

Privileges and Immunities and the Journey from the Articles of Confederation to the United States Constitution: Courts on National Citizenship, Substance, and Antidiscrimination

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The purpose of this paper is to discuss the transition from the Articles of Confederation’s privileges and immunities language to the United States Constitution’s Privileges and Immunities Clause. In this pursuit, the paper examines congressional power and early nineteenth-century adjudication of the Clause.

I. Introduction

The Supreme Court has a well-established, albeit murky, history interpreting the Constitution’s Privileges and Immunities Clause. The Clause states that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”² The distillation of two hundred years of case law on the poorly understood provision has yielded a modern two-step test: (1) is the state-regulated activity fundamental, vital to a national interest, and sufficiently basic to the livelihood of the nation so as to fall within the Clause’s protection; (2) if the answer is yes, then the second inquiry is whether the state’s interest in the activity is substantial and reasonable and whether less restrictive means are available to meet those objectives.³ If the state deprives an individual of a protected privilege, then the Court reviews the legislation and will invalidate it if the Court determines that the challenged state regulation is not substantially related to the approved state interest.⁴ As discussed below, there is a great deal of judicial discretion in the Supreme Court’s test.

This paper traces the founding generation’s use of privileges and immunities language and the courts’ nineteenth-century adjudication of the Clause, especially the first half of the nineteenth century.⁵ Following a short survey of English history, this paper examines the Confederation and the Constitution and argues that privileges and immunities language should not be considered self-executing or self-enforcing.⁶ The courts erred in interpreting privileges and immunities language as providing substantive antidiscrimination protection under the mere language of the Clause itself.⁷ The Supreme Court should not create common citizenship rights or determine whether a regulated activity is “fundamental.” On multiple levels, this kind of discretion was given to Congress.⁸ Nineteenth-century case law drifted off course.⁹ From the disorientation, courts never regained direction.

² U.S. CONST. art. IV, § 2, cl. 1 (1789).

³ Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64-65 (1988); Barnard v. Thorstenn, 489 U.S. 546, 553 (1989) (adding “less restrictive means” to the state’s burden to demonstrate validity to the Court); *infra* Part III.D (modern case law).

⁴ Friedman, 487 U.S. at 64-65.

⁵ In so doing, I discuss a selection of state and federal cases but do not make any effort to survey every case or use of the Clause.

⁶ *Infra* Part III; Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, Part V.F (2011).

⁷ *Infra* Part III.

⁸ *Infra* Parts II.D-E (antidiscrimination and proposed amendments to the Articles of Confederation).

II. Background of the Privileges and Immunities Clause

In an earlier work, I provided a medieval background to the privileges and immunities concept and examined how the colonists of the American Revolution inherited privileges and immunities language from various sources.¹⁰ The next several pages, with modification and addition, summarize that work.

A. Medieval and Colonial Privileges and Immunities: The Crown's Charter

The privileges and immunities concept traces back to the medieval and Roman periods. The king's charter of bookland is an appropriate starting point for illustrating the concept.¹¹ As a dedication to the church, bookland recipients typically received immunity from all earthly burdens of service. Carved out of these broad immunities were the vital services of bridge building, wall building, and military service.¹² Bookland's extensive immunity was one of the key factors that set it apart from other types of land.¹³

With the king's charter, we see the nexus between the terms "privilege" and "immunity" in the phrase "privileges and immunities."¹⁴ Most associate the term "privilege" with the Latin term "privilegium" or the Roman private law.¹⁵ With a Roman background, the papal privilege granted rights with land.¹⁶ The church was well versed in Roman law, and we frequently see this

⁹ *Infra* Part III. For the exact opposite argument, see Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship Under Article IV*, LOYOLA U. CHI. L.J. (forthcoming) (the Privileges and Immunities Clause is self-enforcing and courts erred in giving the Clause a limited meaning to create and protect only fundamental civil rights).

¹⁰ See generally Burrell, *supra* note 6.

¹¹ The Anglo-Saxon king granted bookland (boc land) to religious houses and other important persons. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 60 (2d ed., Boston, Little Brown & Co. 1899); Burrell, *supra* note 6, at 11. For a discussion of Anglo-Saxon charters and the land system, see SCOTT THOMPSON SMITH, *WRITING LAND IN ANGLO-SAXON ENGLAND* (PhD Diss. 2007), online at <http://etd.nd.edu/ETD-db/theses/available/etd-04172007-111752/unrestricted/ScottSmithT042007.pdf>.

¹² The three exceptions were labeled the trinoda or trimoda necessitas. Burrell, *supra* note 6, at 12 n.28 (listing sources discussing bookland's immunities); FREDERIC W. MAITLAND, *DOMESDAY BOOK AND BEYOND* at 186–87, 236, 270–71, 273 (Boston, Little Brown & Co., 1897).

¹³ MAITLAND, *supra* note 12, at 257.

¹⁴ For the most part, "charter" is used generically throughout this essay. Technically, the Anglo-Saxon charter contained formal attributes that distinguished it from other royal documents such as royal patents. *Infra* notes 19–20.

¹⁵ See Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1130–31 (2009) (eighteenth-century and Roman definitions of "privilegium" as a private law). One can see the linguistic similarity between "privilegium" and "privilege." "Privi, ae, a" in Latin can be translated as "special, one's own" (plural) and "leges, -um" is Latin for "laws."

¹⁶ The papal privilege was a great bull or great papal letter with specific and formal components distinguishing it from other papal letters. REGINALD L. POOLE, *LECTURES ON THE HISTORY OF THE PAPAL CHANCERY: DOWN TO THE TIME OF INNOCENT III* 39, 41, 100 (1915). The papal privilege was an instrument granting or confirming rights of property and jurisdiction to churches and religious houses. *Id.*

influence when the church was involved in a matter.¹⁷ English kings took advantage of the church's administrative processes.¹⁸ The Anglo-Saxon charter, a privilege or privilegium, was a hybrid church-state document that granted high immunities and privileged status to its recipients.¹⁹ When the king granted his privilege, he was granting immunities to recipients who became immune from royal burdens. The charter itself was a privilege, and over time, the substantive grants within the charter were also generically referred to as privileges and immunities.

In subsequent centuries, the king's charter (or letter patent²⁰) enfranchised recipients with a variety of privileges.²¹ In medieval times, the crown developed mercantile, monopolistic, and governmental franchises through its charter. The king granted special privileges and immunities to entities and territories: guilds, boroughs, lords, corporations, Parliament, and later the colonies.²² One can clearly see a trend of municipal development through the king's chartered privileges and immunities to guilds and boroughs.²³

We see privileges and immunities language when a nonmember is granted membership to an entity long enfranchised with chartered privileges and immunities.²⁴ When the recipient received membership, he received the privileges and immunities of the entity—the cumulative benefit of the charters in force.²⁵ He was no longer an outsider without the benefit of the

at 100. Poole explained that the privilege was historically a title-deed to be preserved in a chest and produced on rare occasion. After time, ordinary papal letters of grace and administration crept into the sphere of rights-giving that had historically been the role of the privilege. *Id.* at 115, 116, 122. A similar transformation took place among charters, writs, and letters patent. *Infra* note 20.

¹⁷ Anglo-Saxon charters were probably drafted by the churches. HUBERT HALL, *STUDIES IN ENGLISH OFFICIAL HISTORICAL DOCUMENTS* 175 (1908). The church was highly literate and, unlike the English, kept a record of its grants. *Id.* at 176. The ecclesiastic influence and draftsmanship explains the connection between the papal privilege and the Anglo-Saxon charter. FRANK BARLOW, *THE ENGLISH CHURCH 1000-1066*, at 126 (2d ed. 1979) (identifying the church as the source of the charter and comparing the charter to the papal privilege).

¹⁸ BARLOW, *supra* note 17, at 34-35, 126-27.

¹⁹ *Supra* note 12 (immunities). The diploma, land book, or charter preceded the use of the Anglo-Norman writ. F.E. HARMER, *ANGLO-SAXON WRITS* 34-35, 41-42, 129-30, 432 (1952); Burrell, *supra* note 6, at 11.

²⁰ The less formal Anglo-Norman administrative writ succeeded the more formal charter. R.C. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL: STUDIES IN THE EARLY HISTORY OF THE COMMON LAW* 110-11, 113-14, 127-28 (1959) (distinguishing charter and writ). Judicial writs, letters close, and letters patent derived from the administrative writ. *Id.* at 133; HALL, *supra* note 17, at 238-241, 252.

²¹ Burrell, *supra* note 6, at 15-24.

²² *Id.* at 11-48.

²³ *Id.* at 24-48.

²⁴ *Infra* notes 32-34 (examples of denization language removing alienage disabilities for recipient).

²⁵ Burrell, *supra* note 6, at 37-38, 45-46 (guild membership and guild privileges; exclusion of others from privileges and official town governance); *cf. infra* note 95 (freemanship in the colonies). For illustration, consider the preface and collection of charters in W. BOHUN, *PRIVILEGIA LONDINI: OR, THE RIGHTS, LIBERTIES, PRIVILEGES, LAWS, AND CUSTOMS, OF THE CITY OF LONDON* (London, D. Browne, et al., 1723).

entity's privileges and immunities such as monopolistic trading privileges and immunity from toll.²⁶

Medieval charters to guilds and boroughs provided a foundation for colonial privileges and immunities as the chartered trading element within English towns expanded through additional royal privileges and immunities authorizing overseas exploration and colonization.²⁷ Relevant to the colonial experience, the charter licensed explorers and merchant adventurers to travel, load ships, and discover foreign lands.²⁸ Later, the king's charter granted colonial privileges and immunities in the areas of judicial, governmental, and legislative concerns.²⁹ After the colonies became settled, there were three types of colonies, most with their own privileges and immunities or charters directing their governance.³⁰

Reviewing colonial history, we see that colonies received royal privileges and immunities at several points. While Parliament could also legislate for the colonies, colonies were subject to the crown's direct authority, and through that authority, to the Privy Council and any subordinate boards or commissions the Council might establish for regulation of the colonies.³¹

B. Privileges and Immunities of Englishmen

Colonization far away from English authority presented a question of continued English citizenship or subjectship and colonists' rights in the colony. Aliens were mostly denied the ability to use English courts and the ability to own and inherit land.³² Within the colonial charter, colonists, and their heirs born overseas, were to enjoy the privileges and immunities of natural-born subjects as if they were born in England, or in other words, denization or

²⁶ Burrell, *supra* note 6, at 37.

²⁷ *Id.* Parts III, IV.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* Part IV. Colonies that surrendered or forfeit their charters became royal colonies. 3 HERBERT L. OSGOOD, *THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY* 22–23, 47–49, 72 (1907); LEONARD W. LABAREE, *ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783*, at 37, 121–24, 134–35 (1930) (royal colonies had a governor with commission, instructions, and royal colonial council appointed by king).

³¹ As the colonies grew, the crown delegated its power to a council, commission, or board. CHARLES M. ANDREWS, *BRITISH COMMITTEES, COMMISSIONS AND COUNCILS OF TRADE AND PLANTATIONS 1622–1675*, at 9–23 (1908); O.M. DICKERSON, *AMERICAN COLONIAL GOVERNMENT, 1696–1765*, at 18–20 (photo. reprint 1962) (1912) [hereinafter DICKERSON, *AMERICAN COLONIAL GOVERNMENT*] (describing the creation of the Board of Trade in 1696).

³² CLIVE PARRY, *NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH AND OF THE REPUBLIC OF IRELAND* 29–30 (1957) (commenting that aliens faced limitations in holding and inheriting land, limitations in use of courts, and discrimination in trade). For additional discussion and sources, see Burrell, *supra* note 6, at 56. Alienage and alienage disabilities trace back to feudalism and allegiance. Land and use of lord's court were principles of lord and tenant. Alienage can be considered the opposite of allegiance. Feudal customs, such as lordship, allegiance, protection, tenancy, suitor duties, and access to the lord's court, were likely so basic that they were presumed in the English Constitution.

Englishmen status.³³ The denization clauses in American colonial charters were very similar to other denization clauses in early explorers' charters and the typical sixteenth-century denization provisions.³⁴

The whole concept of the crown's privileges and immunities lost focus as England, carrying the colonies, went through a series of transformations in the seventeenth century.³⁵ The "liberty of Englishmen" rose from the disintegration of the crown's grip on Parliament, trade,

³³ Burrell, *supra* note 6, at 56 (denization clause in Warde's charter or letter patent). Technically, English subjects and their children overseas would not lose their status. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 13-15, 65 (1978). But traveling merchants and colonists probably felt more secure with the additional authority. The denization clause in Sir Humphrey Gilbert's 1578 charter provided:

wee doe graunt to the sayd sir Humfrey, his heires and assignes, and to all and every of them, and to all and every other person and persons, being of our allegiance, whose names shall be noted or entred in some of our courts of Record, within this our Realme of England, and that with the assent of the said sir Humfrey, his heires or assignes, shall nowe in this journey for discoverie, or in the second journey for conquest hereafter, travel to such lands, countries and territories as aforesaid, and to their and every of their heires: that they and every or any of them being either borne within our sayd Realmes of England or Ireland, or within any other place with our allegiance, and which hereafter shall be inhabiting within any the lands, countreys and territories, with such license as aforesayd, shall and may have, and enjoy all the priveleges of free denizens and persons native of England and within our alleageance [in suche like ample manner and fourme as if they were borne and personally resiaunte within our said realme of England] any law, custome, or usage to the contrary notwithstanding.

1 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 50-51 (1909); *see also* 1 DAVID B. QUINN, *THE VOYAGES AND COLONISING ENTERPRISES OF SIR HUMPHREY GILBERT* 190-91 (1940) (inserted clause). Subsequent royal charters to many of the American colonies contained similar language. The 1606 Virginia Charter included language that subjects, and children born of such subjects, dwelling in the colonies shall have the "Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes," as if they had been born in England or any of the other dominions. 7 THORPE, *supra*, at 3788 (1606 Charter); *id.* at 3800 (1609 Charter). Massachusetts's 1629 charter provided that all "the Subjects of Vs . . . which shall goe to and inhabite within the saide Landes . . . and every of their Children which shall happen to be borne there, or on the Seas in goeing thither, or retorning from thence, shall have and enjoy all liberties and Immunities of free and naturall Subjects within any of the Domynions of Vs." 3 *id.* at 1857 (1629 Massachusetts Charter). For other colonies' provisions, see Burrell, *supra* note 6, at 62 n.310.

³⁴ WILLIAM PAGE, *LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND 1509-1603*, at ii-iv (Lymington, Chas. T. King 1893) (including denizens' right to sue and be sued; to buy, sell, hold, and enjoy real estate; not to be compelled to pay more taxes, tallages, customs, or subsidies for merchandize exported out of or imported into England; and to enjoy all liberties, franchises, and privileges as freely and peacefully as other lieges born in England, any statute to the contrary notwithstanding). For a discussion on the distinction between denization and naturalization, see KETTNER, *supra* note 33, at 27 n.44, 29-35.

³⁵ Burrell, *supra* note 6, at 91-97.

and monopolies.³⁶ The crown had a long history of establishing monopolies, which, as we explain above, took place through charters or letters patent and their associated privileges and immunities.³⁷ While medieval “liberties” were likely benefits received from the king’s charter, this new “liberty” confronted the king’s monopolistic privileges and immunities.³⁸

The composite result was the concept of the birthright liberty of freeborn Englishmen.³⁹ When this evolving liberty was applied to specific grievances concerning an enfranchised recipient, London for example, we might see “privileges” and “immunities” language creep into the phrase “rights, privileges, and immunities of freeborn Englishmen.”⁴⁰ London had a long history of receiving special privileges and immunities from the crown.⁴¹ As a whole, England looked to the privileges and immunities of enfranchised boroughs like London for a definition of the “rights of Englishmen.”⁴² The Englishman’s liberty and the fight against the king’s prerogative transformed seventeenth-century England, ultimately resulting in civil war, regicide, and the Glorious Revolution.⁴³

England’s transformation also affected its colonies. As settlements grew from wilderness to forts to towns and ultimately to thriving colonies, they were more and more prone to English institutions and English laws.⁴⁴ Charters authorized grantees to make their own laws as long as

³⁶ See, e.g., *Darcy v. Allen*, (1603) 77 Eng. Rep. 1260, 1262-63 (K.B.) (Coke’s report applying the “liberty of Englishmen” to challenge a royal patent); 11 Co. Rep. 84b; Burrell, *supra* note 6, at 52 n.246, 93 n.482 (“Liberty” of merchants to be free from dominant merchant organizations and interference with trade).

³⁷ Burrell, *supra* note 6, at 11-48. For discussion on crown monopolies, see Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HAST. L.J. 1255, 1259-76 (2001).

³⁸ Burrell, *supra* note 6, at 91-94.

³⁹ *Supra* notes 36-38.

⁴⁰ Rachel Foxley, *John Lilburne and the Citizenship of ‘Free-Born Englishmen,’* 47 HIST. J. 849, 852-54 (2004) (Leveller attack on London’s monopoly privileges). As mentioned above, the term “privileges” was connected to the king’s charter, which, up until the seventeenth century and the Glorious Revolution, was a primary source of rights, freedoms, and basic government. Burrell, *supra* note 6, Parts II, III. Entities such as boroughs and merchant adventurers had their own privileges and immunities. Parliament had its privileges as the king summoned his Parliament and extended it the liberty of speech and debate. A.F. POLLARD, *THE EVOLUTION OF PARLIAMENT* 31, 139 (photo. reprint 1964) (2d ed. 1926); THEODORE F.T. PLUCKNETT, *TASWELL-LANGMEAD’S ENGLISH CONSTITUTIONAL HISTORY: FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME* 194-201 (11th ed. 1960).

⁴¹ W. BOHUN, *PRIVILEGIA LONDINI*, *supra* note 25.

⁴² GEORGE UNWIN, *THE GILDS AND COMPANIES OF LONDON* 155-56 (1908); see also GEORGE NORTON, *COMMENTARIES ON THE HISTORY, CONSTITUTION, & CHARTERED FRANCHISES OF THE CITY OF LONDON* 51-53, 66-69 (3d ed. Revised, London, Longmans Green & Co. 1869) (discussing the influence of burgage tenure and mercantile liberties on town liberties and remarking on London’s special liberties and its relationship to the crown); Burrell, *supra* note 6, at 94 n.486.

⁴³ By the Glorious Revolution, Englishmen perceived the “birthright liberty of freeborn Englishmen” to include the Magna Carta, Petition of Right, Habeas Corpus Act, English Bill of Rights, and the like. See *infra* notes 47, 50.

⁴⁴ Exploration and early colonization documents suggested colonial self-sufficiency and a degree of independence from English law. 1 THORPE, *supra* note 33, at 51 (charter giving broad authority to Gilbert and company to establish their own laws, as may be agreeable to the laws and policy of England);

those laws were not repugnant to English law.⁴⁵ As the colonies matured, colonists wanted English law to apply—at least if it served their interests.⁴⁶ As Englishmen, colonists argued for equality with English subjects as if they were residing in England under English law.⁴⁷

England's civil war and revolution began an era of parliamentary sovereignty, and with that, a greater imperial role in colonial affairs—especially commercial affairs in the form of navigation acts.⁴⁸ Eighteenth-century imperial England was concerned with its own interests and revenue. The colonies served England in this respect, as English colonial policy maximized its own interests at the expense of the colonies. England's revenue policies and obstinacy fractured the bond with the American colonies and ultimately precipitated revolt.

By the time of the American Revolution, colonists had a firm belief that their charters and Englishmen status secured substantive English law and common law in the colonies.⁴⁹ Colonists

see also 2 HERBERT L. OSGOOD, *THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY* 436-40 (1904) (de facto independence of proprietorships and corporate colonies in the early-to-mid seventeenth century). By the latter half of the seventeenth and eighteenth century, we see an increase in imperial authority. 4 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* 324 (1938) [hereinafter ANDREWS, *COLONIAL PERIOD*]. Before the period of the American Revolution, Parliament's influence in the colonies was mostly economic such as trade and navigation acts. *Infra* notes 82-86. On the effect of English law in the colonies, *see infra* note 49.

⁴⁵ For more on the origin of charter repugnancy language, *see* Burrell, *supra* note 6, at 44-45 n.210, 51-52 (crown concerned with quality of merchant wares; prevented dominant merchant monopolies from excluding weaker merchants to the disadvantage of the towns); JOSEPH H. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 529-31 (1950) (use of repugnancy clause as means of loosely applying English law in the colonies in the late seventeenth and eighteenth centuries).

⁴⁶ Early Massachusetts rejected English law and the right of colonists to appeal to England. SMITH, *supra* note 45, at 45; *see also* 2 WINTHROP'S JOURNAL: *HISTORY OF NEW ENGLAND 1630-1649*, at 294 (J.K. Hosmer ed., 1908) (arguing that charter provisions were the primary source of authority); 2 OSGOOD, *supra* note 44, at 436, 438 (force of English statutes considered not binding and ignored).

⁴⁷ Burrell, *supra* note 6, at 80-83. We see this clearly during colonists' confrontations with the crown before the Glorious Revolution. *Id.* at 96. James II revoked colonial charters and took away cherished privileges of assembly and perceived rights to representative taxation. DAVID S. LOVEJOY, *THE GLORIOUS REVOLUTION IN AMERICA* 108-10 (1972); *see also* VIOLA F. BARNES, *THE DOMINION OF NEW ENGLAND* 50, 85-90 (F. Ungar Pub. Co. 1960) (1923) (noting several ancient statutes that colonists felt supported their claim that taxation without representation violated the rights of Englishmen); Burrell, *supra* note 6, at 74 n.382, 81, 95-96. Colonists argued in response that they were entitled to the benefit of English common and statute law protecting assembly rights and taxation by consent. *See generally* HENRY CARE, *ENGLISH LIBERTIES OR THE FREE-BORN SUBJECT'S INHERITANCE* (John Carter 1774) (1680) (citing the Magna Carta, the Habeas Corpus Act, other important statutes, and the powers of Parliament). Similar arguments extended into the eighteenth century. GEORGE L. BEER, *BRITISH COLONIAL POLICY, 1754-1765*, at 41 (1907) [hereinafter BEER, *COLONIAL POLICY*] (objections to the Molasses Act because the duties divested colonists of their rights and privileges without consent or representation).

⁴⁸ *Infra* notes 82-86.

⁴⁹ When Parliament expressly provided that legislation included the colonies, there was little debate. The application of statutes passed before the colonial period gave parties more trouble. 1 GEORGE CHALMERS, *OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE* 194-

argued, frequently in birthright or “privileges and immunities” language, that they were entitled to the benefit of English common and statutory law such as the Magna Carta, the Petition of Right, and other statutes securing, for example, trial by jury and taxation by consent or representation.⁵⁰ For colonists on the steps of the American Revolution, these statutory rights represented “fundamental law.”⁵¹ If their charters or applicable English statutes did not directly help colonists against English authority, they had natural law to fall back on.⁵²

1. Stamp Act Crisis and the American Revolution

As we see from our discussion, the claim for the rights of Englishmen was a common grievance when colonists were uncertain about English authority in the colonies. Without colonial representation, colonists viewed English authority in Parliament the same way that English subjects viewed the arbitrary acts of the seventeenth-century king.⁵³ English subjects had their rights of Englishmen; colonists claimed the same.⁵⁴ As they had in the past, colonists complained that taxation without representation and common consent was a violation of their rights as Englishmen.⁵⁵ The Commons in England had, for the most part, obtained

225 (London, Reed & Hunter 1814) (legal opinions on the force of English law in colonies); *see also* SMITH, *supra* note 45, Chapters 8 and 9; St. George Leakin Sioussat, *The Theory of the Extension of English Statutes to the Plantations*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 416–30 (1907); Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in *id.* at 367–415; KETTNER, *supra* note 33, at 135–38 (discussing theories of discovery and conquest and respective implications on force of English law in colonies).

⁵⁰ 3 OSGOOD, *supra* note 30, at 11–12 (noting colonists’ reliance on birthright privileges of Englishmen secured by the Magna Carta, common law, and several fundamental statutes); Burrell, *supra* note 6, at 95–96; *supra* note 47.

⁵¹ CHARLES F. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION, 1760-1776, at 109, 119, 121 (photo. reprint 1966) (1933).

⁵² THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774); MERRILL JENSEN, THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION 1763-1776, at 85-87 (1968) [hereinafter JENSEN, FOUNDING OF A NATION] (discussing James Otis’s pamphlets and natural rights); *see also* Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

⁵³ JAMES WILSON, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT (1774) (analogizing to Englishmen’s right to participate in government and discussing requirement of consent); KETTNER, *supra* note 33, at 139-40 (importance of consent in colonial governance); *supra* note 47 (Colonists’ perceptions of rights to English law). *But see* BEER, COLONIAL POLICY, *supra* note 47, at 42-51 (noting that some in the 1750s favored parliamentary taxation of the colonies for collective military defense).

⁵⁴ *Supra* notes 47, 49-52.

