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

*Stewart Jay**

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

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

There is compelling reason to conclude that the Privileges and Immunities Clause was intended to guarantee Americans traveling or temporarily residing in another state, or doing business or owning property outside their home states, that they would be treated exactly like the local people, without exception, and regardless of whether the right was recognized by other states, including their own. No court or scholar

* Professor of Law and Pendleton Miller Chair in Law, University of Washington School of Law. © Stewart Jay 2013. All spellings and grammatical uses in quoted early documents have been left in their original form without a “sic” to indicate a departure from modern use, except for apparent typographical errors.

has ever reached this conclusion, but it is amply supported by the evidence presented here.

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INTRODUCTION: “THE BASIS OF THE UNION”

Alexander Hamilton wrote in *Federalist No. 80* that the Privileges and Immunities Clause of Article IV was “the basis of the union.”¹ Unfortunately, he did not elaborate, and almost no one else mentioned it at the Constitutional Convention or during ratification, which at least indicates that the provision was not controversial. Courts would later hold that the clause guaranteed Americans the right to move about the country at

1. THE FEDERALIST No. 80, at 537 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

will, buy property in all states, transact business in any place free of discriminatory taxes and regulations, use the courts everywhere, be protected by the writ of habeas corpus, as well as other rights, all on the same terms a state would afford its own citizens.² In that sense, it has served as a kind of equal protection provision for outsiders, requiring that state governments treat them much the same as their own citizens. For this reason as well, courts sometimes refer to it as “the comity article of the Constitution.”³

A student of constitutional law today, however, would be forgiven for being puzzled by Hamilton’s remark. At best, a typical course casebook might devote a few pages to the clause, hardly what one would expect for the foundation of the nation. Part of the reason is that the Dormant Commerce Clause and section one of the Fourteenth Amendment forbid many of the types of discriminatory legislation that are covered by it.⁴ As a leading casebook explains, “the modern function” of the Privileges and Immunities Clause “appears to be that of carving out an exception to the market-participant exception to the commerce clause.”⁵ This is not the fate one would anticipate from “the basis of the union”—an exception to a constitutional rule that was not discussed by the framers and ratifiers of the Constitution, and that no authority anticipated.

Aside from the emergence of doctrines that could not have been predicted at the founding, there is another explanation for why the clause has receded in importance. Early judicial interpretations of the clause were almost certainly wrong in depicting the limited scope of the rights it was intended to protect. In those cases, courts struggled with the word “all” in the clause. Judges somehow could not believe that it literally encompassed

2. See *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (listing rights protected by Privileges and Immunities Clause).

3. *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975), *quoted in Zobel v. Williams*, 457 U.S. 55, 80 n.10 (1982); see also *Mullaney v. Anderson*, 342 U.S. 415, 419 n.2 (1952) (referring to the “comity clause”).

4. See *Baldwin v. Mont. Fish & Game Comm’n*, 436 U.S. 371, 379 (1978) (“Historically, it has been overshadowed by the appearance in 1868 of similar language in section 1 of the Fourteenth Amendment . . .”). On the overlap of the dormant Commerce Clause’s ban on protectionist economic legislation and the Privilege and Immunities Clause, see *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (applying “rigorous scrutiny” under the dormant Commerce Clause when a law favors in-state commerce over out-of-state commerce); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) (“The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty . . .”). On the overlap with the Equal Protection Clause, see *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (“Alabama’s aim to promote domestic industry[,] . . . designed only to favor domestic industry within the State, . . . constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.”).

5. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 256 (6th ed. 2009). This text devotes less than two pages to Article IV, Section 2, clause 1. See *id.* at 255–56.

every one of the rights of citizens. And their holdings reflect that belief, as they rely on formulaic reasoning without any regard for historical usage or context.⁶

In the leading case of this period interpreting the clause, the 1823 circuit court decision *Corfield v. Coryell*, Justice Bushrod Washington asserted that the Privileges and Immunities Clause did not encompass all the rights and benefits that a state bestowed on its citizens. Rather, those protected were ones “which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”⁷ Even though *Corfield* was not a Supreme Court case, with one major exception the decision had permanent consequences, especially in the nineteenth century.⁸ The Court still honors Washington’s conclusion that the clause only protects “fundamental rights,” those “basic to the maintenance or well-being of the Union.”⁹

These pages reconstruct the record in depth, by examining not only the drafting and ratifying history of the clause, but the deeper context offered by the political history, literature, and legal principles of the period. This study has been made possible by searchable databases unknown to prior generations. By searching thousands of published works in English from the eighteenth century and earlier, the meaning of the term “privileges and immunities” emerges with great clarity.

There is compelling reason to conclude that the Privileges and Immunities Clause was intended to do precisely what Justice Washington denied—guarantee to Americans traveling or temporarily residing in

6. See, e.g., *McBurney v. Young*, 133 S. Ct. 1709, 1714–16 (2013) (relying on case precedents alone to interpret the Privileges and Immunities Clause).

7. *Corfield*, 6 F. Cas. at 551.

8. See *Baldwin*, 436 U.S. at 385 (“[*Corfield*’s] holding, and the conception of state sovereignty upon which it relied, formed the basis for similar decisions during later years of the 19th century.”). In 1948, the Court overruled *Corfield*’s conclusion “that although the States were obligated to treat all those within their territory equally in most respects, they were not obliged to share those things they held in trust for their own people,” such as a natural resource. *Id.* In *Toomer v. Witsell*, the Court concluded that “the whole ownership theory” was “a fiction,” in the sense of being merely “legal shorthand [for] the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.” 334 U.S. 385, 402 (1948). This was the correct conclusion, but not for the reason stated in *Toomer*. As shown herein, access to natural resources was a privilege of citizenship, see *infra* text accompanying notes 145–59, and hence a state would be obliged to extend access to all Americans on the same terms.

