for that suggestion. Boumediene v. Bush, 128 S. Ct. 2229, 2246 (2008).

[24] Antieau, *supra* note 1, at 11; *see also* 2 ROTUNDA & NOWAK, *supra* note 1, § 12.7(ii) (noting that U.S. Supreme Court "often quotes" Justice Washington's *Corfield* opinion); *cf.* Zobel v. Williams, 457 U.S. 55, 80 (1982) (O'Connor, J., concurring) (citing Justice Washington's statement with approval). On the influence of Justice Washington's dictum, see generally David R. Upham, Note, Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483 (2005).

[25] *See* Antieau, *supra* note 1, at 11 ("[T]he privileges and immunities protected under Article IV are not those graciously accorded to its citizens by a state of sojourn, but the rights, privileges and immunities of citizens of the several or United States—the natural, fundamental rights of free men everywhere.").

clause in the Articles of Confederation seems to contradict it.[26] Nor is there much evidence of support in the decades following the Founding. The pre-Civil War Supreme Court ignored the dictum, even while citing other parts of Justice Washington's opinion.[27] Professor Antieau argued that five lower court cases showed early support, but those cases are ambiguous at best.[28] No other spokesman for the "natural rights" interpretation of the Clause has offered anything more.[29] Only after the Civil War did Justice Washington's pronouncement become famous.[30]

The Privileges and Immunities Clause has invited other interpretations as well. One common position is that the Clause

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[26] *See* Millar v. Hall, 1 Dall. 229, 232 (Pa. 1788) ("[T]he laws of a particular country, have in *themselves* no extra-territorial force, no coercive operation . . . .").

[27] *See* Forte & Rotunda, *supra* note 1, at 272 ("A number of cases cited *Corfield v. Coryell* before the Civil War, but only for its holding and never for its dictum.").

[28] The earliest case that Antieau cited is *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (Paterson, Circuit Justice, C.C.D. Pa. 1795), which Antieau described as an interpretation of the Privileges and Immunities Clause by the United States Supreme Court. *See* Antieau, *supra* note 1, at 7 (suggesting that early Supreme Court "would have protected [the] natural right of an American citizen when negated by a state other than his own"). In fact, the case has nothing to do with the Privileges and Immunities Clause, and the tribunal deciding it was not even the Supreme Court. *See Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 304 (deciding territorial controversy between states before Circuit Justice). Antieau's second and potentially most useful citation was to *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797), discussed *infra* at note 259 and accompanying text. *See* Antieau, *supra* note 1, at 8 ("It is crystal clear from the [*Campbell*] opinion that the rights protected by the Privileges and Immunities Clause are the basic, fundamental rights . . . ."). While the *Campbell* court did say that the Clause protected "rights," 3 H. & McH. at 554, all of the "rights" enumerated as protected by the Clause—real property ownership, immunity from discriminatory taxation, and collection of debts—were commonly recognized as privileges during the Founding Era rather than rights. *See generally infra* Part IV.B. Moreover, after independence, the term "rights" was ambiguous; it could denote mere privileges. *See infra* Part III.

[29] *See, e.g.*, C. Hermann Pritchett, *Privileges and Immunities*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 787 (Kermit L. Hall et al. eds., 2d ed. 2005) (apparently accepting that the Clause protects natural rights); Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 378 (1997) (reviewing early case law and suggesting possibility that Privileges and Immunities Clause was intended to guarantee universally-recognized common-law rights); *cf.* Hague v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939) (Roberts, J., concurring) (referencing Justice Washington's natural-rights view).

[30] The author's search of Supreme Court opinions in the Westlaw database uncovered no citations to the dictum until the *Slaughter-House Cases*. *See* 83 U.S. 36, 75–76 (1872) (quoting and discussing Justice Washington's dictum in Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C. Pa. 1823)). The dictum was also sometimes quoted during debates over the Fourteenth Amendment. *See infra* note 51.

protects a general right to travel.[31] The difficulty with this interpretation is that, while the predecessor provision in the Articles of Confederation did contain language protecting the right to travel, the Constitution's Framers consciously *removed* that language from their own clause.[32] Another interpretation has been that the "privileges and immunities of citizenship" were the rights specifically enumerated in the Constitution.[33] But again, the Framers chose not to include in the final version any of the "rights" language appearing in earlier versions.[34] A third view is that "privileges and immunities" were the ancestral privileges of Englishmen—transferred to Americans through their colonial charters[35]—and that the Clause protected those privileges as the Founders understood them.[36] While under British rule, the colonists sometimes appealed to privileges and immunities granted in colonial charters.[37] Upon gaining independence, however, those

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[31] *See, e.g.*, Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) ("[T]he clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State . . . ."); 4 ROTUNDA & NOWAK, *supra* note 1, § 18.38(a) (noting that Clause protects citizens travelling between states); Bogen, *Privileges*, *supra* note 1, at 796 ("[T]he privileges and immunities clause . . . . referred to the rights of citizens of the nation to travel freely among the states . . . ."); Forte & Rotunda, *supra* note 1, at 270 ("[T]he colonial experience of privileges and immunities meant . . . a right to travel . . . .").

[32] *See infra* notes 329–44 and accompanying text. *Compare* 4 ROTUNDA & NOWAK, *supra* note 1, § 18.38(a) (claiming that Clause protects right to travel), *with id.* § 18.38(b) (noting that right to travel was explicitly recognized in Articles of Confederation and admitting that "the reason for its exclusion [from the Constitution] is not clear").

[33] *See* CHEMERINSKY, *supra* note 1, at 470 ("The rights enumerated in the Bill of Rights seem the most obvious and the most basic 'privileges and immunities of citizenship.' " (citing Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring))); 2 ROTUNDA & NOWAK, *supra* note 1, § 12.7(ii) ("All rights directly protected by the Constitution . . . constitute privileges and immunities of citizenship . . . ."). *See generally* Curtis, *supra* note 1 (arguing that "privileges and immunities" includes rights enumerated in Constitution).

[34] *See infra* note 279 and accompanying text.

[35] *See* Forte & Rotunda, *supra* note 1, at 269 (" 'Privileges and immunities' constituted a summary of ancient rights of Englishmen that the colonists fought to maintain during the struggle against the mother country.").

[36] *See* Bogen, *Privileges*, *supra* note 1, at 798–803 (exploring colonial charter guarantees as models for Comity Clause); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments:* Slaughter-House Cases *Re-examined*, 31 EMORY L.J. 785, 809–15 (1982) (describing rights granted in colonial charters and claiming that these "privileges and immunities" amounted to British *constitutional* limitations).

[37] *See, e.g.*, ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *reprinted in* HAMILTON, *supra* note 1, at 41, 76–89 (arguing that privileges and immunities found in colonial charters are inconsistent with notion of Parliamentary sovereignty over colonists); *see also* Bogen, *Privileges*, *supra* note 1, at 798–803 (describing rights derived from colonial charters).

appeals ceased.[38] Advocates of the "rights of Englishmen" view[39] have never shown why "privileges and immunities" language drafted in 1787 should be more closely linked to colonial charters than to other usages much more common in 1787.[40]

B. METHODOLOGY EMPLOYED IN THIS ARTICLE

Members of the founding generation did not always agree about the meaning of specific constitutional language, but they did agree as to how that language should be interpreted. When uncertainty arose as to the text of a legal document, including a constitution, contemporaneous lawyers sought "the intent of the makers."[41] In the context of the U.S. Constitution, the "intent of the makers" was to be the subjective understanding of the ratifiers, to the extent the interpreter could recover a coherent understanding.[42] To the extent that this was not possible, the interpreter gave controlling force to the original public meaning:[43] that is, to how, at the time of ratification, the text "would have been understood by a hypothetical, objective, reasonably well-informed reader."[44]

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[38] *See infra* note 150 and accompanying text.

[39] *See, e.g.*, ROGER HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP 9–15 (1918) (citing Magna Carta and other early documents for meaning of "privileges and immunities," but omitting most Founding-Era legal books before resuming discussion with post-ratification court cases); W.J. Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 MICH. L. REV. 286, 286–87 (1903) (discussing "privileges and immunities" language in Articles of Confederation and at Federal Convention, apparently believing that language first appeared in these contexts).

[40] For a discussion of more prevalent usages at the time, see *infra* Part IV. For yet another view, see Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1128 (1988) (suggesting that purpose of Clause was to better secure interstate trade and commerce).

[41] *See* Natelson, *Founders' Hermeneutic*, *supra* note 1, at 1249–55 (discussing interpretive focus of Founding-Era courts).

[42] *See id.* at 1288–89, 1297–1303 (compiling historical evidence of First Congress's reliance on ratifiers' understanding as method of constitutional interpretation).

[43] *See id.* at 1286 ("Where there was no available evidence of subjective intent . . . . the best the court could to was to re-construct the statute's probable public meaning.").

[44] Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003). Scholars have described this interpretive approach as emphasizing:

> how the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in

Significant direct evidence of the ratifiers' subjective understanding of the Privileges and Immunities Clause is not recoverable, because the Clause "received little debate at the Convention"[45] and "virtually no attention in the debates on Constitutional ratification."[46] Even the argumentative delegates at the New York and Virginia ratifying conventions, who proposed amendments to most other parts of the Constitution, let Article IV pass without comment.[47] But while evidence of original understanding is sparse, there is copious evidence of original public meaning. That evidence includes:

* The prevailing definitions of key words in the Clause, as displayed in contemporaneous dictionaries, legal works, state constitutions, statutes, and case law. These key words are "privileges," "immunities," "entitled," and "several." Also relevant are Founding-Era definitions of "rights," a word whose absence from the Clause also evidences its meaning. These definitions are discussed throughout this Article, notably in Part II.

> context, at the time they were adopted, and within the political and linguistic community in which they were adopted. . . .
>
> We call this approach *original, objective-public-meaning textualism.*

Id. (footnote omitted). Kesavan and Paulsen argue that constitutional interpretation should be guided by original-meaning textualism, rather than by the original intent of the drafters or the original understanding of the ratifiers. *Id.* at 1131–32. Further research shows, however, that the Founders would have disagreed, since they favored original understanding in cases where it could be reconstructed. *See* Natelson, *Founders' Hermeneutic*, *supra* note 1, at 1297–1303 (discussing evidence that founding generation favored "intent of the makers" approach). But the Founders would have subscribed to the Kesavan-Paulsen definition in cases where an original understanding could not be reconstructed. *See id.* at 1286 (describing Founders' acceptance of "probable public meaning" approach in absence of evidence of subjective intent).

[45] Bogen, *Privileges*, *supra* note 1, at 837.

[46] *Id.* at 840.

[47] *See* Proceedings of the New York Convention (July 7, 1788), *in* 22 DOCUMENTARY HISTORY, *supra* note 1, at 2107–08 (recording that no New York Convention delegates offered amendments to either Article IV or Article V); The Debates in the Convention of the State of New York (July 5, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 205, 409 (reflecting absence of proposed amendments to same Articles); The Debates in the Convention of the Commonwealth of Virginia (June 27, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 659–61 (recording amendments proposed by Virginia ratifying convention).

* Changes in American forensic discourse during the pre-Revolutionary period. These changes are examined in Part III.
* American word usages after independence, including usages in the Constitution's drafting and ratification history, and the other two appearances of "privilege" in the original Constitution. These usages are discussed in Part IV.
* The drafting history of the Articles of Confederation's privileges and immunities clause and its successor in the Constitution. Both histories are discussed in Parts V and VI, respectively.

After marshalling this evidence, this Article will discuss some of its implications for the ratification process and for modern jurisprudence. This discussion can be found in Parts VII and VIII. Part IX is a short conclusion.

This Article does not purport to render conclusions about the Privileges *or* Immunities Clause of the Fourteenth Amendment.[48] The original force of the Comity Clause does not control the meaning of its successor, for the two provisions have different histories.[49] But it also is true that the original force of the Comity Clause provides *some* evidence of the meaning of the provision adopted eighty years later.[50] And it is fair to say that scholarship on the Privileges *or* Immunities Clause has not yet benefited from an accurate understanding of the Privileges *and* Immunities Clause.[51]

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

[49] *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1397–1410 (1992) (providing historical background behind drafting of Fourteenth Amendment).

[50] *See* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 345 (2005) (noting relationship between Comity Clause and Fourteenth Amendment).

[51] For example, a leading study of the Privileges or Immunities Clause devoted only a few pages to the Comity Clause—and those pages focused exclusively on nineteenth-century views, including Justice Washington's *Corfield* dictum. Harrison, *supra* note 49, at 1398–1402. Although a leading congressional supporter of the Fourteenth Amendment in the 39th Congress did cite *Corfield*, *id.* at 1418, that does not tell us whether the Amendment's *ratifiers* understood the meaning of "privileges and immunities" to be the anomalous one used in *Corfield* or the traditional meaning discussed in this Article—and still applied by the Supreme Court as late as the 1860s. *See, e.g.*, Weightman v. Corp. of Washington, 66 U.S. (1 Black) 39, 50 (1861) (referring to charter grant of privileges and immunities); *see also supra* note 27 and accompanying text.

II. THE TRADITIONAL MEANING OF "PRIVILEGES AND IMMUNITIES"

A. THE MEANING OF "PRIVILEGE"

The term "privilege" was exceedingly common in eighteenth-century legal documents. The entry for the word in the 1762 edition of Giles Jacob's *New Law Dictionary*, then the most popular legal dictionary in America,[52] reads as follows:

> PRIVILEGE, (*Privilegium*) Is defined to be a private or particular Law, whereby a private Person or Corporation is exempted 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, and is sometimes used for a Place that hath a special Immunity: A *Privilege* is therefore *Personal*, or *Real*; *Personal*, as of Members of Parliament, and of Convocation, and their menial Servants, not to be arrested in the Time of Parliament or Convocation, nor for certain Days before or after; Peers, Ambassadors and their Servants, &c. *Real*, that which is granted to a Place, as to the King's Palaces, the Courts at *Westminster*, the Universities, &c. that their Members or Officers must be sued within their Precincts or Courts, and not in other Courts.[53]

Jacob thus tells us that a privilege is: (1) a benefit or advantage; (2) conferred by positive law; (3) on a person or place; (4) contrary to what the rule would be in absence of the privilege.

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[52] *See* HERBERT A. JOHNSON, *supra* note 1, at 59–64 (listing Jacob's as most frequently used eighteenth-century law dictionary); WOLF, *supra* note 1, at 151 (noting prevalence of Jacob's dictionary among both amateurs and professionals).

[53] JACOB, A NEW LAW-DICTIONARY (London, Woodfall & Strahan, 1762) (unpaginated). The 1782 edition of Jacob's Dictionary is substantively similar, but contains much more extensive language. JACOB, DICTIONARY, *supra* note 1 (unpaginated); *see also* 1 JOSIAH BROWN, A NEW ABRIDGMENT OF CASES IN EQUITY 432–33, 443 (London, Strahan & Woodfall 1793) (discussing various aspects of privilege against arrest of members of Parliament and their retainers).

Jacob's publication was not the only law dictionary on the market. Among its competitors was John Cowell's *Interpreter*. Cowell's entry for "privilege" reads as follows:

> PRIVILEGE, *Privilegium*, Is defined by *Cicero* in his Oration *pro domo sua*, to be *lex privata homini irrogata* [i.e., a private law bestowed on a person]. It is, says another, *Jus singulare* [a unique right], whereby a private Man, or a particular Corporation is exempted from the Rigour of the Common Law. It is sometimes used in the Common Law for a Place that hath any special Immunity. . . . *Privilege* is either personal, or real . . . See the *New Book of Entries*, verbo *Privilege.* Privilegium *est jus singulare, hoc est, privata lex, quae uni homini, vel loco, vel Collegio, & similibus aliis conceditur* [a privilege is a unique right, that is, a private law that is granted to one person or place or association or other, similar things].[54]

With the embellishment of classical references, Cowell thus confirmed the four elements of a privilege inherent in Jacob's definition. So also did the legal dictionaries produced by Thomas Blount,[55] Timothy Cunningham,[56] and the anonymous author of the *Student's Law Dictionary*.[57]

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[54] COWEL, *supra* note 1 (unpaginated).

[55] BLOUNT, *supra* note 1 (unpaginated):
> Privilege (*Privilegium, quasi Privatae leges*) is either Personal or Real: A *Personal Privilege* is that which is granted or allowed to any Person, either against or besides the Course of the Common Law; as, a Member of Parliament may not be arrested . . . . A *Privilege real* is that which is granted to a Place, as to the Universities, that none of either may be called to *Westminster-Hall*, or prosecuted in other Courts. . . . Privilegium *est jus singulare, hoc est, privata lex, quae uni homini vel loco, vel Collegio & similibus aliis conceditur.*

[56] CUNNINGHAM, *supra* note 1 (unpaginated):
> Privilege, *(Privilegium,)* Is defined by *Cicero* in his oration *pro domo sua*, to be *lex privata homini irrogata.* It is, says another, *Jus singulare*, whereby a private man, or a particular corporation is exempted from the rigour of the Common Law. It is sometimes used in the Common Law for a Place that hath some special immunity.

[57] STUDENT'S LAW DICTIONARY, *supra* note 1 (unpaginated):

Lay dictionaries were less precise, but their definitions of "privilege" contained some or all of the same four elements. Samuel Johnson's definition suggested at least two such elements: "1. Peculiar advantage. 2. Immunity; publick right."[58] The definition in Nathan Bailey's *Universal Etymological English Dictionary* of 1783 contained all four: "Privilege [in *Law*] is a special Grant or Right, whereby either a private Person, or particular Corporation, is freed from the Rigour of the Common Law; and this is either real or personal."[59]

Nothing in these definitions identified privileges with natural rights or natural law. Nor did the definitions suggest that privileges were necessarily created, as some have asserted,[60] by the English common law. On the contrary, the definitions suggest that privileges were departures from the usual course of common law.[61]

> Privilege, denotes a particular Law, whereby a private Person or Corporation is exempted from the Rigour of the Common Law; or it may be defined to be some peculiar Benefit granted to Persons contrary to the due Course of Law. Privileges are said to be either *Personal* or *Real.* A *Personal Privilege* is such as is extended to Members of Parliament, and of the Convocation, and their menial Servants, who are not to be arrested in the Time of Parliament or Convocation, nor for certain Days before or after. Peers, Ambassadors, and their Servants are likewise exempted from Arrests. A *Real Privilege*, is that which is granted to some particular Place; as to the King's Palaces, the Courts at *Westminster*, the Universities, &c. whereby, 1. It is to be observed, that no Person is to be arrested in or near the King's Court, unless by Leave from the Board of *Green Cloth.* 2. That the Officers of the Courts at *Westminster,* such as Attornies, &c. and also the Members and Officers of the Universities must be sued within their own Courts or Precincts, and in no other Court. And there are divers other Places, as the Counties Palatine, Cinque Ports, &c. that have Privileges as to Pleas, &c.

[58] JOHNSON, DICTIONARY, *supra* note 1 (unpaginated); *see also* ALLEN, DICTIONARY, *supra* note 1 (unpaginated) (defining "privilege" as "a peculiar advantage, immunity or right"); *cf.* ALEXANDER HAMILTON, A FULL VINDICATION OF THE MEASURES OF CONGRESS (1774), *reprinted in* HAMILTON, *supra* note 1, at 1, 31 (exemplifying contemporaneous citation of Johnson's dictionary).

[59] BAILEY, *supra* note 1 (unpaginated) (brackets in original).

[60] *See* Bogen, *Privileges*, *supra* note 1, at 805 n.35 (citing proposed Maryland bill from 1639 which would have guaranteed inhabitants of province same privileges and immunities enjoyed by English subjects); *see also id.* at 807 (referring to English common law as source of colonial privileges).

[61] *See, e.g.*, COWEL, *supra* note 1 (unpaginated) (defining "privilege" as "exempted from the Rigour of the Common Law"); *see also* PRINCIPIA LEGIS & AEQUITATIS 83 (T.B. ed., London, Lintot, 1753) (providing Thomas Branch's definition: "Privilegium est quasi Privata Lex" meaning "a privilege is similar to a private law").

According to William Blackstone's *Commentaries*, privileges were not always benefits: Blackstone relied on Cicero to assert that privileges could include *disadvantages* imposed by law on persons or places.[62] Despite Blackstone's assertion, this usage appears to have been very rare. Because the text of the Comity Clause refers only to privileges and immunities to which a person may be "entitled,"[63] only those privileges that confer benefits are relevant for our purposes.