⁵⁵ *See, e.g.*, RICHARD BLAND, THE COLONEL DISMOUNTED (1764), *reprinted in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750–1776, at 301, 320–21 (Bernard Bailyn ed., 1965) (colonists entitled to all the “liberties and privileges of English subjects” including the right to be free of Parliament’s legislation reaching into the internal governance of the colonies); THOMAS FITCH, REASONS WHY THE BRITISH COLONIES, IN AMERICA, SHOULD NOT BE CHARGED WITH INTERNAL TAXES (1764), *reprinted in id.* at 386–407 (colonists enjoy liberty and privilege of consent for taxation and colonists have the same general privileges of the British constitution as Englishmen enjoy); *supra* notes 47, 50 (colonists’ claims for taxation rights).

representative taxation by the mid-fourteenth century.⁵⁶ But the colonies had long been in the king's private domain.⁵⁷ Nonetheless, through the colonial assembly, colonies mimicked the rights of the House of Commons, and with that, rights to taxation and representation.⁵⁸

Entering into the American Revolution, the several uses of privileges and immunities language came together in colonial grievances.⁵⁹ Colonists had their charter privileges and immunities and the denization clauses containing privileges and immunities language.⁶⁰ Colonists also had their birthright privileges of freeborn Englishmen. The merger of the several uses of the language was captured in the responses to the Stamp Act crisis of the 1760s and the grievances leading up to the American Revolution.

Colonial grievances to the Stamp Act opened with the colonists' claim for the liberties, privileges, and immunities of free and natural-born subjects of England.⁶¹ Grievances of the Stamp Act Congress:

II. That His Majesty's Liege Subjects in these Colonies, are entitled to all the inherent Rights and Liberties of his Natural born Subjects, within the Kingdom of *Great-Britain*.

III. That it is inseparably essential to the Freedom of a People, and the undoubted Right of Englishmen, that no Taxes be imposed on them, but with their own Consent, given personally, or by their Representatives

IV. That the People of these Colonies are not, and from their local Circumstances cannot be, Represented in the House of Commons in *Great-Britain*.

V. That the only Representatives of the People of these Colonies, are Persons chosen therein by themselves, and that no Taxes ever have been, or can be Constitutionally imposed on them, but by their respective Legislature.⁶²

Virginia colonists:

Resolved, That the first Adventurers and Settlers of . . .

⁵⁶ Burrell, *supra* note 6, at 42–43 n.204 (observing that the principle that no taxation should be raised without common consent became commonplace in England by the mid-fourteenth century).

⁵⁷ *Id.* Parts III, IV.

⁵⁸ The colonial assembly felt, as a right of Englishmen, it could mimic the House of Commons in all its privileges. LABAREE *supra* note 30, at 428–30; BEER, COLONIAL POLICY, *supra* note 47, at 163–64, 166–67; *see also* Burrell, *supra* note 6, at 82–83 (same).

⁵⁹ Burrell, *supra* note 6, at 98.

⁶⁰ It is ironic that the charters that gave life to the American colonies were invoked for the doctrine that eventually brought an end to the colonies.

⁶¹ Burrell, *supra* note 6, at 98–99.

⁶² Resolutions of the Stamp Act, Cont. Cong., (October 7–24, 1765), at paras. II–V, *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 62–63 (Edmund S. Morgan ed., 1959).

Virginia brought with them . . . all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of *Great Britain*. . . .

Resolved, That by two royal Charters, granted by King *James* the First, the Colonists . . . are . . . entitled to all Liberties, Privileges, and Immunities of Denizens and natural Subjects, to all Intents and Purposes, as if they had been abiding and born within the Realm of *England*.

. . . .
Resolved, That his Majesty's liege People . . . have . . . enjoyed the inestimable Right of being governed by such Laws, respecting their internal Polity and Taxation, as are derived from their own Consent, with the Approbation of their Sovereign⁶³

Pennsylvania colonists:

Resolved, N. C. D. 3. That the inhabitants of the Province are entitled to all the Liberties, Rights and Privileges of his Majesty's Subjects in *Great-Britain*, or elsewhere, and that the Constitution of Government in this Province is founded on the natural Rights of Mankind, and the noble Principles of *English* Liberty, and therefore is, or ought to be, perfectly free.

Resolved, N. C. D. 4. That it is the inherent Birth-right, and indubitable Privilege, of every *British* Subject, to be taxed only by his own Consent, or that of his legal Representatives, in Conjunction with his Majesty, or his Substitutes.⁶⁴

Here we see colonists advocating for Englishmen status, English law, and taxation rights. Colonists claimed that they were Englishmen and enjoy the same privileges and immunities as English subjects residing in England.⁶⁵ The opening sentence of each grievance seems to be a composite of charter privileges and immunities language and the Leveller-natural law gloss on the seventeenth century's "liberty of Englishmen."⁶⁶

2. Colonial Bill of Rights and the Declaration of Independence

⁶³ Virginia Resolves of May 1765, *reprinted in* PROLOGUE, *supra* note 62, at 47–48.

⁶⁴ Stamp Act Resolves of the Pennsylvania Assembly, September 21, 1765, *reprinted in* PROLOGUE, *supra* note 62, at 51.

⁶⁵ *Supra* notes 47–64. The rights referred to either derived from the king's charters or Parliament. *Cf. infra* note 230.

⁶⁶ *Supra* notes 32–43 (liberty of Englishmen). The Levellers were a political reform movement during the English Civil War. Foxley, *supra* note 40; DON M. WOLFE, LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION (1944).

Conflict with England and its revenue policies continued. In an act of self-government, colonists in 1774 formed their own Continental Congress.⁶⁷ The establishment of a congress without imperial approval was collective defiance to the role of the king and Parliament in America.⁶⁸ The Revolution formally began in July 1776 but really began in the summer of 1774 when the colonies were electing and appointing representatives to the Continental Congress.⁶⁹ States varied in their initial constitutional aims: some wanted a government that followed their old charters; others wanted a new government founded on republican principles.⁷⁰

Just prior to Independence, members of the Continental Congress again described the controversies facing the colonies in the October 14, 1774 Declaration and Resolves—a kind of bill of rights for the colonists.⁷¹ Parliamentary taxation without representation or consent was the leading complaint.⁷² Similar to the Stamp Act responses, colonists reiterated in the second resolution that “our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.”⁷³ The third resolution declared that subjects did not lose these rights by emigrating from England to the colonies but that they “and their descendants now are . . . entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.”⁷⁴ Additional resolutions claimed the benefit of English common and statutory law, as modified by local circumstances. Colonists claimed in resolution seven that they were “likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.”⁷⁵

⁶⁷ MERRILL JENSEN, *THE AMERICAN REVOLUTION WITHIN AMERICA* 38–40 (1974) [hereinafter JENSEN, *AMERICAN REVOLUTION*].

⁶⁸ *Id.*

⁶⁹ *Id.* at 50–51; RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781–1789*, at 56–61 (1987) (describing the state’s Continental Congress election and appointment procedures). Jensen characterized the town committees as rowdy and unprincipled, largely because many of those exercising their community rights had never formally done so before. JENSEN, *AMERICAN REVOLUTION*, *supra* note 67, at 51. Jack Rakove described the town meetings as merely extra-legal and not yet revolutionary. JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 29–30 (1979).

⁷⁰ JENSEN, *AMERICAN REVOLUTION*, *supra* note 67, at 61–64.

⁷¹ See October 14, 1774 Declarations and Resolves, in 1 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 63–73 (1904) [hereinafter JCC].

⁷² See *id.* at 63–64, 68–69.

⁷³ *Id.* at 68 (Resolution 2).

⁷⁴ *Id.* (Resolution 3).

⁷⁵ *Id.* at 69 (Resolution 7); see also Burrell, *supra* note 6, at 100 n.509 (noting that additional complaints included admiralty courts, lack of trial by jury, dependent judges, quartering troops, suspending assemblies, ignoring petitions from local assemblies, trying colonists in England, closing the port of Boston, standing armies, and the right to assemble and petition the king).

Colonial efforts to save the bond with England failed as several events pushed the relationship to a status beyond repair.⁷⁶ On July 4, 1776, the American colonies formally declared Independence.⁷⁷ American and French forces obtained Cornwallis's surrender in 1781 and a peace treaty was signed in 1783.⁷⁸

C. Articles of Confederation and Citizenship

Following the Declaration of Independence, the former colonists no longer relied on the privileges and immunities of English subjects.⁷⁹ States were in the process of adopting their own constitutions.⁸⁰

With English citizenship largely irrelevant, the colonies needed to address state and national citizenship. In June 1776, a Committee of the Continental Congress, in a first step to define citizenship, resolved “[t]hat all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws and are members

⁷⁶ BERNARD DONOUGHUE, *BRITISH POLITICS AND THE AMERICAN REVOLUTION: THE PATH TO WAR, 1773–1775* (1964); H.E. EGERTON, *THE CAUSES AND CHARACTER OF THE AMERICAN REVOLUTION* 103–11 (1923) (conflict in 1775 and 1776 characterized as virtual war before formal Independence).

To pressure Britain into repealing its coercive acts, the colonies united in a pact of nonintercourse with England. A.M. SCHLESINGER, *THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763–1776*, at 393–431 (1917); *id.* appx at 607 (copy of Articles of Association). Eventually, England retaliated against colonial rebels by prohibiting all colonial trade and effectively declaring that the colonists were on par with outlaws and alien enemies. 16 Geo. III, c.5 (1775) (American Prohibitory Act for Colonies in Rebellion); JENSEN, *FOUNDING OF A NATION*, *supra* note 52, at 649–50, 655, 659–60, 664, 669 (documenting how the Prohibitory Act and associated events were a breaking point pushing the rebellion into revolution); SCHLESINGER, *supra*, at 538–40, 552, 579–80 (identifying England's ban as a turning point marking the transformation of the Continental Association's commercial coercion into an armed rebellion).

⁷⁷ 5 JCC, *supra* note 71, at 509–15 (July 4, Declaration of Independence). One might characterize the July Declaration as a formality given the advanced stage of hostilities. The united colonies were already preparing for independence. In the spring of 1776, the Continental Congress adopted a series of resolutions regulating, until locally altered, states' trade in light of England's ban on colonial trade. 4 *id.* at 257–59 (resolutions authorized exportation and importation by the inhabitants of the United Colonies as well as people of foreign nations except Great Britain—excepting a few items and restricting exports to and imports from Great Britain); VERNON G. SETSER, *THE COMMERCIAL RECIPROCITY POLICY OF THE UNITED STATES 1774–1829*, at 11–12 (photo. reprint 1969) (1937) (referring to the event as a commercial declaration of independence).

⁷⁸ MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789*, at 3–4, 18 (1950) [hereinafter JENSEN, *NEW NATION*].

⁷⁹ 2 CHALMERS, *supra* note 49, at 412 (observing that when colonists declared Independence and renounced their English citizenship, they could no longer argue for the privileges and immunities of Englishmen).

⁸⁰ May 10, 1776 Resolves, in 4 JCC, *supra* note 71, at 341–42 (proposal for states to form their own governments); *id.* at 357–58 (May 15, 1776).

of such colony.”⁸¹ One finds a framework for national citizenship by examining the transition from English commercial regulation to Confederation commercial regulation.

Prior to Independence, England had maintained a tight grip on colonial commerce through commercial regulation. Under the navigation acts, trade was limited to English ships manned by a majority of Englishmen.⁸² Notwithstanding England’s regulation, the colonies were little nations in themselves with intercolonial and foreign trade.⁸³ But colonists were restricted from shipping certain goods directly to foreign ports.⁸⁴ Goods were sent to England before being shipped elsewhere.⁸⁵ Aliens were prevented from colonial trade.⁸⁶

After Independence, the colonies were without the oversight function of English navigation and trade laws.⁸⁷ For all the complaints about England’s selfish domination, many leading colonists saw a mutual benefit in England’s commercial laws.⁸⁸ Self-governance over internal affairs was bitterly fought for, but for many, there was a qualified respect for England’s parental function over external commerce. This is the understanding entering into the Confederation and later the Constitutional Convention: internal matters would be with the states, but external matters, especially those related to commerce, needed some form of regulation.⁸⁹

⁸¹ 5 *id.* at 475 (June 24, 1776) (“and that all persons passing through, visiting, or mak[ing] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto”).

⁸² See 4 ANDREWS, COLONIAL PERIOD, *supra* note 44, at 20–84 (background of the seventeenth century navigation acts); O.M. DICKERSON, THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION 7-10 (1951) [hereinafter DICKERSON, NAVIGATION ACTS].

⁸³ 1 GEORGE L. BEER, THE OLD COLONIAL SYSTEM, 1660-1754, at 15-18 (1912) [hereinafter BEER, OLD COLONIAL SYSTEM] (significance of colonial trade). See generally ALBERT A. GIESECKE, AMERICAN COMMERCIAL LEGISLATION BEFORE 1789 (1910) (describing colonial commerce laws including exports, imports, tonnage duties, colonial navigation acts, and other trade regulations).

⁸⁴ Under England’s navigation acts, no goods could be imported into the colonies except in English ships with a majority of English sailors and an English captain. 4 ANDREWS, COLONIAL PERIOD, *supra* note 44, at 61. Essentially, foreign trade was excluded.

⁸⁵ Colonists could trade many goods with foreign countries. *Id.* at 62. Several enumerated colonial goods, however, could only be carried to England. *Id.* at 85–86.

⁸⁶ Restricting alien trade in the colonies was a theme throughout the period of exploration and colonization. See GEORGE L. BEER, THE ORIGINS OF THE BRITISH COLONIAL SYSTEM, 1578–1660, at 16-17, 220–27, 237, 272, 374, 384–400 (1912) [hereinafter BEER, ORIGINS] (following the practice of merchant monopolistic privileges, colonies received monopoly privileges and excluded or restricted foreigners from trade); *supra* notes 82–84.

⁸⁷ DICKERSON, AMERICAN COLONIAL GOVERNMENT, *supra* note 31, at 251. Dickerson described the before and after as commercial harmony and commercial anarchy.

⁸⁸ DICKERSON, NAVIGATION ACTS, *supra* note 82, at 103-34 (discussing support for England’s navigation acts); RAKOVE, *supra* note 69, at 57–59 (colonial grievances omitted most English commercial regulation from complaint); *id.* at 83 (concerns over consequence of declaring independence or forming new governments in regards to loss of England’s commercial framework).

⁸⁹ BAILYN, 1 PAMPHLETS OF THE AMERICAN REVOLUTION, *supra* note 55, at 124-31. Eventually, Congress served this parental function formerly found in England’s commercial regulations. *Infra* Parts II.D-E.

To substitute for English commercial laws⁹⁰ and manage alienage disabilities and interstate discriminations in trade, travel, and commerce, the former colonies needed to confederate.⁹¹ The July 12, 1776 draft of the Articles of Confederation provided in part:

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

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.

Art VIII. Each Colony may assess or lay such Imposts or Duties as it thinks proper, on Importations or Exportations, provided such

⁹⁰ John Dickinson, a founding father from Pennsylvania, was the primary author of the Articles of Confederation's first draft. JENSEN, *AMERICAN REVOLUTION*, *supra* note 67, at 138. Dickinson was a leading figure in the Revolutionary period and supported England's external commercial regulation while opposing internal taxation. DICKERSON, *NAVIGATION ACTS*, *supra* note 82 at 114-17 (noting Dickinson's influence in the colonies and support for England's commercial regulation); RAKOVE, *supra* note 69, at 73 (citing Dickinson's efforts to maintain English control over trade and commerce); 1 PAUL H. SMITH, *LETTERS OF DELEGATES TO CONGRESS* 371, 378-79, 388 (1976-1993) [hereinafter SMITH, LDC] (John Dickinson's notes for a speech), *available at* <http://etext.virginia.edu/washington/delegates/>. Dickinson's views can be found in his *LETTERS FROM A FARMER IN PENNSYLVANIA*, letters 2, 5, 6 (1767) in JOHN DICKINSON, *EMPIRE AND NATION: LETTERS FROM A FARMER IN PENNSYLVANIA* (JOHN DICKINSON), *LETTERS FROM THE FEDERAL FARMER* (RICHARD HENRY LEE) (Forrest McDonald ed., 1999), *available at* ONLINE LIBRARY OF LIBERTY, <http://oll.libertyfund.org>, (search "John Dickinson"); *see also* JOHN DICKINSON, *AN ESSAY ON THE CONSTITUTIONAL POWER OF GREAT-BRITAIN OVER THE COLONIES IN AMERICA* (1774).

As we will see below, drafters prefaced Article IV of the Articles with "harmony" and mutual "friendship" or "benefit" language, similar to the founding generation's characterization of English trade laws. Compare the principle and language in the various drafts of Article IV of the Articles, *infra* notes 92, 118, 120, with the perceived benefit of English navigation laws as stated in Resolution 3 of the 1774 FAIRFAX RESOLVES, a precursor to the 1774 Declaration and Resolves (English navigation laws regulating trade and commerce, though without colonial consent, have created "mutual uninterrupted Harmony and Good-Will, between the Inhabitants of Great Britain and her Colonies; who during that long Period, always considered themselves as one and the same People" . . . [English regulations] "avoid Strife and Contention with our fellow-Subjects").

⁹¹ Dickinson's Articles of Confederation was not the only draft. RAKOVE, *supra* note 69, at 139-51 (discussing alternate drafts of union). Benjamin Franklin's Plan of Union provided for congressional regulation of conflicts among the states including interstate commerce. 2 JCC, *supra* note 71, at 195-96; MORRIS, *supra* note 69, at 81. States resisted congressional regulation of commerce. Small and large states fought over varying interests and were not able to secure any united commercial enforcement power in the Confederation. RAKOVE, *supra* note 69, at 158-59, 168-69, 179 (state conflict in the Confederation proposals of 1776-1777).

Imposts or Duties do not interfere with any Stipulations in Treaties hereafter entered into by the United States assembled, with the King or Kingdom of Great Britain, or any foreign Prince or State.⁹²

First, one notes the use of “inhabitant.” In pre-Independence grievances, colonists frequently referred to themselves as “inhabitants.”⁹³ In subsequent drafts of what would become Article IV of the Articles, drafters proposed “citizens” but ultimately came back to “inhabitants.”⁹⁴

The struggle against the mother country and the eventual loss of Englishmen status placed former colonists in unfamiliar territory. Post-Independence, drafters may have been worried about variances in states’ admission or freemanship policies and a state’s excluding or discriminating (with respect to trade, commerce, and navigation) against their common English brethren.⁹⁵ This concern would be compounded if a state’s commercial society were excluding commoners. We can assume that drafters did not want the Confederation sanctioning a state’s special privileges and immunities or oligarchies in which only a select, corporate commercial

⁹² 5 JCC, *supra* note 71, at 546–48 (July 12, 1776 draft) (strikethrough in original); *see also* David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 817–22 (1987) (discussing the proposed articles). The proposed articles seem to follow the navigation acts’ relevant attributes. *Supra* notes 82-86. The sixth article ensured the status quo and thus prevented alienage disabilities for inhabitants. The seventh article provided commercial privileges across the colonies and removed the restriction that prevented colonists from traveling to foreign ports with certain items, assuming the state granted that freedom to native citizens. The restriction requiring colonists to land in England first when trading enumerated goods with foreign countries was one of the disliked provisions of the navigation acts. DICKERSON, NAVIGATION ACTS, *supra* note 82 at 112-13 (Franklin commenting that the navigation acts were generally mutually beneficial).

⁹³ The 1774 Declarations and Resolves was penned on behalf of the “inhabitants of the English Colonies in North America.” 1 JCC, *supra* note 71, at 67; *see also id.* at 90 (communicating resolutions to the “inhabitants of the British Colonies”). The October 20, 1774 Articles of Association were on behalf of the “inhabitants of the several colonies.” *Id.* at 75, 76 (“To obtain redress of these grievances, which threaten destruction to the lives, liberty, and property of his majesty’s subjects, in North America, we are of opinion, that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable measure: And, therefore, we do, for ourselves, and the inhabitants of the several colonies, whom we represent, firmly agree and associate, under the sacred ties of virtue, honour and love of our country . . .”). The Letter to the Inhabitants of Quebec was written on behalf of the “inhabitants of the . . . Colonies.” *Id.* at 105. Petitions to the king interchanged “subjects,” “colonists,” and “inhabitants.” *Id.* at 115-20.

⁹⁴ An intermediate draft provided in relevant part: “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. . . .” 9 *id.* at 885, 888.

⁹⁵ Many former colonies had freemanship policies. Burrell, *supra* note 6, at 73–74 (colonial freemanship policies). Participation in several colonial governments was limited to desirable inhabitants. *Id.* (“admitted inhabitants” versus others; filtering for dalliance, fornication, lying, drunkenness, blasphemy, and criminal activity). In other colonies, political power resided in or was otherwise influenced by church membership. *Id.* at 73–75. Colonial practice limiting common participation followed England’s practice of corporate oligarchies. *Infra* note 96 (medieval town oligarchies and corporate citizens).

society or incorporated religious affiliation would enjoy antidiscrimination under the Confederation.⁹⁶ In either case, “inhabitants” may have been a least common denominator for the Confederation’s purpose.

The proposed articles show a distinction between the more general sixth and the more specific seventh and eighth articles.⁹⁷ While the proposed seventh article contained specific antidiscrimination language, the proposed sixth article did not. The aim of all three considered together was directed at commercial harmony and antidiscrimination, though the sixth article was more general. The fact that the proposed sixth article linked the seventh with “Rights, Liberties, Privileges, Immunities and Advantages ... said Inhabitants now have, in all cases . . . except in those provided for by the next following Article” suggests that the sixth article was a claim for the status quo across the former colonies except for the more specific concerns addressed in the next articles.⁹⁸

What rights, liberties, and privileges could the drafters have been referring to in the proposed sixth article? At Independence, a few colonies still had colonial charter privileges and immunities. But these privileges and immunities would not have operated “in the other colonies.” Many colonies were formerly royal colonies. But royal commissions and instructions would formally be of no use post-Independence. Natural law?⁹⁹ Drafters, at the very least, had

⁹⁶ Governance of medieval English municipalities was influenced by guilds and restricted to *probi homines*. Burrell, *supra* note 6, at 41. A large portion of English boroughs eventually became oligarchies closed to common townsmen. *Id.* at 39–48.

In their constitutions, states also prohibited “special privileges and immunities” or some variant thereof—perhaps in order to prevent nobility titles, ban officers from farming customs, or prohibit limiting citizenship and governance to special classes of privileged or incorporated “citizens.” See, e.g., 7 THORPE, *supra* note 33, at 3813 (Virginia, 1776 Constitution, Declaration, Sect. 4 “That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.”); 3 *id.* at 1890 (Massachusetts 1780 Constitution, 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”).

Another factor to consider is that the former colonists were proposing free trade for all, both former English subjects as well as alien friends. *Supra* note 77 (commercial independence and open trade for all inhabitants); *infra* note 127 (open trade treaty with French).

⁹⁷ For discussion, see Burrell, *supra* note 6, at 100–104; RAKOVE, *supra* note 69, at 153, 181.

⁹⁸ Burrell, *supra* note 6, at 101.

⁹⁹ Chester J. Antieau, *Paul’s Perverted Privileges or The True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967) (arguing that the Clause represented the Framer’s intent to protect natural law); see also Hamburger, *supra* note 52; R.H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. OF CONST. L. 401 (2007); DAVID S. BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 10–11, 13 (2003). In colonial grievances, the founding generation also looked to a broader concept of natural law in the rights of freeborn Englishmen. See FAIRFAX RESOLVES, *supra* note 90, Resolution 5 “Resolved that the Claim lately assumed and exercised by the British Parliament, of making all such Laws as they think fit, to govern the People of these Colonies, and to extort from us our Money with out our Consent, is not only diametrically contrary to the first Principles of the Constitution,

in mind former English law in force in order to preserve the status quo across the colonies. But English law lost its force after Independence.¹⁰⁰ Post-Independence, state constitutions were intended to serve as the initial interface between former English laws and the people, with future legislation serving the balance of needs.¹⁰¹

The sixth article was introduced within a few days of Independence. Before Independence, Englishmen status served various important functions in the colonies. As mentioned above, status as an Englishmen was important to avoid disabilities under the navigation acts.¹⁰² Foreigners migrating to the colonies sought English naturalization beforehand to avoid restrictions in trade, travel, and land ownership.¹⁰³ Colonial citizenship was not a substitute for English denization or naturalization.¹⁰⁴ Colonial naturals under local naturalization, without English citizenship, faced threats of forfeiture.¹⁰⁵ Until colonial naturalization was banned altogether in 1773, colonial naturals were “Englishmen” only in their local colony and were generally aliens elsewhere.¹⁰⁶ But this was not the case for Englishmen receiving that status under English authority.¹⁰⁷ Subjects of England were Englishmen throughout the other colonies.¹⁰⁸

When considered in conjunction with English trade laws, the commercial aim of the three provisions suggests that the sixth article was an effort to replace or convert the function of Englishmen status into an article of governance for the Confederation.¹⁰⁹ As we saw above, aliens encountered several trade and travel restrictions.¹¹⁰ Englishmen status gave colonists

and the original Compacts by which we are dependant upon the British Crown and Government; but is totally incompatible with the Privileges of a free People, and the natural Rights of Mankind; will render our own Legislatures merely nominal and nugatory, and is calculated to reduce us from a State of Freedom and Happiness to Slavery and Misery.”

¹⁰⁰ Americans had renounced their allegiance to England and had sworn new oaths to their respective states and the national government. MORRIS, *supra* note 69, at 74; *supra* note 79. Some states chose to retain or incorporate some degree of English law until altered by new legislation. JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 109–10 (1971).

¹⁰¹ By 1777, most states had constitutions substituting for former English authority. *Supra* note 80 (resolution for states to adopt their own constitution).

¹⁰² *Supra* notes 82–86.

¹⁰³ KETTNER, *supra* note 33, at 66–69, 91–93, 104, 117–21; *supra* note 86 (aliens and trade in the colonies).