9. *McBurney*, 133 S. Ct. at 1719 (citing *Baldwin*, 436 U.S. at 388). *McBurney*, which held that access to state information via a Freedom of Information Act law was not a fundamental privilege and immunity, is the latest example of reliance on *Corfield*’s summary. *Id.* at 1714, 1716, 1718; see also *Saenz v. Roe*, 526 U.S. 489, 501–02 & n.14 (1999) (discussing rights protected by Privileges and Immunities Clause and citing *Corfield* for support).

another state, or doing business or owning property outside their home states, that they would be treated *exactly* like the local people, without exception, and regardless of whether the right was recognized by other states, including their own. No court or scholar has ever reached this conclusion, but it is amply supported by the evidence presented here.

This study begins with an exploration of origins of the Privileges and Immunities Clause during the period of the Articles of Confederation,¹⁰ and then in the creation and ratification of the Constitution.¹¹ Next, it considers the meaning of “privileges” and “immunities” as legal guarantees in the eighteenth century, including their relation to political liberties and natural rights.¹² The conclusion will be that both the British and Americans understood these terms as encompassing all the rights a state afforded its citizens.

I. ORIGINS AND PURPOSE OF THE PRIVILEGES AND IMMUNITIES CLAUSE

The clause reads in full: “The Citizens of each State shall be entitled to *all* Privileges and Immunities of Citizens in the several States.”¹³ It was worded to be self-enforcing, neither requiring nor authorizing legislation for implementation. Unlike the Full Faith and Credit Clause,¹⁴ Congress was not expressly empowered to enact laws for the purpose of enforcing the guarantee. By default, its implementation depended on the judiciary. The only recorded effort at the Convention to involve Congress in the application of the clause was a proposal—more a suggestion—by Edmund Randolph that each state have an equal vote in the Senate for “regulating the rights to be enjoyed by citizens of one State in the other States.”¹⁵

10. *See infra* Part I.A (discussing how trade disputes between states under the Articles of Confederation precipitated the need to include the Privileges and Immunities Clause in the Constitution).

11. *See infra* Part I.B (discussing how the Privileges and Immunities Clause came into existence and the extent of the rights it was meant to grant).

12. *See infra* Part II (discussing the meaning of the Privileges and Immunities Clause viewed through the perspective of what its creators and their contemporaries would have understood it to mean).

13. U.S. CONST. art. IV, § 2, cl. 1 (emphasis added).

14. *Id.* at art. IV, § 1 (providing that Congress can enact “general Laws” to facilitate the recognition by states of the “public Acts, Records, and judicial Proceedings of every other State”).

15. Edmund Randolph, *Suggestion for Conciliating the Small States* (July 10, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 55 (Max Farrand ed., 1911) [hereinafter 3 CONST. CONV.]. In THE FEDERALIST No. 42 (James Madison), Madison alluded to the possibility of legislation related to the Privileges and Immunities Clause. He noted that under a similar provision in the Articles of Confederation, states could be obliged to extend “the rights of citizenship” and “the privilege of residence” to “aliens who had rendered themselves noxious.” THE FEDERALIST No. 42, *supra* note 1, at 286 (James Madison). He then claimed that the new

Randolph's proposal, which was designed to placate the small states, became moot after the delegates agreed on the Great Compromise.

According to Charles Pinckney, who introduced the clause at the Convention, it was "formed exactly upon the principles" of a similar provision in the Articles of Confederation.¹⁶ The purpose of the provision in the Articles was stated in the preamble to the clause: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union."¹⁷ The part most like the Privileges and Immunities Clause was Article IV, which provided:

[T]he free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce.¹⁸

Protecting nonresident visitors or temporary inhabitants in a state from discrimination was a very old practice, especially as applied to merchants. William Blackstone noted that under Magna Carta "all merchants (unless publickly prohibited beforehand) shall have safe conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandize, without any unreasonable imposts, except in time of war,"

Constitution corrected this "defect of the confederation . . . by authorising the general government to establish an uniform rule of naturalization throughout the United States." *Id.* at 286–87; see also WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 85 (Phila., Philip H. Nicklin 2d ed., 1829) (agreeing that the "evil" of state-specific power of naturalization "could not be better remedied than by vesting the exclusive power in congress"). More recently, it has been argued that the clause was meant to empower Congress "to protect American citizens in their privileges and immunities of citizenship, i.e., their natural, fundamental rights, against invasions by either states or individuals." Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 1–2 (1967). Like Madison and Rawle, Antieau offered no historical evidence for this conclusion, and it has never been judicially recognized. The Privileges and Immunities Clause was placed in Article IV, Section 2, a section imposing obligations on states, not under the powers of Congress in Article I. The Naturalization Clause, art. I, § 8, cl. 4, is the basis for Congress "establish[ing] an uniform rule of naturalization," but it has never been interpreted by courts as creating national legislative power over the rights of state citizenship or the obligation of states under Article IV.

16. Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia* (c. Oct. 1787), in 3 CONST. CONV., *supra* note 15, at 112.

17. ARTICLES OF CONFEDERATION OF 1781, art. IV. Pinckney made the same point about the Full Faith and Credit Clause and the Extradition Clause. See Pinckney, *supra* note 16, at 112.

18. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1. On the drafting history of the Privileges and Immunities Clause, see generally DAVID S. BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 11–21 (2003) [hereinafter BOGEN, PRIVILEGES]; David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 817–40 (1987) [hereinafter Bogen, CASE]; Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1176–83 (2009).

and even then merchants from the belligerent nation were to be as “secure” as English traders were in the belligerent’s country.¹⁹ It was “somewhat extraordinary,” he allowed, that foreign merchants were safeguarded by “a mere insular treaty between the king and his natural-born subjects; this remark occasioned the learned Montesquieu to write with a degree of admiration, ‘that the English have made the protection of *foreign* merchants one of the articles of their *national* liberty.’”²⁰ Blackstone cleverly coupled that quote with another from Montesquieu, in which the French political theorist observed of the British that they knew “better than any other people upon earth, how to value at the same time these three great advantages, religion, liberty, and commerce.”²¹

Eighteenth-century Americans were no different than the British in welcoming outside traders and investors. The colonies, and later the states, protected visitors in varying ways—at least on paper. In 1641, for example, the Massachusetts colony enacted a code of liberties, providing: “Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, . . . without partialitie or delay.”²² As British subjects in the eighteenth century, the American colonists had been entitled to move about the kingdom, establish a residence in England or another colony, trade without discrimination, and own property anywhere in the realm, subject to restrictions applicable to all subjects.²³ Poor laws, for example, could

19. 1 WILLIAM BLACKSTONE, COMMENTARIES *252 (Oxford, 1765).