B. THE MEANING OF "IMMUNITY"

The term "immunity" was less common in eighteenth-century legal sources than "privilege," but it still appeared frequently. An immunity was an exemption, otherwise contrary to law, given to a person or place by special grant. The *Student's Law Dictionary* of 1740 defined the term "Immunities" in this way: "to be free from certain Burdens; as an *Immunity* from Tolls, &c. denotes to be exempted from the Payment thereof."[64] The corresponding entry for "Immunities" in Jacob's *New Law Dictionary* stated: "King *Hen.* 3. by Charter granted to the Citizens of *London*, a general *Immunity* from all Tolls, &c. except Customs and Prisage of Wine."[65]

Blackstone's contrary usage aside,[66] it appears that "immunity" and "privilege" were reciprocal words for the same legal concept.

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[62] *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *46 (following Cicero in labeling ex post facto laws and laws imposing disadvantages as *privilegia*, and denouncing privileges of this sort as harmful).

[63] *See* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be *entitled* to all Privileges and Immunities of Citizens in the several States." (emphasis added)).

[64] STUDENT'S LAW DICTIONARY, *supra* note 1 (unpaginated).

[65] JACOB, DICTIONARY, *supra* note 1 (unpaginated); *see also* ALLEN, *supra* note 1 (unpaginated) (defining "immunity" as "discharge from any duty or obligation"); BAILEY, *supra* note 1 (unpaginated) (defining "immunity" as "Exemption from Office, Duty, or Charge; Freedom, Liberty, Privilege").

[66] *See supra* note 62 and accompanying text. Blackstone's *Commentaries* also includes a rare use of the term "immunity" to encompass both privileges and natural rights. WILLIAM BLACKSTONE, 1 COMMENTARIES *129. When speaking of the statutory rights of Englishmen, Blackstone stated:

> The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear . . . to be . . . no 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.

Id.

Because an immunity was a benefit, otherwise contrary to law, given to a person or place by special grant, it was a privilege.[67] A privilege to act in a certain way necessarily implied an exemption from the normal consequences of so acting—hence, an immunity.

Contemporary dictionaries strongly support the conclusion that "privilege" and "immunity" were reciprocal ways of saying the same thing. The entries for "privilege" in the Jacob and Cowell legal dictionaries both defined the term in terms of exemption.[68] Likewise, Timothy Cunningham's *Law Dictionary* relied on Matthew Bacon's widely-used *New Abridgment* to define "privilege" in terms indistinguishable from "immunity": "an exemption from some duty, burthen, or attendance, to which certain persons are intitled, from a supposition of law . . . ."[69] Evidence of the reciprocal relationship also appeared in Samuel Johnson's *Dictionary*.[70]

Similar evidence crops up in other contemporaneous writings. An example appears in the 1789 history of the American Revolution authored by David Ramsay of South Carolina—a leading American physician, a member of the Continental Congress, and a spokesman for the Constitution during the ratification debates.[71] Ramsay wrote:

> In consequence of the vast extent of vacant country, every colonist was, or easily might be, a freeholder. . . . Each individual might hunt, fish, or fowl, without injury to his neighbours. These *immunities* which, in old countries, are guarded by the sanction of penal laws, and

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[67] *See* COWEL, *supra* note 1 (unpaginated) (defining "privilege" as "a Place that hath any special Immunity").

[68] *See id.* (defining "privilege" as means by which some entity is "exempted from the Rigour of the Common Law"); JACOB, DICTIONARY, *supra* note 1 (unpaginated) (defining "privilege" as law "whereby a private Person or corporation is exempted from the Rigour of the Common Law").

[69] CUNNINGHAM, *supra* note 1 (unpaginated); *see also* 4 BACON, *supra* note 1, at 215 (using similar definition).

[70] *See* JOHNSON, DICTIONARY, *supra* note 1 (unpaginated) (defining "privilege" as "1. Peculiar advantage. 2. Immunity; publick right" and "immunity" as "1. Discharge from any obligation. 2. Privilege; exemption. 3. Freedom.").

[71] *See* Lester H. Cohen, *Foreword* to 1 RAMSAY, *supra* note 1, at xxv–xxvi (discussing Ramsay's career and political involvements).

> monopolized by a few, are the common *privileges* of all, in America.[72]

C. PRIVILEGES AND IMMUNITIES IN ANGLO-AMERICAN JURISPRUDENCE

Before and throughout the Founding Era, Americans shared a common jurisprudence with England.[73] The law of privileges and immunities held a very prominent place within that jurisprudence.[74] In addition to the legal dictionaries referenced earlier,[75] digests of case and statutory law (usually called "abridgments") treated the subject at length. Matthew Bacon's *New Abridgment of the Law* contained (in addition to numerous scattered comments on privilege[76]) a twenty-five-page discussion of the privileges of public officers, lords, and members of Parliament, as well as treatments of the privileges of other persons, of corporations, and of places.[77] Among the privileges Bacon examined were exemption from jury duty,[78] a Peer's privilege to insist that at least two of the jurors hearing his case be qualified as knights,[79] the statutory exemption

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[72] 1 RAMSAY, *supra* note 1, at 30–31 (emphasis added). One might question whether Ramsay was taking literary license in referring to Americans' freedom to hunt, fish, or fowl as "privileges" or "immunities." But these freedoms were, in fact, privileges, because in contemporary theory the ultimate owner of all real estate was the Crown or state. *See infra* note 256 and accompanying text.

[73] Until after the Founding Era, nearly all law books used in America were British. *See* WILLIAM HAMILTON BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA, at xiii–xiv (discussing prominence of English legal literature in eighteenth-century Virginia); WOLF, *supra* note 1, at 131–61 (documenting evidence of British law books in colonies and corresponding scarcity of locally-printed texts); *see also* Robert G. Natelson, *A Bibliography for Researching Original Understanding*, THE SCHOLARSHIP OF THE ORIGINAL UNDERSTANDING OF THE CONSTITUTION, http://www.umt.edu/law/original-understanding/presentation.htm (surveying standard legal resources available at time of Constitution's ratification).

[74] The "law" portion of the Gale database, *Eighteenth Century Collections Online*, encompasses only some of that database's legal commentaries. Yet for the years between 1700 and 1786, that portion alone contains 3488 references to "privilege" and 718 references to "immunity" or "immunities." Eighteenth Century Collections Online, http://www.gale.com/EighteenthCentury (search results on file with the author).

[75] *See supra* notes 52, 54–57 and accompanying text.

[76] *See, e.g.*, 4 BACON, *supra* note 1, at 29, 30, 35, 36 (discussing pleading practice for privileges).

[77] *See id.* at 215–39 (discussing manner and applicability of privileges).

[78] *Id.* at 216.

[79] *Id.*

of surgeons from parish office,[80] and privileges of Parliament.[81] Competing law digests from the same period contain similar discussions.[82]

The coupling of the words "privileges" and "immunities" was common in legal documents. The two words might appear alone or among related terms, such as "rights," "franchises," or "liberties."[83] A search for "privileges and immunities" in the largest database of eighteenth-century works confirms that the phrase denoted exclusively the subjects of special government grant.[84] For example, William Alexander's treatise on the law pertaining to women stated: "Such privileges and immunities as the French and Italian women derive from the influence of politeness, the British derive *from the laws of their country*."[85] Cowell's *Law Dictionary* defined the term "ordels" as "Part of the Privileges and Immunities *granted in Old Charters*, meaning the Right of administering Oaths, and adjudging *Ordeal* Trials within such a Precinct or Liberty."[86] Daines Barrington's *Observations on the More Ancient Statutes* spoke of "privileges and immunities" granted to the clergy by various kings and of pre-existing French privileges and immunities against the Pope.[87] Edward Bullingbroke wrote of the "Rights, Privileges and Immunities" granted by various sovereigns to the Irish church and

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[80] *Id.* at 217.

[81] *See, e.g.*, *id.* at 235 ("The Privilege, Order or Custom of Parliament . . . belongs to the Determination or Decision only of the Court of Parliament . . . .").

[82] *See, e.g.*, 2 JOHN LILLY, THE PRACTICAL REGISTER 454–61 (London, Lintot 2d ed. 1745) (providing extensive discussion of privilege); 2 WILLIAM NELSON, AN ABRIDGMENT OF THE COMMON LAW 1293–1300 (London, Nutt & Gosling 1726) (discussing privileges of ambassadors, attorneys, clerks, and universities); 17 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 508–34 (Cornhill, Eng., Strahan et al. 1743) (providing extensive discussion of privilege).

[83] *See, e.g.*, MASS. CONST. of 1780, pt. 2, ch. V, § 1, art. I (referring to "the powers, authorities, rights, liberties, privileges, immunities and franchises" of Harvard College).

[84] Eighteenth Century Collections Online, *supra* note 74 (search results on file with author). Outside of the Gale database, however, one instance of the word "immunity"—not included in the phrase "privileges and immunities"—was found to refer to natural rights. *See* HAMILTON, *supra* note 58, at 23 (employing "immunity" in the phrase "heaven-descended immunities" in nonlegal sense).

[85] 2 WILLIAM ALEXANDER, THE HISTORY OF WOMEN 313 (London, Strahan 1779) (emphasis added).

[86] COWEL, *supra* note 1 (unpaginated) (emphasis added).

[87] DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES 173, 248 (London, Bowyer & Nichols 1769).

its clergy.[88] Helkiah Bedford argued that false kings had no power to grant "Liberties, Privileges, and Immunities" to cities or corporations.[89] Timothy Cunningham's treatise on commercial law discussed the "privileges [and] immunities" conferred by Parliament on the Bank of England,[90] while Michael Dalton's *The Country Justice*—a popular handbook in colonial America[91]—discussed various privileges as well.[92] All of these sources used the phrase "privileges and immunities" to mean only the results of legal grant.

The grantee of "privileges and immunities" could be a named person, persons, or class of persons; or it might be an identified entity or location. Persons or classes of persons receiving privileges and immunities included clergymen,[93] tradesmen,[94] sponsors of fairs,[95] and many others.[96] Thus, the 1769 royal charter construed by the Supreme Court in the *Dartmouth College Case*[97] bestowed privileges and immunities on certain named persons (the original trustees of the school) and also to their successor trustees (members of a specified class).[98] Entities receiving privileges and immunities

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[88] 1 EDWARD BULLINGBROKE, ECCLESIASTICAL LAW 2–16 (Dublin, Grierson 1770).

[89] HELKIAH BEDFORD, AN ABRIDGMENT OF THE HISTORY OF HEREDITARY RIGHT 104 (London, Booksellers of London and Westminister 1714).

[90] 1 T. CUNNINGHAM, THE MERCHANT'S LAWYER 118 (London, Kearsly 1762).

[91] *See* WOLF, *supra* note 1, at 152 (describing Dalton's treatise as "so commonly known as to become an instrument of satire").

[92] *See* DALTON, *supra* note 1, at 266, 427 (referencing privileges and immunities of universities and dwelling-houses).

[93] *See* 1 *ECCLESIAE PRIMITIVAE NOTITIA:* OR, A SUMMARY OF CHRISTIAN ANTIQUITIES 140–42 (London, Bell et al. 1722) (discussing "Instances of Respecting shewed to the Clergy by the Civil Government").

[94] *See* DALTON, *supra* note 1, at 261 ("No Person shall put to forge or counterfeit the Name, Mark or Vinnet, of any Person privileged to print, without his License, upon Pain to forfeit such Books or Pamphlet."); *see also* Waller v. Travers, [1662] Hardres 301, 302–03, 145 Eng. Rep. 467, 468 (Exch. Div.) (involving wine-trading privileges granted by royal charter).

[95] *See* DALTON, *supra* note 1, at 203 ("Fairs are accounted Things of Franchise and Privilege, as well as of Profit; and whether they be held and claimed by Charter of the King, or by Prescription, which supposes a former Charter, they ought to be holden for no longer Time, than such Grant or Use will warrant . . . .").

[96] *See, e.g.*, Farrell v. Tomlinson (1761), 5 Bro. P.C. 438, 443, 2 Eng. Rep. 782, 785 (H.L.) (referring to statutorily-created privileges and immunities of Irish Protestants); Newburgh v. Newburgh (1712), 3 Bro. P.C. 553, 554, 1 Eng. Rep. 1494, 1494 (H.L.) (discussing grant by royal letters patent of land and "several advantageous privileges and immunities to encourage the patentee, and his fee-farmers, to build upon the lands").

[97] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[98] *See id.* at 525–26, 532 (naming trustees, outlining their authority, and stating method of appointment of successor trustees).

included religious societies,[99] colleges and universities,[100] and municipalities.[101] Among the privileges municipalities received was the local election of municipal officials.[102] If privileges or immunities were attached to a place (such as a municipality or church), parties conveying title to realty within the place conveyed the privileges and immunities appurtenant to the land.[103]

A class receiving privileges and immunities usually was fairly small, although it also could be very large. Some privileges and immunities, for example, were enjoyed by all British married women,[104] while others inhered in all Irish Protestants[105] or even all

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[99] *See, e.g.*, PA. CONST. of 1776, § 45 ("And all religious societies . . . shall be . . . protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy . . . ."); VT. CONST. of 1786, ch. II, § XXXVIII (guaranteeing privileges and immunities to religious societies); VT. CONST. of 1777, ch. II, § XLI ("[A]ll religious societies or bodies of men . . . shall be . . . protected in the enjoyment of the privileges, immunities and estates which they, in justice, ought to enjoy . . . .").

[100] *See* MASS. CONST. of 1780, pt. 2, ch. V, § 1 (detailing privileges and immunities of Harvard College); DALTON, *supra* note 1, at 266 (discussing provision privilege of Cambridge and Oxford Universities).

[101] Hence the title of Robert Brady's seminal treatise. *See generally* ROBERT BRADY, AN HISTORICAL TREATISE OF CITIES AND BURGHS OR BOROUGHS. SHEWING THEIR ORIGINAL, AND WHENCE, AND FROM WHOM THEY RECEIVED THEIR *LIBERTIES, PRIVILEGES,* AND *IMMUNITIES*; WHAT THEY WERE, AND WHAT MADE AND CONSTITUTED A *FREE BURGH*, & *FREE BURGESSES* (London, A.L. 1704) (discussing history of English boroughs). For further discussion of privileges and immunities conferred on municipalities, see Pippard v. Mayor of Drogheda (1759) 2 Bro. P.C. 321, 321, 1 Eng. Rep. 971, 971 (H.L.) (discussing town's "liberties, franchises, privileges, and immunities" granted by letters patent from Crown); 1 "A CITIZEN, AND NATIVE OF LONDON," A NEW AND COMPLEAT SURVEY OF LONDON 425, 451, 465 (London, Lyne 1742) (discussing royal grants of liberties, franchises, privileges, immunities, and rights to "Mayor and Commonalty, and Citizens of the said City of London"); DE VATTEL, THE LAW OF NATIONS 387 (London, Robinson 1797) ("Accordingly, care is usually taken to stipulate, both in particular capitulations and in treaties of peace, that the towns and countries ceded shall retain all their liberties, privileges, and immunities."); 1 FRANCIS DRAKE, *EBORACUM:* OR THE HISTORY AND ANTIQUITIES OF THE CITY OF YORK 599 (London, Bowyer 1736) (referring to liberties and privileges of city of York).

[102] *E.g.*, Rex v. Tolney [1728] Skinner 116, 116–17, 90 Eng. Rep. 54, 55 (K.B.) (discussing privilege of inhabitants of Rye to elect mayor and burgesses of Parliament).

[103] *See, e.g.*, 1 ORL. BRIDGMAN, CONVEYANCES: BEING SELECT PRECEDENTS OF DEEDS AND INSTRUMENTS 23, 149, 231, 269, 278, 281, 317 (London, Nutt & Gosling 1725) (setting forth legal forms for conveying privileges and immunities along with various other appurtenances); GILES JACOB, THE NEW COMPLEAT CONVEYANCER 440 (London, Lintot 1744) (same).

[104] Contrary to modern popular belief, these privileges were not minimal. *See, e.g.*, THE LADY'S LAW: OR, A TREATISE OF FEME COVERTS 78–109 (London, Nutt & Gosling 1737) (discussing privileges retained by married women).

[105] *See* Farrell v. Tomlinson (1761), 5 Bro. P.C. 438, 443, 2 Eng. Rep. 782, 785 (H.L.) (discussing to privileges and immunities of Irish Protestants created by statute).

natural-born British subjects. One privilege in the latter group was trial by jury;[106] another was the privilege to inherit and hold British land, then all titled to the Crown.[107] The more widespread privileges and immunities might appear today like universal rights, but in Anglo-American legal theory they were the product of government grant.

The grant bestowing privileges and immunities might be contained in a statute[108] or in a conveyance memorialized by a charter or by letters patent.[109] Some grants were presumed by reason of long-standing custom.[110] The legal documents granting privileges and immunities often described them, lawyer-like, with several related words.[111] The Massachusetts Constitution of 1780, for example, referred to Harvard College's "powers, authorities, rights, liberties, privileges, immunities, and franchises."[112] The royal charter granted to the trustees of Dartmouth College in 1769 bestowed upon them and their successors "the privileges, advantages, liberties, immunities, and all other the premises [t]herein and [t]hereby granted."[113] The practice of using privileges and immunities in conjunction with several related words also appears in secondary sources.[114] However, one must be careful not

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[106] *See* WILLIAM BLACKSTONE, 3 COMMENTARIES *379 (referring to trial by jury as "the most transcendent privilege which any subject can enjoy").

[107] *See infra* note 256 and accompanying text.

[108] *See, e.g.*, Barton v. Wells (1789) 1 Hag. Con. 21, 23, 161 Eng. Rep. 461, 462 (Consis. Ct.) ("[T]he episcopal house . . . was conveyed by act of parliament, with all rights, privileges, and immunities, to the Crown . . . ."); *Farrell*, 5 Bro. PC. at 441–42, 2 Eng. Rep. at 784 (discussing privileges and immunities of Irish Protestants created by statute). Thus, it appears to be untrue, as Professor Bogen claims, that the American colonists "changed *privileges and immunities* from limits on the King's prerogative to limits on the exercise of power by any sector of English government." BOGEN, REFERENCE GUIDE, *supra* note 1, at 10. Privileges and immunities already could be created by statute.

[109] *See* Newburgh v. Newburgh (1712) 3 Bro. P.C. 553, 554, 1 Eng. Rep. 1494, 1494 (H.L.) (referencing grant by royal letters patent of certain lands and "several advantageous privileges and immunities to encourage the patentee, and his fee-farmers, to build upon the lands").

[110] *See* Rex v. Tolney [1728] Skinner 116, 116, 90 Eng. Rep. 54, 54–55 (K.B.) (referring to custom of electing town's mayor as "privilege [the townspeople] have by election or descent").

[111] *See* Carvill's Lessee v. Griffith, 1 H. & McH. 297, 297 (Md. Prov. Ct. 1769) (summarizing letter patent as granting "rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, royal rights and franchises").

[112] MASS. CONST. of 1780, pt. 2, ch. V, § 1.

[113] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 536 (1819).

[114] *See, e.g.*, 1 THE ATTORNEY AND PLEADER'S TREASURY 389 (London, Nutt & Gosling 1736) (describing corporation's royal grant of "Liberties, Privileges, Franchises,

to identify the words "rights" or "liberties," when coupled with "privileges" and "immunities," as signifying natural rights.[115]

The role of privileges and immunities was to replace rules that otherwise would have prevailed as a matter of natural law. According to Blackstone, a corporate charter enabled the corporation to:

> establish rules and orders for the regulation of the whole, which are a sort of municipal law of this little republic; or rules and statutes may be prescribed to it at its creation, *which are then in the place of natural laws*: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successions . . . .[116]

The frequency and variety of privileges and immunities in the legal literature of the time show that the concepts were not identified principally with colonial charters[117] or the pre-set "rights of Englishmen."[118] Rather, they were the stuff of daily life, used much as the terms "license" or "permit" are used today. Britons and Americans interacted with those concepts in many different ways.

III. "RIGHTS" AND "LIBERTY" CHANGE MEANING, LEAVING PRIVILEGES AND IMMUNITIES BEHIND

Traditionally, the word "right" was, like its Latin equivalent, *jus*,[119] a very broad term that included natural rights, legal rights,[120]

Immunities, Exemptions and Jurisdictions"); 4 BACON, *supra* note 1, at 207 (referring to "Liberty or Privilege" of printing); 1 JOHN WORRALL, BIBLIOTHECA LEGUM ANGLIAE 25 (London, Brooke 1788) (referring to "Charters, Corporations, Customs, Privileges, *and* Records"); *id.* at 33 (referring to "rights and privileges"); *id.* at 111 (referring to "liberties, privileges, and immunities" of cities); *id.* at 202 (referring to "rights and privileges of Englishmen").