¹⁰⁴ KETTNER, *supra* note 33, at 93–96. In 1740, Parliament passed an act that allowed colonial inhabitants to become English subjects if they had resided in the colonies without significant interruption for seven years and had taken the requisite oaths. *Id.* at 74–75.

¹⁰⁵ *Id.* at 78–105.

¹⁰⁶ *Id.* at 96, 105, 121.

¹⁰⁷ *Id.* at 66–67.

¹⁰⁸ There might be exceptions for Scots. 1 BEER, THE OLD COLONIAL SYSTEM, *supra* note 83, at 85–91.

¹⁰⁹ Burrell, *supra* note 6, at 101–102.

¹¹⁰ Following monopolistic merchant charters of the sixteenth century, restrictions on travel were part of the original colonial design. BEER, ORIGINS, *supra* note 86, at 16–17 (travel restrictions); *supra* note 86 (exclusion of aliens from colonial trade). For the most part, the flourishing colonies of the latter seventeenth and eighteenth century encouraged immigration. E.E. PROPER, COLONIAL IMMIGRATION

rights, liberties, and privileges across the colonies. As a replacement for the all-important Englishmen status, the proposed sixth article can be viewed as an initial position that former colonists, “retained all the rights, liberties, privileges, immunities, and advantages of *natural-born Englishmen* in the other colonies without the natural-born Englishmen language.”¹¹¹ In other words, colonists would not be considered aliens and disabled in the other colonies.¹¹²

Removing alienage disabilities across the states is only one-half of the issue. It is easy to say that drafters did not want fellow colonists to be aliens in the other colonies. The unanswered question is what did embryonic “American citizenship” mean in 1776?¹¹³ Was English law concerning alienage disabilities, citizenship, and trade transplanted to the states?¹¹⁴ Was a subset of England’s fundamental law to remain?

When viewing the first draft’s proposed sixth article with the seventh and eighth articles, we see the bigger picture. As a declaration of principle in the background of England’s navigation acts, the proposed sixth article prefaced and supported the underlying need to prevent alienage discriminations in trade, navigation, and commerce.¹¹⁵ The proposed seventh and eighth articles contained the substance of the drafters’ initial interstate concerns and replaced the function of English regulations by placing inhabitants of each colony or state on the same basis as natives with respect to rights in trade, navigation, and commerce.¹¹⁶ Removal of alienage disabilities in conjunction with the other antidiscrimination provisions provided an initial interstate regulation for the new republic.

Both the proposed sixth and seventh articles were omitted from the Articles’ second draft.¹¹⁷ The omission would have left the states unrestricted in alienage disabilities and commercial discrimination. On November 11, 1777, a committee reintroduced both the general

LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA 20-21 (1900). New England had travel restrictions on account of strict religious standards. *Id.* at 22-25. Certain colonies had temporary travel restrictions to prevent servants escaping or debt evasion. Bogen, *supra* note 92, at 812–13.

¹¹¹ Burrell, *supra* note 6, at 102.

¹¹² Land ownership and use of courts were two common alienage disabilities. *Supra* note 32 (denization granted land holding rights and access to courts).

¹¹³ Privileges and immunities language, without a national citizenship definition, attracted to state laws and antidiscrimination against nonresident citizens. *Infra* Parts II.E.1-F. Many early Privileges and Immunities Clause interpretations, *infra* note 196, argued that once a state gave its citizens rights it could not deny those rights to citizens of other states. *Infra* Part III.A.2 (*Livingston* case). We do not find a definition for citizenship rights until Reconstruction and the CRA of 1866. *Infra* Part III.C.

¹¹⁴ As we will see later, the first inclination was for courts to apply some component of English law and English citizenship rights such as land holding rights, use-of-court rights, and perhaps some adaptation of John Locke or Sir William Blackstone’s categorization of rights. *Infra* notes 236–242, 266.

¹¹⁵ Because the crown historically clothed commercial societies with monopolistic privileges, “privileges and immunities” language—similar to denization language for basic land holding and court privileges—easily associated with commercial rights. Burrell, *supra* note 6, Part II (tolls, merchant adventurers, and guild monopolies).

¹¹⁶ *Supra* note 92; see also Burrell, *supra* note 6, at 102.

¹¹⁷ See 5 JCC, *supra* note 71, at 672, 676 (August 20, 1776 draft).

privileges and immunities language and the substantive antidiscrimination language.¹¹⁸ The draft language of what would become Article IV, Paragraph 1, of the Articles went through a few additional revisions.¹¹⁹ In each of the revisions, the general language introduced the more specific antidiscrimination language concerning anticipated discriminations in travel, imposts, and duties. The final draft provided:

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 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

¹¹⁸ The November 11 first form provided:

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.

See 9 id. at 885, 888.

The editors of the Journals indicate that Richard Henry Lee authored the paragraph reintroducing the omitted privileges and immunities and antidiscrimination language. *Id.* at 888 n.2. Lee, like Dickinson, was noted for his support of England's commercial regulation and this may have contributed to his return to commerce-related regulation found in Dickinson's draft. DICKERSON, NAVIGATION ACTS, *supra* note 82 at 119 (Thomas Jefferson quoted as remarking that "...[Richard Henry Lee] stopped at the half way house of Dickinson"—jesting that Lees followed Dickinson in support for England's parental commercial regulation); *see also supra* note 90 (describing Dickinson's support for English commercial regulation).

¹¹⁹ For more discussion, see Burrell, *supra* note 6, at 101–104. On problems with and revisions to the Articles of Confederation in 1776 and its final draft in 1777, see JENSEN, AMERICAN REVOLUTION, *supra* note 67, at 138–44.

or restriction shall be laid by any State, on the property of the United States, or either of them.¹²⁰

The final draft of Article IV of the Articles maintained nondiscrimination in trade, navigation, and commerce in the second half of the first paragraph but also maintained general language in the first half.¹²¹ When the Founders stated that “the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States” they provided generic removal of alienage disabilities in the colonies, and in so doing, they attempted a basic national citizenship for select inhabitants (“all privileges and immunities of free citizens [*of the United States*] in the several States”).¹²² The rest of the Article IV gave commercial substance to that intention in the form of antidiscrimination. The “privileges and immunities of Englishmen” and English trade laws formerly served this purpose.¹²³ The entire focus of Article IV, paragraph 1, was addressing or attempting to address some prototype of American citizenship through the continued prevention of alienage disabilities as well as providing antidiscrimination comparable to what colonists received as Englishmen under English commercial law and the navigation acts.¹²⁴

¹²⁰ ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

¹²¹ *Id.*

¹²² *Id.* (“of the United States” added). The fact that the Confederation exercised a national power to exclude paupers, vagabonds, and fugitives from the entitlement of “privileges and immunities of free citizens” lends credit to this interpretation. The Articles’ privileges and immunities language is similar to denization language *supra* note 33 (denization giving aliens “privileges and immunities of Englishmen” or some variation thereof).

Though most focus in the era of the American Revolution was on states and state constitutions, there was, nonetheless, a national identity. *Supra* note 93 (citing uses of “inhabitants of the colonies” in revolutionary grievances). A few years after the Articles of Confederation was ratified, the Constitution provided for citizens of the United States. U.S. CONST. art. I, §§ 2, 3 (age and residency requirements for several offices). The first naturalization act of 1790 created “citizens of the United States.” Act of Mar. 26, 1790, Sess. II. ch. 3, 1 Stat. 103; *see also infra* note 132 (citizens of western territories enjoyed the privileges of citizens of the United States); *infra* Part II.F (providing additional arguments for the “of the United States” reading of the Clause). *But see infra* notes 206-208 (federalism restraints and states’ citizenship rights); *infra* Part III.A.2 (state-by-state view of citizenship rights and antidiscrimination).

¹²³ *Supra* notes 79–91 (Independence from Englishmen status and England’s commerce laws).

¹²⁴ *Supra* notes 82–121. Thomas Burke in December 1777 was concerned with the reach of the proposed Article IV of the Articles. His concern seems to be limited to Article IV removing alienage of nonresidents only temporarily in North Carolina and who have not paid North Carolina taxes.

The Constitution of No. Carolina permits not the Privilege of Citizens to any who have not resided therein 12 months, and paid Taxes. (Local protection is given to all within the Territory.) The Legislature therefore cannot ratify an Article which gives such privileges to persons residing in other states. Our Commons are voted for by all free Citizens, and if the Inhabitants of our Neighboring States have the privileges of Citizens in ours they might insist upon the right of voting for members of our Legislature which would be a political absurdity.

8 SMITH, LDC, *supra* note 90, at 433 (Thomas Burke, December 18, 1777).

The drafting of the Articles was far from perfect. Drafters were struggling with awkward language and the difficult task of replacing English authority in the several states without England's laws and parental structure, struggling with state sovereignty and a history of commercial societies, and struggling with residual confusion surrounding the significance of and variance within colonial or state naturalization.¹²⁵

The founding generation responsible for the Articles of Confederation was also busy at securing commercial equality for alien friends. The nascent republic needed allies, and one method to ensure friendly relations was to open borders for free trade.¹²⁶ In its July 1776 Plan of Treaties with Louis the Sixteenth, the Continental Congress offered commercial antidiscrimination to the French:

Art. I: The Subjects of the most Christian King shall pay no other Duties or Imposts in the Ports, Havens, Roads, Countries, Islands, Cities, or Towns of the said united States, or any of them, than the Natives thereof, or any Commercial Companies established by them or any of them, shall pay, but shall enjoy all other the Rights, Liberties, Priviledges, Immunities, and Exemptions in Trade, Navigation and Commerce in passing from one Part thereof to another, and in going to and from the same, from and to any Part of the World, which the said Natives or Companies enjoy.¹²⁷

When "privileges and immunities" language is used in an explicit antidiscrimination sense, there is not much difference between the citizenship background and the antidiscrimination principle. In a commercial sense, the proposed treaty extended citizenship to the French.

Examining early treaty discussions, one can see additional uses of privileges and immunities language or at least the concept of commercial reciprocity.¹²⁸ The Confederation's Treaty with Prussia, provided:

¹²⁵ *Supra* Part II.C. See also THE FEDERALIST NO. 42 (James Madison) (famous criticism discussing naturalization and the Articles' privileges and immunities language; noting problem with Articles in which a free inhabitant in one state can compel citizenship rights in that state by receiving admission rights in another state, which the former state must recognize under an interpretation of Article IV of the Articles).

¹²⁶ See, e.g., 4 JCC, *supra* note 71, at 257–59 (commercial independence and open-door policy in April 1776); *supra* note 77. On American treaties of reciprocity with other countries, see generally SETSER, *supra* note 77. It was believed that open borders and free trade would help protect the infant nation, which no longer enjoyed England's protection. SCHLESINGER, *supra* note 76, at 598-99.

¹²⁷ 5 JCC, *supra* note 71, at 574, 576–77 (July 18, 1776 Resolves); see also *id.* at 768.

¹²⁸ James Madison, in December 1782, commented on a proposed treaty with Britain:

Mr. M[adison] added that the letter from Doctr. Franklin [of] 14 Oct. 1782 sh[oul]d be referred to a Committee with a view of bringing into consideration the preliminary article proposing that British subjects & American Citizens s[houl]d reciprocally have in matters of commerce the privileges of natives of the other party.

Article. 2. The subjects of his majesty the king of Prussia, may frequent all the coasts and countries of the United States of America, and reside & trade there in all forts of produce, manufactures and merchandise; and shall pay within the said United states no other or greater duties, charges or fees whatsoever than the most favored nations are or shall be obliged to pay; and they shall enjoy all the rights, privileges and exemptions in navigation & commerce, which the most favoured nation does or shall enjoy; submitting themselves, nevertheless to the laws and usages there established, and to which are submitted the citizens of the United States, and the citizens and subjects of the most favored nations.

Article. 3. In like manner the citizens of the United States of America may frequent all the coasts and countries of his majesty the king of Prussia, and reside and trade there in all forts of produce, manufactures and merchandise, and shall pay in the dominions of his said majesty, no other or greater duties, charges or fees whatsoever, than the most favored nation is or shall be obliged to pay; and they shall enjoy all the rights, privileges and exemptions in navigation and commerce which the most favored nation does or shall enjoy; submitting themselves nevertheless to the laws & usages there established, and to which are submitted the subjects of his majesty the king of Prussia, and the subjects & citizens of the most favored nations.¹²⁹

Reviewing these treaty discussions, one can compare Article IV of the Articles to the treaties in terms of antidiscrimination principles, as Article IV's latter half contained similar

19 SMITH, LDC, *supra* note 90, at 518, 520 (footnotes omitted). *See also* James Madison to Edmund Randolph, May 20, 1783, 20 *id.* at 269-73 (open border policy sharing all commercial privileges initially, with a more restrictive policy as the states became more settled).

Charles Pinckney, in a speech on August 10, 1786, discussed proposals for a treaty with Spain.

Spain consents to treat with us upon what she terms principles of perfect reciprocity. Importation to be freely made in each others vessels. The duties to be paid by each in the ports of the other the same as those paid by the natives . . . Permission to go to the Canaries . . . [and] that we should have liberty to go to the Philippines . . . In return we are to admit her subjects freely into all the ports we have without any exception of articles upon the footing of Natives & to stipulate the forbearance of our right to navigate the Mississippi for a given time.

23 *id.* at 446, 449.

¹²⁹ A Treaty of Amity and Commerce between His Majesty the King of Prussia, and the United States of America (1785), *available at* http://avalon.law.yale.edu/18th_century/prus1785.asp.

antidiscrimination provisions.¹³⁰ When the founding generation wanted to ensure antidiscrimination in terms of a native's privileges, it included express language doing so.¹³¹ In both the Articles of Confederation and the treaties of the period, there was a consistent theme of giving a nonmember commercial membership privileges through the removal of most or all commercial alienage disabilities.¹³²

At this point, summarizing an earlier work, I have discussed the medieval concept of privileges and immunities; the use of charters in towns, guilds, and colonies; the denization clauses within colonial charters; and the colonial charters themselves.¹³³ In the period of exploration and discovery, commerce-related charters extended company privileges to nonmembers who would not have otherwise enjoyed monopoly chartered privileges.¹³⁴ I have also briefly covered the seventeenth-century concept of "liberty of Englishmen."¹³⁵ The American Revolution brought Independence and the transformation of English citizenship and navigation laws into Article IV of the Articles of Confederation.¹³⁶ The founding generation used privileges and immunities language to assist in the removal of commercial alienage disabilities for the inhabitants of the several states and alien friends.¹³⁷ Next, I discuss the Articles of Confederation's transformation into the Constitution.

D. Discrimination and Regulation of Commerce: Amendments to the Articles of Confederation

The Articles of Confederation threaded the former colonies together but failed in several respects. There was a need for ensuring peace and harmony among the states in several matters, especially land boundaries, interstate and foreign commerce, and collection of revenue.¹³⁸

¹³⁰ The Prussia Treaty extended antidiscrimination up to the level of most-favored nation. Article IV of the Articles extended commercial antidiscrimination to the level of native state citizens: "the people of each State shall 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" ARTICLES OF CONFEDERATION, art. IV, para. 1.

¹³¹ *Supra* note 130 and accompanying text; *infra* notes 208, 225 (arguing that the founding generation and the Framers were familiar with state-by-state antidiscrimination language).

¹³² For example, the founding generation ensured that the purchasers of land in the far western territories were given a republican form of government and the "equal enjoyment of all the privileges of citizens of the United States." 23 SMITH, LDC, *supra* note 90, at 453; *see also* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1285-87 (2010) (inhabitants of new territories entitled to the "privileges and immunities of United States citizens").

¹³³ *Supra* Part II.A.

¹³⁴ *Id.*

¹³⁵ *Supra* Part II.B.

¹³⁶ *Supra* Part II.C.

¹³⁷ *Id.*

¹³⁸ *See generally* JENSEN, NEW NATION, *supra* note 78. State conflict between North and South and between large and small states was a problem in 1776 and 1787. *Supra* note 91; *infra* notes 160, 172, 174 (pre-Constitution problems between North and South and the fear that any power in Congress would create a monopoly in favor of the more populous northern carrying states).

United in confederacy with little power in the central Congress, the Confederacy did not fare well. Even if the Articles adequately addressed a matter in principle, there was a problem of enforcement.¹³⁹

Before the states had the opportunity to ratify the Articles of Confederation, there were proposals for change. During this time, Congress borrowed heavily for the War and both the states and Congress were issuing paper money.¹⁴⁰ Currency had depreciated so much that it was worthless.¹⁴¹ Congress was dependent on the states for voluntary support to pay national expenses.¹⁴² To collect revenue, there was a proposal to clothe Congress with the right of levying duties on foreign imports except arms, ammunition, clothing, and other items necessary for war.¹⁴³ Congress passed the proposal in February 1781, which became a proposed amendment to the Articles of Confederation.¹⁴⁴ Under the amendment, duties were to continue until the United States debt had been paid off. Rhode Island, a tiny state when compared with the other states, refused assent, claiming that the impost was against the Articles.¹⁴⁵ The 1781 impost failed.

By the Articles' ratification in March 1781, its defects and the need for more central power were clear.¹⁴⁶ Within a week of ratification, several individuals were appointed to prepare a plan to enforce Confederation acts and resolutions passed pursuant to the Articles.¹⁴⁷ Another committee was tasked with explaining the Confederation's powers.¹⁴⁸ The latter committee answered that one of the Confederation's objectives for execution and supplemental articles was to "describ[e] the privileges and immunities to which the citizens of one State are entitled in another."¹⁴⁹

¹³⁹ 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787, at 141 (Merrill Jensen ed., 1976) [hereinafter DOC. HIST. OF RATIF. CONST.] (attempts to give Confederation Congress powers to enforce Articles).

¹⁴⁰ JENSEN, NEW NATION, *supra* note 78, at 37–42, 313–26; RAKOVE, *supra* note 69, at 210–12; MORRIS, *supra* note 69, at 156–59.

¹⁴¹ MORRIS, *supra* note 69, at 34–36.

¹⁴² 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 140.

¹⁴³ *Id.*

¹⁴⁴ Amendments to the Articles of Confederation required unanimity. ARTICLES OF CONFEDERATION, art. XIII.

¹⁴⁵ JENSEN, NEW NATION, *supra* note 78, at 58, 64–65; *see also* 19 JCC, *supra* note 71, at 109, 112–13 (February 3, 1781). Virginia rescinded its ratification of the impost amendment in 1782. JENSEN, NEW NATION, *supra*, at 65; 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 140, 146. In 1783, Congress proposed a subsequent provision to levy duties on foreign items for twenty-five years. 1 DOC. HIST. OF RATIF. CONST., *supra*, at 146–48; JENSEN, NEW NATION, *supra*, at 74–76, 408–16.

¹⁴⁶ RAKOVE, *supra* note 69, at 288.

¹⁴⁷ *Id.* at 289–90; 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 141–43 (proposing coercive powers against noncomplying states); JENSEN, NEW NATION, *supra* note 78, at 49–50. *See also* 20 JCC, *supra* note 71, at 469–71 (May 2, 1781).

¹⁴⁸ 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 143–45.

¹⁴⁹ 21 JCC, *supra* note 71, at 894.

When Britain closed several Caribbean ports to American vessels (but not to American goods) there was a call for Congress to retaliate.¹⁵⁰ On their own accord, several states retaliated with extreme duties on British trade.¹⁵¹ States were violating treaties with their own independent trade and navigation acts.¹⁵² The need for Congress to regulate foreign trade was widely recognized.¹⁵³ Congress resolved that the states did not have the right to pass legislation “interpreting, explaining or construing a national treaty.”¹⁵⁴ For various reasons, Congress felt that the states would be better served if Congress were to regulate foreign commerce for the states collectively.¹⁵⁵

¹⁵⁰ JENSEN, *NEW NATION*, *supra* note 78, at 162-63, 401; 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 154. After the War, forces in both the states and England wanted to repair the commercial relationship with reciprocity and commercial equality. JENSEN, *NEW NATION*, *supra*, at 157-63. But others in England were worried about American trade and Britain’s trade in the West Indies. Hopes at friendly commercial trade were lost when the crown excluded American ships from the West Indies in 1783. *Id.* at 162-63.

¹⁵¹ MORRIS, *supra* note 69, at 148-49; JENSEN, *NEW NATION*, *supra* note 78, at 298-301, 401-04.

¹⁵² JENSEN, *NEW NATION*, *supra* note 78, at 297 (state navigation acts); *see also id.* at 280-81 (treaty violations concerning pre-War debt); RAKOVE, *supra* note 69, at 343 (same); 31 JCC, *supra* note 71, at 781-874 (discussing treaty violations in relation to Congress, states, and foreign powers); JAMES MADISON, *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES* (1787), at 9 *THE PAPERS OF JAMES MADISON* 345 (Hutchinson ed., 1962-) [hereinafter *MADISON PAPERS*] (listing the Confederation’s failures including commerce regulation and treaty violations); GIESECKE, *supra* note 83, at 123-48 (state commercial legislation and Confederation’s attempts to regulate commerce).

¹⁵³ 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 154.

Resolved, That it be, and it hereby is recommended to the legislatures of the several states, to vest the United States in Congress assembled, for the term of fifteen years, with power to prohibit any goods, wares or merchandize from being imported into or exported from any of the states, in vessels belonging to or navigated by the subjects of any power with whom these states shall not have formed treaties of commerce.

Resolved, That it be, and it hereby is recommended to the legislatures of the several states, to vest the United States in Congress assembled, for the term of fifteen years, with the power of prohibiting the subjects of any foreign state, kingdom or empire, unless authorized by treaty, from importing into the United States, any goods wares or merchandize, which are not the produce or manufacture of the dominions of the sovereign whose subjects they are.

Provided, That to all acts of the United States in Congress assembled, in pursuance of the above powers, the assent of nine states shall be necessary.

Id. (April 30, 1784); *see also* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 266-72 (2005) (noting founders’ belief that uniform congressional commerce legislation was needed).

¹⁵⁴ 32 JCC, *supra* note 71, at 124-25. States were asked to repeal all laws contravening treaties. *Id.* at 176-84 (April 1787); JENSEN, *NEW NATION*, *supra* note 78, at 281.

¹⁵⁵ *Supra* notes 151-154 (states retaliating against British trade and violating treaties).

But reform was not limited to foreign commerce. In 1785, the Confederation Congress wanted greater internal commerce powers. States were fighting each other over boundaries and interstate trade.¹⁵⁶ Contrary to the Articles, which could not be enforced efficiently, states were treating citizens of other states as aliens.¹⁵⁷ It was clear that an amendment to the Articles of Confederation was needed.¹⁵⁸ To remedy these concerns, the Confederation Congress proposed to amend Article IX of the Articles. The 1785 amendment, in relevant part, provided:

The United States in Congress Assembled shall have the sole and exclusive right and power of determining, on peace and war, except in the cases mentioned in the sixth Article[;] of sending and receiving Ambassadors[;] entering into treaties and alliances[;] of regulating the trade of the States as well with foreign Nations, as with each other[;] and of laying such imposts and duties, upon imports and exports, as may be necessary for the purpose; provided that the Citizens of the States, shall in no instance be subject to pay higher imposts and duties, than those imposed on the subjects of foreign powers; provided also that the Legislative power of the several States shall not be restrained from prohibiting the importation or exportation of any species of goods or commodities whatsoever, provided also that all such duties as may be imposed, shall be collected under the authority and accrue to the use of the State in which the same shall be payable. . . .¹⁵⁹

In the excerpt, we see the proposed transition from the antidiscrimination principles underlying Article IV of the Articles to what would eventually be an expanded power in Congress to regulate commerce among the states and foreign nations. The proposed amendment reignited the debate between northern carrying states and southern planting states.¹⁶⁰ The 1785

¹⁵⁶ JENSEN, *NEW NATION*, *supra* note 78, at 330–37 (uncertainty in far western boundaries and efforts for statehood prompted conflict among the states); *id.* at 335–37 (Pennsylvania militia drove Connecticut settlers out of jurisdiction); *id.* at 338–39 (states exported and imported through neighboring states; states grieved customs on imports coming through interstate ports); *id.* at 338–39 (rivalry between New York, Connecticut, and New Jersey resulted in interstate discrimination in trading fees).

¹⁵⁷ MADISON, *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES*, 9 *MADISON PAPERS*, *supra* note 152, at 345–58 (commenting that placing sister states’ commerce and trade on the same footing as foreign nations was a violation of the spirit and harmony of the Confederation); 8 *id.* at 483 (Madison to Monroe, January 22, 1786); *THE FEDERALIST NO. 22* (Alexander Hamilton) (inability to regulate commerce and states treating other citizens as aliens and foreigners). *See also* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 *KY. L.J.* 37, 57–58, 62, 77 (2005). But many states exempted sister states from their respective tariffs on foreign manufactures. JENSEN, *NEW NATION*, *supra* note 78, at 339–41.

¹⁵⁸ 1 *DOC. HIST. OF RATIF. CONST.*, *supra* note 139, at 154–55.

¹⁵⁹ *Id.* at 155–56.