20. *Id.* (quoting 2 MONTESQUIEU, THE SPIRIT OF THE LAWS bk. 20, ch. 13, at 10 (G. & A. Ewing & G. Faulkner eds., Dublin 1751)).

21. *Id.* at *253 (quoting 2 MONTESQUIEU, *supra* note 20, at bk. 20, ch. 6, at 6).

22. THE BODY OF LIBERTIES OF THE MASSACHUSETTS COLLONIE IN NEW ENGLAND (1641), reprinted in 1 THE FOUNDER’S CONSTITUTION 428, 428 (Philip B. Kurland & Ralph Lerner eds., 1987).

23. See *infra* text accompanying notes 177–80, 212–15; see also Douglass’ Adm’r v. Stevens, 2 Del. Cas. 489, 502 (1819) (“Before the Declaration of Independence, the colonists of Great Britain in America, and before and since, the subjects of the King of England in every part of the world, could, and can, acquire, inherit, and hold land in any of his dominions, as fully as an Englishman can in England.”); Bogen, CASE, *supra* note 18, at 817 (“As British subjects, colonists had rights to travel, to become members of another colony by moving there, and to be free of discrimination in trade, property ownership and other legal rights in other colonies.”); *id.* at 811 (“Immigration from England and intercolonial migration occurred throughout the colonial period. The common allegiance to the King meant that the colonist could travel to England or other colonies as freely as the English subject who lived in England. The right to travel was an established English liberty since the Magna Carta.”); *id.* at 861 (“Colonial inhabitants were all originally the King’s subjects, and no colony treated the inhabitants of other colonies as aliens.”). On colonists’ rights as British subjects, see generally BOGEN, PRIVILEGES, *supra* note 18, at 1–6; Bogen, CASE, *supra* note 18, at 796–817. The right to migrate could be restricted in some places on religious grounds, to protect creditors, or to exclude paupers; mercantile regulations prohibited some inter-colonial trade, but these limits applied to everyone. See Bogen, CASE, *supra* note 18, at 811. Non-British residents of colonies could also be treated less favorably than Britons. See *infra* text accompanying notes 169–76.

prevent indigents from relocating, which was the practice well into the nineteenth century.²⁴ The Articles specifically relieved states of any obligation to extend rights of citizenship to “paupers, vagabonds and fugitives from justice.” Article IV, by contrast, granted to every state citizen “*all Privileges and Immunities of Citizens in the several States.*”²⁵ This did not necessarily mean that the clause required states to admit every American to residency or citizenship, as poor laws attested. After studying in more detail the rights of citizenship in early America, it will be evident that the clause did not prevent states from treating nonresidents—whether citizens of the state or not—differently from resident citizens in important ways, such as eligibility to vote and hold public office.²⁶

The proximate reason why the Framers included the clause among the obligations of states under the Constitution was their serious alarm over deteriorating interstate trade relations. It was one of several measures they adopted to prevent discrimination by states in taxing and regulating interstate and international commerce. However, this was only the immediate concern. The larger purpose of the clause was to assure that Americans continued to enjoy what had been an important aspect of being a British subject, the right to live, work, and own property throughout the country without being treated as aliens. The clause meant nothing less than a guarantee that these advantages would not be lost even though the Revolution had formally left the states as separate sovereigns with the power to exclude anyone they wished. It was for this reason that Hamilton could think that the clause was “the basis of the union.”²⁷

24. See John Cummings, *Poor-Laws of Massachusetts and New York: With Appendices Containing the United States Immigration and Contract-Labor Laws: Preface*, 104 PUB. AM. ECON. ASS'N 481, 487 (1895) (“Much of the poor-relief legislation in the United States has taken the form of restriction put upon the migration of paupers. The earlier settlement laws are attempts to regulate the migration of paupers from village to village; the later settlement laws, attempts to regulate interstate migration.”); see also Lawrence F. Ebb, *Interstate Barriers in India and American Constitutional Experience*, 11 STAN. L. REV. 37, 88 (1958) (“The colonial governments in seventeenth- and eighteenth-century America, following the Elizabethan poor law concepts, rated paupers with convicts and imbeciles as wards of a particular community to which they ‘rightfully’ belonged—their place of ‘settlement.’ Before the Constitution was adopted, the American States exercised the power of forcibly moving poor citizens within the state to the district of their settlement.”).

25. U.S. CONST. art. IV, §2, cl. 2 (emphasis added).

26. See *infra* text accompanying notes 193–94, 284–87 (describing various states and the privileges and immunities that their residents possessed as compared to their nonresidents); see also *infra* notes 277, 284–87 (discussing ways states could treat nonresidents less favorably than their own citizens).

27. THE FEDERALIST NO. 80, *supra* note 1, at 537 (Alexander Hamilton); see Saenz v. Roe, 526 U.S. 489, 501 (1999) (“The right of ‘free ingress and regress to and from’ neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been ‘conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.’” (quoting United States v. Guest, 383 U.S. 745, 757 (1966))).