[115] *See infra* notes 119–24 and accompanying text.

[116] WILLIAM BLACKSTONE, 1 COMMENTARIES *468 (emphasis added).

[117] *Cf.* Bogen, *Privileges*, *supra* note 1, at 796–810 (detailing inferred effect of colonial charters in defining meaning of privileges and immunities).

[118] *But see* Forte & Rotunda, *supra* note 1, at 269 (" 'Privileges and immunities' constituted a summary of ancient rights of Englishmen . . . .").

[119] *See* CHARLTON T. LEWIS, A LATIN DICTIONARY 1019 (Oxford, Clarendon Press 1879)

privileges and immunities,[121] and powers.[122] Giles Jacob's legal dictionary defined it as encompassing "any Title or Claim."[123] A related word, "liberty," could be used to refer to natural liberty, but in practice it usually meant a privilege or immunity.[124]

During the first two-thirds of the eighteenth century, legal documents operative in America followed British practice by characterizing grants as conveyances of "rights," "liberties," "franchises," "privileges," and "immunities."[125] The language of these documents makes it clear that these were considered words of overlapping, or even identical, meaning.[126]

During the pre-Revolutionary period, however, the meanings of "right" and "liberty" in American forensic discourse began to diverge from those of "privilege" and "immunity."[127] While the meaning of

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(defining "*jus*" to include, among other definitions, "that which is binding or obligatory," "right, justice, duty," and "[l]egal right, power, authority, permission").

[120] *See, e.g.*, Carvill's Lessee v. Griffith, 1 H. & McH. 297, 311 (Md. Prov. Ct. 1769) ("The powers and privileges given by the charter, do not transfer any royal rights to the Lord Proprietary, but only such as might be exercised by the Bishop of *Durham*.").

[121] 2 JOHNSON, DICTIONARY, *supra* note 1 (unpaginated) (including "[i]mmunity; privilege" among definitions of "right").

[122] Indeed, one can argue that the word "rights" in the Ninth Amendment should be read to include "powers" in view of the amendment's purpose of reinforcing the ideas of federalism and limited federal powers. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *see also* Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 805–06 (2008) (discussing Ninth Amendment's role in preserving sphere of state sovereignty).

[123] JACOB, DICTIONARY, *supra* note 1 (unpaginated).

[124] *See, e.g., id.* (defining "liberty" initially as "a privilege held by grant or prescription" and only subsequently including natural law definition); *see also* CUNNINGHAM, *supra* note 1 (unpaginated) (same).

The term "freedom" could also be used to refer to privileges and immunities. *See* JOHNSON, DICTIONARY, *supra* note 1 (unpaginated) (providing as second definition of "freedom": "Privileges; franchises; immunities"). Presumably this was because both freedom and liberty were valid translations of the Latin *libertas* as used in old charters. LEWIS, *supra* note 119, at 1058. However, this usage appears to have been rare.

[125] Several other terms sometimes appeared in this litany as well. *See, e.g.*, Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 536 (1819) (quoting grant in 1769 charter of "privileges, advantages, liberties, immunities, and all other the premises herein and hereby granted"); Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 479 (1857) (reciting terms of royal charter of colony of Massachusetts as granting "jurisdictions, franchises, royalties, liberties, privileges").

[126] *See supra* notes 111–14 and accompanying text.

[127] *But see, e.g.*, 1 ANNALS OF CONG. 436 (Joseph Gales ed., Wash., Gales & Seaton 1834) (statement of Rep. James Madison) (referring to freedoms of press and conscience as "privileges"); *id.* at 440–41 (quoting Madison referring to freedoms of press and conscience as "privileges" as well as "rights")

the latter two words remained unchanged, speakers increasingly applied "liberty" exclusively to natural liberty and—while continuing to apply "rights" to legal privileges[128]—more frequently than before used the term to designate natural rights. After independence, people routinely distinguished between rights and privileges.[129]

These changes can be traced in the political rhetoric of the pre-Revolutionary period. The era was punctuated by publication of a number of notable pamphlets pleading the American cause. The authors of many of these pamphlets were lawyers,[130] and to a

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Madison was unusual—perhaps unique—among post-independence writers in classifying liberty of conscience as a "privilege." He was in the minority, but not alone, in classifying freedom of the press in that way. *See* Valerius, *Untitled*, MASS. CENTINEL, Nov. 28, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 334 (referring to freedom of press as "essential privilege" as well as "an indispensable right of the people"); *cf.* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 151 (1988) ("The freedoms of speech and conscience were natural rights, but the liberty of the press was distinguishable as a right that did not exist in the state of nature."). A draft bill of rights found among Roger Sherman's papers grouped natural rights in one paragraph—including freedom of speech and conscience and "writing and publishing [one's] Sentiments." However, "liberty of the Press" also was listed later in the document among guarantees of such cherished privileges as trial by jury. Draft Bill of Rights, *reprinted in* Scott D. Gerber, *Roger Sherman and the Bill of Rights*, 28 POLITY 521, 532–33 (1996).

[128] *See, e.g.*, 2 The Debates in the Convention of the State of New York (June 25, 1788), *supra* note 47, at 319 (remarks of Alexander Hamilton) (asserting that "[t]he rights of a state are defined by the Constitution"); *id.* at 325 (remarks of Samuel Jones) (referring to "right" of states to regulate time, place, and manner of elections); THE FEDERALIST No. 42 (James Madison) (referring twice to privileges of citizenship as "rights of citizenship"); THE FEDERALIST No. 84 (Alexander Hamilton) ("It has been several times truly remarked, that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favour of privilege, reservations of rights not surrendered to the prince."); Cassius, *Letter VI*, MASS. GAZETTE, Dec. 21, 1787, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 500, 503 (referring to business privileges and immunities as "rights"); Federal Farmer, Letter XVI (Jan 20, 1788), *in* AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (1788), *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 342, 346 (referring to jury trial and habeas corpus as "rights"); *cf. id.* at 343–49 (applying term "rights" to freedom of press and other natural rights).

[129] *See, e.g.*, 2 WARREN, *supra* note 1, at 306 (referring to "rights of men" but "privileges of Englishmen"). For other examples of later uses of "right" and "liberty" referencing natural law, see The Debates in the Convention of the State of New York (June 25, 1788), *supra* note 47, at 311 (remarks of Melancton Smith) ("What is government itself but a restraint upon the natural rights of the people? What constitution was ever devised that did not operate as a restraint on their original liberties?"); *id.* at 316 (remarks of Alexander Hamilton) (referring to "the perfect balance between liberty and power"). Failure to identify this change of meaning is perhaps the reason Professor Michael Kent Curtis concluded that "privileges and immunities" included all enumerated constitutional rights. *See supra* note 33.

[130] *See, e.g.*, John K. Alexander, *Downer, Silas*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/02/02-00357.html (describing

greater or lesser degree they all relied on British constitutional practice to make their case. A central contention was that the king's subjects in America were entitled to all the constitutional benefits enjoyed by subjects in England, particularly immunity from taxation by anyone but representatives of their own choosing.[131]

An author relying mostly on British jurisprudence was, of course, apt to employ terms in the traditional Anglo-American way. This suggests that he would employ the words "rights" and "liberties" to designate privileges created by law.[132] Illustrative of this usage is

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revolutionary pamphleteer Downer as Rhode Island politician and lawyer); Charles W. Carey, Jr., *Hopkins, Stephen*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/01/01-00420.html (noting that Hopkins served as justice of court of common pleas in Rhode Island); Robert Detweiler, *Bland, Richard*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/01/01-00077.html (noting that Virginia planter Bland had served as justice of the peace); Thomas W. Jodziewicz, *Fitch, Thomas*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/01/01-00286.html (noting that Fitch was prominent Connecticut lawyer); William Pencak, *Adams, John*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12; http://www.anb.org/articles/01/01-00007.html (describing Adams's career as Massachusetts lawyer). Another important colonial pamphleteer was John Dickinson, one of Pennsylvania's leading lawyers. *See* Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN ST. L. REV. 415, 419 (2003) (describing Dickinson's success as Philadelphia attorney). Other principal lawyer-pamphleteers included James Wilson, Alexander Hamilton, and Thomas Jefferson. *See* John K. Alexander, *Wilson, James*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/02/02-00340.html (detailing Wilson's legal practice and pamphleteering efforts); Forrest McDonald, *Hamilton, Alexander*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/02/02-00154.html (listing Hamilton's contributions to law and politics); Merrill D. Peterson, *Jefferson, Thomas*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/02/02-00196.html (noting that Jefferson's successful legal career was cut short by onset of American Revolution).

[131] *See infra* note 133 and accompanying text.

[132] *See, e.g.*, RICHARD BLAND, AN INQUIRY INTO THE RIGHTS OF THE BRITISH COLONIES (1766), *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 1, at 67, 82 ("These Acts . . . deprived the Colonies . . . of the Privileges of English Subjects, and constituted an unnatural Difference between Men under the same Allegiance, born equally free, and entitled to the same civil Rights."); *id.* at 83 (arguing colonists "have . . . a Right to the Liberties and Privileges of Englishmen"); A Son of Liberty (Silas Downer), A Discourse, Delivered at the Dedication of the Tree of Liberty (1768), *in* 1 AMERICAN POLITICAL WRITING, *supra* note 1, at 97, 98 ("They forfeited not the privileges of *Englishmen* by removing themselves hither, but brought with them every right, which they could or ought to have enjoyed had they abided in *England*."); HAMILTON, *supra* note 58, at 29 (referring to right of trial by jury as benefit conferred by law). Bland's use of "right" and "privilege" demonstrates a very mixed pattern. *See, e.g.*, BLAND, *supra*, at 72 ("Every Person therefore who is denied his Share in the Legislature of the State to which he had an original Right, and every Person who from his particular Circumstances is excluded from this great Privilege, and refuses to exercise his natural Right of quitting the Country, but remains in it, and continues to exercise the Rights

the following extract from Thomas Fitch's 1764 tract, *Reasons Why the British Colonies in America Should Not Be Charged with Internal Taxes*:

> By the Constitution, Government and Laws of *Great Britain*, the *English* are a Free People. Their Freedom consists principally, if not wholly, in this general Privilege, that "NO LAWS CAN BE MADE OR ABROGATED, WITHOUT THEIR CONSENT, BY THEIR REPRESENTATIVES IN PARLIAMENT."
>
> . . . .
>
> These being the essential Rights and Privileges of the *British* Constitution, founded on the Principles of the common Law . . . *The King's Subjects in the Plantations*, claim a general Right to the Substance and constitutional Part of them, as their Birth-Right and Inheritance.[133]

On the other hand, many colonial authors buttressed their cause with appeals to natural law, and doing so called for somewhat different language. Stephen Hopkins' tract, *The Rights of Colonies Examined*,[134] is an early example. The tract drew a clear distinction between rights and privileges: "[T]he British subjects in America have equal rights with those in Britain . . . they do not hold those rights as a privilege granted them, nor enjoy them as a grace and favor bestowed, but possess them as an inherent, indefeasible right . . . ."[135] Similarly, the anonymous pamphleteer "Britannus Americanus" relied in part on the "rights, liberties, privileges and

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of a Citizen in all other Respects, must be subject to the Laws . . . ."). But this may be accounted for by his distinction between natural rights and civil rights. *See id.* at 83–84 (explaining difference).

[133] THOMAS FITCH, REASONS WHY THE BRITISH COLONIES IN AMERICA SHOULD NOT BE CHARGED WITH INTERNAL TAXES 3, 5 (New Haven, Mecom 1764).

[134] STEPHEN HOPKINS, THE RIGHTS OF COLONIES EXAMINED (1764), *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 1, at 45.

[135] *Id.* at 49–50. This collection contains numerous examples of such transitional writing. *See, e.g.*, Aequus, *From the Craftsman*, MASS. GAZETTE & BOSTON NEWSLETTER, Mar. 6, 1766, *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 1, at 62, 63 (describing English liberty as " 'the primitive right that every freeholder had of *consenting* to those laws by which the community was to be obliged,' " and referring to this as "fundamental privilege").

immunities of [English subjects],"[136] but also contended that a natural right "circumscribes and limits the power of those, whom they have or shall constitute to be their legislators or governors."[137] And the Massachusetts House of Representatives' circular letter of 1768 stated that there was a "right in nature, engrafted into the British constitution as a fundamental law . . . that what a man hath honestly acquired, is absolutely his own, which he may freely give, but cannot be taken from him without his consent,"[138] and that "American subjects may therefore, exclusive of any consideration of charter rights, . . . assert this natural, constitutional right."[139]

Among the most celebrated of the colonial pamphlets was John Adams's *Novanglus* ("The New Englander"), published in 1775. *Novanglus* contained appeals to British jurisprudence,[140] notably the ruling in *Calvin's Case*[141] that Scottish subjects could inherit under English law.[142] Adams was careful to use the word "privileges" to refer to such benefits, and to benefits promised Americans under

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[136] Britannus Americanus, *Untitled*, BOSTON GAZETTE, Mar. 17, 1766, *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 1, at 88, 89; *see also* Virginia Resolves (May 29, 1765), *reprinted in* 1 WARREN, *supra* note 1, at 403, 403 ("*Resolved*, That the first adventurers and settlers of this his majesty's colony and dominion of Virginia, brought with them, and transmitted to their posterity . . . all the privileges and immunities that have at any time been held, enjoyed, and possessed, by the people of Great Britain.").

[137] Brittanus Americanus, *supra* note 136, at 90; *cf.* HAMILTON, *supra* note 37, at 70 ("The fundamental source of all your errors . . . is a total ignorance of the natural rights of mankind. Were you once to become acquainted with these, you could never entertain a thought, that all men are not, by nature, entitled to a parity of privileges.").

[138] Letter from the House of Representatives of the Province of Massachusetts Bay to Speakers of the Respective Houses of Representatives and Burgesses on the Continent of North America (Feb. 11, 1768), *reprinted in* 1 WARREN, *supra* note 1, at 416, 417–18.

[139] *Id.* at 418.

[140] *See, e.g.*, John Adams, *Novanglus No. IX*, BOSTON GAZETTE, Mar. 27, 1775, *reprinted in* ADAMS, *supra* note 1, at 254, 254–62 (using multiple citations to English case law and commentary); John Adams, *Novanglus No. X*, BOSTON GAZETTE, Apr. 10, 1775, *reprinted in* ADAMS, *supra* note 1, at 262, 262–69 (same).

[141] *See* Adams, *Novanglus No. IX*, *supra* note 140, at 255–56 (referring to decision in *Calvin's Case* as one of "the greatest cases, and most deliberate and solemn judgments, that [was] ever passed"). Alexander Hamilton resorted to *Calvin's Case* for the same purpose. *See* HAMILTON, *supra* note 37, at 57 (citing *Calvin's Case* for discussion of natural law).

[142] Calvin's Case (1572-1616) 7 Co. Rep 1a, 25a–25b, 77 Eng. Rep. 377, 407–08 (K.B.). The court, in turn, appealed to even more ancient sources. *Id.* at 24a, 77 Eng. Rep. at 406 ("Paul was a Jew, born at Tarsus in Cilicia, in Asia Minor; and yet being born under the obedience of the Roman Emperor, he was by birth a citizen of Rome in Italy in Europe, that is, capable of and inheritable to all privileges and immunities of that city." (citing *Acts* 25:10-11)).

For a discussion of *Calvin's Case* in the context of the Privileges and Immunities Clause, see Bogen, *Privileges*, *supra* note 1, at 797–98.

their colonial charters.[143] But he identified "liberty" and "right" primarily with the law of nature. His formula paralleled that of the Massachusetts circular letter:

> English liberties are but certain rights of nature, reserved to the citizen by the English constitution, which rights cleaved to our ancestors when they crossed the Atlantic, and would have inhered in them . . . even although they had taken no patent or charter from the king at all. These rights did not adhere to them the less, for their purchasing patents and charters, in which the king expressly stipulates with them, that they and their posterity should forever enjoy all those rights and liberties.[144]

The argument in the Continental Congress's resolution on the rights of the colonies, adopted October 14, 1774,[145] also relied on multiple sources. It appealed to *rights* "by the immutable laws of nature,"[146] to *rights* granted by law such as the right to vote—universally recognized as a privilege[147]—and to "*immunities and privileges* granted & confirmed to [the colonists] by royal charters, or secured by their several codes of provincial laws,"[148] including the "privilege" of trial by jury.[149]

However:

> When the decision for independence was made, all claims to rights that were based upon royal grants, the common law, and the British constitution became

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[143] *See* John Adams, *Novanglus No. VIII*, BOSTON GAZETTE, Mar. 13, 1775, *reprinted in* ADAMS, *supra* note 1, at 237, 243 (arguing that privileges derived from colonial charter could no more be forfeited than those of "the people of Great Britain").

[144] *Id.* at 240. Note that Adams adopted a view similar to that of Blackstone, but used the term "liberties" rather than "immunities" to refer to natural rights. *Id.*; *see also supra* note 66 and accompanying text.

[145] 1 J. CONT'L CONG. 63 (Oct. 14, 1774), *available at* http://memory.loc.gov/ammem/amlaw/lwjclink.html (follow "Volume 1" hyperlink; then follow "Navigator" hyperlink).

[146] *Id.* at 67.

[147] *See id.* at 68 (tracing colonists' legal rights to their English ancestors); *see also infra* Part IV.B.*4*.

[148] 1 J. CONT'L CONG., *supra* note 145, at 69 (emphasis added).

[149] *Id.*

> theoretically irrelevant. Independence—the very existence of the United States—was unequivocably justified in the Declaration itself by an appeal to "the Laws of Nature and of Nature's God." Quite as clearly, it was declared that the rights of Americans arose from the same source.[150]

The Bill of Rights introducing the 1776 Virginia Constitution exemplified the new usage. It asserted that "all men . . . have certain inherent rights"[151] but that no men "are entitled to . . . separate emoluments or privileges from the community, but in consideration of public services."[152] Similarly, *The Essex Result*, a 1778 pamphlet penned by Theophilus Parsons of Massachusetts (later a leading ratifier), explained in detail how concessions from the government should be distinguished from natural rights, both alienable and unalienable.[153] We also can trace the divergence between rights/liberties and privileges/immunities, and the effects of that divergence, in successive drafts of the Articles of Confederation.[154]

An amusing instance of post-independence usage of these terms appeared in Benjamin Franklin's 1789 satire on the abuses of freedom of the press.[155] Because freedom of the press was not a gift of government, Franklin referred to it as a "liberty."[156] Franklin, a

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[150] MCDONALD, NOVUS, *supra* note 1, at 58–59; *see also* The Debates in the Convention of the Commonwealth of Virginia (June 27, 1788), *supra* note 47, at 657 ("[T]here are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."); *cf.* VA. DECLARATION OF RIGHTS, § 1 (1776) ("That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.").

[151] VA. CONST. of 1776, Bill of Rights, § 1.

[152] *Id.* § 4.

[153] THEOPHILUS PARSONS, THE ESSEX RESULT (1778), *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 1, at 480, 483, 485, 487–89.

[154] *See infra* Part V.

[155] Benjamin Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania, viz., The Court of the Press*, FEDERAL GAZETTE (Phila.), Feb. 12, 1789, *reprinted in* 2 AMERICAN POLITICAL WRITING, *supra* note 1, at 707.

[156] *Id.* at 708. *But see supra* note 127 (pointing out that several post-independence writers thought of freedom of the press, unlike freedom of speech, as a "privilege").

former printer and publisher, saw liberty of the press as a mixed blessing:

> [B]ut if it means the liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my share of it whenever our legislators shall please so to alter the law, and shall cheerfully consent to exchange my *liberty* of abusing others for the *privilege* of not being abused myself.[157]

Ultimately, however, Franklin suggested that instead of restricting liberty and creating a privilege, government could take another course:

> At length, however, I think I have found [a solution] that, instead of diminishing general liberty, shall augment it; which is, by restoring to the people a species of liberty of which they have been deprived by our laws, I mean the *liberty of the cudgel*. . . .
>
> My proposal then is to leave the liberty of the press untouched, to be exercised in its full extent, force, and vigor; but to permit the *liberty of the cudgel* to go with it *pari passu*. Thus, my fellow-citizens, if an impudent writer attacks your reputation, dearer to you perhaps than your life . . . you may go to him as openly and break his head.[158]

IV. PRIVILEGES AND IMMUNITIES IN AMERICAN FORENSIC DISCOURSE AFTER THE DECLARATION OF INDEPENDENCE

A. INTRODUCTION

At this point, we focus again on "privileges" and "immunities"—the two words that did not change meaning—to show how Americans used those terms during the period between 1776 and 1789. This Part relies particularly, but not exclusively, on

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[157] *Id.* at 708–09.
[158] *Id.* at 710.

discourse and other language specifically pertaining to the U.S. Constitution. It draws upon the text of the Constitution itself, state constitutions then in force, contemporaneous enactments and court decisions, the records of the Federal Constitutional Convention (Federal Convention), writings like the Federalist Papers published as part of the ratification debate, and the transcripts of the state ratifying conventions.