¹⁶⁰ JENSEN, *NEW NATION*, *supra* note 78, at 403–06 (Southerners wanted to avoid being forced to ship in more expensive northern ships; fear that Northerners in Congress would pass a navigation act favorable to northern shipbuilders); 1 *DOC. HIST. OF RATIF. CONST.*, *supra* note 139, at 155; *see also supra* note 91 (conflict among the states in 1776 and 1777).

amendment contemplating congressional regulation of interstate commerce generated so much controversy in Congress that it was never sent to the states for ratification.¹⁶¹ Change was needed but perceived conflict prevented change.¹⁶²

The many problems with the Articles and the efforts to amend the Confederation led to more systematic reforms. In the spring of 1786, several modifications were considered. On May 3, 1786, Congress agreed to consider a broader remedy to the problem.¹⁶³ The Grand Committee's Report proposed seven amendments to the Articles of Confederation.¹⁶⁴ Proposed Article 14 provided:

The United States in Congress Assembled shall have the sole and exclusive power of Regulating the trade of the States as well with foreign Nations as with each other and of laying such prohibitions, and such Imposts and duties upon imports, and exports, as may be Necessary for the purpose; provided the Citizens of the States shall in no instance be subjected to pay higher duties and Imposts than those imposed on the subjects of foreign powers, provided also, that all such duties as may be imposed shall be collected under such Regulations as the United States in Congress Assembled shall establish consistent with the Constitutions of the States Respectively and to accrue to the use of the State in which the same Shall be payable; provided also that the Legislative power of the several States shall not be restrained from laying embargoes in times of Scarcity—And provided lastly that every Act of Congress for the above purpose shall have the assent of Nine States in Congress Assembled, and in that proportion when there shall be more than thirteen in the Union.¹⁶⁵

As we see in both the proposed 1785 amendment and Article 14 of the 1786 Grand Committee Report, Congress was attempting to regulate, define, and enforce antidiscrimination among the states—to define the privileges and immunities of citizens across the states.¹⁶⁶

¹⁶¹ JENSEN, *NEW NATION*, *supra* note 78, at 404–06.

¹⁶² *Id.* at 337-39.

¹⁶³ 1 *DOC. HIST. OF RATIF. CONST.*, *supra* note 139, at 163; JENSEN, *NEW NATION*, *supra* note 78, at 418–21.

¹⁶⁴ 1 *DOC. HIST. OF RATIF. CONST.*, *supra* note 139, at 164–68.

¹⁶⁵ *Id.* at 164. This proposed amendment was quite similar to the 1785 amendment. *Supra* note 159.

¹⁶⁶ Additional provisions in the 1786 Report provided sanctions for violations of congressional revenue regulations. States would be fined for noncompliance with their quota and revenue requests. Proposed Article 15. If noncompliance continued, then Congress would step in the shoes of the state and levy, assess, and collect the funds through the same process by which states collected funds from its own citizens. Congress or its agents could compel state officers to collect the funds. Under the proposed Article 18, states were to pass laws showing their compliance with regulations concerning revenue. The Grand Committee Report also provided for the creation of a federal tribunal in Article 19. The tribunal would have jurisdiction over crimes by federal officers and appellate jurisdiction over state tribunals concerning: (1) interpretation of the law of nations or federal treaties with foreign nations; (2) U.S.

Consideration of the Grand Committee's amendments did not move forward due to internal disputes over commercial powers.¹⁶⁷ Thereafter, Virginia called the Annapolis Convention, which resolved to call a new convention in 1787.¹⁶⁸ The latter became the Philadelphia Constitutional Convention of 1787.¹⁶⁹

E. United States Constitution and Antidiscrimination

One year after the Grand Committee's Report, the Framers met in Philadelphia to draft the United States Constitution. Primary concerns were the ability to raise revenue, regulate commerce, and enforce the Articles of Confederation.¹⁷⁰

Above, we saw that there was much controversy over giving the Confederation Congress the power to regulate trade.¹⁷¹ These concerns were seen in Convention debates. A majority of debates centered on the extreme differences among North and South and large and small states.¹⁷² The principal concern was that the larger states creating a majority would bully the smaller states along self-interested pursuits if those small states had only a proportional

regulations addressing taxation, trade, and commerce; and (3) any other great cause of interest where the U.S. is a party. 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 164-68.

¹⁶⁷ 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 163-64; JENSEN, AMERICAN REVOLUTION, *supra* note 67, at 154 (commenting that North-South disputes prevented any resolution of congressional commerce power).

¹⁶⁸ RAKOVE, *supra* note 69, at 374-80.

¹⁶⁹ JENSEN, AMERICAN REVOLUTION, *supra* note 67, at 158-61 (congressional commerce power was a major concern of the Annapolis Convention).

¹⁷⁰ JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), 9 MADISON PAPERS, *supra* note 152, at 345; 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18-28 (photo. reprint 1966) (1937) (Randolph's enumeration of the Confederation's defects); 3 FARRAND, *supra*, at 539-51 (Madison's preface to the Convention).

¹⁷¹ *Supra* Part II.D.

¹⁷² *See, e.g.*, 1 FARRAND, *supra* note 170, at 480-507 (June 30, 1787) (debates on controversies between northern and southern states and large and small states; concerns with alliances raised in response to proposal to vest states with equal votes in Senate); *id.* at 598-606 (further debates on census, representation, and basis for taxation); *supra* note 91 (conflict among the states in 1776 and 1777).

Before the Convention, the Confederation considered apportioning national debt on states' population of free white inhabitants. *See* 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 148 (1783 proposal that expenses be apportioned not on value of land but on number of free and white inhabitants and 3/5s of slaves, excluding Indians not taxed); 24 JCC, *supra* note 71, at 191. Northerners argued that they would be paying for all the country's expenses. Northerners had more free white citizens; southerners had fewer free white citizens and many slaves. Distributing national expenses on the white population combined with a prohibition on Congress's ability to levy export duties would probably result in northern states paying for national government. 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 242.

This controversy continued into the Convention debates. By the middle of the Convention, the Framers had agreed to extend the basis of expenses and representation to free white inhabitants, indentured servants, and 3/5s of others. *See, e.g.*, 1 FARRAND, *supra* note 170, at 589-606 (debates of July 12 and 13).

representation in the national Congress.¹⁷³ Specifically, there was a fear that northern carrying states being more powerful would be able to limit southern planting states on matters of trade and commerce.¹⁷⁴ Northerners, however, felt that Congress must have unlimited power to regulate trade.¹⁷⁵ The northern states were opposed to equal voting, as minority states should not be able to control a majority, essentially creating a veto over important legislation.¹⁷⁶ The introduction of new western states would exacerbate the problem.¹⁷⁷

These positions can be seen throughout the Confederation debates on the Virginia Plan and the New Jersey Plan and the method of voting in Congress's two branches.¹⁷⁸ In the heart of the debate, Edmund Randolph, who had introduced the Virginia Plan, discussed with James Madison the option of giving the small state's an equal vote in the Senate on thirteen key subject matters, mostly involving commercial and national issues.¹⁷⁹ Enhanced representation, both proportional and in equal state units, was seen as a means of remedying bias where that bias was most likely to be critical.¹⁸⁰ One of the highlighted areas was "regulating the rights to be enjoyed by citizens of one State in the other States."¹⁸¹ Randolph's proposal mirrors the Confederation's charge to describ[e] the privileges and immunities to which the citizens of one

¹⁷³ 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 241. The recommendation was for a census to be taken every number of years so that representation in the House and the distribution of expenses could be reapportioned. Northerners opposed the census. *Id.* at 241. Presumably, it would increase their expense burden. The problem of apportioning voting and national expenses was a difficulty back in 1774-1776. *Id.* at 239-40; JENSEN, NEW NATION, *supra* note 78, at 74.

¹⁷⁴ 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 241; JENSEN, NEW NATION, *supra* note 78, at 403-07; 2 FARRAND, *supra* note 170, at 445-56; *supra* note 160.

¹⁷⁵ 2 FARRAND, *supra* note 170, at 445-56; *supra* notes 172-173.

¹⁷⁶ *Supra* notes 172-173; *see also supra* note 145 (Rhode Island frustrating proposed 1781 impost). To protect against northern dominance, an intermediate draft of the Constitution proposed that commercial legislation receive a two-thirds majority vote of each house, that Congress be forbidden from levying export duties, and that Congress be forbidden from laying import duties upon or prohibiting the importation of persons. 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 242; 2 FARRAND, *supra* note 170, at 445-56.

¹⁷⁷ 2 FARRAND, *supra* note 170, at 445-56.

¹⁷⁸ The Virginia Plan, with proportional voting in one branch, was submitted on May 29, 1787. The elected branch selected members of the second branch from a pool of nominees chosen by the states. 1 FARRAND, *supra* note 170, at 20. The small states felt proportional voting would effectively disenfranchise them. The New Jersey Plan provided for equality voting, giving the small states an equal vote. 1 FARRAND, *supra* note 170, at 241-47; *see also id.* at 252 (Wilson contrasting the two Plans).

¹⁷⁹ 3 FARRAND, *supra* note 170, at 55 (July 10, 1787); *see also* FRANK G. FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES: FROM THE REVOLUTIONARY WAR TO 1861, at 20 (1906).

¹⁸⁰ Giving the states an equal vote in critical and national issues was contemplated in Silas Deane's draft of union following Independence. 2 SMITH, LDC, *supra* note 90, at 418-19, articles 6, 7 (affording the regular proportional congress with the colonies themselves in matters of war and the privileges of the colonies, both individually and collectively); RAKOVE, *supra* note 69, at 143-44 (discussing Silas Deane's proposals for union).

¹⁸¹ 3 FARRAND, *supra* note 170, at 55.

State are entitled in another.”¹⁸² Randolph never introduced the compromise plan because a vote earlier that morning had given the small states an equal Senate vote in all cases.¹⁸³

The significant differences between North and South and large and small states almost brought an end to the Convention. Eventually, the Convention was able to navigate the differences between the Virginia and New Jersey Plans.¹⁸⁴ The major compromise being states’ equal voting in the Senate in all matters but proportional voting in the House.

As discussed above, the aim of Article IV of the Articles was to prevent former colonists from being considered aliens in the other colonies.¹⁸⁵ Article IV’s privileges and immunities language attempted to replace the parental function that Englishmen status and English laws served in trade and commerce.¹⁸⁶ Article IV contained two distinct concepts—an embryonic citizenship provision removing alienage in the general language and the more specific antidiscrimination language in the latter part.¹⁸⁷ The entire focus of Article IV was addressing or attempting to address some prototype of American citizenship and the continued prevention of alienage disabilities in the background of English commercial law.¹⁸⁸

The pre-Constitution period and the Convention debates show the transformation of Article IV’s principles.¹⁸⁹ Repairing the Articles’ defects, the Convention created a union of states with greater powers in raising revenue and regulating interstate and foreign commerce.¹⁹⁰ The Framers stripped Article IV’s antidiscrimination principles and entrusted them to Congress for legislative enforcement. Congress’s Article I powers—further establishing and defining the privileges and immunities of citizens in the other states—protect interstate harmony in several areas. Article I, Section 8 grants congressional power to impose uniform imposts and duties; to regulate foreign and interstate commerce among the states; to provide uniform naturalization and bankruptcy laws; and to enact necessary and proper laws under defined powers.¹⁹¹ Section 9 prohibits taxing exports of states; prohibits giving preferences to ports; and prohibits requiring ships land and pay duties in states.¹⁹² Section 10 prohibits state taxation of imports and exports beyond inspection fees unless approved by Congress and prohibits tonnage duties unless

¹⁸² 21 JCC, *supra* note 71, at 894; *supra* note 149.

¹⁸³ 2 FARRAND, *supra* note 170, at 17-18.

¹⁸⁴ 1 *id.* at 488 (Franklin’s speech of compromise: “The diversity of opinions turns on two points. If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges of [the] planks do not fit[,] the artist takes a little from both, and makes a good joint. In like manner[,] here both sides must part with some of their demands, in order that they may join in some accommodating proposition.”).

¹⁸⁵ *Supra* Part II.C.

¹⁸⁶ *Id.*

¹⁸⁷ *Supra* notes 92-124.

¹⁸⁸ *Supra* notes 83-124.

¹⁸⁹ *Supra* Parts II.C-D.

¹⁹⁰ *See, e.g.*, THE FEDERALIST NO. 30 (Alexander Hamilton); THE FEDERALIST NO. 42 (James Madison).

¹⁹¹ U.S. CONST. art I, § 8 (1789).

¹⁹² U.S. CONST. art I, § 9.

approved by Congress.¹⁹³ Article IV, Section 2, Clause 3, provides protections for slaveholders in other states. Framers also added the census, 3/5s clause, and other checks and balances to help promote harmony between the states. These are examples of repairs to the Articles of Confederation. In many ways, much of the Constitution came out of the former Article IV of the Articles and the need to manage commercial harmony among the states.¹⁹⁴

1. Naturalization and the Privileges and Immunities Clause

One of the harmony reforms given to Congress was uniform naturalization authority.¹⁹⁵ Accompanying Congress's naturalization power, Framers changed privileges and immunities language from "free inhabitants" to "citizens." Of the former Article IV of the Articles, with little discussion or debate, the Framers retained only "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."¹⁹⁶ Instead of the states' "free inhabitants," we have "citizens of each state" entitled to the privileges and immunities of citizens. What were the effects of these two provisions? At face value, the intended remedy was to prevent states from giving undesirable rights of citizenship in the several states—a favorite criticism of the Articles.¹⁹⁷ With the changes, only Congress could grant citizenship and rights of citizenship across the states.

What were the rights of citizens in the several states? Under English law, naturalization and denization were national acts and English citizenship had an effect across the dominions—removing the ancient disabilities of holding land and using the courts for certain actions.¹⁹⁸ Several trade and travel laws were based on English citizenship and aliens were prevented from some level of intercourse.¹⁹⁹ Once naturalized, foreigners conceptually enjoyed benefits and restrictions as other Englishmen did unless some other disability specifically applied. For example, in England at the turn of the eighteenth century, naturalized aliens were restricted from holding office and serving on the Privy Council or in Parliament.²⁰⁰

What was missing, as it was with the Confederation Congress, was Congress's power to define the "privileges and immunities of citizens" of the United States in the several states. While providing authority for commercial antidiscrimination privileges and immunities, Article I was silent on basic citizenship privileges and immunities attaching to naturalization or the Clause's congressional enforcement. Without a national definition of "privileges and immunities

¹⁹³ U.S. CONST. art I, § 10.

¹⁹⁴ *Supra* Parts II.C-D.

¹⁹⁵ U.S. CONST. art I, § 8, cl. 4 ("To establish an uniform Rule of Naturalization").

¹⁹⁶ U.S. CONST. art. IV, § 2, cl. 1; 2 FARRAND, *supra* note 170, at 135, 173-74, 187, 443.

¹⁹⁷ In 1782, James Madison complained that under the Articles obnoxious aliens could become entitled to rights of citizens in other states through a state's lax naturalization provisions. 1 MADISON PAPERS OF JAMES, *supra* note 152, at 86 (August 27, 1782). *See also* THE FEDERALIST NO. 42 (James Madison) (Madison, commenting on the Constitution's uniform naturalization power, criticized the Articles' privileges and immunities language and the ability of mere inhabitants of one state to benefit from the rights of citizenship across the states).

¹⁹⁸ *Supra* note 32.

¹⁹⁹ *Supra* notes 84-86, 103-112.

²⁰⁰ Act of Settlement 1701, 12 & 13 Will. III c.2 (1701).

of citizens,” the practical effect of national naturalization and national citizenship was uncertain. What did congressional removal of alienage disability or constitutional protection for citizens mean if Congress was not able to assign national privileges and immunities that citizens of the United States enjoyed across the states? What was to become of basic rights such as the ability to own and use land, inheritance rights, access to the courts, and travel typically associated with English citizenship and allegiance? The chief obstacle to the Articles’ naturalization and national citizenship transformation was the dual form of government. Under federalism principles, most rights would remain with states, presumably even those basic rights historically associated with English citizenship.²⁰¹ Contrary to English practice, there was clear asymmetry between explicit national naturalization power but state control of all citizenship privileges and immunities.

Following ratification, Congress quickly confronted this mismatch between national naturalization power but uncertainty in the authority to secure accompanying citizenship rights. Similar to excluding paupers, vagabonds, and fugitives from the Confederation’s “privileges and immunities of free citizens,” post-Constitution congresses frequently discussed raising or reducing naturalization requirements and joining rights of holding office, holding land, and voting to national citizenship via national residency periods.²⁰² In the first half century, states’ rights advocates wanted more immigration with broader state control, typically open borders and full privileges; nationalists, however, wanted stricter immigration policies with more stringent requirements such as long residency periods for voting and holding office.²⁰³ But with

²⁰¹ *Supra* notes 32-33 (English alienage disabilities); *infra* notes 205-206 (federalism concerns preventing congressional definition of citizenship rights attaching to naturalization).

²⁰² Congress considered residency and oath requirements for land ownership. FRANKLIN, *supra* note 179, at 33-48 (1790 naturalization act debates ranged from outright land privileges for aliens to residence and oath restrictions due in part to concerns of pauperism, crime, and lack of character); *id.* at 41 (“Every man taking the oath of allegiance and purposing residence ought to be admitted to buy land”); *id.* at 46-47 (separating naturalization power from property ownership and most arguing that the latter should remain with the states as it would be a congressional usurpation to attach a property rule to naturalization).

Congress also debated whether to give naturalized aliens suffrage rights upon oath alone or whether it should add a moderate to long residency requirement. There was more concern with the privilege of voting and office holding than there was with mere land ownership. *Id.* at 38, 40; *id.* at 41 (“Stone (Md.) would give property rights after six months’ residence, requiring an oath of allegiance and of intended residence. For voting and office-holding[,] he would require seven years’ residence, following the example of the Constitution”); *see also id.* at 208-09, 223, 254, 258-60, 292-93 (debates on alienage and voting rights in antebellum period). The Constitution added several heightened requirements for holding federal offices. U.S. CONST. art. I, §§ 2, 3 (age and residency requirements for several offices).

During the 1795 naturalization act debates, Congress failed to secure a provision that would have required naturalized aliens renounce their slaves. ANNALS OF CONG, 3d Cong., 2d Sess. 1041 (January 2, 1795), *cited in* FRANKLIN, *supra* note 179, at 61-62.

²⁰³ *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 137-164 (1996) (contrasting Jeffersonian and Federalist ideals); FRANKLIN, *supra* note 179, at 208-09. The last ten years of the eighteenth century saw radical debate on aliens and naturalization. FRANKLIN, *supra* note 179, at 49-96. As sentiments on immigration changed in the nineteenth century, the proposed residency requirement grew from two to twenty-one years. *Id.* at 184-300 (effect of pauperism and crime on immigration beliefs; sentiment that political rights should be reserved to native-born Americans).

federalism principles and preexisting state laws and state residency requirements enveloping citizenship and political rights, Congress had difficulty imposing restrictions on matters residing with the states.

During the 1790 naturalization act debates, Congress contemplated attaching several privileges to naturalization.²⁰⁴ The 1st Congress ultimately concluded that the powers of land holding, office holding, and voting should remain with the states.²⁰⁵ Emphasizing federalism grounds for refusing to expand congressional powers at the expense of the states, Congressman White doubted:

[W]hether the constitution authorized Congress to say on what terms aliens or citizens should hold lands in the respective States; the power vested by the Constitution in Congress . . . extend[ed] to nothing more than a uniform rule of naturalization. After a person has once become a citizen, the power of Congress ceases to operate on him; the rights and privileges of citizens in the several States belong to those States; but a citizen of one State is entitled to all the privileges and immunities of citizens in the several States. Now, if any State in the Union should choose to prohibit its citizens from the privilege of holding real estates, without a residence of a greater number of years than should be thought proper by this House, they could do it, and no authority of the

²⁰⁴ ANNALS OF CONG., 1st CONG. 2d Sess. 1147-64 (February 3-4, 1790).

²⁰⁵ *Id.* at 1149 (Lawrence observed that the Constitution provided qualifications for national office but the proposal adding office holding to national naturalization would venture into the territory of state sovereignty); *id.* at 1153-54 (Lawrence: “We are authorized to establish a uniform rule of naturalization; but what are the effects resulting from the admission of persons to citizenship, is another concern, and depends upon the constitutions and laws of the States now in operation.”); *see also id.* at 1156-57 (Stone: Congress “cannot say what shall be the effect of that naturalization, as it respects the particular States. Congress cannot say that foreigners, naturalized under a general law, shall be entitled to privileges which the States withhold from native citizens.”); *id.* at 1160-61 (Seney: “Congress had no right to intermeddle with the regulations of the several States, while prescribing a rule of naturalization. If they were disposed to say that two, three, or four years’ residence in the United States was proper, before an alien should be eligible to an office under the General Government, they might; but after they have admitted a foreigner to citizenship, he did not believe they were authorized to except him, for two years more, from being capable of election, or appointment to any office, legislative, executive, or judicial, under the State governments, provided the State laws or constitutions admit him at a shorter period. Nor did he believe Congress could admit foreigners to such privilege so early as two years in States requiring a longer term of probation. He had, however, no objection to foreigners being admitted to hold property, without any previous residence; but he did not like the idea of admitting them to a participation in the Government, without a residence sufficiently long to enable them to understand their duty.”); *id.* at 1163 (Tucker: “[W]e ought to provide a rule of naturalization, without attempting to define the particular privileges acquired thereby under the State governments.”).

While the 1st Congress had many federalism reservations over expanding naturalization laws, later courts did not share the same degree of reservation in discussing the Privileges and Immunities Clause. *Infra* Parts III.A-B (courts considering and applying many of these citizenship rights notwithstanding federalism constraints).

Government . . . could enforce an obedience to a regulation not warranted by the constitution . . . [A]ll, therefore, that the House have to do on this subject, is to confine themselves to an uniform rule of naturalization, and not to a general definition of what constitutes the rights of citizenship in the several states.²⁰⁶

Throughout the first half of the nineteenth century and into the Reconstruction debates, several courts and legislators shared the same state-by-state view of citizenship rights.²⁰⁷ For them, the Privileges and Immunities Clause reinforced federalism boundaries. They read the Clause: the citizens of each state are entitled to the privileges and immunities of *native citizens* in the several states. Courts and congressmen adopting this state-by-state view likely found support in the Articles' antidiscrimination provisions, transposing that character to the Constitution's residual Clause.²⁰⁸ The state-by-state interpretation left no congressional discretion to define naturalization rights or Article IV's citizenship privileges and immunities across the states. With state sovereignty, primary responsibility over naturalization's effect would rest with the states and state privileges and immunities.

F. Summary of Part II

The remedy to the Confederation's defects was to empower Congress with substantive enforcement authority.²⁰⁹ Throughout this post-Revolution period, a major concern was giving Congress the power to define privileges and immunities and to protect peace and harmony

²⁰⁶ ANNALS OF CONG., 1st CONG. 2d Sess. 1152 (February 3, 1790). Most agreed to a greater or lesser degree with White. Few argued that Congress had powers to establish national rules for land holding and office holding under the Constitution's naturalization power. FRANKLIN, *supra* note 179, at 37 (citing Smith as the sole supporter of nationwide citizenship rights); *id.* at 46, 47 (report of Ellsworth commenting that rights of land holding, voting, and office holding should be described in the naturalization act and should be alike for all the states).

²⁰⁷ *Infra* Part III.A.2 (*Livingston v. Van Ingen* and the state-by-state antidiscrimination view); ROGER HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP 16-32 (1918) (describing the ascent of the state-by-state antidiscrimination view of the Clause). The Reconstruction debates opened with comments on congressional enforcement of the Clause, the national citizenship view, as well as the state-by-state view. *Infra* Part III.C.

²⁰⁸ As illustrated above, *supra* Part II.C, the second half of the latter version provided for antidiscrimination insofar as "the people of each State shall 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...." ARTICLES OF CONFEDERATION, art. IV, para. 1.

One might also argue that Article IV's intermediate drafts providing "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" suggest that drafters were focused on antidiscrimination on a on state-by-state basis. 9 JCC, *supra* note 71, at 885, 888. However, intermediate drafts were too different from the initial and final drafts to argue for continuity. The drafters were considering alternates rather than language for a common principle. *Supra* note 131 (remarking that the founding generation was familiar with state-by-state language and chose to use that language when it was intended); *infra* note 225 (same).

²⁰⁹ *Supra* Part II.E.

among the states. In the transformation of Article IV of the Articles to the Constitution, the Framers retained only a variation of the broader privileges and immunities language. The Articles' phrase: "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," became the Constitution's "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."²¹⁰

As we saw above, both in the pre-Constitution proposals and the Convention debates, the substantive antidiscrimination concerns, formerly found in the latter half of Article IV of the Articles, were swept into the Constitution's Article I provisions as the states granted Congress greater authority in regulating, among other national issues, interstate commerce, naturalization, and bankruptcy.²¹¹ Congressional legislation and checks and balances were the interface between the states and the solution to the Confederation's failed effort at ensuring interstate comity and enforcing the Articles.²¹² Beyond that, the Constitution had an amendment process.²¹³ Under federalism principles, several other local matters were left to the states and state constitutions.²¹⁴

And so we are left with the same question we faced in the initial proposals of the Articles of Confederation: what does Article IV's general privileges and language mean? Why keep the residual language in the Constitution? Reviewing the period from the American Revolution to the Convention, we have a few potential but overlapping answers: (1) the residual language was merely short-hand for interstate harmony, travel, and the types of commercial antidiscrimination found in Article IV of the Articles as a whole;²¹⁵ (2) the residual language protected some perceived concept of natural or fundamental law inherent in freeborn citizens—to be discovered and enforced by the courts against government;²¹⁶ (3) the language entitled United States citizens to some or all of the privileges and immunities of each state as enjoyed by native citizens of that state;²¹⁷ or (4) the privileges and immunities language conveyed membership or citizenship to a

²¹⁰ ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1; U.S. CONST. art. IV, § 2, cl. 1.