*A. The Problem of Interstate Trade Discrimination
During the Confederation*

With the conclusion of the Revolution, relations among the states deteriorated rapidly as the revolutionary esprit de corps dissipated. Boundary disputes, discriminatory trade legislation, and refusals of state courts to honor debt claims by citizens of other states became common occurrences, ultimately traceable to what Edmund Randolph termed “the jealousy of the states with regard to their sovereignty.”²⁸ Hamilton complained at the Philadelphia Convention that the states “constantly pursue internal interests adverse to those of the whole.”²⁹ By referring to “the whole,” Hamilton meant the thirteen states as a collective entity—a nation. In his view, the United States had a national public interest, one that stood distinct from the partial concerns of states or individuals. Madison had a parallel outlook, as he observed that “[e]xperience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions.”³⁰

Trade declined sharply during the Revolution and remained feeble in the 1780s, owing in significant part to the British exclusion of American trade with the West Indies. Exports plummeted. Nevertheless, Americans imported large quantities of manufactured goods in the early 1780s, in part to replace what had been destroyed or depleted in the war. Despite lingering antagonism toward their erstwhile mother country, Americans still preferred British manufactured products, and by mid-decade they were running a sizeable balance of payment deficit with Britain. Much of the deficit was financed by overseas debt, which had to be repaid in specie, not paper money. This in turn “acted like a magnet to draw gold and silver from America to Britain.”³¹ The consequence was that America’s “long-

28. Edmund Randolph, Remarks at the Federal Convention of 1787 (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 19 (Max Farrand ed., 1911) [hereinafter 1 CONST. CONV.]. Randolph was hardly alone in his assessment of the states. Elbridge Gerry, one of the strongest advocates for states’ rights at the Convention, exclaimed: “The States & the advocates for them were intoxicated with the idea of their *sovereignty*.” *Id.* at 467 (June 29, 1787). This problem—most of the Framers saw it as such—was inherent in confederations like the Articles. “A confederacy supposes sovereignty in the members composing it & sovereignty supposes equality,” Roger Sherman noted for the benefit of other delegates. *Id.* at 178 (June 9, 1787). John Lansing, who departed the Convention midstream because he thought the Constitution as it stood when he left was dangerous to the independence of the states, chided the delegates: “It could not be expected that those possessing Sovereignty could ever voluntarily part with it.” *Id.* at 336–37 (June 20, 1787).

29. *Id.* at 284 (Alexander Hamilton, June 18, 1787).

30. *Id.* at 164 (Alexander Hamilton, June 8, 1787).

31. CURTIS P. NETTELS, THE EMERGENCE OF A NATIONAL ECONOMY, 1775–1815, at 49 (1962).

term credit had been stretched to the breaking point by late 1785,” as more and more buyers of imports “proved unable to pay dry goods importers their debts.”³² By then, the economy was in the midst of a commercial depression.³³ James Wilson observed in 1785:

The disagreeable state of our commerce has been the effect of extravagant and injudicious importation. . . . What was the consequence? Those who made any payments made them chiefly in specie; and in that way diminished our circulation. Others made no remittances at all, and thereby injured our credit.³⁴

During the Confederation, Congress had no authority to regulate or tax foreign trade, and States pursued their own policies, which included tariffs on imports and exports, tonnage duties on trading vessels, bans or high duties on British imports and vessels, and embargoes of domestic products, among others.³⁵ States had many legitimate reasons for enacting trade policies, not the least of which was to raise badly needed revenue from customs duties and tonnage charges.³⁶ Protective tariffs and embargoes on

32. Cathy Matson, *The Revolution, the Constitution, and the New Nation*, in 1 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES: THE COLONIAL ERA 363, 380 (Stanley L. Engerman & Robert E. Gallman eds., 1996).

33. The state of the American economy in the 1780s has long been disputed by historians. There is general agreement that commercial sectors were in depression by the mid-1780s. See MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781–1789*, at 187 (1950) (“By the spring of 1784, the glutted market, the scarcity of specie, and the overextension of credit all combined to produce a serious commercial depression. . . .”); JOHN J. MCCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607–1789*, at 373 (1985) (“[I]f the results of current research stand future scrutiny, something ‘truly disastrous’ happened to the American economy between 1775 and 1790.”). Merrill Jensen, however, concluded that “the period was one of extraordinary economic growth. . . . [T]here is no evidence of stagnation and decay in the 1780’s.” JENSEN, *supra*, at 423–24. Jensen’s point was that Americans should not have been pessimistic given the economy’s upward direction and the country’s immense resources. He also noted that farmers who did not grow for export “were self-sufficing to a large extent.” *Id.* at 177. Most Americans lived subsistence lives. See James F. Shepherd, *British America and the Atlantic Colonies*, in *THE ECONOMY OF EARLY AMERICA: THE REVOLUTIONARY PERIOD 1763–1790*, at 3, 38 (Ronald Hoffman et al. eds., 1988). Nonetheless, ordinary Americans in the 1780s experienced sharply lower incomes than before the war. See *infra* note 57.

34. James Wilson, *Considerations on the Bank of North America* (1785), reprinted in 2 THE WORKS OF JAMES WILSON 824, 838 (Robert Green McCloskey ed., 1967). On trading patterns after the Revolution, see NETTELS, *supra* note 31, at 45–63. Great Britain closed its ports in the West Indies to Americans in 1783, ending a trade “absolutely essential to pay for English manufactures.” ALBERT ANTHONY GIESECKE, *AMERICAN COMMERCIAL LEGISLATION BEFORE 1789*, at 127 (1910). On the relationship between the trade deficit and indebtedness, see Shepherd, *supra* note 33, at 17. On the decline in trade during and after the Revolution, see *id.* at 19–32.