B. TYPES OF PRIVILEGES AND IMMUNITIES COMMONLY DISCUSSED

The privileges and immunities Americans had in mind during the period between 1776 and 1789 fell principally into six general categories:

(1) Powers or exemptions for governments or government officials;[159]
(2) Advantages bestowed on aristocrats, nobles, and similar groups;[160]
(3) Benefits granted through the acts and customs of international law;[161]
(4) The "franchise" of suffrage and the resulting political representation;[162]
(5) Preferences bestowed by law on some, but not all, persons and entities pursuant to government regulation of internal affairs;[163] and
(6) Benefits bestowed by positive law on all citizens as an incident of citizenship.[164]

As explained below, the comity provisions of the Articles of Confederation and the Constitution protected only the last category.

1. Powers or Exemptions for Governments or Government Officials. The first category of privileges and immunities consisted of the powers and exemptions granted by law to government officials

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[159] *See infra* notes 165–85 and accompanying text.
[160] *See infra* notes 186–90 and accompanying text.
[161] *See infra* notes 191–200 and accompanying text.
[162] *See infra* notes 201–15 and accompanying text.
[163] *See infra* notes 216–24 and accompanying text.
[164] *See infra* notes 225–59 and accompanying text.

or government entities. Such privileges and immunities were commonly referenced. State constitutions recited privileges of the legislature[165] and of other government officials and agencies.[166] The New Jersey Constitution, for instance, granted the lower house of the legislature an exclusive "privilege" to prepare and alter money bills.[167] Similarly, the constitutions of New York and South Carolina granted to their respective legislatures the "privileges" they enjoyed while those states were colonies.[168]

The records of the Federal Convention contain frequent mention of legislators' privilege from arrest[169] and other governmental privileges, such as the exclusive power of lower houses to initiate money bills.[170] Delegates further discussed the privileges of the

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[165] *See* MD. CONST. of 1776, art. XII ("That the House of Delegates may punish, by imprisonment, any person who shall be guilty of a . . . . breach of privilege, by arresting on civil process, or by assaulting any of their members, during their sitting, or on their way to, or return from the House of Delegates, or by any assault of, or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending on, or on their way to or from the House, or by rescuing any person committed by the House: and the Senate may exercise the same power, in similar cases.").

[166] *See* S.C. CONST. of 1778, art. XXVI ("That justices of the peace shall be nominated by the senate and house of representatives jointly, and commissioned by the governor and commander-in-chief during pleasure. They shall be entitled to receive the fees heretofore established by law; and not acting in the magistracy, they shall not be entitled to the privileges allowed them by law."); *see also* N.J. CONST. of 1776, art. III ("That on the second Tuesday in October yearly, and every year forever (with the privilege of adjourning from day to day as occasion may require) the counties shall severally choose one person . . . .").

[167] *See* N.J. CONST. of 1776, art. VI ("That the Council shall also have power to prepare bills to pass into laws, and have other like powers as the Assembly, and in all respects be a free and independent branch of the Legislature of this Colony; save only, that they shall not prepare or alter any money bill-which shall be the *privilege* of the Assembly . . . ." (emphasis added)).

[168] *See* N.Y. CONST. of 1777, art. IX ("That the assembly, thus constituted, shall choose their own speaker, be judges of their own members, and enjoy the same *privileges*, and proceed in doing business in like manner as the assemblies of the colony of New York of right formerly did . . . ." (emphasis added)); S.C. CONST. of 1778, art. XVI ("And the senate and house of representatives, respectively, shall enjoy all other *privileges* Which have at any time been claimed or exercised by the commons house of assembly." (emphasis added)).

[169] *See, e.g.*, Records of the Committee of Detail, *in* 2 FARRAND, *supra* note 1, at 129, 140 ("The delegates shall be privileged from arrest."); *id.* at 166 ("[T]he Members of each House shall . . . be privileged from Arrest during their Attendance at Congress . . . .").

[170] *See, e.g.*, James Madison, Notes on the Federal Convention (July 5, 1787), *in* 1 FARRAND, *supra* note 1, at 526, 527 (discussing "exclusive privilege of originating money bills"); *id.* at 529 (citing Pierce Butler as "not consider[ing] the privilege concerning money bills . . . of any consequence"); James Madison, Notes on the Federal Convention (July 6, 1787), *in* 1 FARRAND, *supra* note 1, at 540, 544 (citing James Wilson's query as to which political branch "should have an independent disposal of public money"); James

existing Congress,[171] of states,[172] and of the new federal Congress.[173] The Constitution they eventually produced guaranteed a congressional "privilege[ ] from Arrest."[174]

Participants in the ratification debates frequently referred to the privileges of government and government actors. This was notably true of the authors of *The Federalist*.[175] References of the same kind were also prevalent at state ratifying conventions. In Connecticut, Oliver Ellsworth spoke of the "powers and privileges" of the City of

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Madison, Notes on the Federal Convention (July 7, 1787), *in* 1 FARRAND, *supra* note 1, at 549, 551 (referencing William Paterson's refusal to "decide whether the privilege concerning money bills were a valuable consideration"); James Madison, Notes on the Federal Convention (July 14, 1787), *in* 2 FARRAND, *supra* note 1, at 2, 5 (recording Elbridge Gerry's remarks concerning "exclusive privilege of making propositions"); James Madison, Notes on the Federal Convention (Aug. 11, 1787), *in* 2 FERRAND, *supra* note 1, at 259, 262 (referencing Edmund Randolph's reluctance to consider money-bill privilege "whilst a proportional Representation in the Senate was in contemplation").

[171] *See, e.g.*, James Madison, Notes on the Federal Convention (May 29, 1787), *in* 1 FARRAND, *supra* note 1, at 17, 22 ("[P]rovision ought to be made for the continuance of Congress and their authorities and privileges . . . ."); Journal (June 5, 1787), *in* 1 FARRAND, *supra* note 1, at 115, 118 (adopting provision).

[172] *See* William Paterson, Notes on the Federal Convention (July 7, 1787), *in* 1 FARRAND, *supra* note 1, at 555, 555 (quoting James Wilson's remarks on smaller states' proposed "privilege" of equal representation in Senate).

[173] *See, e.g.*, Journal (Aug. 20, 1787), *in* 2 FARRAND, *supra* note 1, at 334, 334 ("Each House shall be the Judge of it's [sic] own privileges . . . ."); James Madison, Notes on the Federal Convention (Aug. 20, 1787), *in* 2 FARRAND, *supra* note 1, at 340, 341 (same); James Madison, Notes on the Federal Convention (Sept. 4, 1787), *in* 2 FARRAND, *supra* note 1, at 496, 503 (remarking on congressional privileges); *see also* James Madison, Notes on the Federal Convention (Aug. 9, 1787), *in* 2 FARRAND, *supra* note 1, at 230, 235 (summarizing legislature's power to regulate naturalization and privileges of citizenship); James Madison, Notes on the Federal Convention (Aug. 10, 1787), *in* 2 FARRAND, *supra* note 1, at 248, 250 ("It was as improper as to allow [Congress] to fix their own wages, or their own privileges.").

[174] U.S. CONST. art. I, § 6, cl. 1.

[175] *See* THE FEDERALIST NO. 19 (James Madison) ("The prerogatives of the emperor are numerous. The most important of them are, his exclusive right to make propositions to the diet . . . to grant privileges not injurious to the states of the empire . . . ."); THE FEDERALIST NO. 37 (James Madison) ("Experience has instructed us, that no skill in the science of government has yet been able to discriminate and define . . . the privileges and powers of the different legislative branches."); THE FEDERALIST NO. 43 (James Madison) ("The exception in favour of the equality of suffrage in the senate, was probably meant as a palladium to the residuary sovereignty of the states . . . . The other exception must have been admitted on the same considerations which produced the privilege defended by it."); THE FEDERALIST NO. 66 (Alexander Hamilton) ("The exclusive privilege of originating money bills, will belong to the house of representatives."); THE FEDERALIST NO. 81 (Alexander Hamilton) ("[T]here is no colour to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way . . . .").

New York.[176] In Massachusetts, various delegates referred to the privileges of towns[177] and the privileges of nations.[178] At the New York convention, Hamilton mentioned the privileges of the British Parliament[179] and of the American states.[180] In North Carolina, Archibald MacLaine referred to the "privilege of the democratic branch."[181] During the Pennsylvania convention, James Wilson noted the relative lack of official privileges in the proposed office of President.[182] In the South Carolina legislative debates over whether to call a state ratifying convention, Rawlins Lowndes assailed a claimed privilege of Henry VIII.[183] In the Virginia convention, Patrick Henry defended the privilege of states to arm their

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[176] Fragment of the Debates in the Convention of the State of Connecticut (Jan. 7, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 185, 196.

[177] *See* Debates in the Convention of the Commonwealth of Massachusetts (Jan. 9, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 2 (reporting resolution of committee to determine whether towns "had exceeded their privileges to send members").

[178] *See* Debates in the Convention of the Commonwealth of Massachusetts (Jan. 16, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 24 (remarks of Caleb Strong) ("Nations have lost their liberties by neglecting their privileges . . . .").

[179] *See* The Debates in the Convention of the State of New York (June 21, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 205, 265 (remarks of Alexander Hamilton) ("Notwithstanding the cry of corruption that has been perpetually raised against the House of Commons, it has been found that that house, sitting at first without any constitutional authority, became, at length, an essential member of the legislature, and have since, by regular gradations, acquired new and important accessions of *privilege* . . . ." (emphasis added)).

[180] *See* The Debates in the Convention of the State of New York (June 27, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 205, 353 (remarks of Alexander Hamilton) ("Will they make themselves more respectable in the view of foreign nations, or of their fellow-citizens, by robbing the states of their constitutional privileges?").

[181] Debates in the Convention of the State of North Carolina (July 25, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 69 (remarks of Archibald MacLaine).

[182] *See, e.g.*, The Debates in the Convention of the State of Pennsylvania (Dec. 11, 1787), *in* 2 Elliot's DEBATES, *supra* note 1, at 415, 523 (remarks of James Wilson) ("Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States?"); *see also* The Debates in the Convention of the State of Pennsylvania (Dec. 4, 1787), *in* 2 Elliot's DEBATES, *supra* note 1, at 415, 480 ("[The President] is placed high, and is possessed of power far from being contemptible, yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*.").

[183] *See* Debates in the Legislative and in Convention of the State of South Carolina (Jan. 16, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 253, 266 (remarks of Rawlins Lowndes) ("The tyrannical Henry VIII. had power given him by Parliament to issue proclamations that should have the same force as laws of the land; but this unconstitutional privilege had been justly reprobated and exploded.").

militias,[184] while William Grayson mentioned the privilege of sovereign powers to alienate territory.[185]

2. Advantages Bestowed on Aristocrats, Nobles, and Similar Groups. Closely related to governmental privileges were those associated with nobility and other persons holding semipublic positions. Like all privileges, these were seen as arising from government grant.[186] State[187] and federal[188] constitutions sought to ban conferral of these sorts of privileges.[189] Anti-Federalists claimed

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[184] *See* The Debates in the Convention of the Commonwealth of Virginia (June 25, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 650 (remarks of Patrick Henry) ("With respect to your militia, we only request that, if Congress should refuse to find arms for them, this country may lay out their own money to purchase them. . . . And shall we be deprived of this privilege?").

[185] *See* The Debates in the Convention of the Commonwealth of Virginia (June 13, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 342 (remarks of William Grayson) ("Territorial dismemberment, or the relinquishment of any other privilege, is the highest act of a sovereign power.").

[186] *See, e.g.*, THE FEDERALIST NO. 69 (Alexander Hamilton) ("[The President] can confer no privileges whatever: The [British King] can make denizens of aliens, noblemen of commoners; can erect corporations with all the rights incident to corporate bodies."); THE FEDERALIST NO. 70 (Alexander Hamilton) ("[T]he consuls, who were generally chosen out of the former body [the plebians], were commonly united by the personal interest they had in the defence of the privileges of their order."); THE FEDERALIST NO. 71 (Alexander Hamilton) (referencing "the privileges of the nobility"); James Madison, Notes on the Federal Convention (June 25, 1787), *in* 1 FARRAND, *supra* note 1, at 397, 398 (quoting Charles Pinckney's remarks on "the honors and privileges the public can bestow").

[187] *See, e.g.*, MASS. CONST. of 1780, pt. 1, art. VI ("No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, law-giver, or judge, is absurd and unnatural."); N.C. CONST. of 1776, Declaration of Rights, § III ("[N]o man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."); *id.* § XXII ("[N]o hereditary emoluments, privileges or honors ought to be granted or conferred in this State."); S.C. CONST. of 1776, art. XIX ("[J]ustices of the peace . . . . not acting in the magistracy, they shall not be entitled to the privileges allowed to them by law."); VA. CONST. of 1776, Bill of Rights, § 4 ("[N]o 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.").

[188] *See* U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State."); *id.* art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility.").

[189] Debates in the Legislature and in Convention of the State of South Carolina (May 17, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 253, 328 (remarks of Charles Pinckney) ("The mischiefs of an aristocracy are dissensions in the ruling orders of the state; an

the proposed federal Constitution did not provide enough protection in this regard, and some state ratifying conventions proposed amendments to strengthen the Constitution's proscription against them.[190]

3. Benefits Granted Through the Acts and Customs of International Law. A third category of privileges and immunities frequently referenced in the newly-independent United States were those arising in diplomatic affairs and international law. Among such privileges and immunities were special benefits conferred on ambassadors and resident aliens. In 1780, two years after a treaty between France and the Congress of the Confederation granting Americans in France certain inheritance tax exemptions, the Delaware legislature enacted a statute extending similar "privileges and immunities" to French citizens living in Delaware.[191] In the 1784 case *Respublica v. de Longchamps*, both James Wilson, a Founder of the first rank,[192] and Chief Justice Thomas McKean, a

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oppression of the lower orders by the privilege of the higher . . . ."); *see also* Debates in the Convention of the State of North Carolina (July 26, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 97 (remarks of James Iredell) (denouncing hereditary nobility).

[190] One Anti-Federalist, "Montezuma," prepared a satirical piece—supposedly written by a Federalist—urging adoption of the Constitution "to secure to our friends *privileges and offices*, which were not to be valued on [sic] under the former government." *Essay by Montezuma*, INDEP. GAZETTEER (Phila.), Oct. 17, 1787, *reprinted in* 3 STORING, *supra* note 1, at 53, 56.

A constitutional amendment proposed at the Virginia ratifying convention in order to win Anti-Federalist votes provided that "no man or set of men are entitled to separate or exclusive public 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, or any other public office, to be hereditary." The Debates in the Convention of the Commonwealth of Virginia (June 27, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 657. The North Carolina convention proposed a similar amendment. Debates in the Convention of the State of North Carolina (Aug. 1, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 243.

[191] *See* An Act for Conferring Certain Privileges and Immunities on the Subjects of His Most Christian Majesty the King of France, Within This State (1780), *reprinted in* 2 LAWS OF THE STATE OF DELAWARE pt. 1, at 701, 702 (John D. Cushing ed., 1981) ("[Resident French subjects] may by testament, donation or otherwise dispose of their goods, moveable and immoveable, in favour of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them, *ab intestat*, without being obliged to obtain letters of naturalization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogatives of provinces, cities or private persons; and the said heirs, whether such by particular title, or *ab intestat*, shall be exempt from all duty called *Droit de Detraction*, or other duty of the same kind . . . .").

[192] *See* Alexander, *Wilson, James*, *supra* note 130 ("Scholars often rank Wilson's importance to the convention as second only to that of James Madison.").

Founder of the second rank,[193] applied the term "privilege" to benefits accorded ambassadors under international law.[194] Similarly, the dissenters at the Maryland ratifying convention referred to "ambassadors and ministers privileged by the law of nations" in their proposed constitutional amendments.[195]

Also in this category were commercial concessions granted to other nations and to foreign nationals pursuant to international agreement. This sort of privilege or immunity was much discussed during the constitutional debates—at the Federal Convention,[196] in state assemblies,[197] and in public writings.[198] Indeed, one of the

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[193] McKean, a signer of the Declaration of Independence for Delaware, was a leading Federalist spokesman at the Pennsylvania state ratifying convention. *See* G.S. Rowe, *McKean, Thomas*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/03/03-00318.html (detailing McKean's career).

[194] *See* Respublica v. de Longchamps, 1 U.S. (1 Dall.) 120, 122 (Pa. Oyer and Terminer, 1784) (citing Wilson's reference to "[t]he necessity of sustaining the law of nations, of protecting and securing the persons and privileges of ambassadors"); *id.* at 125 (citing Chief Justice McKean's reference to "privileges" of ministers).

[195] Address to the People of Maryland (Apr. 21, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 548, 550.

[196] *See, e.g.*, Journal (Aug. 25, 1787), *in* 2 FARRAND, *supra* note 1, at 408, 410 (referring to "immunity" from duties for vessels entering country); James McHenry, Notes on the Federal Convention (Aug. 25, 1787), *in* 2 FARRAND, *supra* note 1, at 420, 421 (same).

[197] *See, e.g.*, Debates in the Legislature and in Convention of the State of South Carolina (Jan. 16, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 253, 267 (remarks of John Rutledge) (discussing commercial treaties); Debates in the Legislature and in Convention of the State of South Carolina (Jan. 17, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 253, 279 (remarks of Charles Pinckney) ("By our treaty with France, we declare she shall have all the privileges . . . with the most favored nation. Suppose a particular state should think proper to grant a particular privilege to Holland, which she refuses to France; would not this be a violation of the treaty with France?"); *id.* at 284 ("They can enjoy their independence without our assistance. If our government is to be founded on equal compact, what inducement can they possibly have to be united with us, if we do not grant them some privileges with regard to their shipping?"); *id.* at 305 ("I cannot think it would have been prudent or fitting to have given the ships of all foreign nations a constitutional right to enter our ports whenever they pleased, and this, too, notwithstanding we might be at war with them; or they may have passed laws denying us the privileges they grant to all other commercial nations . . . ."); *id.* at 320 ("Would the subjects of the emperor in the Netherlands have presumed to contend for, and ultimately to secure, the privileges they demanded?"); The Debates in the Convention of the Commonwealth of Virginia (June 13, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 344 (remarks of James Monroe) (discussing "mutual privileges in point of commercial intercourse and connection"); *id.* at 349–50 (remarks of William Grayson) (discussing privilege of navigating Mississippi River).

[198] *See, e.g.*, THE FEDERALIST NO. 11 (Alexander Hamilton) ("If we continue united, we may, in a variety of ways, counteract a policy so unfriendly to our prosperity. By prohibitory regulations, extending at the same time throughout the states, we may oblige foreign countries to bid against each other, for the privileges of our markets. . . . Would it not enable

Federalists' arguments for ratification was that a stronger central government would be better able to negotiate trading privileges with foreign nations.[199] Anti-Federalist (and future President) James Monroe responded, however, that "[i]t is the interest of the United States to invite all nations to trade with them; to open their ports to all, and grant no exclusive privilege to any, in preference to others."[200]

4. The "Franchise" of Suffrage and the Resulting Political Representation. The fourth kind of "privilege" recognized during the period was the vote and the resulting political representation (hence the term "franchise" to describe the vote). Suffrage and representation were characterized as "privileges" in state constitutions,[201] the state ratifying conventions,[202] and in

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us to negotiate, with the fairest prospect of success, for commercial privileges of the most valuable and extensive kind, in the dominions of that kingdom? . . . And if to this consideration we add that of the usefulness of supplies from this country, in the prosecution of military operations in the West Indies, it will readily be perceived, that a situation so favourable would enable us to bargain with great advantage for commercial privileges."); THE FEDERALIST NO. 22 (Alexander Hamilton) ("No nation acquainted with the nature of our political association, would be unwise enough to enter into stipulations with the United States, conceding on their part privileges of importance . . . .").