²¹¹ *Supra* Part II.E.

²¹² *Supra* notes 179-182, 189-194.

²¹³ U.S. CONST. art. V.

²¹⁴ As we saw above, state constitutions were the initial substitution for English authority. *Supra* notes 100-101.

²¹⁵ Justice Marshall in *Austin v. New Hampshire*, 420 U.S. 656, 660-61 & nn.5-7 (1975), noted that there was no substantive difference between Article IV of the Articles and Article IV of the Constitution, only that the Constitution contains the briefer form. *Austin*, 420 U.S. at 661 n.6, *citing* Pinckney's Observations, which can be found at 3 FARRAND, *supra* note 170, at 106, 112. *See also* Saenz v. Roe, 526 U.S. 489, 501 (1999) ("The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides: 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'").

²¹⁶ *Supra* notes 52, 99 (natural law in the period of the American Revolution); *infra* Part III.A.4 (*Corfield v. Coryell* and "fundamental" law).

²¹⁷ *Supra* Part II.E.1 (state-by-state view in naturalization act debates); *infra* Part III.A.2 (*Livingston's* premise of state-by-state antidiscrimination).

community of national privileges and immunities found in the Constitution and national laws further establishing privileges and immunities across the states.²¹⁸

Tracing the concept of privileges and immunities and its membership usage in medieval, merchant, and colonial charters, it seems that the Privileges and Immunities Clause, with the purpose of removing alienage disabilities across the states, is best treated as a national right-of-citizenship protection similar to the suggested construction of the general language of the proposed sixth article of the Articles of Confederation's first draft.²¹⁹ This national citizenship interpretation connects the residual language to the former "privileges and immunities of Englishmen" function. Historically, we saw privileges and immunities language when a nonmember was given membership and access to rights accompanying that membership (the privileges and immunities held by the community, the entity, or Englishmen in general).²²⁰

Privileges and immunities language is legislative in nature.²²¹ There are both state laws or privileges and immunities and national laws or privileges and immunities.²²² Once such a

²¹⁸ As we will see below, the courts' early adjudication of the Clause mixed some combination of 1-4. Eventually, 1-3 became a "reasonableness" composite. *Infra* Part III.D.

²¹⁹ *Supra* Part II.C.

²²⁰ *Supra* Part II.A.

²²¹ See Justice Thompson's concurrence in *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812).

All the arguments which have been urged against the policy or expediency of granting exclusive privileges in general, or the particular privilege which forms the present subject of inquiry, have been addressed to the wrong forum. They are arguments for legislative, not for judicial consideration. We are called upon to pronounce what the law is, not what it ought to be. In a legislative capacity, considerations of policy and expediency are entitled to their due weight, to convince the judgment or guide the discretion. But in a judicial capacity, no such latitudinary power is given; we are under the solemnity of an oath to decide the rights and claims of parties, according to existing law. Unless, therefore, we are prepared to pronounce the appellants' claim, as set up, to be absolutely void, their right must be considered fixed and established.

Id. Many commentators, however, regard the Privileges and Immunities Clause as a guarantee of individual rights to the exclusion of legislation. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1490 & n.81, 1523-26 (2007).

²²² This discussion is captured in Taney's opinion in *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857):

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or

division is made, one places national privileges and immunities under federal guardianship. In addition to Article I's authority to provide commercial interstate privileges and immunities—and respecting federalism principles—early Congresses could have justified limited national citizenship privileges and immunities for United States citizens under the Privileges and Immunities Clause or the Naturalization Clause.²²³ Fundamental and national citizenship rights include the right to own, use, and inherit land; travel; and access to the courts. Under this understanding, just as English authority gave life to Englishmen status through positive laws, Congress could resume its goal to define, by national enactment, Article IV's "privileges and immunities of citizens" across the states. At Congress's discretion, state privileges and immunities associated with state laws not rising to the level of fundamental citizenship rights would remain with the states.²²⁴ A state's own independent character would not introduce that state status into the national stream for effect in the other states.

The interpretation that a United States citizen should receive all the privileges and immunities of state citizenship as natives enjoy in the several states avoids many complications but does not fit well with the Englishmen background, the genesis of the Clause, or the final language used.²²⁵ As we will see below, the antidiscrimination interpretation begs a national

privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

Id. at 405-06. As nineteenth-century adjudication of the Clause progressed, courts distinguished between national and state citizenship, sometimes characterized as general privileges and immunities and special privileges and immunities—the latter remaining with the state and the former with the federal government. *McCready v. Virginia*, 94 U.S. 391, 396 (1877) (Waite, C.J.); *see also Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74, 78-79 (1873) (Miller, J.).

²²³ This very authority was invoked for the 39th Congress's Civil Rights Act establishing national citizenship rights. *Infra* Part III.C.

²²⁴ *Supra* notes 149, 181-182 (remarking how Congress was the body to describe and define the rights, privileges, and immunities that one citizen enjoys in another state).

²²⁵ The Constitution borrowed the Privileges and Immunities Clause directly from the Articles. The drafters of the Articles were familiar with state-by-state language. Outside of the general privileges and

selection or designation of those state privileges and immunities covered under the Clause.²²⁶ Are political rights included? Who determines which basic fundamental state privileges and immunities are protected for United States citizens in each state?

In both the state-by-state and national citizenship constructions, the question becomes whether Congress provides substance to Article IV's citizenship privileges and immunities language or whether that definition is left to the courts.

As we have shown above, privileges and immunities language conceptually was not self-enforcing language for the judiciary, rather it referred to established law—mostly rights conferred by the king's charters and letters patent before the reign of parliamentary supremacy.²²⁷ As evidence supporting the non-self-enforcing view of the Clause, the Framers adopted the residual privileges and immunities language with almost no debate while Article I's provisions dealing with interstate harmony and commerce received significant debate.²²⁸ If the Framers intended the Privileges and Immunities Clause to be a substantive antidiscrimination provision giving courts the ability to regulate interstate relations or create national or fundamental law, certainly it would have received more attention. If privileges and immunities language was merely shorthand for all of the language of the former Article IV of the Articles, what purpose did the Constitution's expanded powers in interstate harmony serve?²²⁹ To relegate Article I to an echo of the Clause reverses the Constitution's foundation. If the substance behind the "Privileges and Immunities of Citizens" meant judicial implementation of the rights of Englishmen or a subset of English law, there likely would have been debate about what such laws meant in a republican form of government or which English laws the republic wished to adopt.²³⁰

immunities language, the second half of Article IV's first paragraph contained state-by-state antidiscrimination language. Also, the privileges and immunities language of intermediate drafts contemplated protecting "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." 9 JCC, *supra* note 71, at 885, 888. In the final draft of the general language, drafters did not use language such as "in any of the other states." Bogen, *supra* note 92, at 850, 854-55. If the drafters of Article IV intended a state-by-state protection in the residual clause, some degree of this language probably would have been retained. *Supra* notes 131, 208.

²²⁶ *Infra* note 255 (under substantive antidiscrimination interpretations, courts need to decide which state privileges and immunities are protected for nonresidents).

²²⁷ *Supra* Part II.A.

²²⁸ 2 FARRAND, *supra* note 170, at 443; *supra* Part II.E (debate over interstate concerns and general balance between federal and state powers when discussing enhanced congressional powers under proposed Constitution); Burrell, *supra* note 6, at 105 n.529 (making same observation).

²²⁹ See *supra* note 215 (judicial opinions equating the Articles' privileges and immunities language with the Constitution's Privileges and Immunities Clause).

²³⁰ Many "rights" discussed in the period of the American Revolution and Constitutional Convention find an English counterpart established by Parliament or the parliamentary equivalents in Medieval and Stuart England. *Supra* notes 47-51 (Magna Carta, Petition of Right, etc.). The Framers chose to incorporate some degree of this body of law in the Constitution. A large amount of "fundamental law" would, however, remain with the sovereign states and their state constitutions. To the extent that later advocates

As we will see in the next part, within ten years of ratification courts were giving substance to the Clause. Courts sought a definition of “privileges and immunities of citizens in the several states,” and, without congressional direction, courts treated the Clause as self-enforcing for judicially derived citizenship rights.²³¹ Falling back to state citizenship rights and pre-Constitution antidiscrimination, courts protected a subset of state privileges and immunities for nonresident citizens, as natives of the state enjoyed. But with our English background, judges also saw the Clause’s national citizenship background and judicially attached several rights thereto.²³²

At this point, building upon work in a previous publication, I have shown the genesis of the language and the underlying principles of Articles IV of the Articles. I have illustrated the Confederation’s enforcement problems and discussed the Constitution’s remedies of congressional power in interstate affairs and naturalization. Having discussed the concept of privileges and immunities from our English and colonial foundation and having provided the structural background of the language in the Articles of Confederation and the Constitution, it is now time to focus on early nineteenth-century adjudication of the Privileges and Immunities Clause.

III. The Privileges and Immunities Clause and the Courts

A. Phase One: National Citizenship, Substance, and Antidiscrimination

From the beginning, courts treated the Privileges and Immunities Clause as a grant of substantive authority for the judiciary: either protecting their perception of citizenship rights or ensuring antidiscrimination similar to the principles of the second half of Article IV, paragraph I, of the Articles.²³³ Defining what state regulation was subject to the Clause, courts varied from covering state citizenship rights to covering basic notions of “fundamental” rights—in both cases, typically searching former English law for definition.²³⁴ In protecting nonresident citizens from state regulation or discrimination, courts essentially created national citizenship rights.²³⁵

1. Campbell v. Morris

believed that some provision of “fundamental law” was not adequately protected in the states from the states themselves, the Constitution gave amendment powers in Article V.

²³¹ *Infra* Parts III.A-B (judicial implementation of the Clause); *infra* Part III.C (discussing congressional enforcement of the Clause).

²³² *Infra* Part III.

²³³ *Infra* Parts III.A-B. The second half of Article IV of the Articles provided that “the people of each State shall 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....” ARTICLES OF CONFEDERATION, art. IV, para. 1.

²³⁴ Parties and courts might invoke the law of nations for interstate citizenship rights on comity principles. See Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 831-36, 847-49 (1997).

²³⁵ *Infra* Parts III.A-B.

In an early interpretation of the Clause, Judge Jeremiah T. Chase, of the Maryland General Court, searched for a definition of the terms “privileges” and “immunities” and held that they include, among other things, the right to own and enjoy property as well as personal rights.²³⁶ The issue in *Campbell* involved a law allowing the attachment of a nonresident citizen’s real property in order to compel appearance. Maryland residents were treated more favorably than nonresident citizens. To understand the Clause, Judge Chase advocated for a “retrospective view” back to Article IV of the Articles.²³⁷

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

By taking a retrospective view of our situation antecedent to the formation of the first general government, or the confederation, in which the same clause is inserted verbatim, one of the great objects must occur to every person, which was the enabling the citizens of the several states to acquire and hold real property in any of the states, and deemed necessary, as each state was a sovereign independent state, and the states had confederated only for the purposes of general defence and security, and to promote the general welfare.

It seems agreed, from the manner of expounding, or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected. The court are of opinion it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. It means, such property shall not be liable to any taxes or burdens which the property of the citizens is not subject to. It may also mean, that as creditors, they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights.²³⁸

²³⁶ *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797) (opinion of Chase, J.). It is likely that Chase consulted Blackstone, a popular legal book of the generation. Blackstone’s “rights of man” provided a source for nineteenth-century adjudication of “privileges and immunities.” 1 Sir WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 209 *et seq.* (*124) (William Carey Jones ed., 1915); *see also infra* note 271 (judicial opinion explicitly citing Blackstone).

²³⁷ *Campbell*, 3 H. & McH. at 553-54.

²³⁸ *Id.*

As we see, Chase was focusing not on the text itself but on the historical context prompting Article IV of the Articles.²³⁹ In the first instance, Chase saw a national citizenship component to the Clause.²⁴⁰ Incorporating English law, Chase observed the citizenship and allegiance background of privileges and immunities language. As noted above, if you would have asked a medieval English lawyer what he understood an alien's grant of denization or "privileges and immunities of Englishmen" meant, owning land and use of courts would probably be the first answer.²⁴¹ Aliens did not have full land rights and were prevented from using the courts for many causes of actions.²⁴² Denization and naturalization removed these alienage disabilities and gave the recipient membership privileges.²⁴³ The recipient would be entitled to these established citizenship rights not because of any special quality of the terms "privileges" or "immunities" but because the law of the land or territory provided these benefits to denizens.²⁴⁴ Because of the language's citizenship background, nineteenth-century judges initially applied the English citizenship meaning to the Privileges and Immunities Clause.²⁴⁵ Observing federal and state boundaries, and likely influenced by the Articles' antidiscrimination provisions, Chase also gave the Clause an antidiscrimination meaning: a state may not discriminate against a nonresident citizen in taxes, burdens, or protections. Chase qualified the scope of protection, concluding that the Clause protected civil rights but not political rights.²⁴⁶

Campbell v. Morris was appealed to Maryland's Court of Appeals. The Court of Appeals commented in relevant part:

On the first point it must be observed, that this law makes a distinction between our own citizens and others, in this, that an

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ In England, land ownership and access to courts followed the feudal principles of lord and tenant. *Supra* notes 32–34 (denization provisions in the colonies; ancient feudal customs of allegiance and protection). *See also* *Ward v. Morris & Nicholson*, 4 H. & McH. 330, 341 (Md Gen. Ct. 1799) (Chase, J.) (referring to *Campbell v. Morris*, Chase found that the Clause meant not rights of suffrage or election but that "[t]he privilege or capacity of taking, holding, conveying, and transmitting lands, lying within any of the United States, is by the general government conferred on, and secured to all the citizens of any of the United States, in the same manner as a citizen of the state where the land lies could take, hold, convey, and transmit the same").

²⁴² *Supra* notes 32–34.

²⁴³ *Id.* Parliamentary naturalization gave the alien greater rights than denization. *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Infra* Parts III.A-B.

²⁴⁶ *Campbell*, 3 H. & McH. at 554. Chase's limitation finds support in the colonial context. For at least some colonies, colonial denization conferred citizenship rights but not political rights. PROPER, *supra* note 110, at 59 n.1; Natelson, *supra* note 15, at 1124, 1156-59 (discussing exclusions from the right to vote). *But see Corfield v. Coryell*, *infra* Part III.A.4 (Justice Washington included political rights in his list of fundamental rights protected by the Privileges and Immunities Clause). Suffrage triggered a heated debate during naturalization acts debates. *See supra* Part II.E.1. Denization and naturalization gave equal rights in allegiance and protection but presumably would not necessarily affect express status differentiations on matters such as political rights. Burrell, *supra* note 6, at 58 & n.284; *supra* note 200 (Settlement Act of 1701); *infra* note 424 (rights of citizenship versus citizenship rights).

attachment cannot be obtained against a citizen of *Maryland*, who is out of the state, unless he has absconded from justice, whereas one may be had against a citizen of any other state, who does not reside here; and hence they contend for the defendant that this law is repugnant to the 4th article of the federal constitution, sec. 2. by which it is declared, “That the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

The object of the convention in introducing this clause into the constitution, was to invest the citizens of the different states with the general rights of citizenship; that they should not be foreigners, but citizens. To go thus far was essentially necessary to the very existence of a federate government, and in reality was no more than had been provided for by the first confederation in the fourth article.

But it never could have been the intention of the framers of our national government, to melt down the states into one common mass; to put the citizens of each in the exact same situation, and confer on them equal rights: this principle would have been wholly destructive of the state governments.

The expressions, however, of the fourth article convey no such idea. It does not declare that “the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states.” Had such been the language of the constitution, it might, with more plausibility, have been contended that this act of assembly was in violation of it; but such are not the expressions of the article; it only says that “The citizens of the several states shall be entitled to all privileges and immunities of citizens in the several states.” Thereby designing to give them the rights of citizenship, and not to put all the citizens of the *United States* upon a level; consequently, the injury, as to the effect of a law of any state, will not be whether it makes a discrimination between citizens of the several states; but whether it infringes upon any civil right, which a man as a member of civil society must enjoy.²⁴⁷

The Court of Appeals recognized the national citizenship background but had trouble determining its significance. The court was careful to avoid a rule protecting all rights for all citizens as many state laws had nothing to do with the concept of national citizenship. Conservative in approach, the Court of Appeals stated that the Framers could not have intended for the Clause to melt the states into one by securing all citizens of other states all local privileges and immunities. The Court of Appeals felt that the Clause only granted national

²⁴⁷ *Campbell*, 3 H. & McH. at 562. Compare *id.* with *supra* note 241 (Judge Chase’s 1799 opinion in *Ward v. Morris & Nicholson* bridging the national citizenship and the state-by-state antidiscrimination views.

“rights of citizenship” to all citizens. The Court of Appeals concurred with Chase that the Clause protected civil rights.²⁴⁸

Although both Chase and the Court of Appeals avoided much of the substantive baggage, subsequent judges following Chase’s opinion treated the generic sentence as shorthand for pre-Constitution principles. By falling back to Article IV of the Articles, the courts and the “retrospective view” fused the antidiscrimination principle from the Articles to the Constitution’s Privileges and Immunities Clause.²⁴⁹ This is the interpretation of the Clause that we see moving forward. The denization or antialienage understanding falls away. Judicial opinions picked up additional substance in the void, and judicial construction defining national citizenship rights followed.

2. Livingston v. Van Ingen

In *Livingston v. Van Ingen*, the New York Supreme Court of Errors considered whether the state’s grant of a steamboat monopoly to certain individuals was unconstitutional.²⁵⁰ The Court felt that the power to grant an exclusive monopoly was within the state’s power. In relevant part, the significance of this case was the strong characterization of the Privileges and Immunities Clause as a provision against discrimination on a state-by-state basis. Justice Yates:

To all municipal regulations, therefore, in relation to the navigable waters of the state, according to the true construction of the constitution, to which the citizens of this state are subject, the citizens of other states, when within the state territory, are equally subjected; and until a discrimination is made, no constitutional barrier does exist. The constitution of the United States intends that the same immunities and privileges shall be extended to all the citizens equally, for the wise purpose of preventing local jealousies, which discriminations (always deemed odious) might otherwise produce. As this constitution, then, according to my view, does not prevent the operation of those laws granting this exclusive privilege to the appellants, they are entitled to the full benefit of them.²⁵¹

Chief Justice Kent:

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

²⁴⁸ *Id.* at 564-65; *supra* note 246.

²⁴⁹ *Supra* notes 237-239 (retrospective view).

²⁵⁰ 9 Johns. 507 (N.Y 1812).

²⁵¹ *Id.*

property must, in all respects, be equally subject to our law. This is a very clear proposition, and the provision itself was taken from the articles of the confederation.²⁵²

The justices did not discuss or find a national citizenship character to the Clause.²⁵³ With several exceptions, *Livingston*'s state-by-state antidiscrimination characterization became the consensus view until Reconstruction.²⁵⁴

Though not discussed in *Livingston*, courts adopting this state-by-state antidiscrimination view, perhaps mixing with other cases finding a national citizenship meaning, limited the degree of the Clause's antidiscrimination protection to a subset of state privileges and immunities, leaving rights such as political rights to the states.²⁵⁵

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Infra* Part III.C. Compare *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-28 (1824) (“A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen except so far as the Constitution makes the distinction. The law makes none.”); *id.* at 892 (“The law of the United States creates the Bank, and the common law, or State law more properly, takes it up and makes it what it is. Who can deny that, in many points, the incidents to such an institution may vary in different States, although its existence be derived from the general government? It is the case with the natural alien, when adopted into the national family. His rights, duties, powers, &c., receive always a shade from the *lex loci* of the State in which he fixes his domicil.”) with *supra* notes 206-207 (state-by-state view in naturalization debate).

Many courts, commentators, and legislators cite to Joseph Story's discussion of the Clause. Story's definition is consistent with both a national citizenship meaning as well an antidiscrimination meaning. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1800 (Citing *Livingston*, among other cases, “The [Privileges and Immunities Clause] in the constitution avoids all this ambiguity. It is plain and simple in its language; and its object is not easily to be mistaken. Connected with the exclusive power of naturalization in the national government, it puts at rest many of the difficulties, which affected the construction of the article of the confederation. It is obvious, that, if the citizens of each state were to be deemed aliens to each other, they could not take, or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them, if one may so say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.”). One thing is clear, Story believed that the Clause removed alienage disabilities, specifically real estate privileges.

²⁵⁵ Both Chase and the Court of Appeals essentially excluded political rights from the Clause's coverage. *Supra* notes 246, 248. Future cases would also limit the Clause's coverage to some qualified level of state activity. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371 (1978); see also *Lawrence CONG. GLOBE*, 39th Cong. 1st Sess. 1835-36 (1866)

3. Douglass v. Stephens

The issue in this case was whether a Delaware provision that gave priority of debts to Delaware residents over nonresidents conflicted with the Privilege and Immunities Clause.²⁵⁶ A majority of the court concurred with Chief Justice Johns that the Privileges and Immunities Clause did not reach state laws granting creditor preferences. Johns was conservative; he viewed the Clause as removing alienage disabilities and protecting “common” privileges of a national character, those which were found in federal rules.²⁵⁷ Johns further opined that the Clause prevented Congress from creating special privileges and immunities for some citizens.

The privileges and immunities to be secured to all citizens of the United States are such only as belong to the citizens of the several States; which includes the whole United States, and must be understood to mean, such privileges as should be common, or the same in every State; and this seems to limit the operation of the clause in the Constitution to federal rules; and to be designed to restrict the powers of Congress as to legislation, so that no privilege or immunity should be granted by it to one citizen of the United States, but such as might be common to all.²⁵⁸

With a national focus, Chief Justice Johns at first limited his construction of the Clause to federal rules but then moved on to discuss another angle.

The language is not that the citizens in any State shall be entitled to all the privileges of citizens in each State. If it was, there would be more plausible ground to say that a citizen of Maryland should have the same privileges and rights in Delaware as a citizen of Delaware is entitled to[.] But, even supposing the design of this clause of the Constitution to have been to restrict the powers of legislation by the State Legislatures, it cannot be extended so far as that no peculiar advantage can be given by any State to its own citizens, but such as must be extended to all citizens in every State in the Union; because, the privileges secured are not such as are given to citizens in one or more States by the State laws, but must

(noting that courts construed “all privileges” to “some privileges” and attempting a partial categorization of inherent privileges and immunities and state privileges and immunities).

²⁵⁶ *Douglass v. Stephens*, 1 Del. Ch. 465 (1821), 1821 WL 183.

²⁵⁷ *Id.* at *8.

²⁵⁸ *Id.* It seems that Johns is concerned about congressional monopolies or oligarchies. *See Kincaid v. Francis*, 3 Tenn. 49 (Tenn. Err. & App. 1812), 1812 WL 214 (“It seems to us most probable that this clause in the Constitution was intended to compel the general government to extend the same privileges and immunities to the citizens of every State, and not to permit that government to grant privileges or immunities to citizens of some of the States and withhold them from those of others; and that it was never designed to interfere with the local policy of the State governments as to their own citizens.”).

be such as the citizens in the several States, that is, in *all* the States, are entitled to.²⁵⁹

Following earlier discussions in *Campbell v. Morris*, Johns determined that the Clause did not extend all state privileges and immunities to other citizens but only national privileges and immunities.

The great object to be attained was to prevent a citizen in one State from being considered an alien in another State—to secure the right to acquire and hold real property. Our situation, antecedent to the formation of the first General Government, in 1778, rendered such a provision necessary; and, accordingly, a similar clause was inserted in the Articles of Confederation then adopted; from which the second Section of the fourth Article of the Constitution of the United States was, probably, taken.

The privileges and immunities, &c., are not enumerated or described; but they are all privileges common in the Union,—which certainly excludes those privileges which belong only to citizens of one or more States, and not to those in every other State. . . .

By the Constitution of the United States all power, jurisdiction, and rights of sovereignty, not granted by that instrument, or relinquished, are retained by the several States.

Uniformity of laws in the States is contemplated only on two subjects, viz.: bankruptcy and naturalization.

The legislative powers of Congress, defined in the eighth section of the first Article, do not interfere with or abridge the power of the States to make local regulations which are to operate within the State.

The restrictive clauses in the tenth section of the first Article of the Constitution of the United States, limiting the powers of the States, are confined to certain enumerated cases; none of which comprehend the subject of the distribution of the assets of a deceased person's estate among his creditors.²⁶⁰

For Johns, privileges and immunities language was clearly legislative and national. Johns attempted to define national privileges and immunities but then worked into a broad federalism observation.²⁶¹ In searching for a legislative definition of the language, Johns discussed Congress's potential to legislate and the constitutional limits thereupon.²⁶² According to Johns, limits on Congress's powers defined the contours of the Privileges and Immunities Clause. We will see that a nexus between the Commerce Clause and the Privileges and Immunities Clause

²⁵⁹ *Id.*

²⁶⁰ *Id.* at *9.

²⁶¹ *Id.*

²⁶² *Id.*

became the norm for interstate commerce discrimination cases.²⁶³ Johns held that creditor preferences were the province of the states, noting that many states had different rules and the Constitution's limits on state powers did not reach such preferences.