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

36. See Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 45 (2005–2006)

imports were justified as means to promote local manufacturing and agriculture, retain scarce resources, and keep money from leaving the state.³⁷ Tonnage fees, assessed on the weight of merchant vessels, paid for lighthouses and other navigation aids.³⁸ Measures that discriminated against British trade were taken in retaliation against its restrictive policies toward American commerce.³⁹ None of these efforts were coordinated, however, and policies varied from place to place. They also fluctuated unexpectedly, to the consternation of merchants and planters, who preferred stable regulations. In a recurring scenario, provisions imposed by one state, such as tariffs, would be exploited by others. Hugh Williamson, a North Carolina delegate to the Philadelphia Convention, wrote that if one state tried “to raise a little money by imports or other commercial regulations . . . [a] neighbouring state immediately alters her laws, and defeats the revenue by throwing the trade into a different channel. Instead of supporting or assisting, we are uniformly taking the advantage of one another.”⁴⁰ Writing to Jefferson in 1786, Madison bemoaned this situation:

The States are every day giving proofs that separate regulations are more likely to set them by the ears, than to attain the common object. When Massts. set on foot a retaliation of the policy of G. B.[.] Connecticut declared her ports free. N. Jersey served N. York in the same way. And Delaware I am told has lately followed the example in opposition to the commercial plans of Penna.⁴¹

Even when state trade policies were adopted for the good reasons, the benefits gained by the enacting states usually came at the expense of

(noting functions of tonnage charges, including raising needed revenue).

37. *Id.* (noting legitimate justifications for duties and tonnage charges).

38. See Adam S. Grace, *From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent That Broadened the Commerce Clause, Shrunk the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 ALB. L. REV. 97, 102 (2004) (stating that tonnage duties were “relied upon by states for the maintenance of their lighthouses”); see also, e.g., Virginia Act of Oct., 1786, Ch. XXIX, at 21 (tonnage duties dedicated to maintaining lighthouse).

39. On the types of state trade policies and their rationales, see generally GIESECKE, *supra* note 34, at 123–40; Matson, *supra* note 32, at 379–81. On discrimination against British trade, see NETTELS, *supra* note 31, at 72; Denning, *supra* note 36, at 45–48; *id.* at 46 (“During this period, according to one count, six states passed imposts, nine states discriminated against British goods, seven states imposed duties on British ship entrances and British commodities, and three states forbade export of American goods in British ships.” (citing Matson, *supra* note 32, at 379)).

40. Hugh Williamson, *Remarks on the New Plan of Government*, ST. GAZETTE N.C., 1788, reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788*, at 397, 393, 403 (Paul L. Ford ed., Brooklyn, Historical Printing Club 1892) [hereinafter *ESSAYS ON THE CONSTITUTION*].

41. Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), reprinted in 8 *THE PAPERS OF JAMES MADISON* 500, 502 (Robert A. Rutland et al. eds., 1973) [hereinafter *MADISON PAPERS*]. On states taking advantage of trade restrictions by other states, see NETTELS, *supra* note 31, at 73.

Americans beyond their borders. States with naturally superior ports played their geographical upper hands to the detriment of states without direct sea links. Massachusetts and New York, for example, raised large sums by imposts on imports, which in turn were passed on to customers in states such as New Jersey and Connecticut.⁴² Oliver Ellsworth put the point provocatively at the Connecticut ratifying convention when he stated that “we pay a tribute” to Massachusetts.⁴³ He further estimated that one-third of New York’s revenue from imposts came from goods consumed in Connecticut.⁴⁴ Madison wrote to Jefferson in 1783, stating that the duties Pennsylvania and Maryland were imposing on Virginia trade amounted to “a tribute which if paid into the treasury of State would yield a surplus above all its wants.”⁴⁵

Retaliation was sometimes the consequence of such policies, as occurred in 1787 when New York increased duties on foreign goods brought to New York from Pennsylvania, New Jersey, Connecticut, and Rhode Island, and raised port fees for coastal shipping. This action was taken in response to the pursuit of free trade policies by these other states that undercut New York’s tariffs. New Jersey retaliated by imposing a large tax on a lighthouse operated on its coast by New York. Connecticut imposed a fee on coastal ships under twenty tons “bound either to the State of New-York or Rhode-Island.”⁴⁶

Some of the trade measures enacted by states amounted to “overt discrimination by one state against goods produced in or re-exported from a neighboring state.”⁴⁷ Maryland, for example, imposed import and export

42. See Matson, *supra* note 32, at 380 (“States with major port cities, especially New York and Massachusetts, took advantage of their superior position in international commerce and in regional markets to pass discriminatory duties against neighboring states’ traffic at their ports, while weaker states tried to divert trade to themselves by abolishing duties altogether, thus setting parameters for intense interstate rivalries by mid-1785.”).

43. Oliver Ellsworth, Remarks at the Connecticut Ratifying Convention (Jan. 4, 1788), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 185, 189 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT’S DEBATES].

44. *Id.* (one-third estimate).

45. Letter from James Madison to Thomas Jefferson (Dec. 10, 1783), reprinted in 7 THE PAPERS OF JAMES MADISON 401, 401 (Robert A. Rutland et al. eds., 1973).

46. An Act in Alteration of an Act, entitled, An Act for Regulating Fees, etc., reprinted in CONNECTICUT ACTS 356 (Hartford, Hudson & Goodwin 1787). On the New York acts and subsequent retaliation, see E. WILDER SPAULDING, NEW YORK IN THE CRITICAL PERIOD, 1783–1789, at 156–57 (1932); *id.* at 156 (“New York in 1785 not only took her toll from imports passing through to her neighbor states, but taxed foreign articles which reached her after importation in foreign ships through neighboring ports.”).

47. Denning, *supra* note 36, at 48. On trade discrimination by states during the Confederation, see *id.* at 39 (arguing that the concern over interstate “discrimination was not the product of the fevered imagination of nationalists bent on reining in the states, but that it really existed, and that it showed no signs of abating on the eve of the Philadelphia Convention”);

duties on various commodities, but allowed substantial deductions for goods carried on vessels built in Maryland that were owned or navigated by its citizens (ostensibly, this was to encourage ship building in the state).⁴⁸ Similarly, Virginia levied tonnage charges and other duties on all vessels entering or leaving the state's ports, but exempted those owned by its citizens.⁴⁹

The actual extent of the trade barriers that resulted from this interstate competition has long been a subject of debate among historians. Writing in the late nineteenth century, John Fiske concluded that “the different states, with their different tariff and tonnage acts, began to make commercial war upon one another.”⁵⁰ Revisionist historians subsequently took exception to this thesis, none more aggressively so than Merrill Jensen, who contended in an influential work that barriers to trade “were the exception rather than the rule.”⁵¹ Jensen and others made much of the fact that “[t]he general rule was that all American goods were exempted from state imposts.”⁵²

Matson, *supra* note 32, at 379–81 (describing discriminatory policies and their effects); *see also* GIESECKE, *supra* note 34, at 126–27 (“Although the reason for most of these acts was revenue, motives of discrimination and protection were prominent in those of the northern states, and to a less extent in the southern states.”); *id.* at 125–40 (providing examples of discriminatory laws); RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781–1789*, at 148–49 (1987); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 448 (1941) (“[T]he states were using their imposts as weapons against each other . . .”).