[199] *See* THE FEDERALIST NO. 22 (Alexander Hamilton) ("It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance that more strongly demands a federal superintendence.").

[200] The Debates in the Convention of the Commonwealth of Virginia (June 10, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 213 (remarks of James Monroe).

[201] *See, e.g.*, MASS. CONST. of 1780, pt. 2, ch. 1, § 3, art. II ("[E]ach town now incorporated, not having one hundred and fifty rateable polls, may elect one Representative: But no place shall hereafter be incorporated with the privilege of electing a Representative. . . ."); *id.* pt.2, ch. 1, § 2, art. II (referring to voting as "privilege").

[202] *See, e.g.*, Debates in the Convention of the Commonwealth of Massachusetts (Jan. 14, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 5–6 (remarks of Thomas Dawes) ("[T]he right of electing representatives in the Congress . . . will be the acquisition of a new privilege by the people . . . ."); Debates in the Convention of the Commonwealth of Massachusetts (Jan. 16, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 28 (remarks of William Widgery) (referencing franchise as among citizens' "dearest privileges"); *id.* at 29 (remarks of Charles Jarvis) (referencing elections as "essential privilege"); Debates in the Convention of the Commonwealth of Massachusetts (Feb. 5, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 158 (remarks of Fisher Ames) (referring to "the privilege of forming a constitution"); The Debates in the Convention of the State of New York (June 20, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 205, 219 (remarks of John Lansing) ("Conquest can do no more, in the state of civilization, than to subject us to be ruled by persons in whose appointment we have no agency. . . . and, as I suppose a government so organized, and possessing the powers mentioned in the proposed Constitution, will unavoidably terminate in the depriving us of that invaluable privilege . . . ."); *id.* at 226–27 (remarks of Melancton Smith) (discussing reference to representation of slaves as privilege for slaveholders); The

publications such as *The Federalist*.[203] The Northwest Ordinance of 1787 used the term "benefit" to describe the "proportionate representation of the people in the legislature."[204] In that document, "benefit" seems to have been used as a synonym for "privilege."

Although suffrage was a privilege, it was not a privilege incident to citizenship.[205] None of the state constitutions then in force granted the vote to all citizens. The Georgia Constitution of 1777 granted the franchise only to those white male inhabitants of the state, twenty-one years or older, who had resided in the state for at least six months and either: (1) paid taxes and owned wealth amounting to £10; or (b) belonged to "any mechanic trade."[206] The

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Debates in the Convention of the State of New York (June 21, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 205, 256 (remarks of Alexander Hamilton) (referring to election as "invaluable privilege"); The Debates in the Convention of the State of Pennsylvania (Dec. 4, 1787), *supra* note 182, at 464 (remarks of James Wilson) (referring to elections as privilege); The Debates in the Convention of the Commonwealth of Virginia (June 6, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 110–11 (remarks of Francis Corbin) ("While the right of suffrage is secured, we have little to fear. . . . [T]he qualifications which the laws of the states require to entitle a man to vote for a state representative are the qualifications required by this plan to vote for a representative to Congress; and in this state, and most of the others, the possession of a freehold is necessary to entitle a man to the privilege of a vote."); The Debates in the Convention of the Commonwealth of Virginia (June 9, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 185 (remarks of Henry Lee) (referring to "the privilege of representation"); *see also* The Debates in the Convention of the Commonwealth of Virginia (June 5, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 46 (remarks of Patrick Henry) (referring to representation as privilege); The Debates in the Convention of the Commonwealth of Virginia (June 6, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 102 (remarks of Wilson Nicholas) (referring to "our privilege of representation in the federal government"); The Debates in the Convention of the Commonwealth of Virginia (June 14, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 403 (remarks of George Mason) (characterizing voting as privilege); Debates in the Convention of the State of North Carolina (July 30, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 208 (remarks of Richard Spaight) (referring to representation as "privilege"); Debates in the Legislature and in Convention of the State of South Carolina (May 14, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 253, 331 (remarks of Charles Pinckney) (referring to elections as "inestimable privileges").

[203] THE FEDERALIST NO. 60 (Alexander Hamilton) (referring to vote as fundamental privilege).

[204] NORTHWEST ORDINANCE, § 14, art. 2 (1787), *available at* http://avalon.law.yale.edu/18th_century/nworder.asp.

[205] For instance, David Bogen correctly states that a North Carolina participant in the ratification process erred in thinking that the Privileges and Immunities Clause would require nonresident voting, but seems to misunderstand the reason why that opinion was erroneous: "Either voting was not a *privilege or immunity*, or the nature of the privilege was to vote for *one's own* representative." BOGEN, REFERENCE GUIDE, *supra* note 1, at 14. The actual reason the participant's opinion was erroneous was that, while voting was a privilege, it was not a privilege incident to citizenship.

[206] GA. CONST. of 1777, art. IX.

Maryland Constitution of 1776 required those voting for its House of Delegates to be freemen over the age of twenty-one who either: (a) owned a freehold of fifty acres or more within the county in which they lived and voted; or (b) owned some sort of property in Maryland worth at least £30 and had lived within the county where they would vote for the year preceding the election.[207] Such conditions were entirely typical.[208] Only New Jersey formally permitted women to vote, and the State imposed property requirements on both males and females.[209] Some state constitutions disqualified persons from voting if they refused to take a particular oath[210] or for other reasons.[211] Moreover, voting could be disconnected from citizenship in another way: the North Carolina Constitution permitted certain property-holding noncitizens to vote.[212]

For the founding generation, property requirements were not merely holdovers from the colonial past, but the product of a central principle of republican government. The view was nearly universal that good political decision making required decision makers who were financially independent of others who might unduly affect

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[207] MD. CONST. of 1776, art. II.

[208] *See, e.g.*, MASS. CONST. of 1780, pt. 2, ch. 1, § 2, art. II (limiting voters for State Senators to those "having a freehold estate . . . of the value of sixty pounds"); *id.* pt. 2, ch. 1, § 3, art. IV (limiting voters for State Representatives to freeholders "of the annual income of three pounds, or any estate of the value of sixty pounds"); N.Y. CONST. of 1777, art. VII (limiting franchise to male inhabitants who paid taxes or met certain property requirements); PA. CONST. of 1776, § 6 (limiting vote to resident taxpayers and adult sons of freeholders).

[209] *See* N.J. CONST. of 1776, art. IV ("That all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for Representatives in Council and Assembly; and also for all other public officers, that shall be elected by the people of the county at large."). The word "inhabitants" permitted qualified women to vote, and many did. *See generally* Judith Apter Klinghoffer & Lois Elkis, *"The Petticoat Electors": Women's Suffrage in New Jersey, 1776–1807*, 12 J. EARLY REPUBLIC 159 (1992) (reporting evidence of voting habits of women in late eighteenth-century New Jersey).

[210] *See* GA. CONST. of 1777, art. XIV ("Every person entitled to vote shall take the following oath or affirmation, if required, viz: 'I, A B. do voluntarily and solemnly swear (or affirm, as the case may be) that I do owe true allegiance to this State, and will support the constitution thereof; so help me God.' ").

[211] *See* PA. CONST. of 1776, § 32 ("[A]ny elector, who shall receive any gift or reward for his vote, in meat, drink, monies, or otherwise, shall forfeit his right to elect for that time . . . .").

[212] *See* N.C. CONST. of 1776, art. IX ("[A]ll persons possessed of a freehold in any town in this State . . . shall be entitled to vote for a member to represent such town in the House of Commons . . . .").

their decisions.[213] Limiting the franchise to state taxpayers or property owners was thought of as a good government measure.

Founding-Era records also contain references to suffrage and political representation as "rights," particularly at the 1788 North Carolina ratifying convention, where suffrage and political representation were labeled "privileges," "rights," or both.[214] This reminds us that while in the post-independence period the term "liberty" had become fairly well limited to natural liberty and "privilege" and "immunity" to government favors, the word "right" could mean either.[215]

5. Preferences Bestowed by Law on Some, but Not All, Persons and Entities Pursuant to Government Regulation of Internal Affairs. The fifth category of privileges and immunities recognized during this period were those bestowed on politically-favored persons, entities, and places pursuant to government regulation of internal affairs. This was a very large group indeed. It included various business privileges, such as corporate charters,[216] trading concessions granted to some local inhabitants for doing business either at home or abroad,[217] state-granted monopolies,[218] advantages

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[213] *See* Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353, 382–90 (2002–2003) (discussing Founders' view of role of citizen independence in new republic).

[214] Debates in the Convention of the State of North Carolina, *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 65 (remarks of Samuel Spencer) (referring to both "right" and "privilege" of representation); *id.* at 67 (remarks of William Davie) ("[T]his can never deprive the people of the *right* or *privilege* of election"); Debates in the Convention of the State of North Carolina (July 30, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 202 (remarks of William Lenoir) (mentioning "[t]he right of [legislative] representation"); *id.* at 208 (remarks of Richard Spaight) (referring to representation as "privilege").

[215] *See supra* Part III (discussing changes in American discourse during pre-Revolutionary period).

[216] *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *468 (referring to privileges bestowed by corporate charters); Journal (Aug. 20, 1787), *in* 2 FARRAND, *supra* note 1, at 335 (referring to "privileges and immunities" of "Bodies Corporate").

[217] *See, e.g.*, William McHenry, Notes on the Federal Convention (Sept. 6, 1787), *in* 2 FARRAND, *supra* note 1, at 529–30 ("If [the Constitution] comprehends such a power [to provide for the common defense and general welfare], it goes to authorise the legisl. to grant exclusive privileges to trading companies etc."); The Debates in the Convention of the Commonwealth of Virginia (June 16, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 440 (remarks of Edmund Pendleton) ("Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, it could have no effect the moment it would go without that place; for their exclusive power is confined to that [capital] district.").

[218] *See* MCDONALD, NOVUS, *supra* note 1, at 17 (discussing "monopoly privileges").

for particular locales,[219] bounties and awards,[220] and access to land.[221] It also included privileges granted to particular educational institutions,[222] municipalities, and religious sects.[223] Although in that era of mercantilism there was widespread acceptance of such preferences, a trend against this category of privilege already was underway, notably with respect to religious sects.[224]

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[219] The Debates in the Convention of the Commonwealth of Virginia (June 12, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 291 (remarks of William Grayson) ("Congress may give exclusive privileges to merchants residing within the ten miles square, and that the same exclusive power of legislation will enable them to grant similar privileges to merchants in the strongholds within the states. . . . Things of a similar nature have happened in other countries; or else from whence have issued the Hanse Towns, Cinque Ports, and other places in Europe, which have peculiar privileges in commerce as well as in other matters?"); The Debates in the Convention of the Commonwealth of Virginia (June 16, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 431 (reporting similar comments); *see also id.* at 434 ("Look at the other end of the Ohio, towards South Carolina, extending to the Mississippi. See what these, in process of time, may amount to. [Congress] may grant exclusive privileges to any particular part of which they have the possession.").

[220] *See, e.g.*, MASS. CONST. of 1780, pt. 2, ch. V, § 2 ("[I]t shall be the duty of Legislatures and magistrates . . . to encourage private societies and public institutions, rewards and *immunities*, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country . . . ." (emphasis added)); Journal (Aug. 18, 1787), *in* 2 FARRAND, *supra* note 1, at 322 (referencing proposal to empower Congress "[t]o establish . . . rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures"); James Madison, Notes on the Federal Convention (Aug. 18, 1787), *in* 2 FARRAND, *supra* note 1, at 325 (same).

[221] *See* James Madison, Notes on the Federal Convention (July 6, 1787), *in* 1 FARRAND, *supra* note 1, at 541 (quoting Rufus King discussing "privileges" conferred by new congressional plan regarding western expansion).

[222] *See, e.g.*, MASS. CONST. of 1780, pt. 2, ch. V, § 2 ("[I]t shall be the duty of Legislatures and Magistrates . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially the University at *Cambridge*, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and *immunities* . . . ." (emphasis added)); *see also id.* pt. 2, ch. V, § 1, art. I (providing special "privileges" to Harvard University).

[223] *See, e.g.*, N.J. CONST. of 1776, art. XIX ("That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect. who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects."); S.C. CONST. of 1778, art. XXXVIII ("The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges."); Debates in the Convention of the Commonwealth of Massachusetts (Jan. 19, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 44 (remarks of Amos Singletary) (referring to privilege of Christians to serve in office as opposed to adherents of other religions).

[224] *See, e.g.*, PA. CONST. of 1776, § 45 ("And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other

6. Benefits Bestowed by Positive Law on All Citizens as an Incident of Citizenship. The sixth and final group of privileges and immunities consisted of those that were incidents of citizenship—meaning that any citizen could take advantage of them. Unlike the elective franchise, privileges and immunities incident to citizenship were available to married women and children,[225] although women and children might be required to follow special procedures to exercise them.

During the Confederation, the states determined who qualified as citizens and the scope of any privileges attending naturalization.[226] The Federal Convention's proposed constitution gave Congress some control over the subject, since Congress would be able to qualify persons as citizens under federal naturalization laws.[227] During the ratification debate, a New York Anti-Federalist writing as "Sydney" asserted that the combined operation of the naturalization power and the Comity Clause would enable Congress to "absorb all those powers of the state."[228] In fact, though, under the Constitution each state would retain the power to decide what privileges and immunities attached to citizenship within its jurisdiction. The Comity Clause would require only that each state protect the same benefits for visitors.[229] Presumably, the state could require of visiting children and married women the same special procedures that it required for residents in the same category.

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pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this state."); VT. CONST. of 1786, ch. 2, art. XXXVIII (similar provision).

[225] *See supra* note 104 and accompanying text.

[226] *Cf.* James Madison, Notes on the Federal Convention (Aug. 9, 1787), *in* 2 FARRAND, *supra* note 1, at 238 (quoting Gouverneur Morris on "the privileges which emigrants would enjoy among us" and "the privileges allowed to [naturalized] foreigners"); James Madison, Notes on the Federal Convention (Aug. 13, 1787), *in* 2 FARRAND, *supra* note 1, at 271 (referring to "the law under which [naturalized] foreigners held their privileges").

[227] *See* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization.").

[228] *Address by Sydney*, N.Y. JOURNAL, June 13–14, 1788, *reprinted in* 6 STORING, *supra* note 1, at 107, 120.

[229] *See* The Federal Farmer, Letter XVIII (Jan. 25, 1788), *in* AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (1788), *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 360, 368 ("By the constitution itself, the citizens of each state will be naturalized citizens of every state, to the general purposes of instituting suits, claiming the benefits of the laws, &c.").

Privileges incident to citizenship did vary among the states.[230] For example, in 1787 the "privilege" of importing slaves,[231] presumably considered a "privilege" because it violated natural law, remained an incident of citizenship in only a few states.[232] Additionally, a state might grant all of its citizens some of the privileges listed in the fifth category, such as trading benefits. This would require extending those privileges to visitors. Thus, during the North Carolina ratifying convention, William R. Davie, formerly a delegate in Philadelphia, strongly suggested that the Comity Clause applied to trading or other business preferences offered by a state to all its own citizens.[233] A leading Federalist writer, "Cassius," suggested much the same thing.[234] So did "Agrippa," one of the more thoughtful Anti-Federalist authors, who wrote that because of the Comity Clause, "the whole country is to be considered as a trading company, having exclusive privileges."[235] This projected result strongly commended the Constitution to Alexander Hamilton, who wished to prevent states from limiting business preferences only to their own citizens.[236]

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[230] *See* James Madison, Notes on the Federal Convention (June 11, 1787), *in* 1 FARRAND, *supra* note 1, at 199 (quoting remarks of Benjamin Franklin regarding differences among states).

[231] *See* James Madison, Notes on the Federal Convention (Aug. 21, 1787), *in* 2 FARRAND, supra note 1, at 364 (quoting remarks of Luther Martin regarding privilege of slave ownership).

[232] *See* Debates in the Convention of the Commonwealth of Massachusetts (Jan. 25, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 107 (remarks of James Neal) (noting all but two states had abolished slave trade by 1788).

[233] *See* Debates in the Convention of the State of North Carolina (July 24, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 20 (remarks of William Davie) (suggesting that Maryland law "granting exclusive privileges to her own vessels" was "contrary to the Articles of the Confederation").

[234] Cassius, *supra* note 128, at 503 ("This section must also be a source of much advantage to the inhabitants of the different states, who may have business to transact in various parts of the continent.").

[235] Agrippa, *Letter VI*, MASS. GAZETTE, Dec. 14, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 426, 428.

[236] *See* THE FEDERALIST NO. 7 (Alexander Hamilton) ("The competitions of commerce would be another fruitful source of contention. The states less favourably circumstanced, would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbours. Each state, or separate confederacy, would pursue a system of commercial polity peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to those causes of discontent, than they would naturally have, independent of this circumstance.").

There were some privileges incident to citizenship that all states recognized. Some were so important to personal freedom they were sometimes informally called "rights." However, the participants in the constitutional debates seem to have understood that, legally, they were privileges rather than natural rights.[237] An example was the writ of habeas corpus, which was recognized everywhere in America[238] and which was denominated a "privilege" at the Federal Convention,[239] in the state ratifying conventions,[240] and by the Constitution itself.[241]

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[237] *See supra* notes 119–28 and accompanying text. Thus, at the Virginia ratifying convention, James Madison referred to jury trial as a "privilege." The Debates in the Convention of the Commonwealth of Virginia (June 20, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 534 (remarks of James Madison). However, in the debate over the Bill of Rights in the First Federal Congress, James Madison tried to explain the phrase "bill of rights" by identifying jury trial as a "right" other than a natural one: "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." 1 ANNALS OF CONG. 454 (Joseph Gales ed., Washington, Gales & Seaton 1834) (statement of Rep. Madison). It was generally understood, however, that bills of rights were actually bills of rights and privileges. *See infra* note 351 and accompanying text.

[238] *See, e.g.*, MASS. CONST. of 1780, pt. 2, ch. VI, art. VII ("The privilege and benefit of the writ of habeas-corpus shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner . . . .").

[239] *See* Journal (Aug. 20, 1787), *in* 2 FARRAND, *supra* note 1, at 334 (quoting proposition regarding "privileges and the writ of habeas corpus" to be submitted to committee).

[240] *See, e.g.*, Debates in the Convention of the Commonwealth of Massachusetts (Jan. 26, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 108 (remarks of Francis Dunn) (clarifying that writ was privilege incident to citizenship: "[T]he citizen had a better security for his privilege of the writ of habeas corpus"); *id.* at 109 (remarks of Increase Sumner) ("This privilege [of *habeas corpus*] . . . is essential to freedom."); Debates in the Convention of the Commonwealth of Massachusetts (Feb. 1, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 137 (remarks of Samuel Nason) (denoting writ of habeas corpus as "a great privilege indeed"); The Debates in the Convention of the State of New York (July 2, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 399 (remarks of Thomas Tredwell) (referring to writ as "that great privilege, so sacredly secured to us by our state constitutions"); The Debates in the Convention of the Commonwealth of Virginia (June 14, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 203 (remarks of Edmund Randolph) ("That privilege [of habeas corpus] is secured here by the Constitution, and is only to be suspended in cases of extreme emergency."); *id.* at 569 (remarks of William Grayson) (discussing suspension of privilege of writ of habeas corpus); Debates in the Convention of the State of North Carolina (July 29, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 171 (remarks of James Iredell) ("By the privileges of the *habeas corpus*, no man can be confined without inquiry . . . ."). Consistent with the status of habeas corpus and trial by jury as privileges, John Dickinson's plan for a constitution would have protected "the Benefits of the writ of Habeas Corpus and Trial by Juries." John Dickinson's Plan of Government (I), *in* SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787, at 87 (James H. Hutson ed., 1987); *see also* John Dickinson's Plan of Government (II), *in* SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 90 (same language).

[241] *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not

The classification of habeas corpus as a "privilege" was typical of the classification of other standard judicial procedures.[242] Among the procedures repeatedly referred to as "privileges" were trials,[243] trials by jury,[244] jury challenges,[245] appeal processes,[246] procedures granting criminal defendants the same access to witnesses and counsel that the prosecution enjoyed,[247] confrontation by an accused

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be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[242] *See, e.g.*, The Federal Farmer, *supra* note 229, at 368 (expressing concern that Comity Clause could be used to establish fictional diversity jurisdiction); *see also* "Theophrastus," *A Short History of the Trial by Jury* (1787), *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 1, at 693, 695, 696 (referring to challenges to jurymen serving as jurors as "privilege"); Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 618, 619–20 (expressing same concern).