Following a pattern similar to Judge Chase's opinion in *Campbell v. Morris*, Chancellor Ridgely's²⁶⁴ opinion in *Douglass v. Stephens* examined the Articles and pre-Constitution interstate relationship.²⁶⁵

Chancellor Ridgely set up his discussion as a question as to whether the Clause was limited to removing alienage or whether it made citizens equal with or on the same economic footing as all United States citizens. Ridgely observed the Framers' desire to prevent states from treating citizens of other states as aliens and noted the citizenship rule that English subjects, in all the dominions, may use the courts and acquire, enjoy, and inherit land.²⁶⁶ But Ridgely went much further and opined that the Clause includes all basic natural rights for welfare and good required by a person in society including civil rights and the enjoyment of life, liberty, and property.²⁶⁷

Ridgely highlighted the change from the Articles' "free inhabitants" to the Constitution's "citizens."²⁶⁸ From there, Ridgely felt that the difficult part was finding a judicial definition for "citizens."²⁶⁹ In finding that definition, Ridgely drifted further off course by invoking John Locke's political theory of limited government and sovereignty of the people.²⁷⁰ In so doing, Ridgely created a platform for the court to create citizenship rights.

When men entered into a State they yielded a part of their
absolute rights, or natural liberty, for political or civil liberty,
which is no other than natural liberty restrained by human laws, so

²⁶³ *Infra* Part III.B. See also Metzger, *supra* note 221, at 1486 (noting overlap between the Privileges and Immunities Clause and the Commerce Clause).

²⁶⁴ Delaware's Chancellor had some degree of equitable powers. 1 THORPE, *supra* note 33, at 576 (Delaware's 1792 Constitution placing equity jurisdiction in Delaware's Chancery Court).

²⁶⁵ *Supra* notes 237-238 (retrospective view).

²⁶⁶ *Douglass*, 1821 WL 183 at *2. See Coke's dicta in Calvin's Case, 7 ENG. REP. 377 (1608) ("Furthermore, in the case of a conquest of a Christian kingdom . . . the King's subjects . . . are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in England."); *supra* notes 32-34, 241-243 (feudal theory, allegiance, land ownership, and use of courts).

²⁶⁷ *Douglass*, 1821 WL 183 at **3-5.

²⁶⁸ Article IV of the Articles: "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 Article IV of the Constitution: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1; U.S. CONST. art. IV, § 2, cl. 1.

²⁶⁹ *Douglass*, 1821 WL 183 at *4.

²⁷⁰ *Infra* note 271; see, e.g., 2 JOHN LOCKE, THE TWO TREATISES ON CIVIL GOVERNMENTS §§ 89, 95, 131, 135-142 (1689).

far as is necessary and expedient for the general advantage of the public. The rights of enjoying and defending life and liberty, of acquiring and protecting reputation and property,—and, in general, of attaining objects suitable to their condition, without injury to another, are the rights of a citizen; and all men by nature have them. . . .

The right of enjoying and defending life consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and in resisting, even to the commission of homicide, where such resistance is necessary to save one's own life. The right of enjoying and defending life, without the privilege of protecting it by all the means which the law as well as nature, in extreme cases, furnishes, would be illusory to the last degree. Therefore, this privilege belongs to us, and, by the Constitution of the United States, to every other citizen of the United States in common with us.

And so, as to the enjoyment and defence of liberty. To exercise this right every individual entitled to it must have the privilege of locomotion, of changing situation, or removing his person to whatsoever place his inclination may direct, without imprisonment or restraint, unless by due course of law. To secure this right more effectually our Constitution (Art. I, Sec. 13,) has declared, that the privilege of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.²⁷¹

Under the Chancellor's theory of the case, when joining a government, it is necessary to surrender a part of natural liberty to form civil and political liberty. One retains, however, "uninterrupted enjoyment of his life, his limbs, his body, his health. . . ." This is fine for a political theory of government, but this cannot be grafted onto the Clause for a court's execution. Here we certainly see an extension of an all-things interpretation of the Privileges and Immunities Clause. Ridgely criticized Article IV of the Articles to the extent it limited "privileges and immunities" by stating only a few privileges and immunities.²⁷² Ridgely felt that

²⁷¹ *Douglass*, 1821 WL 183 at **4-5, *citing* BLACKSTONE'S COMMENTARIES.

²⁷² Chancellor Ridgely:

After employing the most comprehensive words, "privileges and immunities," [Article IV of the Articles] descended into a detail of some of those privileges and immunities, and weakened the force of those terms by not including in the detail all the privileges and immunities they were designed to protect. Ingress and regress from one State to another, the privileges of trade and commerce, and the removal of property are the only privileges and immunities enumerated, although the words "privileges and immunities" comprehend all the rights, and all the methods of protecting those rights, which belong to a person in a state of civil society,—subject, to be sure, to some restrictions, but to such only as the welfare of society and the general good require.

the Constitution's Privileges and Immunities Clause protected all conceivable privileges and immunities because it, unlike Article IV of the Articles, was enacted without a limited enumeration of commercial antidiscrimination rights.²⁷³

Ridgely recognized the need for a property owner to use the courts to protect his property. Ridgely considered this a privilege and immunity of citizens secured by the Constitution.²⁷⁴ To this, Ridgely connected contract obligations, as the acquisition of property was carried out by contract.²⁷⁵ Ridgely felt that the contract's terms then became citizenship rights and the Clause protected all types of citizenship rights. From there, Ridgely completed the syllogism.

To what purpose are all privileges and immunities reserved to the citizens of each State, if a State can discriminate between its own citizens and the citizens of another State in the privileges of a citizen, and unless the same method to protect their property is allowed to them. If we may cut and carve and limit and restrain other citizens in the exercise of our privileges as citizens, it is evident that they are not entitled to all privileges and immunities of citizens in this State. To recover a debt is a privilege; but unless he can recover it equally, or as fully, as a citizen of this State, something is withheld, and he has not the privilege of a citizen in this State.²⁷⁶

Ridgely concluded that an absolute antidiscrimination application along national citizenship rights was the proper meaning of the language.

The only reasonable construction to be given to this clause is that of placing all citizens of the United States on the same footing, and

Id. at *3; *id.* at *4 (“The second section of the fourth Article was designed . . . to extend to the citizens of the several States, in each State, all privileges and immunities of citizens, without implication or construction.”).

²⁷³ *Id.* at *6 (“If this 2d section of the 4th Article is to be understood with an exception, it is strange that it was not mentioned.”)

²⁷⁴ *Id.* at *5.

²⁷⁵ Ridgely:

An obligation is a contract, and it is one of the various methods by which property may be acquired; and, therefore, a citizen of another State may claim from the courts of this State the enforcement of his contracts or satisfaction for their breach, precisely as the citizens of this State can; because it is the privilege of a citizen, and is secured to him by the Constitution of the United States. This debt must take its place according to the order of payment prescribed to executors and administrators; otherwise, the creditor will not enjoy in this State all privileges and immunities of citizens; for a common right must be enjoyed by all alike.

Id.

²⁷⁶ *Id.*

extending to them a perfect equality in their rights, privileges and immunities. If one citizen has a privilege to which others are not entitled, then they are not entitled to all privileges and immunities of citizens in the several States; which is directly contrary to this provision.²⁷⁷

In his interpretation of the Privileges and Immunities Clause, Chancellor Ridgely secured an extreme discretion in the courts' ability to invalidate state laws along life, liberty, property, and rights of men.

Ridgely further appealed to a false dichotomy by construing the courts as the only means of protecting the values of free citizens.

If this be an exception to the clause of the constitution, and the intention was only to prevent citizens of other States being declared aliens, the Legislature might abolish all the rights, privileges and immunities of the citizens of other States. They might forbid the recovery of debts upon any terms; the privilege of *habeas corpus* might be disallowed them, and they might be subjected to perpetual imprisonment; the descent of land to them might be regulated differently from the descent of land generally; immunity from arrest, in suitors and witnesses during their attendance on courts of justice, might be withdrawn; extraordinary and excessive taxes might be imposed upon the lands of non-residents; and all the ties by which we are united as one people, so far as they depend upon our own internal State government, might be dissolved. Why should the citizens of another State be made aliens as to the recovery of debts, and not to all other purposes? Thus, indirectly, might be done what it cannot be pretended the State could directly do.²⁷⁸

For Ridgely, the Clause was a blank checkbook for various guarantees. In molding the Clause to cover what he must have perceived as fundamental rights Ridgely judicially identified the Constitution's omissions and assumed those rights to the Clause. Construing "privileges and immunities of citizens" in the absolute antidiscrimination sense and equivalent to the rights of man, Ridgely provided a platform for judicial creation of national privileges and immunities or citizenship rights.²⁷⁹ Ridgely essentially put all conceivable state legislation for life, liberty, and property under the umbrella of the Clause. By appeal to tyranny, Ridgely gave the Clause an organic property to assume what were effectively Article V amendment powers.²⁸⁰

²⁷⁷ *Id.* at *6.

²⁷⁸ *Id.* Ridgely's assortment of protections trace back to English law. *Supra* note 230.

²⁷⁹ *Id.* See also *infra* note 424 (rights of citizenship compared with citizenship rights).

²⁸⁰ Under courts' substantive privileges and immunities interpretations, there would be no need for congressional legislation on interstate affairs. Through the Clause, judges could protect interstate commerce or select and incorporate components of English law when the judge felt it was appropriate.

As argued above, the Framers shared no intention for the courts to be the cure-all through the Privileges and Immunities Clause—which was barely discussed in the Convention debates.²⁸¹ The Convention was a long, drawn out process in which several federalism principles were discussed and debated. The end result gave Congress several enhanced powers to protect the peace and harmony among the states. Where the Convention left a matter out, the states remained sovereign. If the Framers intended the judiciary and the Privileges and Immunities Clause to be the cure for state legislative abuses, the Clause would have received more discussion.²⁸² Instead, the Framers entrusted Congress with antidiscrimination and praised the Constitution’s checks and balances, especially in those critical areas where antidiscrimination and bias were likely to be present and detrimental to the Union.²⁸³ Checks and balances, in a republican form of government, were a replacement for the Englishmen’s fundamental privileges and immunities.²⁸⁴

The Framers believed in federalism.²⁸⁵ We saw above how federalism concerns prevented the 1st Congress from interfering with state sovereignty by establishing national rights to hold land, hold office, or vote.²⁸⁶ If Congress, the intended engine for peace and harmony among the states, was prevented from regulating interstate affairs and establishing national citizenship rights, by even greater reasoning, courts, too, should be restricted from self-executing definitions of citizenship rights. But judges interpreting the Clause, such as Ridgely, showed no such similar restraint in their interpretations. Courts felt free to rewrite the federal-state balance or even the Constitution through open-ended interpretation.

To sum up the importance of this case: (1) Johns associated the Clause with federal rules or federal laws. But Johns limited the Clause’s reach by discussing both constitutional limits upon Congress’s reach as well as constitutional limits upon the states.²⁸⁷ Applying these limits, Johns found that Congress’s potential powers did not reach state creditor preferences and the Constitution did not otherwise restrict the state from the regulation at issue. Thus, the state law on creditor preferences was beyond the reach of the Privileges and Immunities Clause. By

Moreover, despite precedent to the contrary, there is no formal constraint preventing the Clause from being interpreted as a protection for all citizens, both native and nonresident. The Privileges and Immunities Clause could become its own miniature constitution.

²⁸¹ *Supra* notes 228-230 (noting absence of Convention debate and recognizing that much of “fundamental law” went into the Constitution with sovereign states and state constitutions retaining the remainder).

²⁸² *Id.* (observing the scant treatment of the Clause in the Constitution’s making).

²⁸³ *Supra* notes 179-182, 189-194, 212.

²⁸⁴ *Supra* Part II.B (Liberty of Englishmen and Privileges and Immunities of Englishmen); JENSEN, AMERICAN REVOLUTION, *supra* note 67, at 171 (citing to contemporaneous observation that the Revolution’s cry of “rights and privileges and immunities of the people” evolved into the Constitution’s “checks and balances”).

²⁸⁵ *Supra* Part II.E.

²⁸⁶ *Supra* Part II.E.1 (highlighting 1st Congress’s federalism concerns with adding rights to naturalization laws).

²⁸⁷ *Supra* note 262 and accompanying text (limits on Clause through the Constitution’s limits on Congress).

mixing congressional powers with the privileges and immunities analysis, Chief Justice Johns anticipated future litigation incorporating both the substantive Privileges and Immunities Clause and the Dormant Commerce Clause.²⁸⁸ (2) Chancellor Ridgely followed the path of former judges and also applied a retrospective interpretation.²⁸⁹ Ridgely combined several different meanings of the language to form a substantive, all-things interpretation reaching for Locke's rights of man.²⁹⁰ Under this approach, judges have the ability to strike down vast amounts of state legislation regulating life, liberty, and property.²⁹¹

4. Corfield v. Coryell

Perhaps the best-known early interpretation of the Clause is Justice Bushrod Washington's discussion in *Corfield v. Coryell*.²⁹² Plaintiff's vessel was used to fish for oysters in New Jersey's waters. New Jersey law prohibited nonresidents from fishing for oysters in its waters and penalties included forfeiture of boat. Plaintiff, whose boat was seized, claimed that the law violated the Privileges and Immunities Clause. Justice Washington held that the Clause only protected fundamental rights and concluded that the New Jersey law did not reach that level. Washington added:

The inquiry is what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either

²⁸⁸ *Infra* Part III.B.1.

²⁸⁹ *Supra* notes 237-238, 265.

²⁹⁰ *Supra* notes 270-273, 279-280 and accompanying text.

²⁹¹ *Id.*

²⁹² 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). *Corfield* was frequently cited in Reconstruction debates on the CRA of 1866 and Section One. For coverage, see Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329 (2011) [hereinafter "Part II"].

real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) ‘the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.’²⁹³

Washington, like Chancellor Ridgely before him, listed a host of fundamental privileges and immunities that he felt belonged to the citizens of all free governments.²⁹⁴ Presumably, Washington thought that the mere Clause itself guaranteed all of these rights. After describing what appears to be an unbounded list of national privileges and immunities, Washington commented that not all privileges and immunities enjoyed by citizens of a state need be shared with citizens of other states. Private property interests not interfering with common right can be regulated by the states and denied to nonresident citizens.

But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in

²⁹³ *Corfield*, 6 F. Cas. at 551–52. Justice Washington included political rights in his list of fundamental rights protected by the Privileges and Immunities Clause. Early courts had excluded political rights from coverage. *Supra* notes 246, 248.

²⁹⁴ *Id.*

common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.²⁹⁵

Washington did not feel that fishing for oysters was a fundamental or national activity protected by the Clause, and the Clause did not reach lesser categories of state activities. Justice Washington's explanation completes the substantive retrospective progression of the Court's initial adjudication of the Clause.

At this point, we can summarize the initial phase of judicial interpretation. In this first phase of nineteenth-century adjudication, courts grafted substance to the Privileges and Immunities Clause.²⁹⁶ Courts construed the Clause as a question of common or national citizenship rights on the one hand or a nonresident citizens' entitlement to a certain character of state privileges and immunities on the other hand. In either case, courts were designating or protecting a subset of national and fundamental rights. For a working definition of "fundamental," judges often traveled back to the English Constitution and English citizenship rights.²⁹⁷ Congress's role as the engine defining and enforcing privileges and umpiring the peace and harmony among states was lost or minimized.²⁹⁸ Courts accomplished this first by the "retrospective view," that is, going back to the Articles and pre-Constitution period for the meaning of the Constitution's Article IV.²⁹⁹ When considering Article IV of the Articles, courts merged the first general sentence with the rest of paragraph 1.³⁰⁰

The "retrospective view" and its antidiscrimination emphasis was a common theme in privileges and immunities cases. Analysis of basic "rights of citizenship" or antialienage, frequently beginning the courts' discussion, was ultimately discarded for the broader substantive interpretation. From here, to a greater or lesser degree, the substance and antidiscrimination applications take flight.³⁰¹ Judges did not know what to make of the language, but it had to mean something—and they looked to generic principles to find that meaning. General principles naturally led to open-ended language.³⁰² Any type of discrimination could be subject to the Clause. But having climbed too high, courts limited the all-things interpretation to find the

²⁹⁵ *Id.* at 552.

²⁹⁶ *Supra* Part III.A.

²⁹⁷ *See, e.g., supra* notes 32, 236, 271 (English "fundamental" law; Blackstone's rights of man; citizenship rights concerning property and use of courts).

²⁹⁸ Congress certainly did not have all the powers to protect "citizenship rights" as could be argued by parties and courts. Congress's power was limited and not able to address all interstate harmony conflicts. *Infra* notes 425-426 and accompanying text.

²⁹⁹ *Supra* notes 237-238, 265.

³⁰⁰ *Supra* note 215.

³⁰¹ *Supra* notes 271-272.

³⁰² *Supra* notes 265-279.

substantive Privileges and Immunities Clause limited to discrimination affecting fundamental law and national concerns.³⁰³

There are several problems with the Clause's substantive retrospective progression. First, in tracing the connection to the Articles and reviewing the genesis of Article IV of the Articles, we see that the general sentence was set off from the substantive antidiscrimination clauses.³⁰⁴ That is, Article IV of the Articles contained two concepts: a status-quo citizenship concept and a commercial antidiscrimination concept.³⁰⁵ The substantive clauses in Article IV's intermediate and final drafts focused on preventing antidiscrimination in trade, travel, and commerce.³⁰⁶ Second, and more importantly, the Constitution radically replaced this whole system and provided for congressional discretion in regulating interstate and foreign commerce and other antidiscrimination in several areas such as naturalization and bankruptcy. Congressional regulation of antidiscrimination interests was key to the Convention compromise and intertwined with several constitutional principles.³⁰⁷ Where authorized, the substance of antidiscrimination regulation was not with the courts to invent but Congress to enact.³⁰⁸ Once Congress made the appropriate judgments defining interstate privileges, federal and state judges, under oath, executed that supreme law against conflicting state law.³⁰⁹

B. Phase Two: Commerce and Taxation

Expanding upon early nineteenth-century adjudication, the Privileges and Immunities Clause merged with more complex issues involving the labyrinth of taxation and Commerce Clause litigation.³¹⁰

1. Commerce Clause

Reviewing the post-Revolution period, we know that Congress was to regulate interstate and foreign commerce. The commerce line, however, between Congress and the states was uncertain. In *Gibbons v. Ogden*, the Court noted that Congress's powers did not stop at the state

³⁰³ *Supra* note 293 (“fundamental” qualification in *Corfield*); *cf. infra* note 314 (Courts creating Dormant Commerce Clause doctrine and settling on “uniform” and “national activities” in *Cooley v. Board of Wardens*).

³⁰⁴ *Supra* Part II.C.

³⁰⁵ *Id.* In England, English citizenship provided trading and commerce rights through the navigation acts and other English laws. *Supra* notes 82-86.

³⁰⁶ *Supra* Part II.D.

³⁰⁷ *Supra* Parts II.D-E.

³⁰⁸ *Id.* *But see infra* Part III.B.1 (Dormant Commerce Clause doctrine).

³⁰⁹ U.S. Const. art. VI (Supremacy Clause); *infra* note 434 (judges impartially giving supremacy to federal laws under Supremacy Clause in order to avoid confusion of several different state determinations). Federal officers' “oath” to the Constitution and national laws was an important check and balance. 1 FARRAND, *supra* note 170, at 22 (Oath in Resolution 14 of the Virginia Plan); *see also id.* at 203-04 (Convention debates on the oath provision); 1 DOC. HIST. OF RATIF. CONST., *supra* note 139, at 113-14 (recommendation that delegates to Confederation Congress take oath to general government as general government will have interests separate from individual governments).

³¹⁰ *Infra* Part III.B.

boundary line and Congress had power to license steamboats traveling between two states.³¹¹ But the Court left open the question of what would be the role between federal and state commerce authority if Congress were silent.³¹² Would federal commerce power be exclusive such that state law touching interstate or foreign commerce would be void even in the absence of conflicting congressional law?

During the period following *Gibbons* through the 1870s, the Court battled internally over the interpretation of the Constitution's commerce and taxation powers.³¹³ By the second half of the nineteenth century, the Court sided on Congress's exclusive commerce power for national activities or activities in which a uniform regulation was needed.³¹⁴ Because the Court considered this power exclusive, even when Congress had not spoken, state legislation in this domain would be judicially void in violation of what became known as the dormant or negative Commerce Clause.³¹⁵ By the latter half of the nineteenth century, the Court regularly applied the Dormant Commerce Clause to state legislation.³¹⁶

As the shadows of the Commerce Clause moved into the sphere of judicial execution through the Dormant Commerce Clause, they naturally attracted to and joined with the substantive interpretation of the Privileges and Immunities Clause—at least in commerce-related cases. In the latter half of the nineteenth century, parties brought suit under both the substantive Privileges and Immunities Clause and the Dormant Commerce Clause.³¹⁷ One might speculate that the substantive excesses of judicial Privileges and Immunities Clause interpretations helped generate the Dormant Commerce Clause as judges were deeming the Privileges and Immunities Clause equivalent to citizenship rights on the one end and equivalent to potential federal law on another end.³¹⁸

³¹¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (Gibbons's license under congressional law to operate steamboat was supreme over Ogden's New York steamboat monopoly).

³¹² *Gibbons*, 22 U.S. at 209 (Chief Justice Marshall commenting on exclusivity but without formal holding).

³¹³ *Infra* note 314; DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 168-183, 204-06, 222-36 (1985).

³¹⁴ In *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852), Justice Curtis held for the majority that the Commerce Clause is exclusively in Congress on those subjects of a national nature or that require a uniform system of regulation. The *Cooley* holding bounced around. *Steamship Co. v. Portwardens* (moving away from the *Cooley* test); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (going back to the *Cooley* test); CURRIE, *supra* note 313, at 332-42; *see also* *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 282 (1876) (Field, J.) ("The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled.").

³¹⁵ The Dormant Commerce Clause doctrine has never been fully accepted. *See* *Tyler Pipe Indus. v. Wash. State Dep't of Rev.*, 483 U.S. 232, 259-65 (1987) (Scalia, J., concurring in part and dissenting in part).

³¹⁶ *Supra* notes 313-315.

³¹⁷ *Infra* Part III.B.2.

³¹⁸ *Supra* Part III.A.2 (Chief Justice John's majority opinion contrasted with Chancellor Ridgely's opinion). One might also find that Dormant Commerce Clause opinions from *Cooley*, 53 U.S. at 319

2. Paul v. Virginia

Justice Stephen Field considered both the Privileges and Immunities Clause and the Dormant Commerce Clause in *Paul v. Virginia*.³¹⁹ The issue in this case involved a state law that required out-of-state insurance companies obtain a license to sell insurance in Virginia. Following the Court's Dormant Commerce Clause cases, appellants claimed a violation of both the Privileges and Immunities Clause and the Commerce Clause.³²⁰ Ruling against the appellants, Justice Field held:

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home,

("national" and "uniform") and *Henderson v. Mayor of New York*, 92 U.S. (2 Otto) 259, 272-73 (1876) (same), contributed to the development of substantive Privileges and Immunities Clause interpretations. See the Court's modern substantive Privileges and Immunities Clause test and its coverage of national and fundamental activities. *Infra* notes 397-399 (modern Privileges and Immunities Clause test).

³¹⁹ 75 U.S. (8 Wall.) 168 (1869).

³²⁰ *Id.* at 169-70.

unless the assent of other States to their enjoyment therein be given.³²¹

In these few paragraphs, Field traced closely the Clause's history.³²² Field began with a citizenship meaning by discussing removal of alienage disabilities. Field then followed a substantive approach. Like other judges before him, Field added an all-things interpretation of the language.³²³ Throughout, however, Field emphasized that the Clause's focus was on a state's discrimination against nonresident citizens in certain state privileges and immunities that a state grants to its own citizens. Field held that the Clause did not allow a foreign corporation's rights in the native state and that states were permitted to exclude foreign corporations notwithstanding the rights a state gave to its own corporations.³²⁴ Field considered the Commerce Clause argument but held that issuance of these simple insurance contracts was not "commerce."³²⁵

3. Ward v. Maryland

In *Ward v. Maryland*, Justice Clifford considered the Clause in a case in which a Maryland law required that out-of-state merchants obtain an expensive license to conduct business in the state.³²⁶ Unlike the less expensive in-state license, the out-of-state license was independent of the merchant's amount in commerce. Under the Maryland law, out-of-state merchants had to pay at least double the highest in-state license fee. As expected, parties argued both the Privileges and Immunities Clause and the Commerce Clause. The Court framed the issue:

Congress possesses the power to regulate commerce among the several states as well as commerce with foreign nations, and the Constitution also provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and the defendant contends that the statute of the state under consideration, in its practical operation, is repugnant to both of those provisions of the Constitution, as it either works a complete prohibition of all commerce from the other states in goods to be sold by sample within the limits of the described district or at least creates an unjust and onerous discrimination in favor of the citizens of the state enacting the statute in respect to an extensive and otherwise lucrative branch of interstate commerce by securing to the citizens of that state, if not the exclusive control of

³²¹ *Id.* at 180-81 (footnotes omitted). Field focused on antidiscrimination and did not seem to hold any national standard for the Clause. Field held that the Clause did not reach "special privileges" that a state may grant solely to its citizens. *Supra* note 222 (contrasting "special" and "general" privileges and immunities language).

³²² *Supra* Parts III.A-B; *see also* THE FEDERALIST NO. 80 (Alexander Hamilton).

³²³ *Supra* Part III.A.

³²⁴ *Paul*, 75 U.S. at 181-82.

³²⁵ *Id.* at 183.