48. *See* An Act To Impose Duties on Certain Enumerated Articles Imported Exported Into and Exported Out of this State, and on All Other Goods, Wares and Merchandise, Imported into this State, ch. 84, § 16, *reprinted in* 1784 LAWS OF MARYLAND 442 (Alexander Hanson ed., Annapolis, Frederick Green 1787) (example of deductions from import duties for Maryland citizens); An Act to Amend the Act for Ascertaining Certain Taxes and Duties, and for Establishing a Permanent Revenue, ch. 79, § 19, *reprinted in* 1782 VIRGINIA ACTS 25 (John Dunlap & James Hayes 1781) (amending the revenue act to clarify that “all vessels coming within this State from any of the United States, or from any port or place whatever, vessels of war excepted, shall be liable to pay the tonnage and other duties”).

49. *See* An Act to Amend the Act of Amend and Reduce the Several Acts of Assembly for Ascertaining Certain Taxes and Duties . . . , ch. 38, § 3, *reprinted in* 1783 VIRGINIA ACTS, *supra* note 48, at 206 (exempting from tonnage all ships owned by Virginia citizens as well as vessels owned by Maryland citizens under sixty tons).

50. JOHN FISKE, *THE CRITICAL PERIOD IN AMERICAN HISTORY: 1783–1789*, at 144–45 (Boston, New York, Houghton Mifflin & Co. 1888). Fiske's view is now generally regarded by economic historians as an exaggeration of the actual degree of trade disputes among the states. *See* JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 333 (1979). That does not deny, however, that leading proponents of the Constitution regarded the problem as urgently needing reform.

51. Jensen, *supra* note 33, at 340.

52. *Id.* Another prominent critic of Fiske whose views about trade restrictions in the 1780s paralleled Jensen's was William F. Zornow. *See* William Frank Zornow, *Georgia Tariff Policies, 1775 to 1789*, 38 GA. HIST. Q. 1, 1–10 (1954); William Frank Zornow, *Massachusetts Tariff Policies, 1775–1789*, in 90 ESSEX INST. HIST. COLLECTIONS 194, 194–216 (1954); William Frank Zornow, *New York Tariff Policies, 1775–1789*, 37 PROC. N.Y. ST. HIST. ASS'N 40, 40–63 (1956); William Frank Zornow, *Tariff Policies in South Carolina, 1775–1789*, 56 S.C. HIST.

Some economic historians also have doubted whether “either interstate or foreign trade was greatly hampered, or that the regional differences in recovery and adjustment to being outside the British Empire had much to do with this tariff system.”⁵³ In rejoinder, defenders of the traditional view—that discriminatory trade policies were a significant problem—have pointed to laws in at least seven states that involved “some form of discrimination against the commerce of neighboring states,” most of which Jensen overlooked.⁵⁴ Furthermore, the duties on foreign products that were then re-exported to states without competitive port facilities had to be borne by merchants and consumers in those states.⁵⁵

Regardless of who is correct about the actual significance of conflicting trade policies (Fiske and Jensen may be arguing the issue in the afterlife), the far more important point for constitutional history is that the Americans most responsible for bringing the Constitution to fruition were convinced that the problem of discriminatory legislation was real, and they proclaimed this conviction as a central rationale for establishing national control over trade. Jensen contended somewhat cynically that these “supporters of centralized power used the few discriminatory laws as an argument for a new government.”⁵⁶ It is true that the key proponents of the Constitution were mainly merchants and planters directly affected by the economic turmoil inasmuch as their fortunes were tied to trade, or they were lawyers who represented them. They were not typical of the great mass of Americans whose livelihoods depended on subsistence farming.⁵⁷ Yet those who led the effort to revise the Articles did contend, publicly and privately, that there were serious conflicts between the states over trade regulations.⁵⁸

MAG. 31, 31–44 (1955); William Frank Zornow, *The Tariff Policies of Virginia, 1775–1789*, 62 VA. MAG. HIST. & BIOGRAPHY 306, 306–319 (1954). For a convincing counterpoint to Jensen and Zornow, see Denning, *supra* note 36, at 40–77.

53. Shepherd, *supra* note 33, at 35.

54. Denning, *supra* note 36, at 60.

55. *See id.* at 75 (explaining how discrimination by states against British trade adversely affected other states).

56. Jensen, *supra* note 33, at 339.

57. That does not mean the economic problems of the 1780s were not dire or without consequence to the average person. Although economic statistics are imprecise, “the net effect of war was a sharp decline in individual income,” and the “painfully slow” recovery was years away when the Constitution went into effect. JOHN J. MCCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607–1789*, at 366–67 (1985).