[243] *See* The Debates in the Convention of the Commonwealth of Virginia (June 10, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 236 (remarks of Benjamin Harrison) (referring to "privilege of trial").

[244] *See* Debates in the Convention of Commonwealth of Massachusetts (Jan. 30, 1788), *in* 2 Elliot's DEBATES, *supra* note 1, at 1, 111 (remarks of Abraham Holmes) ("[A] person charged with the crime shall have the privilege of appearing before the jury which is to try him."); The Debates in the Convention of the Commonwealth of Virginia (June 5, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 47 (remarks of Patrick Henry) (referring to jury trial in civil cases as "this best privilege"); The Debates in the Convention of the Commonwealth of Virginia (June 6, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 68 (remarks of Edmund Randolph) ("This privilege [of jury trial in civil cases] . . . is secured by the constitution of each state . . . ."); The Debates in the Convention of the Commonwealth of Virginia (June 20, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 534 (remarks of James Madison) (calling jury trial "privilege"); The Debates in the Convention of the Commonwealth of Virginia (June 24, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 610–11 (remarks of John Dawson) (referring to trial by jury in civil cases as "that inestimable privilege"); Debates in the Convention of the State of North Carolina (July 28, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 1, 145 (remarks of James Iredell) (calling jury trial "valuable privilege"); *id.* at 150 (remarks of Joseph McDowall) (calling jury trial "principal privilege"); Debates in the Legislature and in Convention of the State of South Carolina (Jan. 16, 1788), *in* 4 Elliot's DEBATES, *supra* note 1, at 253, 260 (remarks of Charles Pinckney) (calling civil juries "one of the most invaluable privileges a free country can boast"); *see also* "Theophrastus," *supra* note 242, at 696, 697 (referring to trial by jury as "privilege").

[245] *See* The Debates in the Convention of the Commonwealth of Virginia (June 20, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 546 (remarks of Edmund Pendleton) ("[T]he privilege of challenging, or excepting the jury, is not secured."); *id.* at 558 (remarks of John Marshall) ("But it seems that the right of challenging the jurors is not secured in this Constitution. Is this done by our own Constitution, or by any provision of the English government? Is it done by their Magna Charta, or bill of rights? This privilege is founded on their laws.").

[246] *See id.* at 549 (remarks of Edmund Pendleton) ("An appeal can be had only on application of the defendant, who thus gains a privilege instead of an injury . . . .").

[247] *See* N.J. CONST. of 1776, art. XVI ("[A]ll criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to.").

of the accusers and of the witnesses against him,[248] the opportunity to call for evidence on one's own behalf,[249] and the limitation on forfeiture to the life of the criminal.[250]

Another legal privilege was at stake in *Millar v. Hall*,[251] a 1788 case decided by the Supreme Court of Pennsylvania under the leadership of Chief Justice Thomas McKean. A Pennsylvania creditor sought to enforce a debt against a Maryland debtor who had been given a discharge under Maryland bankruptcy law.[252] The debtor's counsel contended that a discharge in bankruptcy was a "privilege" under the Articles of Confederation's comity clause.[253] The court seems to have agreed, for it concluded that, "under the principles of the law of nations, and the reciprocal obligation of the states under the articles of confederation" the Maryland discharge was binding on citizens of other states.[254] If Justice Washington had been familiar with *Millar*, he might not have interpreted the Constitution's phrase "privileges and immunities" to mean entitlements "in their nature, fundamental; which belong, of right, to the citizens of all free governments."[255] Discharges in bankruptcy, of course, were not of this character.

Under English law, tenure of land was a privilege because all land nominally belonged to the Crown.[256] It was a privilege extended to all British subjects, but limited to them only, as English

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[248] *See* The Debates in the Convention of the Commonwealth of Virginia (June 6, 1788), *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 67 (remarks of Edmund Randolph) (mentioning privilege of "being confronted with" accusers and witnesses).

[249] *Id.* (noting "privilege of calling for evidence in [one's] behalf").

[250] *Id.* at 103 (remarks of George Nicholas) ("The limitation of the forfeiture to the life of the criminal is also an additional privilege.").

[251] 1 Dall. 229 (Pa. 1788).

[252] *Id.* at 229; *cf.* Phelps v. Holker, 1 Dall. 261, 264 (Pa. 1788) (holding that Articles of Confederation should not be construed so that Massachusetts judgment in rem was binding without further inquiry in Pennsylvania).

[253] *Millar*, 1 Dall. at 231.

[254] *Id.* at 232.

[255] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

[256] *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (1793) ("All the country, now possessed by the United States, was then a part of the dominions appertaining to the crown of Great Britain. Every acre of land in this country was then held, mediately or immediately, by grants from that crown."); HAMILTON, *supra* note 37, at 75 ("By means of the *feudal* system the king became, and still continues to be . . . the original proprietor, or lord paramount, of all the lands in England."); *cf.* MCDONALD, NOVUS, *supra* note 1, at 65 ("[A]ll specific property rights derive from the laws of the political society, not from nature . . . .").

law prohibited aliens from owning realty.[257] After independence, Americans continued to view land tenure as a "privilege," and some sought to limit that privilege to citizens.[258] Several newly-independent states enacted laws that banned or set conditions on holdings by people who were not local citizens. As late as 1797, twenty-one years after the switch to republican institutions, the Maryland court deciding *Campbell v. Morris* still characterized land ownership as a "privilege."[259]

Thus, we have seen that Americans in the constitutional era, like their British forebears, thought of "privileges and immunities" as legal benefits granted to citizens or groups by official grace. They represented a very different juristic category from natural rights. Natural rights, to the extent their exercise did not harm others, were inalienable. But local law determined who enjoyed which privileges or immunities. Local law extended some privileges to all citizens if specified procedural conditions were met. As just noted, examples of privileges incident to citizenship included land tenure, access to judicial benefits such as the writ of habeas corpus, and, depending on the state, economic privileges such as licenses or

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[257] *See* Apthorp v. Backus, 1 Kirby 407, 408 (Conn. 1788) ("[I]t appears the plaintiff is an alien;--and therefore, cannot, by law, hold or recover any real estate.").

[258] *See, e.g.*, N.C. CONST. of 1776, art. XL ("[E]very foreigner, who comes to settle in this State having first taken an oath of allegiance to the same, may purchase, or, by other means, acquire, hold, and transfer land, or other real estate; and after one year's residence, shall be deemed a free citizen."); *Apthorp*, 1 Kirby at 411 (discussing Connecticut statute "declaring aliens incapable of purchasing or holding lands in [the] state").

[259] *See* 3 H. & McH. 535, 553–54 (Md. 1797) ("Privilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege . . . . It seems agreed, from the manner of expounding, or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected. The court are [sic] 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.").

On the problems with post-ratification evidence, see Natelson, *Founders' Hermeneutic*, *supra* note 1, at 1289–90. In this instance, however, the fact that the *Campbell* holding was handed down several years after the change from monarchical to republican institutions shows the degree to which the original theory was embedded.

discharges in bankruptcy. At any time, however, a state could alter privileges conceded to some or all of its citizens.

With this background, we are prepared to examine the Privileges and Immunities Clause of the Articles of Confederation, followed by its successor in the Constitution.

V. THE DEVELOPMENT OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE ARTICLES OF CONFEDERATION

A key to understanding the Privileges and Immunities Clauses of both the Articles of Confederation and the Constitution is to be mindful of a fact that most modern writers have overlooked: the founding generation drew a sharp conceptual distinction between *internal state affairs* on the one hand and *interjurisdictional commerce* on the other.

This way of thinking was largely a product of the colonial past. Before independence, internal affairs had been governed primarily by each colony's local assembly, while interjurisdictional commerce had been governed primarily by British imperial trade regulations:[260] the extent to which one colony's internal policy could discriminate against visitors from another colony was limited by common British citizenship, while the extent to which one colony could engage in commercial discrimination was limited by the British law of trade.

A year before independence, Congress began to consider plans of colonial combination. Benjamin Franklin's proposed plan of union of July 21, 1775[261] would have empowered Congress to deal extensively with both internal state affairs and interjurisdictional commerce. By enacting "Ordinances" for the general welfare,[262]

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[260] *See* Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 836–39 (2006) (examining meaning of "commerce" in America prior to ratification of Constitution).

[261] 2 J. CONT'L CONG. 195 (1775).

[262] Article V of Franklin's plan provided:

> That the Power and Duty of the Congress shall extend to the Determining on War and Peace, to sending and receiving ambassadors, and entring [sic] into Alliances, [the Reconciliation with Great Britain;] the Settling all Disputes and Differences between Colony and Colony about Limits or any other cause if such should arise; and the Planting of new Colonies when proper.

Congress could resolve disputes among the states, regulate commerce, and exercise some impact over local policy.[263] Such powers presumably rendered any comity clause unnecessary, and Franklin's plan did not include one. Notably, Franklin's plan retained the traditional identity of "rights" with political privileges.[264]

The following year, but still before the colonies won their independence, John Dickinson prepared the first draft of the Articles of Confederation.[265] Unlike the Franklin plan, it granted Congress no general power to regulate intercolonial commerce or to enact legislation for the general welfare. Instead, it contained two comity clauses. The first, Article VI, was designed to limit each participant's governance of its internal affairs:

> The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.[266]

The second comity clause, Article VII, was directed at intercolonial trade:

> The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and

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> The Congress shall also make ~~and propose~~ such general ~~Regulations~~ Ordinances as tho' necessary to the General Welfare, particular Assemblies ~~from their local Circum~~ cannot be competent to; viz. ~~such as may relate to~~ those that may relate to our general Commerce; or general Currency; to the Establishment of Posts; and the Regulation of our common Forces. The Congress shall also have the Appointment of all General Officers, civil and military, appertaining to the general Confederacy, such as General Treasurer, Secretary, &c.

Id. at 196 (alterations in original).

[263] Only "some impact," because Franklin's Article III stated that "each Colony shall enjoy and retain as much as it may think fit of its own present Laws, Customs, Rights, ~~and~~ Privileges, and peculiar Jurisdictions." *Id.* (alteration in original).

[264] *See supra* note 121 and accompanying text.

[265] MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774–1781, at 126 (1940).

[266] ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. VI (proposed draft July 12, 1776), *available at* http://avalon.law.yale.edu/18th_century/contcong_07-12-76.asp.

> Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony ~~or any Commercial Society, established by its Authority shall~~ enjoy.[267]

Dickinson, a conservative who opposed independence,[268] used the word "colony," rather than "state," and retained the traditional verbal formula in which "rights" and "liberties" were mixed indiscriminately with "privileges" and "immunities." This was true even though the draft was presented to Congress on July 12, 1776, more than a week *after* independence had been declared.

Congressional debate over the Articles of Confederation continued fitfully for nearly a year and a half thereafter. Comparatively little of that debate has been preserved.[269] We do know that a new draft was presented to Congress on August 20, 1776.[270] This draft added a provision for ad hoc congressional adjudication of interjurisdictional disputes: "Every State shall abide by the determinations of the United States in Congress Assembled, on all questions which by this Confederation are submitted to them."[271] It is doubtful whether this new provision actually added anything to congressional power, since the Dickinson draft already specified that Congress would have authority to settle all interstate disputes.[272] However, the new provision was coupled with omission of Dickinson's comity clauses, suggesting once again that congressional regulation and comity clauses were considered to be alternative solutions to the same class of potential problems.

The following two drafts of the Articles of Confederation [273] were

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[267] *Id.* art. VII (alteration in original).

[268] Elaine K. Ginsberg, *Dickinson, John*, *in* AMERICAN NATIONAL BIOGRAPHY ONLINE, *supra* note 12, http://www.anb.org/articles/01/01-00218.html.

[269] *See* Bogen, *Privileges*, *supra* note 1, at 819–23 (presenting summary of debate).

[270] 5 J. CONT'L CONG. 672 (1776).

[271] *Id.* at 678.

[272] *See id.* at 681–82 (comparing Dickinson's original draft to August 20, 1776 draft and showing former granted Congress power to settle "all Disputes and Differences now subsisting, or that hereafter may arise").

[273] The three drafts and the final version included privileges and immunities clauses that Professor Bogen calls "Draft A," "Draft B," and the "final committee draft." Bogen, *Privileges*, *supra* note 1, at 819.

"Draft A" read:

combined by a committee into a third, called the "final committee draft."[274] All of these versions omitted provisions for congressional

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> And for the more certain preservation of friendship and mutual intercourse between the people of the different States in this Union, the Citizens of every State, going to reside in another State, Shall be entitled to all the rights and privileges of the natural born free Citizens of the State to which they go to reside; and the people of each State Shall have free egress and regress for their persons and property to and from every other State, without hinderance, molestation or imposition of any kind. Provided, that if Merchandize of any sort be imported for purposes of traffick within any State, that the person So importing Shall be liable to the Same imposts and duties as the people of the State are by law liable to where Such importations are made, and none other. And provided also that the benefit of this Article Shall extend to the property of the United States, and of any particular State, in the Same manner as to the property of an Individual in any State.

9 J. CONT'L CONG. 888 (1777).

"Draft B" read:

> And the better to secure and perpetuate mutual Friendship and Intercourse between the People of the different States in this Union, ~~Agreed "that,~~ The free Inhabitants of each of these States, Paupers Vagabonds and fugitives excepted, shall be entitled to all Priviledges and Immunities of free Citizens in ~~all and every of said~~ the respective States (~~saving to the Inhabitants of the respective States the Admission of their own Inhabitants and the Sole Management of their own municipal Affairs~~). And the People of each State shall have free Ingress and Egress for their Persons and Property to and from every other State, to trade and traffick, without any Hindrance or Imposition of any Kind whatsoever, provided that if any Merchandise or Commodity be imported into any State for the purpose of Traffick therein, the Person so importing shall be liable to the same Imposts and Duties as the People of the State are by Law liable to where such Importations are made and none other, provided also that the Benefit of this Article shall Extend to the property of the United States and of any particular State in the same Manner as to the property of an Individual.

Id. (alterations in original).

[274] The "final committee draft" read:

> And [the better to secure and perpetuate mutual] friendship and intercourse between the people of the different States in this Union, the Inhabitants of every State [Paupers Vagabonds and fugitives from Justice excepted] going to reside in another State shall be entitled to all the rights and priviledges of the natural born free Citizens of the State to which they go to reside: And the people of each State shall have free [Ingress and Egress] for their persons and property to and from every other state without hinderance, or imposition of any kind, Provided that if Merchandise be imported [into any State] for purpose of trafficking therein, the person so importing shall be liable to the same imposts and duties as the people of the State are by law liable to where such importations are made, and none other, And provided also that the benefit of this article shall extend to the property of the United States, and of any

regulation and instead contained comity clauses. Each comity clause addressed both state internal policy and state commercial policy. Congress then amended the final committee draft to produce the finished version. It was duly incorporated into the Articles, which were completed in November of 1777 and ratified by the thirteenth state in 1781.[275] The finished version of the Articles' comity clause read:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the United States, or either of them.[276]

This wording warrants some explanation. First, because the final draft of the Articles of Confederation granted Congress neither power to limit internal state policy nor power to regulate interstate commerce, it included a two-fold comity clause. That clause contained both a ban on discrimination against out-of-staters or new immigrants in domestic policy making ("shall be entitled to all privileges and immunities of free citizens in the several States"),[277]

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particular State, in the same manner as to the property of an Individual.

Id. at 889 (brackets in original).

[275] *See* Bogen, *Privileges*, *supra* note 1, at 831 ("[I]t was not until 1781 that every state ratified the Articles.").

[276] ARTICLES OF CONFEDERATION art. IV, § 1 (1781).

[277] *Id.*

and a ban on most discrimination in matters of travel and trade ("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").[278]

Second, all reference to "rights" or "liberties" was gone. One of the two versions prepared for the final drafting committee had used the phrase "rights and privileges," while the other employed "Priviledges [sic] and Immunities."[279] The committee chose the former,[280] but Congress opted for the latter.

Third, omission of a congressional power to regulate interstate trade and omission of the words "rights" and "liberties" from the comity clause exemplified how drafts of the Articles of Confederation had moved somewhat away from central authority and toward state autonomy.[281] By protecting "rights," "liberties," or both, earlier drafts potentially would have allowed Congress to define and enforce natural rights. The final version dropped such language and, with it, the potential power.[282] Exemplifying the same trend was another change: In Article VI of Dickinson's proposed draft, a state that abolished a commercial privilege for its own citizens could abolish it for visitors as well, but a state that changed its internal law to abolish a privilege for its own citizens

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[278] *Id.*

[279] *See supra* note 273 and accompanying text.

[280] *See supra* note 274 and accompanying text.

[281] *See supra* notes 261–63 and accompanying text. The trend toward decentralized authority was most dramatically illustrated in the conversion of Article III of the Dickinson draft into Article II of the final Articles. *Compare* ARTICLES OF CONFEDERATION AND PERPETUAL UNION, *supra* note 266, art. III ("Each Colony shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation."), *with* ARTICLES OF CONFEDERATION art. II (1781) ("Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."). The principal effect of this change seems to have been to eliminate from Congress any implied powers.

[282] *See* BOGEN, REFERENCE GUIDE, *supra* note 1, at 13 ("Delegates to the Continental Congress were cautious about imposing obligations on their states. They specified that the free inhabitants receive all 'privileges and immunities of free citizens' rather than all 'rights and privileges of natural born free citizens.' ").

had to retain it for visitors.[283] The final version omitted that restriction on state power.[284]

Fourth, another change in the same direction was the final version's phrase "in the several States."[285] This phrase replaced "the other Colonies"[286] and "the respective States"[287] from earlier drafts. In the English of the time, to speak of the "several" states was to speak of the separate or individual—the severed—states.[288] (The Constitution, too, consistently uses "several" in this manner.[289]) The effect of this change was to reverse implications in earlier drafts that a national standard for privileges or immunities was being erected. Failure to understand this has led some modern commentators into error.[290]

Fifth, the Dickinson draft had provided that "[t]he Inhabitants of each Colony shall henceforth always *have* the same Rights, Liberties, Privileges, Immunities and Advantages, in the other

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[283] *See* ARTICLES OF CONFEDERATION AND PERPETUAL UNION, *supra* note 266, art. VI (granting future colonial inhabitants same rights, privileges, and immunities as current citizens).

[284] *See* Bogen, *Privileges*, *supra* note 1, at 818 (discussing omission of Dickinson's Article VI from revised draft articles).

[285] ARTICLES OF CONFEDERATION art. IV (1781).

[286] ARTICLES OF CONFEDERATION AND PERPETUAL UNION, *supra* note 266, art. VI.

[287] "Draft B" referred to "all Priviledges and Immunities of free Citizens in . . . the respective States." *See supra* note 273.

[288] "Several" could be used in the eighteenth century to mean "a number of." *See, e.g.*, COLLIER, *supra* note 1, at 135 ("The first sort [of friendship] is that real, true, and reciprocal friendship, which was said to subsist . . . between several others . . . ."). But far more often, the word had the meaning of "separate" or "individual." *See id.* ("[I]t is necessary to say something concerning the article of friendship itself, of which, I think, there are to be found three *several* sorts." (emphasis added)); *see also* JOHNSON, DICTIONARY, *supra* note 1 (unpaginated) (defining "several" as "1. Different; distinct; unlike one another. 2. Divers; many. 3. Particular; single: *every tongue brings a* several *tale.* 4. Distinct; appropriate.").

[289] *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); *id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . ."); *id.* art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States."); *id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ."); *id.* art. V ("The Congress . . . shall propose amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States . . . when ratified by the Legislatures of three fourths of the several States . . . ."); *id.* art. VI, cl. 3 ("[T]he Members of the several State Legislatures . . . both of the United States and of the several States, shall be bound by Oath of Affirmation . . . .").

[290] *See, e.g.*, Antieau, *supra* note 1, at 5 (suggesting that "in the several States" means "of the United States").