³²⁶ 79 U.S. (12 Wall.) 418 (1870).

the market, very important special privileges and immunities by exemption from burdensome requirements, and onerous exactions imposed upon the citizens of the other states desirous of engaging in the same mercantile pursuits in that district.³²⁷

Noting the semantics between “license” and “tax,” the Court discussed the state’s broad power to tax.³²⁸

After discussing the Constitution and the state’s legislative powers at length, the Court summarized with a very broad limitation on states’ power. Blending the Dormant Commerce Clause and the substantive Privileges and Immunities Clause, the Court limited state legislative powers to those that were “not inconsistent with the power of Congress to regulate commerce nor repugnant to the laws passed by Congress upon the same subject.” Further, the Court would allow state legislation if it were “not in any way discriminating against the citizens of other states.”³²⁹

Possessing as the states do the power to tax for the support of their own governments, it follows that they may enact reasonable regulations to provide for the collection of the taxes levied for that purpose not inconsistent with the power of Congress to regulate commerce nor repugnant to the laws passed by Congress upon the same subject. Reasonable regulations for the collection of such taxes may be passed by the states whether the property taxed belongs to residents or nonresidents, and in the absence of any Congressional legislation upon the same subject, no doubt is entertained that such regulations, if not in any way discriminating against the citizens of other states, may be upheld as valid; but very grave doubts are entertained whether the statute in question does not embrace elements of regulation not warranted by the Constitution, even if it be admitted that the subject is left wholly untouched by any act of Congress.³³⁰

Here, as in earlier Dormant Commerce Clause cases, the Court fused the judiciary to Congress’s authority to regulate commerce.³³¹ Clifford and the Court approved of but avoided an express Dormant Commerce Clause position—opting instead for an antidiscrimination holding under the substantive Privileges and Immunities Clause.³³² According to the Court, discriminating taxes violate the Clause’s guarantees:

³²⁷ *Id.* at 425.

³²⁸ *Id.* at 426-29 (noting the inability of the state to tax the federal government).

³²⁹ *Id.* at 428-29.

³³⁰ *Id.*

³³¹ *Id.* Recall Chief Justice Johns linking the Clause to federal rules, *supra* notes 259-263.

³³² The Court sanctioned the Commerce Clause’s negative implication:

Excise taxes levied by a state upon commodities not produced to any considerable extent by the citizens of the state may perhaps be so

Taxes, it is conceded in those cases, may be imposed by a state on all sales made within the state, whether the goods sold were the produce of the state imposing the tax or of some other state, provided the tax imposed is uniform; but the Court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of the other states of the Union would be inconsistent with the provisions of the federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. . . .

. . .

Attempt will not be made to define the words “privileges and immunities” or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the Court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens.³³³

Justice Clifford held that the Clause forbade a state from charging nonresidents higher excise taxes than the taxes state residents pay.³³⁴ The Court found the Maryland provision plainly discriminatory against out-of-state merchants.

In *Ward*'s interstate discrimination discussion, the two substance vehicles, the substantive Privileges and Immunities Clause and the Dormant Commerce Clause, met formally. Justice Clifford cogently summarized the Confederation's commerce problems and the need to prevent interstate discrimination but placed power in the Court to correct those evils.³³⁵ Following this

excessive and unjust in respect to the citizens of the other states as to violate that provision of the Constitution even though Congress has not legislated upon that precise subject; but it is not necessary to decide any of those questions in the case before the Court, as the Court is unhesitatingly of the opinion that the statute in question is repugnant to the second section of the fourth article of the Constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Ward, 79 U.S. at 429.

³³³ *Id.* at 429-30 (footnotes omitted); CURRIE, *supra* note 313, at 336-38 (discussing cases where Court focused on discriminatory taxation). *See also* Conner v. Elliott, 59 U.S. 591, 593 (1855) (Court deciding to develop its definition of Privileges and Immunities Clause on a case-by-case basis).

³³⁴ *Ward*, 79 U.S. at 429-30.

³³⁵ *Id.* at 430-32.

trend, we see the courts become more and more comfortable with giving organic substance to the Constitution's provisions.³³⁶ Litigation under either of the Clauses was likely easier than seeking legislative or constitutional reform.³³⁷

C. Race and the Privileges and Immunities Clause

Above, it was noted that strong federalism beliefs and perhaps the Constitution prevented Congress from adding even basic national citizenship rights to its naturalization powers or enforcement powers under the Privileges and Immunities Clause.³³⁸ During the first half of the nineteenth century, lax immigration laws, foreign influxes, and escalating race conflicts among the states challenged federalism reservations preventing Congress from legislating on citizenship rights.³³⁹

As discussed above, courts were freely using the Privileges and Immunities Clause to establish various citizenship rights directly through a national citizenship interpretation or indirectly through a national or fundamental subset of a state's privileges and immunities.³⁴⁰ Because of the language's broad interpretations, litigants attempted to use the Clause to protect

³³⁶ *Supra* note 280.

³³⁷ Following the Fourteenth Amendment's ratification, litigants often cite a violation of the Privileges and Immunities Clause, the Dormant Commerce Clause, the Equal Protection Clause, or some combination thereof. *McBurney v. Young* 569 U.S. --- (2013) (plaintiff claimed violation of both Commerce Clause and Privileges and Immunities Clause); *General Motors v. Tracy*, Tax Comm'r of Ohio, 519 U.S. 278 (1997) (case arose under both the Commerce Clause and Equal Protection Clause); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 70 (1988) (plaintiff argued Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause); *Hicklin v. Orbeck*, 437 U.S. 518, 521 (1978) (appellants challenged the Alaska statute under the Privileges and Immunities Clause and the Equal Protection Clause); *Mont. Outfitters Action Group v. Fish & Game Comm'n of Mont.*, 417 F. Supp. 1005, 1007 (D. Mont. 1976) (plaintiff claimed relief under the Privileges and Immunities Clause, the Equal Protection Clause, and the Due Process Clause). *See also supra* note 280 (observing how expansive interpretations of the substantive Privileges and Immunities Clause create a miniature constitution); *infra* note 436 (noting how substantive Equal Protection Clause and substantive Due Process Clause compete with substantive Privileges and Immunities Clause).

The Supreme Court has held that a state taxation classification can violate the Equal Protection Clause by failing to satisfy a rational basis even though it passes the Court's Dormant Commerce Clause doctrine. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) (imposing lower tax on in-state than out-of-state insurance companies was facially discriminatory). In *Ward*, the Court found that the state discrimination did not violate the Dormant Commerce Clause because Congress had authorized states to burden interstate commerce in the insurance field. *Id.* at 880.

³³⁸ *Supra* Part II.E.I.

³³⁹ *See* EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869*, at 1-12 (1990) (introducing citizenship and status problems at the turn of the Civil War); FRANKLIN, *supra* note 179 (discussing immigration and naturalization policies from the American Revolution to the Civil War); *infra* notes 341-342 (antebellum race conflicts in the states).

³⁴⁰ *Supra* notes 247-249, 279, 293-294 (rights of citizenship compared with citizenship rights); *infra* notes 405, 424 (making same observation); *supra* Parts III.A.2, III.B.2 (state-by-state view).

nonresident citizens' slaveholder rights in nonslave states;³⁴¹ reformers, on the other hand, used the Clause to challenge local restrictions affecting free blacks in antebellum slaveholding states.³⁴² These challenges presented the same questions in a new light. What did the Privileges and Immunities Clause mean? Was Congress to enforce the Clause?

Above, it was observed that the Framers did not expressly provide for congressional enforcement of Article IV's Privileges and Immunities Clause in Article I.³⁴³ Article IV's Fugitive Slave Clause likewise did not contain express enforcement language, but Congress, within a few years of ratification, nonetheless enforced the Fugitive Slave Clause.³⁴⁴ Comparing the Privileges and Immunities Clause and the Fugitive Slave Clause, the justices in *Prigg v. Pennsylvania* suggested that Congress was able to enforce the Privileges and Immunities Clause just as it was able to enforce the Fugitive Slave Clause.³⁴⁵ *Prigg* involved a non-Pennsylvania citizen defendant abducting a runaway slave in Pennsylvania. Pennsylvania law outlawed such acts. Finding the Pennsylvania statute unconstitutional because it conflicted with Congress's

³⁴¹ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (capture of fugitive slave by nonresident citizen contrary to law of native state but Court held state law unconstitutional); *Lemmon v. People*, 20 N.Y. 562 (1860) (state emancipation of traveling slaveholder's slaves); *Commonwealth v. Aves*, 35 Mass. 193 (Mass. 1836) (emancipation of temporary resident's slaves in nonslave state); *Wiley v. Parmer*, 14 Ala. 627 (Ala. 1848) (state's double tax on nonresidents' slaves, without any justification other than nonresidency, violated the Clause). The primary objections to the Clause mentioned in the debates and state conventions concerned providing protection for slaveholder rights. 2 FARRAND, *supra* note 170, at 443; *see also* Bogen, *supra* note 92, at 837-40.

³⁴² *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (noting laws in the South and concluding that free blacks were not considered citizens of the United States for purposes of the Constitution's guarantees); *Pendleton v. State*, 6 Ark. 509 (Ark. 1846) (same); *State v. Claiborne*, 19 Tenn. 331 (1839) (free blacks were not intended to be citizens under the Clause and Clause has no effect on state law preventing free blacks from settling in Tennessee); *Amy v. Smith*, 11 Ky. 326 (Ky. Ct. App. 1822) (refusing to consider free blacks citizens of the United States). *See generally* Philip Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61, 83-104 (2011) (discussing antebellum race controversies and Privileges and Immunities Clause); BOGEN, *supra* note 99, at 28-36 (same); Antieau, *supra* note 99, at 20-21 (noting antebellum efforts to have Congress protect the privileges and immunities of free blacks from southern travel restrictions).

³⁴³ *Supra* Parts II.E.1-F.

³⁴⁴ Fugitive Slave Act of 1793, Act of Feb. 12, 1793, ch. 7, 1 Stat. 302; *see also* Fugitive Slave Act of 1850, Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

³⁴⁵ 41 U.S. 539, 615 (1842) (Congress enforces the Fugitive Slave Clause); *id.* at 628-29 (Taney's concurrence comparing the Fugitive Slave Clause and the Privileges and Immunities Clause); *infra* note 346. *Compare* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378-79 (1821) (parties argued that the Privileges and Immunities Clause was self-executing), *with* *Miller v. McQuerry*, 17 F. Cas. 335, 338 (C.C.D. Ohio, 1853) (No. 9583) (quoting the Clause, "Congress unquestionably may provide in what manner a right claimed under this clause, and denied by a state, may be enforced."). *See also* Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153 (2004) (discussing the founding father's intent that Congress enforce the Fugitive Slave Clause and extrapolating from that intent the role of Congress as the enforcer of the Constitution's commands); Antieau, *supra* note 99, at 1-2 (Congress can enforce the Privileges and Immunities Clause through the Necessary and Proper Clause); Metzger, *supra* note 221, at 1487-99 (discussing congressional enforcement of Article IV's provisions).

exclusive power and the Fugitive Slave Act of 1793, the Court placed the power to protect the Constitution's commands with the general government.³⁴⁶ Justice Story:

But it has been argued that [Congress's Fugitive Slave Act] is unconstitutional because it does not fall within the scope of any of the enumerated powers of legislation confided to that body, and therefore it is void. Stripped of its artificial and technical structure, the argument comes to this—that although rights are exclusively secured by, or duties are exclusively imposed upon, the National Government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress, and they must operate solely *proprio vigore*, however defective may be their operation—nay! even although, in a practical sense, they may become a nullity from the want of a proper remedy to enforce them or to provide against their violation. If this be the true interpretation of the Constitution, it must in a great measure fail to attain many of its avowed and positive objects as a security of rights and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct either in theory or practice. No one has ever supposed that Congress could constitutionally, by its legislation, exercise powers or enact laws beyond the powers delegated to it by the Constitution. But it has on various occasions exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also, or, in other words, that the power flows as a necessary means to accomplish the end.³⁴⁷

Chief Justice Taney agreed with Story as to the Fugitive Slave Clause's congressional enforcement but felt that states too could legislate on the issue.

There are other clauses in the Constitution in which other individual rights are provided for and secured in like manner, and it never has been suggested that the States could not uphold and maintain them because they were guaranteed by the Constitution of

³⁴⁶ *Prigg*, 41 U.S. at 615 (The Fugitive Slave Clause “require[s] the aid of legislation to protect the right . . . The fundamental principle, applicable to all cases of this sort, would seem to be that, where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the National Constitution, and not in that of any State. It does not point out any state functionaries, or any state action, to carry its provisions into effect.”).

³⁴⁷ *Id.* at 618-19 (providing several instances where Congress gave life to constitutional commands).

the United States. On the contrary, it has always been held to be the duty of the States to enforce them, and the action of the General Government has never been deemed necessary, except to resist and prevent their violation.

Thus, for example, the Constitution provides that no State shall pass any law impairing the obligation of contracts. This, like the right in question, is an individual right placed under the protection of the General Government. And, in order to secure it, Congress have passed a law authorizing a writ of error to the Supreme Court whenever the right thus secured to the individual is drawn in question, and denied to him in a state court, and all state laws impairing this right are admitted to be void. Yet no one has ever doubted that a State may pass laws to enforce the obligation of a contract, and may give to the individual the full benefit of the right so guaranteed to him by the Constitution, without waiting for legislation on the part of Congress.

Why may not the same thing be done in relation to the individual right now under consideration?

Again, the Constitution of the United States declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. And, although the privileges and immunities, for greater safety, are placed under the guardianship of the General Government, still the States may, by their laws and in their tribunals, protect and enforce them. They have not only the power, but it is a duty enjoined upon them by this provision in the Constitution.³⁴⁸

Following *Prigg*, race issues continued to escalate. In *Dred Scott*, Chief Justice Taney and the majority distinguished the privileges and immunities of a state citizen from those of a national citizen.³⁴⁹ *Dred Scott* involved a slave suing in federal court for freedom based on his former residence in a nonslave territory and nonslave state. One of the central questions was whether the federal courts had jurisdiction. Was Dred a “citizen” for purposes of diversity jurisdiction? Taney and the majority held that a state’s granting rights to free blacks did not make them citizens for purposes of the Constitution’s guarantees nor entitle them to the privileges and immunities of citizens in the several states.³⁵⁰ Refusing Dred United States citizenship, the majority dismissed Dred’s suit for lack of jurisdiction. The *Dred Scott* decision was divisive and furthered the rift between North and South.

³⁴⁸ *Prigg*, 41 U.S. at 628-29 (Taney, C.J., concurring). See also *Civil Rights Cases*, 109 U.S. 3, 12 (1883) (weighing the degree and scope of Section Five’s enforcement powers and in so doing commenting on Congress’s power to enforce “No State shall ... impai[r] the Obligation of Contracts”).

³⁴⁹ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *supra* note 222; *infra* note 350.

³⁵⁰ The majority in *Dred Scott* distinguished state citizenship from the Constitution’s national citizenship. The Privileges and Immunities Clause applied to the latter. *Scott*, 60 U.S. at 405 (“He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State.”). See also *supra* Part II.E.1 (naturalization and federalism).

Shortly after the *Dred Scott* decision, the American Civil War broke out. The War and the Thirteenth Amendment ended the institution of slavery.³⁵¹ But slavery and the laws of several states also denied citizenship rights, and thus newly freed slaves and free blacks needed formal citizenship rights in the several states.³⁵²

Post-War Reconstruction for newly freed slaves centered on congressional legislation. Congress defended initial efforts to establish citizenship rights on either the Thirteenth Amendment's enforcement section,³⁵³ the Privileges and Immunities Clause, or Congress's Naturalization Clause.³⁵⁴

For many members of the 39th Congress, like many courts before it, the Privileges and Immunities Clause meant national citizenship rights for "citizens of the United States" in the several states.³⁵⁵ Bingham advocated giving Congress the power to secure to all persons equal personal rights in all the states. Justifying an amendment to the Constitution, Bingham reasoned that an amendment enforcing national citizenship rights would not change much:

[Consider] the words of the Constitution itself: "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis "of the United States") in the several States." This guarantee is of the privileges and immunities of citizens of the United States in, not of, the several States. This guarantee of your Constitution applies to every citizen of every State of the Union.³⁵⁶

Bingham believed that his proposed amendment merely enforced powers that the Constitution already contained. For Bingham, the Privileges and Immunities Clause was a national citizenship provision.³⁵⁷

³⁵¹ U.S. CONST. art XIII.

³⁵² Thomas H. Burrell, *Justice Stephen Field's Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony*, 43 GONZ. L. REV. 77, 84 & n.39 (2007) (CRA debates recounting that slave codes did not allow contracting, purchasing, or holding property).

³⁵³ U.S. CONST. art XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation").

³⁵⁴ *Infra* notes 359-364 (various sources of authority for CRA).

³⁵⁵ *Supra* Parts II.E.1-F; *supra* Parts III.A-B (Clause's judicial interpretation); *supra* note 122 (construction of Article IV of the Articles as an emerging naturalization provision for "citizens of the United States").

³⁵⁶ Bingham CONG. GLOBE, 39th Cong. 1st Sess. 158 (1866); *see also id.* at 1089-91. *But see* Lash, Part II, *supra* note 292, at 334-35 (emphasizing that Bingham, eventually, if not from the outset, appreciated the difference between the Privileges and Immunities Clause and the Privileges or Immunities Clause and agreed that the privileges or immunities language of Section One differed from the Privileges and Immunities Clause as the "Or" Clause had nothing to do with state-conferred common-law rights).

³⁵⁷ *Supra* note 356; *see also* Bingham CONG. GLOBE, 39th Cong. 1st Sess. 1089 ("[No] State has the right to deny to a citizen of any other State any of the privileges or immunities of citizens of the United States."); *id.* at 1090 (similar language); *id.* at 1095 ("It is to secure to the citizen of each State all the

While Congress considered Reconstruction reforms, Senator Lyman Trumbull introduced the Civil Rights Act of 1866 (CRA). The CRA, as enacted, provided:

[t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.³⁵⁸

Trumbull felt that the Thirteenth Amendment and Congress's power to naturalize authorized the CRA.³⁵⁹ Reversing the slave codes, the CRA provided a definition of the

privileges and immunities of citizens of the United States in the several States.”); *see also* Woodbridge *id.* at 1088 (“[It] gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States.”); Howard *id.* at 2765 (“With a view to prevent such confusion and disorder, and to put the citizens of the several States on an equality with each other as to all fundamental rights, a clause was introduced in the Constitution declaring that ‘the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.’ The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States.”).

³⁵⁸ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; Burrell, *supra* note 6, at 108-09 nn. 541-542 (noting the similarity between the CRA’s citizenship rights language and language in English denization privileges and immunities). No one would deny that the CRA secured citizenship rights for newly freed slaves. Technically, however, some or all of the act’s protection was tied to the rights that states granted to white persons, and thus states could escape having to provide such rights to others by denying those same guarantees to white persons.

³⁵⁹ Trumbull CONG. GLOBE, 39th Cong. 1st Sess. 474-75, 499-500, 600 (equating CRA’s provisions with liberty and freedom); *see also* Johnson *id.* at 507 (“If the power was in Congress by legislation to make citizens of all the inhabitants of the State of Texas, why is it not in the power of Congress to make citizens by legislation of all who are inhabitants of the United States and who are not citizens? That is what this bill does, or what it proposed to do. There are within the United States millions of people who are not citizens, according to the view of the Supreme Court of the United States.”); Shellabarger *id.* at 1293-94 (Congress has power to naturalize, and the CRA merely enforced citizenship rights associated with national citizenship and did not invade states’ rights on matters over which states have jurisdiction).

privileges and immunities of United State citizens in the several states.³⁶⁰ Representative James Wilson, who introduced the CRA in the House, defined CRA's civil rights and immunities with the same substance that Courts had reached under their interpretations of the Privileges and Immunities Clause: Blackstone's right of personal security, personal liberty, and right to acquire and enjoy property.³⁶¹ Wilson, like many before him, saw a national citizenship behind "privileges and immunities of citizens in the several states" and felt that Congress was naturally able to give life to the Clause through laws establishing national privileges and immunities.³⁶² Joining Trumbull and Wilson, Representative William Lawrence, too, argued that Congress has incidental powers under the Privileges and Immunities Clause to protect national and inherent citizenship rights:

I maintain that Congress may by law secure the citizens of the nation in the enjoyment of their inherent right of life, liberty, and property . . . to enforce the observance of . . . article four, section two, and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State.

Congress has the incidental power to enforce and protect the equal enjoyment in the States of civil rights which are inherent in national citizenship. The Constitution declares these civil rights to be inherent in every citizen, and Congress has power to enforce the declaration.³⁶³

Lawrence continued:

[W]hen an alien . . . becomes naturalized, and thus is clothed by national authority with all the rights of an American citizen owing

³⁶⁰ Trumbull *id.* at 474 (finding CRA necessary to protect privileges which are essential to freemen); *supra* note 352 (CRA reversed slave codes).

³⁶¹ Wilson CONG. GLOBE, 39th Cong. 1st Sess. 1117-18; *supra* notes 236, 271 (referencing BLACKSTONE). Wilson noted that the CRA's enforcement provisions were based on the Fugitive Slave Act of 1850. CONG. GLOBE, 39th Cong. 1st Sess. 1117-18. The fugitive slave acts enforced Article IV's Fugitive Slave Clause the same way the CRA enforced the Privileges and Immunities Clause. *Supra* notes 343-348; *see also* Kaczorowski, *supra* note 345, at 206-07, 217-19, 221-22 (discussing various statutes enforcing Article IV's provisions).

³⁶² Wilson CONG. GLOBE, 39th Cong. 1st Sess. 1117-18 (arguing that the bill accomplishes what the states should have protected under Article IV and that Congress has authority to protect citizenship rights under the Thirteenth Amendment); *see also* Lawrence *id.* at 1835-36 (Clause and inherent powers of Congress authorize CRA; clause provides national privileges and immunities of Citizens "of the United States" in the several states). In July, after Congress passed the Fourteenth Amendment, Representative Shellabarger introduced his own civil rights bill to enforce the Privileges and Immunities Clause. Shellabarger described his bill as an effort to enforce "that demand of the Constitution which declares 'the citizens of each State shall be entitled to all the privileges and immunities of citizens' [of the United States] 'in the several states.'" CONG. GLOBE, 39th Cong. 1st Sess. app. 293 (bracketed phrase in original). Shellabarger's bill would have extended federal protection beyond the CRA's civil rights.

³⁶³ Lawrence *id.* at 1835. This passage from Lawrence was in response to the President's veto of the CRA.

allegiance to the Government, invested with civil rights declared to be inherent and inalienable, shall Congress have no authority to protect him in the enjoyment of these rights when they are stricken down by State laws?³⁶⁴

But not everyone agreed with Trumbull, Wilson, and their colleagues.³⁶⁵ Representative Rogers, similar to comments in the 1790 naturalization act debates, argued that Congress did not have the right to control the privileges and immunities of every citizen of the states.³⁶⁶ Representative Michael Kerr too felt that the CRA was not authorized by either the Thirteenth Amendment or the Privileges and Immunities Clause.³⁶⁷

³⁶⁴ *Id.* at 1836.

³⁶⁵ See Saulsbury *id.* at 476 (remarking that before the Thirteenth Amendment, Congress could not enact the CRA and the Thirteenth Amendment only prohibited slavery); Cowan *id.* at 499 (Thirteenth Amendment limited to ending slavery and not to authorize legislation such as CRA); Davis *id.* at 595 (arguing that Privileges and Immunities Clause does not give authority for subject matter of CRA but might authorize some congressional action for interstate issues when a citizen goes into another state for a change of residence or to enjoy rights of citizens in the other state); *id.* at 597-98 (Davis felt that Congress did not have the right to make a “citizen” despite the uniform naturalization power in Article I; after naturalization, “the authority of Congress is exhausted; it has no further power whatever over the question of . . . citizenship”); Bingham *id.* at 1291-92 (noting state sovereignty problems with congressional enforcement of CRA’s provisions). Compare similar federalism arguments restricting national interference with state citizenship rights notwithstanding Congress’s uniform naturalization authority. *Supra* notes 202-206, 254.

³⁶⁶ CONG. GLOBE, 39th Cong. 1st Sess. 1120 (Rogers finding Bingham’s amendment must be passed before the proposed CRA would be constitutional; identifying the problem that if Congress could extend the privileges of citizenship by such legislation, then it could also take away privileges of citizenship by the same power); see also Lash, Part II, *supra* note 292, at 381-82.

³⁶⁷ Kerr:

[L]et it be remembered that in all these authorities it is assumed that the privileges and immunities referred to as attainable in the states are required to be attained, if at all, *according to the laws or constitutions of the States*, and never in *defiance* of them. This bill rests upon a theory utterly inconsistent with and in direct hostility to every one of these authorities. It asserts the right of Congress to regulate the laws which shall govern in the acquisition and ownership of property in the States, and to determine who may go there and purchase and hold property, and to protect such persons in the enjoyment of it. The right of the State to regulate its own internal and domestic affairs, to select its own local policy, and make and administer its own laws for the protection and welfare of its own citizens, is denied. If Congress can declare what rights and privileges shall be enjoyed in the States by the people of one class, it can by the same kind of reasoning determine what shall be enjoyed by every class.

CONG. GLOBE, 39th Cong. 1st Sess. 1270; see also Poland *id.* at 2961 (finding that the Constitution did not allow enforcement of the Privileges and Immunities Clause but “[t]he clause of the first proposed amendment, that ‘no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,’ secures nothing beyond what was intended by the original provision in

Whether or not Congress had power to establish the CRA before the Fourteenth Amendment, Bingham and the Reconstruction Congress crafted Section One of the Fourteenth Amendment to constitutionalize the CRA and give Congress enforcement power to define and protect national privileges and immunities or national citizenship rights.³⁶⁸ Bingham built what would become Section One on the Constitution as it existed before the amendment, including the Privileges and Immunities Clause. An early draft provided:

Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.³⁶⁹

Bingham explained:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.³⁷⁰

the Constitution, that ‘the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.’”).