58. On perceptions during the 1780s of the trade problem, see Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 53 (1988) (“Many writings at the time of the Convention condemned commercial exploitation of one state by another with respect to foreign trade. Some discussed exploitation of weak states by stronger ones. Others decried exploitation of favorable geography to tax goods passing through ports on the way to or from less favored states.”); *see also* RICHARD G. ALBION, *THE RISE OF THE PORT OF NEW YORK* 7 (1939)

Madison wrote to Jefferson in Paris a few months before heading to the Philadelphia Convention that “[t]he necessity of harmony in the commercial regulations of the states has been rendered every day more apparent,” reiterating his earlier message that efforts to retaliate against British trade restrictions, “instead of succeeding have in every instance recoiled more or less on the states which ventured on the trial.”⁵⁹ On his list of the dozen “vices” of the Confederation, Madison included “[t]he practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations.”⁶⁰ Hamilton wrote in *Federalist No. 22* that “interfering and unneighborly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others.”⁶¹

B. Creating the Privileges and Immunities Clause

There was almost no recorded debate about the Privileges and Immunities Clause at the Convention. Pinckney’s remark indicated that it was a comity provision with the same purpose as its predecessor in the Articles, notwithstanding that the texts of the two differed substantially.⁶² The counterpart in the Articles was much lengthier—148 words versus nineteen. One change corrected a drafting gaffe in the Articles, which provided that “the free inhabitants” of one state were entitled to the privileges and immunities of “free citizens” in other states.⁶³ As Madison pointed out, that obliged states to grant visitors who were inhabitants but not citizens of other states “greater privileges than they may be entitled to in their own State.”⁶⁴

Additional departures from the Articles were not explained at the time. For unstated reasons, the Convention omitted a clause from the Articles guaranteeing that “the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the

(“Interstate rivalry and the jumbled condition of the state currencies . . . seriously hampered the merchants—a depressed and at times desperate tone runs through their letter-books of those years.”); Matson, *supra* note 32, at 377 (“By the mid-1780s, . . . it was becoming clear to Americans concerned about international and interstate developments that distinct state policies often pitted some groups of Americans against others.”).

59. Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), *reprinted in* MADISON PAPERS, *supra* note 41, at 476.

60. James Madison, *Notes on Ancient and Modern Confederacies* (April–June, 1786), *reprinted in* 9 MADISON PAPERS, *supra* note 42, at 348, 350.

61. THE FEDERALIST NO. 22, *supra* note 1, at 137 (Alexander Hamilton).

62. See *supra* text accompanying note 16 (noting Pinckney’s explanation of the purpose for the Privileges and Immunities Clause).

63. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1.

64. THE FEDERALIST NO. 42, *supra* note 1, at 286 (James Madison).

privileges of trade and commerce.”⁶⁵ One possible explanation for this deletion could be that “there was to be no constitutional right to travel,” that is, the Constitution did not guarantee interstate movement.⁶⁶ No direct evidence supports this explanation, however, and it is hard to see how a provision that was “the basis of the union” could not have encompassed the right to enter states and engage in trade and commerce.⁶⁷ When Americans were British subjects they could move throughout the empire, and it would be remarkable if the Constitution was meant to abrogate a basic freedom expressly provided for in the Articles. A state’s citizens had the liberty to enter and leave, and consequently the Framers most likely regarded the freedom of interstate movement as “implicit in article IV. Since the privileges and immunities clause grants a citizen rights in another state, any attempt by the origin or destination state to prevent interstate travel would deny the individual those rights.”⁶⁸

The Articles also expressly provided that “the people of each State shall . . . enjoy” in “any other State . . . all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.”⁶⁹ No similar provision was included in Article IV, and that has led some to conclude the clause was not about trade at all. According to this view, it was intended “to protect American citizens in their privileges and immunities of citizenship, i.e., their natural, fundamental rights, against invasions by either states or individuals.”⁷⁰ There were other provisions of the Constitution that addressed the specific problems in trade regulation and taxation that had plagued the Confederation. Prohibiting state duties, imposts, and tonnage without congressional consent directly eliminated the most important sources of discrimination.⁷¹ Furthermore, Congress’ power over interstate commerce

65. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1.

66. Natelson, *supra* note 18, at 1183.

67. THE FEDERALIST NO. 80, *supra* note 1, at 537 (Alexander Hamilton). The Court eventually confirmed that Article IV, Section 2 “plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation.” *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871).

68. Bogen, CASE, *supra* note 18, at 836.

69. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1.

70. Antieau, *supra* note 15, at 2.

71. See U.S. CONST., art. I, § 10, cl. 2–3 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress. No State shall, without the Consent of Congress, lay any Duty of Tonnage . . .”). The Court in 1869 held that the Import-Export Clause applied only to trade with foreign nations, not interstate commerce. See *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 133 (1869). There is a strong argument that

could be used to impose uniform rules for trade across borders. And the availability of federal courts for diversity actions was expected to diminish discrimination in the judicial arena.

In actuality, these other anti-discrimination provisions show only that the Framers were sufficiently concerned about centralizing control over trade and ending discriminatory taxes that they inserted multiple protections. States could very well engage in other forms of discrimination not covered by the Constitution's direct prohibitions, such as closing markets to outsiders, differentially taxing the property of noncitizens, or imposing higher wharfage fees for vessels not owned or sailed by state citizens. There also were many ways for states to discriminate with regard to property. In a 1788 Pennsylvania case, for example, the state's supreme court described a Delaware law as "a narrow and contracted one indeed, which obliges executors or administrators to discharge the debts due from the deceased to his creditors *within the state*, in preference to every other."⁷² Moreover, from the perspective of 1787–88, it was less than obvious how the commerce power could reach property not moving as trade across state lines.

Interpreting the term "Privileges and Immunities of Citizens" as either not encompassing trade or being limited only to "natural, fundamental rights," entirely neglects the breadth of meanings that these words had at the time, a subject soon to be explored in depth.⁷³ Neither position has any direct support from statements by those involved in framing and ratifying the Constitution. Trading rights and the freedom to move about the empire were among the most important privileges that Americans had possessed as British subjects,⁷⁴ and it is unlikely that many would want to diminish them. The relation of "privileges and immunities" to natural rights is more

Woodruff was wrongly decided. See Collins, *supra* note 58, at 51–52 ("[I]t is odd that the framers would directly forbid state tariffs on foreign goods, but allow them on interstate shipments absent an act of Congress to the contrary. . . . [*Woodruff*'s] reasoning is inconsistent with much of the contemporaneous argument about the need for a new Constitution, argument that stressed interstate commercial rivalry.").