Colonies"[291] and that "[t]he Inhabitants of each Colony shall *enjoy* all the Rights, Liberties, Privileges, Immunities, and Advantages."[292] In the final version, just as "rights" and "liberties" were dropped, the verbs "have" and "enjoy" were changed to "entitled."[293] This is significant because the changes parallel each other: unlike "have" and "enjoy," the word "entitled" always implied that something had been given or bestowed.[294] After independence, natural rights and liberties were inherent in one's humanity, but privileges and immunities were still bestowed.[295]

Sixth, the persons granted equal access to privileges and immunities in the final version of the clause were "free inhabitants."[296] Earlier drafts had protected "inhabitants," "citizens," "free inhabitants," and then "inhabitants" again.[297] It was clear that slavery was on the delegates' minds. This is confirmed by the decision, reflected in the final draft, to ensure that a visitor leaving a state could take his property with him—and this included *any property*, not merely property carried into the state for commercial purposes, as in earlier versions.[298] All persons, even if not "free inhabitants," were protected by the travel and commercial portion of Article IV.[299]

Seventh, the final version was ambiguous as to whether it protects a universal right to travel or something less. The Dickinson draft seems to have protected only commercial travel, and only to the extent that the host state permitted it for its own

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[291] ARTICLES OF CONFEDERATION AND PERPETUAL UNION, *supra* note 266, art. VI (emphasis added).

[292] *Id.* art. VII (emphasis added).

[293] ARTICLES OF CONFEDERATION art. IV (1781).

[294] *See, e.g.*, JOHNSON, DICTIONARY, *supra* note 1 (unpaginated) (defining "entitle" as "1. To grace or dignify with a title or honourable appellation. 2. To give a title or discriminative appellation. 3. To superscribe or prefix as a title. 4. To give a claim to any thing. 5. To grant any thing as claimed by a title."); *see also* ALLEN, *supra* note 1 (unpaginated) (defining "entitle" as "to grace a person with a title of honour; to call by a particular name; to give a claim or right"); BAILEY, *supra* note 1 (unpaginated) (defining "entitle" as "to give a claim to any thing; to prefix a title").

[295] *See* VA. CONST. of 1776, § 1 (referring to "inherent rights"); *id.* § 4 (referring to persons "entitled" to "privileges from the community").

[296] ARTICLES OF CONFEDERATION art. IV (1781).

[297] *See* Bogen, *Privileges*, *supra* note 1, at 818–19 (discussing earlier drafts).

[298] *See id.* (discussing breadth of final draft).

[299] ARTICLES OF CONFEDERATION art. IV (1781).

citizens.[300] One of the intermediate drafts protected commercial travel unconditionally.[301] Two other drafts seem to have guaranteed all travel unconditionally.[302] The relevant portion of the final version reads: "[A]nd the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."[303]

If one assumes that the comma after "any other State" represents a grammatical stop akin to a semicolon, the Articles of Confederation recognized an unconditional right to travel to another state for any purpose. My personal view is that this represents the more plausible reading of this clause. However, one might well treat this comma as a grammatical nullity—as one of those gratuitous commas of which eighteenth-century writers were so fond. If so, then "free ingress and regress," like "privileges of trade and commerce," depended on the "duties, impositions, and restrictions" imposed by the receiving state on its own inhabitants. That would result in the final version protecting a right to travel for any purpose—not just for commerce—but subject to the conditions the host state applied to its own people.

In summary, the privileges and immunities clause of the Articles of Confederation consisted of two provisions. The first served in lieu of congressional power to regulate internal state affairs, entitling the free inhabitants of any state who visited another state to nondiscriminatory access to benefits that the host state gave to its own citizens. State governments could decide what benefits they would offer their own citizens, so long as they extended those

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[300] *See* ARTICLES OF CONFEDERATION AND PERPETUAL UNION, *supra* note 266, art. VII ("The inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony ~~or any Commercial Society, established by its Authority shall~~ enjoy." (alteration in original)).

[301] *See* 9 J. CONT'L CONG. 888 ("Draft B" reads: "And the People of each State shall have free Ingress and Egress for their Persons and Property to and from every other State, to trade and traffick, without any Hindrance or Imposition of any Kind whatsoever.").

[302] *See id.* ("Draft A" reads: "[A]nd the people of each State Shall have free egress and regress for their persons and property to and from every other State, without hinderance, molestation or imposition of any kind."); *id.* at 889 (noting that "final committee draft" contains similar language).

[303] ARTICLES OF CONFEDERATION art. IV (1781).

benefits to visitors as well. To ensure that only government-granted benefits were protected, the drafters deliberately excised all references to rights and liberties, changing the accompanying verbs accordingly.

The second provision served in lieu of congressional power to regulate interstate commerce. It protected Americans conducting commerce and traveling to other states—probably absolutely, but at least to the same extent as host states protected their own inhabitants. Other than the right to travel, however, the privileges and immunities clause of the Articles of Confederation did not protect natural rights.

VI. THE DRAFTING OF THE PRIVILEGES AND IMMUNITIES CLAUSE AT THE CONSTITUTIONAL CONVENTION AND THE OMISSION OF THE "RIGHT TO TRAVEL"

Insofar as we know, the inclusion of the Comity Clause in the Constitution was first suggested at the Federal Convention by Charles Pinckney, a delegate from South Carolina.[304] His outline of a proposed Constitution contained a provision reading: "Mutual Intercourse – Community of Privileges – Surrender of Criminals – Faith to Proceedings &c."[305]

From May 25 until July 23, 1787, the Convention deliberated and resolved, whereupon it broke from its work and handed its resolutions to a "Committee of Detail" (Committee) to prepare a first draft of the Constitution.[306] John Rutledge of South Carolina chaired the Committee, joined by Edmund Randolph of Virginia, James Wilson of Pennsylvania, Oliver Ellsworth of Connecticut, and Nathaniel Gorham of Massachusetts.[307] Gorham was a businessman, but all the others were leading lawyers in their respective states.[308]

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[304] *See* Papers of Committee of Detail, *in* 2 FARRAND, *supra* note 1, at 129, 134–37 (reproducing putative outline of Pinckney Plan).

[305] *Id.* at 135.

[306] *See* James Madison, Notes on the Federal Convention (July 23, 1787), *in* 2 FARRAND, *supra* note 1, at 87, 95 (documenting motion to establish Committee of Detail "to prepare & report a Constitution comformable" to the proceedings of the Convention).

[307] James Madison, Notes on the Federal Convention (July 24, 1787), *in* 2 FARRAND, *supra* note 1, at 97, 106.

[308] *See* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper*

The Committee assigned to Randolph the task of making an initial outline. We have this outline, and it does not include a privileges and immunities clause.[309] Rutledge then undertook revisions, adding the sentence: "The free (inhabs) Citizens of each State shall be intitled to all Privileges & Immunities of free Citizens in the sevl States."[310] Sometime later, Rutledge also added the following language:

> Any person charged with Treason Felony or high Misdemeanor who shall flee from Justice & be found in any of the U States shall on demd of the executive power of the State from wh. he fled be delivd. up & removed to the State havg Jurisdn of (the tr) the Offence.–
>
> Full Faith & Credit &c.[311]

The Committee reported its draft constitution to the full Federal Convention on August 6, by which time the text had been polished to read:

> The Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.
>
> . . . .
>
> Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence.
>
> . . . .
>
> Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial

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Clause, 55 CASE W. RES. L. REV. 243, 269–71 (2004) (describing backgrounds and talents of members of Committee of Detail).

[309] *See id.* at 271–72 (describing Randolph's role).

[310] Papers of Committee of Detail, *in* 2 FARRAND, *supra* note 1, at 173–74.

[311] *Id.* at 174.

> proceedings of the Courts and Magistrates of every other State.[312]

Although the Convention subjected the Committee's draft to intense editing during the period between August 6 and the Convention's adjournment five weeks later, the first sentence of this portion underwent only changes in capitalization.[313] It ultimately became the Privileges and Immunities Clause of the finished Constitution.

The new provision mirrored its counterpart in the Articles of Confederation in two respects. First, it protected only privileges and immunities, not rights. That this was a deliberate choice is suggested by the fact that the delegates were aware of alternative drafts that included the word "rights." Many members of the Convention[314]—including Committee member James Wilson—were present in the Continental Congress when it debated drafts of the Articles that would have protected rights. More recently, Randolph's kinsman Thomas Jefferson had proposed a bill in the Virginia Legislature to extend to citizens of other states "all *rights*, privileges, and immunities of free citizens in this commonwealth."[315] Nevertheless, the delegates excluded all reference to rights from the Comity Clause so that the final version protected only privileges and immunities. Moreover, the Committee and Convention retained the corresponding verb "entitled" in the sense of receiving something bestowed.[316]

In other respects, however, the new provision differed from its predecessor. Under the Articles of Confederation, the parties entitled to claim the privileges and immunities of citizens in host states were "free inhabitants" of other states.[317] In the Constitution,

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[312] James Madison, Notes on the Federal Convention (Aug. 6, 1787), *in* 2 FARRAND, *supra* note 1, at 177, 187–88.

[313] For the final version accepted by the Convention, see U.S. CONST. art. IV, § 2, cl. 1.

[314] For example, John Dickinson, the author of a draft of the Articles that would have protected rights, represented Delaware at the Convention. *See supra* note 265 and accompanying text.

[315] Thomas Jefferson, A Bill Declaring Who Shall Be Deemed Citizens of This Commonwealth (1779), *reprinted in* 4 FOUNDERS' CONSTITUTION, *supra* note 1, at 487 (emphasis added).

[316] *See supra* note 276 and accompanying text.

[317] ARTICLES OF CONFEDERATION art. IV (1781).

they were "citizens."[318] We can infer the reason for this change. Rutledge, who penciled it in,[319] was a slaveholder and a member of the Convention's most pro-slavery state delegation, South Carolina.[320] The effect of his alteration would be to prevent African-Americans who had obtained freedom in other states, but not full citizenship, from claiming the rights of citizens in South Carolina. It is possible, as Charles Pinckney subsequently suggested,[321] that the South Carolinians were unaware that free blacks already enjoyed the privileges of citizenship in some states.[322] Later in the Convention, the South Carolina delegation sought a fugitive slave clause to ensure that slaves could not rely on differences in state laws to obtain their freedom.[323] The Convention approved this unanimously, apparently as a quid pro quo for denying the South Carolinians a constitutional requirement allowing Congress to adopt any "navigation act" by a two-thirds vote.[324]

The Articles of Confederation had excluded from the class protected by its comity clause all paupers and vagabonds.[325] The Federal Convention removed this exclusion.[326] Perhaps the

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[318] U.S. CONST. art. IV, § 2, cl. 1.

[319] *See* Papers of Committee of Detail, *in* 2 FARRAND, *supra* note 1, at 137 n.6, 173–74 (showing Rutledge's edits).

[320] JAMES HAW, JOHN & EDWARD RUTLEDGE OF SOUTH CAROLINA 17 (1997).

[321] *See* Charles Pinckney in the House of Representatives (Feb. 13, 1821), *in* 3 FARRAND, *supra* note 1, at 445, 446 ("[T]he article on which now so much stress is laid, and on the meaning of which the whole of this question is made to turn, and which is in these words: 'the citizens of each State shall be entitled to all privileges and immunities in every State,' having been made by me, it is supposed I must know, or perfectly recollect, what I meant by it. In answer, I say, that, at the time I drew that constitution, I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen, nor could I then have conceived it possible such a thing could have ever existed in it; nor, notwithstanding all that has been said on the subject, do I now believe one does exist in it.").

[322] *See generally* Stanton D. Krauss, *New Evidence that* Dred Scott *Was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction*, 37 CONN. L. REV. 25 (2004) (arguing that most in founding generation did recognize that blacks could have state citizenship).

[323] *See* James Madison, Notes on the Federal Convention (Aug. 28, 1787), *in* 2 FARRAND, *supra* note 1, at 443 ("Pinkney was not satisfied with [the Privileges and Immunities Clause]. He seemed to wish some provision should be included in favor of property in slaves. . . . Mr. [Pierce] Butler and Mr. Pinkney moved 'to require fugitive slaves and servants to be delivered up like criminals.' ").

[324] *See* James Madison, Notes on the Federal Convention (Aug. 29, 1787), *in* 2 FARRAND, *supra* note 1, at 447, 453–54 (outlining voting sequence and outcomes).

[325] ARTICLES OF CONFEDERATION art. IV (1781).

[326] U.S. CONST. art. IV, § 2, cl. 1.

delegates recognized that poor financial status was no reason to deny citizens such basic privileges as habeas corpus and trial by jury.[327] The Federal Convention also removed an exclusion for fugitives from justice, who were dealt with by a new extradition clause.[328]

The Convention deleted the Articles' protection for the guarantee of "free ingress and regress to and from any other State" and "[enjoyment of] all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."[329] Some commentators who subscribe to the view that the Constitution's Comity Clause protects a right to travel have confessed that they find this deletion puzzling,[330] though various explanations have been proposed. Professor Antieau suggests that the Convention was "not primarily concerned with protecting peddlers in their interstate peregrinations."[331] Anyone reasonably familiar with the Constitution's historical background arguably knows that the Founders did not share Professor Antieau's dismissive view of commercial freedom. Indeed, securing commercial consistency among states was a principal motivation for calling the Federal Convention.[332]

The Supreme Court has said that the omission had no substantive effect anyway,[333] because the right to travel inheres in

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[327] *See supra* notes 242, 244 and accompanying text.

[328] *See* U.S. CONST. art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

[329] ARTICLE OF CONFEDERATION art. IV (1781).

[330] *See, e.g.*, 4 ROTUNDA & NOWAK, *supra* note 1, § 18.38(a) (stating that Clause protects right to travel); *id.* § 18.38(b) (conceding that although right to travel is protected explicitly in Articles, "the reason for its exclusion [from the Constitution] is not clear").

[331] Antieau, *supra* note 1, at 6.

[332] This was even conceded by Anti-Federalists. *See* Address of the Minority of the Pennsylvania Convention (Dec. 12, 1787), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 268, 268 (Bruce Frohnen ed., 2002) ("[A]ll now agreed that it would be advantageous to the union to enlarge the powers of Congress; that they should be enabled in the amplest manner to regulate commerce.").

[333] *See* Austin v. New Hampshire, 420 U.S. 656, 661 (1975) ("[T]he [Privileges and Immunities Clause] was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the clause in fashioning a single nation.").

the "privileges and immunities" of citizenship and in the nature of the union itself.[334]

One drawback to this argument is that it reverses the usual evidentiary presumption that a change in language signifies a change in meaning. So to buttress it, the Court has cited Charles Pinckney's subsequent assertion that the new clause was "formed exactly upon the principles of the 4th article of the present Confederation."[335]

An obvious response is that even the omitted language may not have actually encompassed a universal right to travel, but only a limited privilege of visitors to be free of restrictions to the same extent as locals.[336] Thus, one accepting Pinckney's claim of identity still need not concede a universal right to travel in the constitutional provision. But a more fundamental answer emerges when one

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[334] *See* United States v. Guest, 383 U.S. 745, 758 (1966) ("The reason [the right to travel finds no explicit mention in the Constitution] . . . is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."). Various commentators agree. *See, e.g.*, BOGEN, REFERENCE GUIDE, *supra* note 1, at 21 (citing *Austin*, 420 U.S. at 661); Bogen, *Privileges*, *supra* note 1, at 796 ("[T]he privileges and immunities clause was not a natural law, but was solely concerned with creating a national citizenship."); Forte & Rotunda, *supra* note 1, at 270 ("[T]here were specific practical effects to the guarantees of privileges and immunities. . . . [A]ny freeman had the right to travel and take up residence within any of the English colonies.").

[335] *Austin*, 420 U.S. at 661 n.6 (quoting CHARLES PINCKNEY, OBSERVATIONS ON THE PLAN OF GOVERNMENT SUBMITTED TO THE FEDERAL CONVENTION (1787), *reprinted in* 3 FARRAND, *supra* note 1, at 106, 112); *see also* Zobel v. Williams, 457 U.S. 55, 79 (1982) (O'Connor, J., concurring) (same). Pinckney's full discussion of Article IV reads:

> The 4th article, respecting the extending the rights of the Citizens of each State, throughout the United States; the delivery of fugitives from justice, upon demand, and the giving full faith and credit to the records and proceedings of each, is formed exactly upon the principles of the 4th article of the present Confederation, except with this difference, that the demand of the Executive of a State, for any fugitive, criminal offender, shall be complied with. It is now confined to treason, felony, or other high misdemeanor; but, as there is no good reason for confining it to those crimes, no distinction ought to exist, and a State should always be at liberty to demand a fugitive from its justice, let his crime be what it may.

PINCKNEY, *supra*. Comments by several other Convention delegates can be read as disputing a claim that the clauses were identical. *See, e.g.*, The Debates in the Convention of the Commonwealth of Virginia, *supra* note 47, at 454 (remarks of James Madison) (explaining that final clause of Article IV, section 2 was "expressly inserted, to enable owners of slaves to reclaim them"); Report of the North Carolina Delegates to Governor Caswell (Sept. 18, 1787), *reprinted in* 3 FARRAND, *supra* note 1, at 83, 84 ("The Southern States have also a much better Security for the Return of Slaves who might endeavour to Escape than they had under the original Confederation.").

[336] *See supra* note 303 and accompanying text.

considers together: (1) the Founders' sharp conceptual distinction between governmental power over state "internal police" *versus* governmental power over interjurisdictional commerce;[337] (2) the Constitution's grant of authority only over the latter; and (3) the history of previous efforts at federal constitution-drafting.

American efforts to draft a constitution during the Revolutionary Era commenced, it will be recalled, with Franklin's proposed Articles of Confederation.[338] Both Franklin's original draft and the August 20, 1776 draft granted Congress considerable power over *both* internal state affairs and interjurisdictional commerce.[339] These grants rendered unnecessary any comity clauses curbing state discrimination in internal policy or state discrimination in commerce and travel.[340] Neither draft contained either kind of clause.[341]

On the other hand, both Dickinson's draft and the final version of the Articles denied Congress authority over *either* domestic policy or interjurisdictional commerce.[342] Accordingly, each contained a two-fold comity clause prohibiting state discrimination in either internal affairs or travel and commerce.

The powers granted by the Constitution lay midway between the extremes. The Constitution did not grant Congress power over internal state policy,[343] but it did grant Congress full power over interstate commerce—a power its drafters expected would be employed to prevent state abuses.[344] Hence, the drafters inserted only a Comity Clause of the "internal affairs" type. The terms of interstate trade and travel would be fixed by Congress, not the Constitution. In other words, the real reason no constitutional right

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[337] *See supra* note 260 and accompanying text.

[338] *See supra* notes 261–64 and accompanying text.

[339] *See supra* notes 261–64 and accompanying text.

[340] *See supra* note 263 and accompanying text.

[341] *See supra* notes 261–64 and accompanying text.

[342] *See supra* note 267 and accompanying text.

[343] *See generally* Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003) (detailing broad areas that advocates of proposed Constitution represented would remain within exclusive state authority).

[344] *See* James Madison, Notes on the Federal Convention (Aug. 21, 1787), *in* 2 FARRAND, *supra* note 1, at 359–60 (quoting Oliver Ellsworth's explanation that Congress could contain state abuses of residual commercial powers).

to travel was inserted into the Privileges and Immunities Clause is simply because there was to be no constitutional right to travel.

This conclusion is in tension with pronouncements by the modern Supreme Court. In *United States v. Guest*, for example, the Court observed that "[a]lthough there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists."[345] What this statement amounts to is: "We don't know where the right to travel is located in the Constitution, but it must be in there somewhere."

Actually, it's not.

VII. THE ORIGINAL MEANING OF THE PRIVILEGES AND IMMUNITIES CLAUSE AT THE RATIFICATION

The foregoing discussion enables us to reconstruct, with a fair degree of certainty, the public meaning of the Comity Clause at the time of ratification. Because there is an absence of evidence to the contrary, it is reasonable to presume that the ratifiers accepted this meaning when they approved the Constitution.[346]

A. THE "PRIVILEGES AND IMMUNITIES" OF STATE CITIZENSHIP DID NOT INCLUDE LOCALLY-ENUMERATED NATURAL RIGHTS

A significant number of states—but not all[347]—inserted bills of rights in their early constitutions, although some of these bills were quite short and, to our way of thinking, incomplete. By way of illustration, the South Carolina bill of rights protected the natural right of freedom of the press, but not the natural right of free speech.[348]

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[345] 383 U.S. 745, 759 (1966) (footnote omitted).

[346] *See supra* notes 41–43 and accompanying text.

[347] *See, e.g.*, N.Y. CONST. of 1777 (omitting any bill of rights).