³⁶⁸ U.S. CONST. amend XIV, §§ 1, 5. *But see infra* note 376 (contrasting authority for self-enforcement with arguments for congressional enforcement). Similar to the CRA debates, it was argued that Congress already had enforcement authority under the Privileges and Immunities Clause. Higby CONG. GLOBE, 39th Cong. 1st Sess. 1036 (suggesting that the principle of Bingham’s initial proposed amendment could have been enforced under the Constitution’s other sections); Kelley *id.* at 1057, 1062, 1063 (expressing doubts that the Constitution, without the amendment, authorized the powers proposed by the amendment but after a long speech concluding that it does); Bingham, *supra* notes 356-357. *But see* Hale CONG. GLOBE, 39th Cong. 1st Sess. 1063 (commenting on the radical effect the proposed amendment’s first draft would have on the states); *supra* notes 366-367 (identifying argument that an amendment was needed for the proposed CRA).

³⁶⁹ Bingham CONG. GLOBE, 39th Cong., 1st Sess. 1034 (providing for congressional enforcement and citing Supremacy Clause); *see also id.* at 158, 1088-1092 (early draft language of what would become Section One).

³⁷⁰ Bingham *id.* at 2542.

Bingham's proposed amendment went through many revisions.³⁷¹ One of the major modifications was the structural change from Congress establishing uniform citizenship rights in the first instance (Congress shall) to Congress having a remedial enforcement power to curb state abuse (no state shall).³⁷² The final draft authorized congressional enforcement through remedial legislation rather than full power to legislate in the states' domain in the first instance.³⁷³ In the final draft, as in the initial draft, the "Privileges and Immunities Clause" was mostly restated in Section One's "Privileges or Immunities Clause."³⁷⁴

Section One. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section Five. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.³⁷⁵

With the amendment's ratification, Section Five gave Congress the power to enforce national citizenship rights—but now for newly freed slaves, free blacks, and loyal whites across the states.

Likely influenced by the courts' history with the substantive Privileges and Immunities Clause, a question arose as to whether Congress enforced Section One or Section One was for the courts to interpret and enforce—notwithstanding Section Five's text. The courts went with self-execution.³⁷⁶ Contrary to Section One's later judicial development, for Bingham, the

³⁷¹ Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 29–56 (1955) (analyzing original language and revisions).

³⁷² *Id.*

³⁷³ *Infra* notes 376-378.

³⁷⁴ U.S. CONST. amend XIV, § 1.

³⁷⁵ U.S. CONST. amend. XIV, §§ 1, 5.

³⁷⁶ *See City of Boerne v. Flores*, 521 U.S. 507, 524, 536 (1997) (analogizing to judicial assumption of enforcement in other areas to argue for judicial enforcement of Section One; Congress given remedial but not substantive enforcement power; Supreme Court, under *Marbury v. Madison*, has oversight of Constitution); *see also id.* at 545-46 (O'Connor, J., dissenting) (); *cf.* *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (Fifteenth Amendment's Section One is self-executing). *But see* Burrell, *supra* note 6, at Part V.F (arguing for congressional enforcement rather than judicial interpretation and enforcement of Section One); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005) (discussing the scope and degree of Congress's Fourteenth Amendment enforcement powers); *supra* notes 343-348 (citing *Prigg* for proposition that Congress enforces the Constitution's commands including individual rights and the Privileges and Immunities Clause); *supra* notes 354-364 (39th Congress's belief that it could enforce the Privileges and Immunities Clause).

Constitution was not self-executing.³⁷⁷ Referring to Section One’s “no state shall” language, Bingham emphasized in a post-ratification debate that Congress was to enforce the Constitution’s negative limitations as well as its affirmative powers.³⁷⁸ Bingham, more radical than most of the 39th Congress, explained Congress’s power to establish national privileges and immunities:

[B]y virtue of these amendments, it is competent for Congress to-day to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances, for these are of the rights of citizens of the United States defined in the Constitution and guaranteed by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered.³⁷⁹

It is by no means clear that a majority or even a significant body would agree with the enforcement legislation Bingham supported. But this passage, and discussion as a whole, conveys Bingham’s emphasis that Congress was the vehicle enforcing Section One. Throughout the Reconstruction discussion, the question was one of Congress’s power to enforce civil rights against noncomplying states. Just as Congress provided interstate commercial privileges and immunities, now Congress provided national citizenship privileges and immunities through legislation such as the civil rights acts. Congress not the courts provided the substance of civil rights.³⁸⁰

³⁷⁷ CONG. GLOBE, 42d Cong., 1st Sess. app. 81 (“The Constitution is not self-executing, therefore laws must be enacted by Congress for the due execution of all the powers vested by the Constitution in the Government of the United States, or in any department or any officer thereof.”).

³⁷⁸ *Id.* (“[U]nder the Constitution . . . it always was competent for the Congress of the United States, by law, to enforce every affirmative grant of power and every express negative limitation imposed by the Constitution upon the States.”); *id.* at 83-85.

³⁷⁹ *Id.* at 85.

³⁸⁰ The states, too, shared a role in protecting civil rights. The CRA granted substantive protection but was crafted in terms of antidiscrimination with a state’s white citizens. *Supra* note 358. Thus, Congress defined and limited the scope of protected civil rights but left some degree of that protection with the states. By placing the substantive protection in terms of antidiscrimination, Congress avoided some federalism concerns.

A theme throughout this essay has been that the Constitution's privileges and immunities language begs for a national definition of "privileges and immunities" or in other words, a national law defining (rather than judicial decisions defining) fundamental citizenship rights across the states. Whatever the character of the Privileges and Immunities Clause before the Reconstruction amendments, with the Fourteenth Amendment, Congress finally obtained, complementing its naturalization authority and perhaps implied enforcement authority under the Clause, power to create a set of limited and fundamental citizenship rights to be enjoyed by citizens across the states. The transformation of Article IV of the Articles to congressional definition and enforcement of privileges and immunities in the several states was complete.

D. Modern Case Law

The main purpose of this paper is to discuss the Articles' transformation to the Constitution and highlight early nineteenth-century judicial development of the Privileges and Immunities Clause. From the nineteenth-century background, the Supreme Court generalized the Privileges and Immunities Clause's protections. In the twentieth century, the Court settled on a self-administered test that protected fundamental and national objects, which, as we saw above, traces back to nineteenth-century adjudication.³⁸¹

In *Toomer v. Witsell*, nonresident shrimp fishermen challenged a South Carolina law regulating shrimp trawling offshore.³⁸² One of the relevant state statutes provided for a \$25 license fee for in-state trawlers and a \$2,500 license fee for out-of-state trawlers.³⁸³ Most of the Court's discussion concerned the 100 times difference for the out-of-state license. The Court initially took a strong antidiscrimination approach to the Privileges and Immunities Clause. The Clause, opined the Court, was "designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."³⁸⁴ But like many nineteenth-century cases restricting the Clause's scope, the Court considered its precedents and held that the Privileges and Immunities Clause did not prohibit a state's discriminatory legislation when there was a "substantial reason" for the discrimination and the discrimination bore a close relation to that reason.³⁸⁵ The Court's test shows how the Clause's interpretation weathered down from removing alienage disabilities, providing rights "common to all," and protecting "fundamental" citizenship rights into a standard of "reasonableness."³⁸⁶ The *Toomer* Court ruled that the South Carolina statute, without justification, was plainly discriminatory to the point of exclusion.³⁸⁷

³⁸¹ *Supra* Parts III.A-B.

³⁸² 334 U.S. 385 (1948).

³⁸³ *Id.* at 389-91.

³⁸⁴ *Id.* at 395; *supra* Part III.A.2 (*Livingston v. Van Ingen's* state-by-state focus).

³⁸⁵ *Toomer*, 334 U.S. at 396. One sees the influence of several decades of substantive Due Process case law in the Court's language.

³⁸⁶ *Supra* note 218.

³⁸⁷ *Toomer*, 334 U.S. at 396-403. The Court avoided an Equal Protection Clause challenge and found that one of the challenged statutes violated the Dormant Commerce Clause and one did not. *Id.* at 394-95, 403-04.

In *Baldwin v. Fish and Game Commission of Montana*, the Court considered a Montana statute that charged out-of-state residents several multiples more for a state elk-hunting license than in-state residents were charged.³⁸⁸ Nonresident citizens sued Montana’s Department of Fish and Game Commission. They challenged Montana’s license scheme under the Privileges and Immunities Clause and the Fourteenth Amendment’s Equal Protection Clause. Denying relief, the district court distinguished hunting elk from other rights such as travel, education, the right to speak, the right to vote, and the right to pursue a calling.³⁸⁹ On appeal, the Supreme Court held that hunting big game elk was not a national “privilege” or “immunity” because hunting elk was not vital to the nation’s wellbeing.³⁹⁰ The Court held that the state’s discrimination in licensing fees to preserve a finite state resource was not unreasonable.³⁹¹ Recognizing state sovereignty for nonnational acts, the Court said:

It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those “privileges” and “immunities” bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.³⁹²

The *Baldwin* Court summed up the Clause’s history, borrowed limitations and qualifications from earlier Court interpretations, and held that elk hunting was not one of the fundamental activities protected under the Clause.³⁹³

³⁸⁸ 436 U.S. 371 (1978).

³⁸⁹ *Mont. Outfitters Action Group v. Fish & Game Comm’n of Mont.*, 417 F. Supp. 1005, 1009 (D. Mont. 1976).

³⁹⁰ *Baldwin*, 436 U.S. at 388; *Compare id. with Cooley v. Board of Wardens and Steamship v. Portwardens*, *supra* note 314 (courts focusing on national activities in which uniformity is needed under the judiciary’s Dormant Commerce Clause doctrine).

³⁹¹ *Baldwin*, 436 U.S. at 390.

³⁹² *Id.* at 383 (citations omitted).

³⁹³ *Id.* at 388 (“We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident’s participation therein without similarly interfering with a resident’s participation. Whatever rights or activities may be ‘fundamental’ under the

Shortly thereafter, the Court in *Hicklin v. Orbeck* considered the matter of Alaska giving state residents an employment preference with firms having oil leases with the state.³⁹⁴ The Court held that it would not invalidate all state legislation treating resident and nonresident citizens differently when there is a perfectly valid reason for the disparity. But it will do so when there is no reason for the discrimination other than state citizenship.³⁹⁵ And once given a legitimate reason, the regulation must bear a substantial relation to that approved interest.³⁹⁶

Following its nineteenth-century footprints, the Supreme Court settled on a two-step test to determine whether a state's action violates the Privileges and Immunities Clause. The first step is to determine whether the activity in question is sufficiently fundamental or basic to the livelihood of the nation so as to fall within the Clause's protection.³⁹⁷ Second, if the state deprives an individual of a protected privilege, then the Court reviews the legislation to determine if it is related to the advancement of a substantial state interest and whether less restrictive means are available.³⁹⁸ Courts allow such discriminating legislation when it has a substantial relation to a substantial state interest.³⁹⁹

IV. Conclusion

As we saw in Part II, problems between the states and Congress were complicated, and this relationship underpins the entire Constitution. On peace-and-harmony matters, the Framers intended for Congress to be the substantive decisionmaker—sorting out the *meum and tuum* between the states and the national legislature and further defining the privileges and immunities across the states.⁴⁰⁰ This sensitive harmony relationship among the states is far too complicated for the courts to invent negative inferences or treat privileges and immunities language as

Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.”).

³⁹⁴ 437 U.S. 518 (1978).

³⁹⁵ *Id.* at 525-27. Following the language of *Baldwin* and *Hicklin*, the Supreme Court held that the right to become a member of a state bar cannot be denied to out-of-state residents. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). The *Piper* Court noted the Clause's derivation from the Articles and commented that the Clause itself was designed to form an economic union. *Id.* at 279-80 nn.7-8. The Court reasoned that its precedents do not state that practicing law should not be a “privilege” within the meaning of the Privileges and Immunities Clause. *Id.* at 280-81. According to the Court, the practice of law should be considered a “fundamental right.” *Id.* at 281. The Court rejected the state's many attempts to satisfy the substantial reason and relation test. *Id.* at 284-87.

³⁹⁶ *Hicklin*, 437 U.S. at 526-27; *Toomer v. Witsell*, 334 U.S. 385, 399 (1948). The Court supported its privileges and immunities holding by referring to “mutually reinforcing” Dormant Commerce Clause cases, which similarly prohibit states from favoring their own citizens' use of in-state resources over nonresidents' use when that resource is going into interstate commerce. *Hicklin*, 437 U.S. at 531-32.

³⁹⁷ *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988).

³⁹⁸ *Id.* at 64-65.

³⁹⁹ *Toomer*, 334 U.S. at 396-97.

⁴⁰⁰ *Supra* Parts II.D-E.

substantive and self-executing.⁴⁰¹ Just look at the Convention debates between large and small states, North and South, and equal versus proportionate voting in Congress.⁴⁰²

From the beginning, however, courts interjected themselves into a legislative role.⁴⁰³ Siphoning Congress's authority, the Court supplied substance to the Clause to create national rights. In the face of congressional refusal to do so on federalism principles,⁴⁰⁴ courts nonetheless felt that the Privileges and Immunities Clause granted the judiciary the ability to define citizenship rights to fill perceived voids in the Constitution, fill voids in Congress's legislation, or to protect nonresident citizens in all or a national subset of a state's privileges and immunities.⁴⁰⁵

Part of the problem was a misunderstanding of the language. Framers did not provide direct authority for Congress to define naturalization rights or enforce the Clause. Before Reconstruction, Congress was not able to reunite the privileges and immunities concept with naturalization authority or comity's new legislative home in Article I.⁴⁰⁶ Like a zipper starting off track, courts fell into the trap of forcing a meaning to the Articles' privileges and immunities language or Article IV as a whole.⁴⁰⁷ Courts transposed the Confederation's antidiscrimination provisions to the Constitution's Clause. The judicial process followed a pattern: (1) the judge was thrown into a situation concerning citizenship rights or interstate harmony but without the benefit of congressional direction; (2) parties argued the Privileges and Immunities Clause, and the Court, viewing an inkblot, had no ready interpretation of the Clause's meaning; and (3) giving substance to the Clause, the judge fell back on similar language in Article IV of the Articles of Confederation (retrospective view) and associated the Constitution's privileges and immunities language with pre-Constitution concepts for harmony and antidiscrimination.⁴⁰⁸ In other words, courts devolved the Constitution's Article IV-Article I relationship into Confederation concepts and antidiscrimination principles.

Taking the Clause out of its cradle, courts had an open horizon to define the Clause. Given the undeveloped nature of Article IV and the Articles, courts naturally construed the language via broad principles.⁴⁰⁹ Instead of treating the language as legislative, judges, through an antidiscrimination lens, defined the Clause by looking to state privileges or immunities or assembling a collection of fundamental rights.⁴¹⁰ Thus, on the one hand, courts deemed privileges and immunities language as equivalent to the principle of peace and harmony and

⁴⁰¹ *Id.*

⁴⁰² *Supra* notes 172, 174-176, 184-194.

⁴⁰³ *Supra* Part III.

⁴⁰⁴ *Supra* Part II.E.1. (congressional restraint from legislating on basic citizenship rights).

⁴⁰⁵ *Supra* notes 265-279, 293-294 (judicial definition of citizenship rights).

⁴⁰⁶ *Supra* Part II.E.1.

⁴⁰⁷ *Supra* notes 237-239, 265 (retrospective view).

⁴⁰⁸ *Id.*

⁴⁰⁹ For example, the Articles were not drafted with the kind of detail necessary for judicial enforcement. No analogous federal judicial tribunal existed at the time of the Articles to adjudicate national issues between the states. *Supra* note 166.

⁴¹⁰ *Supra* Parts III.A.2, III.B.2 (state-by-state view); *supra* notes 265-279 (Chancellor Ridgely's interpretations).

opined freely on national citizenship rights. On the other hand, privileges and immunities language became equivalent to antidiscrimination, entitling a nonresident citizen to the state privileges and immunities of a native citizen.

Despite the fact that the Framers placed the Confederation's antidiscrimination principles with Congress, courts became a substitute for a legislative discussion of citizenship rights in several national and fundamental areas.⁴¹¹ The addition of the Dormant Commerce Clause doctrine only added to the Court's discretion over commercial affairs as it gave an identity to what the Court was doing with the substantive Privileges and Immunities Clause in commercial areas.⁴¹² Litigants brought commerce-related challenges under both the Privileges and Immunities Clause and the Dormant Commerce Clause.⁴¹³

Was the Convention's "community of privileges" self-executing?⁴¹⁴ If we could ask an individual from the era the content of this "community," we might receive a list corresponding to the perceived values of free citizens: trial by jury, habeas corpus, freedom of conscience.⁴¹⁵ A similar response, perhaps the same response, might occur if we asked members of the founding generation what "privileges and immunities of Englishmen" meant.⁴¹⁶ Along the same reasoning, there is no need to fight Blackstone's categorization of rights of persons.⁴¹⁷ Each of these rights would have been a historical part of the English Constitution or English citizenship rights promulgated by English authority.

Herein lies the disconnect. Privileges and immunities language was conceptually the exact opposite of self-executing.⁴¹⁸ "Privileges" and "immunities" were derived from royal grants or later by the king in Parliament. In a republican form of government, we do not have a direct analogue to "privileges and immunities." Americans, as former Englishmen, were left with the byproduct of the English Constitution but without the source in the king or the king in Parliament. In modern times, the intuitive counterpart to "privileges and immunities of citizens" is national legislation or the Constitution.⁴¹⁹ Congress enacts laws, that is, privileges and/or

⁴¹¹ *Supra* Part III.

⁴¹² *Supra* Part III.B.1.

⁴¹³ *Id.*

⁴¹⁴ "Community of privileges" was the terminology used by the Convention's Committee of Detail. *See* 2 FARRAND, *supra* note 170, at 135, 173-74, 187 (proposing what would become the Privileges and Immunities Clause with little variation in the Constitution's final draft); *see also* 3 FARRAND, *supra* note 170, at 446 (Pinckney's comments on the Clause some thirty years after the Convention).

⁴¹⁵ *See, e.g.*, Natelson, *supra* note 15, at 1163-64 (discussing perceived rights and privileges during the era of the American Revolution).

⁴¹⁶ *Supra* Part II.B.

⁴¹⁷ *Supra* notes 236, 271 (Blackstone in case law); *supra* note 361 (Blackstone in CRA debates).

⁴¹⁸ *Supra* Part II.A.

⁴¹⁹ *Supra* Parts II.E-F (arguing for national civil rights legislation instead of judicial creation of civil rights); *cf.* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 66 (1873) ("[W]e think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which

immunities.⁴²⁰ The Constitution also contains privileges and immunities of citizens because of the Constitution’s ratification not because of some characteristic of the provision in question—though privileges and immunities language frequently attracts to its historical connotation of citizenship and mercantile rights.⁴²¹

A better interpretation is for courts to treat the Clause as a nonsubstantive membership clause, removing alienage disabilities and ensuring citizens access to national laws—similar in form and meaning to the privileges and immunities language of denization and naturalization clauses.⁴²² This bare, uncontroversial interpretation of the Clause fits well with the bare, uncontroversial treatment of the Clause in the Convention debates.⁴²³ It is one thing to say that the Clause grants a “right of citizenship”; it’s quite another to say that the Clause itself grants citizenship rights to be arbitrarily discovered or designated by the courts as time goes by.⁴²⁴ If judges deem the Clause to mean substantive extremes, such as Locke’s theory of citizenship rights, then the Clause might as well be its own constitution.⁴²⁵

One might counter that Congress cannot legislate to the full extent of peace and harmony because Congress is limited to enumerated ends.⁴²⁶ While that may be true, the absence of extant congressional authority does not serve as a justification for judicial invention of citizenship rights under the Privileges and Immunities Clause. Courts do not discover citizenship rights; legislatures responsible to the people create citizenship rights.⁴²⁷ The Constitution’s federalism design did not include an open horizon for the courts to provide peace and harmony through the Privileges and Immunities Clause. “Fundamental law” from the English Constitution was important to the Framers and they made sure these fundamental provisions went into the Constitution.⁴²⁸ And those components not covered federally were left to the

come within any just definition of the word monopoly...[and] the power to do this has never been questioned or denied.”).

⁴²⁰ When similar privileges and immunities language was placed in Section One of the Fourteenth Amendment, Congress was the enforcer, giving substance to the protected privileges and immunities. *Supra* Part III.C.

⁴²¹ *Supra* note 115.

⁴²² *Supra* notes 32-34.

⁴²³ *Supra* note 228.

⁴²⁴ *Supra* note 247 (rights of citizenship); *supra* notes 265-279, 293-294 (citizenship rights). Contrary to securing equal citizenship rights, the better construction would be that the Clause itself secures equal membership to the laws of the land. Specific legislation can handle the ins and outs of “equality,” much like the commerce relationship between the states and Congress. *Cf. supra* note 246 (grants of denization gave equal membership but would not necessarily affect other discriminations and statuses).

⁴²⁵ *Supra* note 280.

⁴²⁶ *Supra* note 298 (discussing same point).

⁴²⁷ *Supra* Part II.A (noting that the privileges and immunities concept traced to the king’s charter). Fundamental English statutes and English citizenship rights, frequently invoked in Privileges and Immunities Clause activism, were typically obtained through Parliament and parliamentary equivalents. *Supra* note 230. *But see supra* notes 265-279, 293-294 (e.g., Chancellor Ridgely’s list, Locke’s “rights of man,” Justice Washington’s dicta)

⁴²⁸ *Supra* notes 211-214, 278-290 (fundamental law, state sovereignty, and the Constitution’s Article V amendment process).

sovereign states to enforce. If the people want to ensure commercial or citizenship equality in the states to various additional degrees, this should be a congressional matter, either under existing authority or through an amendment expanding congressional authority, for example, the Fourteenth Amendment.

There is no doubt that states have enacted laws discriminating against citizens of other states.⁴²⁹ The judiciary, however, is not the ideal body to remedy interstate conflict. The Framers were aware of the difficulties between the states. They faced far greater interstate strife going into the Constitutional Convention of 1787 than any conflicts arising thereafter.⁴³⁰ The Constitution's checks and balances were specifically designed for managing interstate differences in critical areas such as those between North and South and large and small states.⁴³¹ The transition from the Articles of Confederation to the Constitution entrusted the power to "describ[e] the privileges and immunities in other states" to Congress.⁴³² If something serves the nation's wellbeing, Congress is able to make the necessary determination.⁴³³ The judiciary is important insofar as it impartially gives life and supremacy to Congress's substantive remedies.⁴³⁴

⁴²⁹ See generally HOWELL, *supra* note 207.

⁴³⁰ *Supra* Parts II.D-E.

⁴³¹ *Supra* Part II.E, specifically *supra* notes 179-182, 189-194.

⁴³² *Supra* notes 149, 182-183.

⁴³³ See *Tyler Pipe Indus. v. Wash. State Dep't of Rev.*, 483 U.S. 232, 261-62 (1987) (Scalia J., concurring in part and dissenting in part) (). The dissenting justices in *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371 (1978), broke from the majority, which had held that the Clause was limited to providing relief for nonresidents over state activity affecting "fundamental" and national activities. For the dissenting justices, the Court, through the Clause, would require states to justify any discrimination against nonresidents—not just discrimination affecting a fundamental or national activity. *Id.* at 402.

⁴³⁴ THE FEDERALIST NO. 80 (Alexander Hamilton); see also *supra* note 309. One might conclude that Hamilton argued for a judicial construction of the Privileges and Immunities Clause. Another interpretation is that Hamilton recognized federal jurisdiction in order to carry out the Clause's principle: national laws and the Constitution gave the substance of "privileges and immunities" and federal courts impartially enforced the "equality of privileges" in the states of the Union. Hamilton's view of the national judiciary can be found in FEDERALIST NO. 22:

A circumstance which crowns the defects of the Confederation . . . [is] the want of a judiciary power. . . . We often see not only different courts, but the judges of the same court, differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

This is the more necessary where the frame of the government is so compounded, that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals are invested with a right of ultimate decision, besides the contradictions to be expected from difference of opinion, there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations. . . . The treaties of the United States,

It seems the courts' justification for usurping state sovereignty or Congress's authorized discretion is the false dichotomy that if the courts allowed the state discrimination, the people will have no remedy, and over time, Congress would not be able to legislate to correct the discrimination because its power would become "valueless."⁴³⁵ To the contrary, through such a philosophy, courts and judicial activism have largely rendered legislative powers and the republican form of government valueless—especially in controversial civil, political, and social areas. The courts' unchecked substance serves as a judicial bypass to Congress and Article V. If not for the open-ended interpretations of Section One's substantive Due Process Clause and substantive Equal Protection Clause, we would likely still see the substantive Privileges and Immunities Clause serving as a judicial cure-all to society's conflicts.⁴³⁶

under the present Constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.

⁴³⁵ *Supra* note 278 (potential for improper state legislation if without judicial intervention under Clause).
Justice Clifford:

Grant that the states may impose discriminating taxes against the citizens of other states and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the states to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several states.

Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430-31 (1870).

⁴³⁶ *See supra* notes 280, 336-337.