[348] *See* S.C. CONST. of 1778, art. XLIII (providing protection for press but failing to extend same protection to speech); *see also id.* art. XXXVIII (requiring clergy to agree that "[n]o person whatsoever shall speak anything in their religious assembly irreverently or seditiously of the government of this State").

Even some of the "rights" included were recognized to be privileges rather than rights of nature—trial by jury,[349] for example. Indeed, it was widely acknowledged that the very phrase "bill of rights" was troublesome.[350] So, to be more accurate, some states denominated these charters as "bills of rights and privileges."[351] To the extent that such bills protected natural rights theoretically unalterable by the legislative power, they were, as Hamilton remarked, "intended as limitations of the power of the government itself."[352] To the extent, however, that they guaranteed privileges, they protected only grants by the government or by the sovereign. The fact that both natural rights and legal privileges were enumerated in "bills of rights" did not alter the fact that natural rights and legal privileges were distinct concepts. Enumerating a natural right in a state constitution did not convert it into a privilege or immunity.

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[349] *See* VA. CONST. of 1776, Bill of Rights, § 8 ("That in all capital or criminal prosecutions a man hath a right to demand . . . a speedy trial by an impartial jury of twelve men of his vicinage . . . ."); *cf. supra* note 244 and accompanying text.

[350] *See, e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton) ("For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"); *see also* PARSONS, *supra* note 153, at 488–89 (explaining that bill of rights should include both those natural rights retained by the people and government guarantees—i.e., privileges—conferred in exchange for those alienable natural rights the people have surrendered).

[351] *See* N.J. CONST. of 1776, art. XVIII (referring to jury trial as "right" and freedom of religion as "privilege"); *id.* art. XXII (referring to "the rights and privileges contained in this Charter"); N.Y. CONST. of 1777, art. XIII (referring to "the rights or privileges secured to the subjects of this State by this constitution"); PA. CONST. of 1776, § 10 (requiring that legislators swear or affirm that "as a member of this assembly, I will not propose or assent to any bill, vote, or resolution . . . that shall have a tendency to lessen or abridge [the people's] rights and privileges, as declared in the constitution of this state"); VT. CONST. of 1786, art. XXXIX ("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 presence whatsoever."); THE FEDERALIST NO. 84 (Alexander Hamilton) (noting that New York constitution protected both rights and privileges despite lack of formal bill of rights); Valerius, *supra* note 25, at 333 (noting that bills of rights protect both "rights and privileges"); The Debates in the Convention of the Commonwealth of Virginia, *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 318 (remarks of Patrick Henry) (stating that Virginia Bill of Rights "secures [the citizens'] most valuable rights and privileges").

[352] THE FEDERALIST NO. 84 (Alexander Hamilton).

B. WHY WERE NATURAL RIGHTS NOT INCLUDED?

Why would the Founders draft and approve two basic charters of government—the Articles of Confederation and the Constitution—that required states to confer upon visitors equality of *privileges*, but not equality of *natural rights*? If a Massachusetts citizen visited South Carolina, why guarantee him access to South Carolina courts, but neither freedom of speech, unenumerated in the South Carolina constitution, nor freedom of the press, which was enumerated?

We can deduce at least four reasons. First, privileges and immunities were created by each state's positive law. Their identity and scope were subject to ready judicial determination. The scope of natural rights might be much less certain. To the extent that courts or other agencies of the federal government define and enforce reputed rights, those courts and agencies would become involved in setting fundamental internal state law. Most in the founding generation did not want this to happen.[353]

Second, few in the founding generation saw the states as threats to individual rights,[354] except in a handful of categories where there had been specific abuses. These abuses pertained mostly to criminal and economic matters, and were addressed in Article I, Section 10 of the Constitution.[355] During the ratification debates, many suggested constitutional amendments, but no one suggested forcing the states to honor additional rights. In the First Congress, James Madison did propose an amendment providing that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or

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[353] Recognition of this can be found in the conciliation proposal of July 10, 1787, by Edmund Randolph—the chief proponent of the Virginia Plan—which would have granted sweeping powers to Congress to impact internal state policy. Edmund Randolph's Suggestion for Conciliating the Small States (July 10, 1787), *in* 3 FARRAND, *supra* note 1, at 55. Nevertheless, Randolph proposed to mollify the smaller states by ceding them an equal voice in the Senate as to any bill "regulating the rights to be enjoyed by citizens of one State in the other States." *Id.* Of course, the Convention later rejected the congressional power part of the Virginia Plan entirely in favor of a scheme of enumerated powers. *See* Natelson, *supra* note 343, at 473 (discussing replacement of Virginia Plan language with enumerated powers).

[354] *See* Robert J. Reinstein, *Foreward: On the Judicial Safeguards of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 343, 350 (2008) (noting that most Founders believed national government to be greatest threat to individual rights).

[355] *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

the trial by jury in criminal cases."[356] Madison's proposal was defeated.

Third, states and their delegates may well have objected to recognizing rights in visitors—such as freedom of the press or of speech—that would have empowered those visitors to participate in local political life. Even today, many are disturbed when locally-influential newspapers and broadcasters are owned by out-of-state interests. Few Virginians probably would have wanted to open their political system to visiting New Englanders or New Yorkers. The reverse also was true: when James Madison dabbled in New York politics via his authorship of some of the *Federalist* essays, he kept his identity a secret.[357]

Fourth, even if some states were willing to recognize the rights of some classes of visitors, those states may have balked at recognizing the rights of other classes. If a free African-American with Massachusetts citizenship visited South Carolina on business, South Carolina might acquiesce in his conducting that business. But South Carolina might well object to his exercising the natural rights to bear arms or to give speeches on street corners. States willing to grant accused vagabonds the privilege of jury trials might balk at allowing them the right to assemble.[358]

Thus, the goal of the Comity Clause, like the rest of Article IV, was the modest one of addressing technical points of federalism.[359] It was not concerned with broad issues of freedom.

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[356] 1 ANNALS OF CONG. 435 (Joseph Gales ed., Wash., Gales & Seaton 1834) (statement of Rep. Madison).

[357] *See* Talley v. California, 362 U.S. 60, 65 (1960) ("Even the *Federalist Papers*, written in favor of the adoption of the Constitution, were published under fictitious names.").

[358] *Cf.* ARTICLES OF CONFEDERATION art. IV (1781) (excluding "paupers, vagabonds, and fugitives" from some protections afforded by this article).

[359] *See* John M. Gonzales, Comment, *The Interstate Privileges and Immunities: Fundamental Rights or Federalism?* 15 CAP. U. L. REV. 493, 495 & n.12 (1986) (arguing out that several provisions of Article IV were designed to make federalism function better by limiting states' use of their reserved powers). This also was the goal of Article IV, Section 4 of the Constitution, which guarantees to each state a republican form of government. U.S. CONST. art. IV, § 4. This section was adopted largely because the Founders' historical investigations led them to conclude that, in federations with both monarchical and republican members, the former tended to destabilize and dominate the latter. *See* The Debates on the Convention in the Commonwealth of Virginia, *in* 3 Elliot's DEBATES, *supra* note 1, at 1, 130 (remarks of James Madison) (indicating that King Philip of Macedon "acquired sufficient influence to become a member of the [Amphictyonic League]" and that "[t]his artful and insidious prince soon after became master of their liberties").

C. EFFECT OF THE CLAUSE

Under the original meaning of the Comity Clause, if a state bestowed a benefit (other than mere recognition of a natural right) on its citizens as an incident of citizenship, then that state was required to extend the same benefit to American citizens visiting from other states. Visitors could employ the same procedures for acquiring tenure of real property, creating and enforcing debts, and accessing the courts that local citizens employed.[360] As long as a state protected its own citizens with trial by jury and the writ of habeas corpus, it had to extend those procedures to visitors. States were free to alter those privileges, or any other privileges, so long as locals and visitors were treated alike.[361] If a state adopted programs available to all its citizens on an equal basis—such as general incorporation laws,[362] bankruptcy laws, programs of rewards, or bounties—the state had to offer them to visitors as well. Voting was not a privilege incident to citizenship, and so was not subject to the Clause.[363]

Whether a person was entitled to the benefit of the Comity Clause depended on whether that person was a citizen of one of the United States. That was a matter for the law of the home state, modified only by federal naturalization laws. The Clause would protect all citizens, including women and minors, but it would not protect aliens or slaves.[364]

The Clause did not guarantee a general right to travel, so a host state had the power to impose travel restrictions on visitors, at least to the same extent the state imposed them on locals.[365] Congress could, and was expected to, remedy abuses of this power.[366] The Clause did not protect visitors in the exercise of mere natural rights,

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[360] *See supra* Part IV.B.*6* (identifying certain privileges typically incidental to citizenship).

[361] *See* Bogen, *Privileges*, *supra* note 1, at 796 (noting that "privileges and immunities [are] an evolving concept"); Forte & Nowak, *supra* note 1, at 271 ("[A] state could revise or repeal a traditional privilege or immunity, and the nonresident had no right to claim it for himself.").

[362] The first such general incorporation law was not passed until several decades after the Founding, by New York. FORREST MCDONALD, STATES' RIGHTS AND THE UNION 85 (2000).

[363] *See supra* Part IV.B.*4*.

[364] *See supra* notes 319–24 and accompanying text.

[365] *See supra* notes 329–45 and accompanying text.

[366] *See supra* note 344 and accompanying text.

such as the right to keep and bear arms, the right of property, the right to earn a living, or the freedoms of speech, press, assembly, or religion. This was true even when those rights were enumerated in the host state's constitution.[367] However, any privileges a state granted to its citizens in vindication of those rights had to be extended to visitors. If citizens were permitted to convey land by deed, visitors could employ the same method. If an occupational license was available on easy terms to citizens, it had to be made available to out-of-staters on the same terms.[368]

VIII. ORIGINAL MEANING AND MODERN CONDITIONS: SOME PROBLEMS

A. NEW PRIVILEGES CREATED BY STATES SINCE THE FOUNDING

The results reached in many of the Supreme Court's Comity Clause cases agree with the results that would have been reached by applying the original meaning. The Court has announced that the Clause protects out-of-staters from discrimination concerning occupational licenses,[369] employment opportunities,[370] taxes[371] and tax exemptions,[372] court procedures,[373] health services,[374] and real

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[367] *See supra* Part VII.A.

[368] *See supra* notes 233–36 and accompanying text.

[369] *See* Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985) (holding state may not discriminate against nonresidents in issuance of licenses to practice law); Mullaney v. Anderson, 342 U.S. 415, 416–17 (1952) (striking down commercial fishermen license fees differential based on citizenship).

[370] *See* Hicklin v. Orbeck, 437 U.S. 518, 520–21, 531 (1978) (invalidating Alaska employment statute preferring residents to nonresidents).

[371] *See* Austin v. New Hampshire, 420 U.S. 656, 657, 668 (1975) (invalidating discriminatory commuter tax); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 424, 429 (1870) (invalidating discriminatory business license tax).

[372] *See* Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 315 (1998) (invalidating denial of alimony deductions to nonresidents).

[373] *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 468 U.S. 888, 894 (1988) (applying Commerce Clause to strike down Ohio tolling statute for suits against nonresident defendants). *But see* Canadian N. Ry. Co. v. Eggen, 252 U.S. 553, 562 (1920) ("[T]he constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens.").

[374] *See* Doe v. Bolton, 410 U.S. 179, 200 (1973) (invalidating residency requirement for abortion services).

estate tenure.[375] The founding generation would have recognized all of these as privileges. Moreover, the same rationale that led the founding generation to consider real property tenure a privilege certainly would support the Supreme Court's conclusion that fishing in state-owned ocean banks is protected by the Clause.[376] As a matter of original meaning, the Clause was not designed to protect rights, but that makes little difference today because the modern Supreme Court generally enforces rights against states through other parts of the Constitution.[377] Under the original meaning, a state administering a health care program (a privilege) for its own citizens should make it available to visitors during the time of their visit. The Court is also well on its way toward this outcome, for it has relied on other parts of the Constitution to abolish significant residency requirements for social programs.[378]

Differences in results between modern and originalist interpretations arise mostly because the Supreme Court: (1) sustains state denial of any privilege the Court does not consider "fundamental"; and (2) sustains state denial of even fundamental privileges by laws that survive a form of intermediate scrutiny—that is, laws that bear a "substantial relationship" to substantial objectives.[379] Hence, the Court has held that states need not make recreational hunting licenses available on the same terms for visitors as for residents because recreational hunting is not "fundamental."[380] It is generally presumed that the Court would uphold tuition preferences for local residents at state universities, either because a cheap state university education is not

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[375] *See* Blake v. McClung, 172 U.S. 239, 254–55 (1898) (invalidating Tennessee law limiting foreign corporations' right to mine).

[376] Toomer v. Witsell, 334 U.S. 385, 399 (1948).

[377] *See* CHEMERINSKY, *supra* note 1, at 470 ("[G]enerally, there is no need to use the privileges and immunities clause to protect constitutionally guaranteed rights. If a state were to prevent out-of-staters from engaging in religious worship, a challenge certainly could be brought under the privileges and immunities clause. But, in reality, the suit would be brought under the First Amendment . . . .").

[378] *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 510–11 (1999) (applying Privileges or Immunities Clause of Fourteenth Amendment to invalidate law limiting welfare benefits of newly-arrived residents); Shapiro v. Thompson, 394 U.S. 618, 627 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974) (applying Equal Protection Clause to invalidate statutory prohibition of welfare benefits to residents of less than one year).

[379] CHEMERINSKY, *supra* note 1, at 473.

[380] Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978).

fundamental or because differential tuition survives intermediate scrutiny.[381] The original meaning of the Comity Clause, however, would compel the opposite result in the cases of both hunting licenses and state universities.[382]

As a matter of policy, one can foresee objections to the application of the original meaning to hunting licenses or public universities. Why should nonresidents, who do not contribute financially to such programs, enjoy equal access to them? The answer must be found not in our own policy preferences, but in the policies that motivated the Comity Clause.

One of these policies was to forestall hostility among states. Another was to assure open national markets. A third was to promote economic efficiency.[383] A state that discriminates against out-of-state applicants for licenses or university admissions certainly risks provoking interstate hostility. A state that imposes involuntary taxes on citizens to subsidize hunting opportunities or university programs arguably distorts the relevant markets by creating more supply than there would be if these services were unsubsidized. When the state discriminates among users of a service for reasons other than the respective cost of providing the service, the state arguably distorts the market further. Applying the original meaning of the Privileges and Immunities Clause would require states to either: (1) charge the same rates to all users; or (2) withdraw from direct participation in the relevant market. Either or both courses of action may conflict with our own policy

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[381] *See, e.g.*, Francesca Strumia, *Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity*, 12 COLUM. J. EUR. L. 713, 741 (2006) ("The Supreme Court has repeatedly held that a distinction between residents and non-residents for tuition purposes does not violate equal protection, nor chills the right to travel.").

[382] *See, e.g.*, Forte & Rotunda, *supra* note 1, at 272 ("The Court has also . . . found that the clause was not violated when a state requires a higher tuition at a state university for nonresident students." (citing Vlandis v. Kline, 412 U.S. 441 (1973))). *Vlandis* was actually a due process case, but the Court seems to have assumed for purposes of the case that the differential tuition schedule was valid. *See* 412 U.S. at 444–45 (noting that appellees' due process claim did not challenge State's classification of students as residents or nonresidents).

[383] *See* Thomas H. Day, Note, *Hiring Preference Acts: Has the Supreme Court Rendered Them Violations of the Privileges and Immunities Clause?*, 54 FORDHAM L. REV. 271, 274 (1985) (describing policy objectives behind Comity Clause as "protecting United States citizens from parochial, self-interested state actions that curtail economic and political freedoms of nonresidents and inhibit the growth of a competitive national market and a unified people").

preferences. But they serve the first two policies behind the Comity Clause because they reduce the risk of interstate tension and of market distortions. One can argue that they also serve the third policy, economic efficiency, by making it harder for states to finance economically-damaging government programs.[384]

B. VOTING

Another difficult area pertains to suffrage. Most members of the founding generation who addressed the issue seem to have accounted suffrage a "privilege" rather than a right.[385] However, they did not attach it to citizenship as such, so the Comity Clause created no risk that visitors would demand to vote in state elections. Today, however, we generally think of voting as incident to citizenship—that is, with few exceptions, all state citizens can vote. Does the original meaning of the Clause require that nonresidents visiting a state on Election Day, or at least in time to register, be granted a vote?

There are two ways to answer this. One possible response is that voting is an incident of citizenship and must be granted to visiting out-of-staters. Although most members of the founding generation would concede that it would be foolish for a state to admit large numbers of nonresidents to state elections,[386] they probably would

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[384] For example, some studies conclude that states spending relatively higher amounts on welfare programs may induce subsequent economic lag. *See generally* Bruce Benson & Ronald N. Johnson, *Capital Formation and Interstate Tax Competition*, *in* TAXATION AND THE DEFICIT ECONOMY: FISCAL POLICY AND CAPITAL FORMATION IN THE UNITED STATES (Dwight R. Lee ed., 1986) (arguing that taxes imposed at state and local level adversely affect capital formation and economic development). While it is commonly assumed that spending on state universities is economically beneficial, there is recent evidence that it may be more beneficial to rely on private, rather than state, universities. *See, e.g.*, RICHARD VEDDER, GOING BROKE BY DEGREE: WHY COLLEGE COSTS TOO MUCH 134–45 (2004) (finding strong inverse relationships between state public spending on universities and both subsequent and contemporaneous economic growth); Jon Sanders, *Does Spending on Higher Education Drive Economic Growth? 20 Years of Evidence Reviewed*, Goldwater Institute Pol'y Rep. No. 181, May 12, 2003, *available at* http://www.goldwaterinstitute.org/Common/Files/Multimedia/285.pdf (finding that university spending does not propel economic growth, but rather that economic growth propels university spending).

[385] *See supra* Part IV.B.4.

[386] Most states at the time required residency to vote. *See, e.g.*, N.Y. CONST. of 1777, art. VII (requiring six months' residency in county to vote for county's representatives in state assembly); PA. CONST. of 1776, § 6 (requiring one year of state residency for voting right).

contend that modern Americans have brought this situation on themselves by extending the franchise too broadly. Voting, the Founders believed, should be limited to people with a capacity for independent decision making—a category that did not include the penniless or those who do not pay taxes.[387]

A better response is that, even today, voting really is not an incident of citizenship, even if we often speak as if it were. All states continue to exclude many citizens from the franchise, notably minors and felons.[388] The Constitution specifically recognizes a state's authority to do so.[389] Because the franchise is not an incident of citizenship, it is not subject to the Privileges and Immunities Clause.

IX. CONCLUSION

In the eighteenth century, the phrase "privileges and immunities" had a clear denotation. It referred to special benefits conferred by positive law. The set of privileges and immunities was not closed, and did not depend for its content on colonial charters or the English common law.

As originally understood, the Privileges and Immunities Clause did not protect a right to travel, or any other natural right. Its role was to guarantee to an American visiting another state equal access to those privileges and immunities that the host state granted its own citizens as an incident of citizenship. Founding-Era examples included access to the courts on a nondiscriminatory basis, real property tenure, equal tax treatment, and equal access to rewards and bounties. However, it was understood that a state could attach new privileges and immunities to state citizenship and abolish old

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[387] *See* HAMILTON, *supra* note 37, at 72–74 (relying on Blackstone for conclusion that people without minimal property cannot and should not vote because they do not have independent wills). *But see* U.S. CONST. amend. XXIV, § 1 (prohibiting exclusion of nontaxpayers from federal elections).

[388] *See, e.g.*, COLO. REV. STAT. § 1-2-103(4) ("No person while serving a sentence of detention or confinement in a correctional facility, jail, or other location for a felony conviction or while serving a sentence of parole shall be eligible to register to vote or to vote in any election . . . .").

[389] *See* U.S. CONST. amend. XIV, § 2 (exempting states from punitive provision of that section for denying criminals voting rights); *id.* amend. XXVI, § 1 (authorizing denial of vote to those under eighteen years of age).

ones. Any new privileges and immunities made incident to state citizenship became subject to the Clause.

The original meaning of the Clause differs from the Supreme Court's modern jurisprudence in that the original meaning did not include rights, but did include all privileges and immunities that a state made incident to its citizenship. The original meaning did not take account of whether a privilege or immunity was "fundamental" or whether a particular level of scrutiny was satisfied. In most cases, the rules applied by the modern- and original-meaning jurisprudence yield similar results. In some cases, they do not. Applying the original meaning would force some states to make hard choices, but their likely responses would further the policies underlying the Clause.