72. *Millar v. Hall*, 1 U.S. (1 Dall.) 229, 232 (Pa. 1778) (emphasis added). *Millar* involved a claim by a Pennsylvania citizen that the discharge in bankruptcy by Maryland for one of its citizens was not binding in Pennsylvania. *Id.* at 230. Defense counsel alluded to both the Full Faith and Credit Clause and the Privileges and Immunities Clause of the Articles in contending that the Maryland discharge was binding everywhere. *Id.* at 231. The Court agreed that the discharge was binding on choice-of-law grounds. *Id.* at 232. However, contrary to the suggestion of Natelson, it did not decide that the bankruptcy relief was a "privilege." *Id.* at 232–33; see Natelson, *supra* note 18, at 1165.

73. See *infra* text accompanying notes 82–295 (discussing expansive meaning of "privileges" and "immunities").

74. See *supra* note 23 and accompanying text (discussing British subjects' freedom to trade and move freely about the British territories); see also *infra* text accompanying notes 177, 180, 212–15 (discussing the rights of British subjects to trade and movement).

complicated, as we shall see,⁷⁵ but the terms unquestionably included many liberties and advantages that no one regarded as required by natural law.

Once we examine the many usages of “privileges and immunities,” the likeliest explanation for the Convention’s excision of most of the provisions in the Articles was that the Framers thought them redundant. Just as they trimmed many other clauses to the bare minimum over the course of the proceedings, they might have preferred the elegance of the more parsimonious version. Substantively, they could have worried about future judicial construals of the clause. Had it explicitly protected ingress, regress, trade, and commerce, the implication could be that this was an exclusive listing of “privileges and immunities.” That could lead to unduly narrow interpretations of the clause, whereas “Privileges and Immunities of Citizens” had broad and familiar connotations for Americans, a point to be developed shortly. Madison also commented in *Federalist No. 42* about the “confusion of language” in the omitted clause from the Articles, observing that the term “all the privileges of trade and commerce” could not “easily be determined.”⁷⁶ Stripping “trade and commerce” from the clause still left it indeterminate, but the phrasing invited liberality of interpretation rather than a focus on specific subjects (the Court many years later decided that there was no substantive difference between the two versions).⁷⁷

There was a close relationship between the Constitution’s provision for a federal judiciary and the Privileges and Immunities Clause. The states had ignored the Articles when they enacted discriminatory trade laws. At the Convention, Madison “instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens (of other states) are entitled to equality of privileges by the Articles of Confederation.”⁷⁸ William R. Davie similarly commented at the North Carolina Convention that “Maryland lately passed a law granting exclusive privileges to her own vessels, contrary to the Articles of the Confederation,” but there was no means to stop such blatant discriminations.⁷⁹ A guarantee of privileges and immunities was worthless without national judicial enforcement. State courts were known to treat outsiders with “evasion and subterfuge,”

75. See *infra* text accompanying notes 296–386 (discussing the relationship between natural rights and “privileges and immunities”).

76. THE FEDERALIST NO. 42, *supra* note 1, at 285 (James Madison).

77. See *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (asserting that the “briefer form” of the Constitution’s Privileges and Immunities Clause made “no change of substance or intent, unless it was to strengthen the force of the clause in fashioning a single nation”).

78. James Madison, Remarks at the Federal Convention of 1787 (June 19, 1787), *reprinted in* 1 CONST. CONV., *supra* note 28, at 317.

79. William R. Davie, Address at the North Carolina Ratifying Convention (July 24, 1788), *in* 4 ELLIOT’S DEBATES, *supra* note 43, at 7, 20.

Hamilton said.⁸⁰ The answer was the federal judiciary, which would have “no local attachments,” and thus could keep “inviolable . . . that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens.”⁸¹

*C. The Privileges and Immunities Clause
as Restoring Rights Lost by Independence*

Even though the immediate impetus for adopting the Privileges and Immunities Clause was to thwart discrimination in commerce among the states, it also had a larger purpose, one that both explains Hamilton’s salute to Article IV as the foundation of the union and the Framers’ choice of its sweeping, unrestricted language. The rupture with Great Britain ended all the rights Americans had possessed in common as British subjects. Under English law, a person became a subject upon birth within the kingdom,⁸² or by naturalization—which required parliamentary authorization.⁸³ Subjects were “under the king’s protection,”⁸⁴ and in exchange they owed “universal and permanent”⁸⁵ “natural allegiance”⁸⁶ to the monarch as “a debt of gratitude,”⁸⁷ arising from “an implied contract with the prince.”⁸⁸ In short, “immediately upon their birth,”⁸⁹ subjects possessed “a great variety of rights.”⁹⁰ That included the privilege to do business and own property in any part of the kingdom except for places restricted to specific persons.⁹¹ Hamilton observed in *Federalist No. 7* that Americans had been “accustomed” since “the earliest settlement of the country” to commerce among the colonies “on the basis of equal privileges.”⁹² With independence, however, each state gained sovereignty over its territory, with the consequence that Americans no longer had rights of citizenship outside of their own states. Without the Privileges and Immunities Clauses of the Articles and Constitution, states would be able to treat citizens of

80. THE FEDERALIST NO. 80, *supra* note 1, at 537 (Alexander Hamilton).

81. *Id.*

82. See 1 BLACKSTONE, *supra* note 19, at *357 (commenting that one’s allegiance to country occurs “immediately upon . . . birth”).

83. See *id.* at *362 (“Naturalization cannot be performed but by an act of parliament . . .”).

84. *Id.* at *357.

85. *Id.* at *358.

86. *Id.*

87. *Id.* at *357.

88. *Id.* at *358.

89. *Id.* at *357.

90. *Id.* at *359.

91. See *infra* text accompanying notes 177, 180, 210–15 (detailing the rights granted to British subjects).

92. THE FEDERALIST NO. 7, *supra* note 1, at 40 (Alexander Hamilton).

other states as aliens. Those clauses assured the continuation of the common rights Americans possessed as British subjects.⁹³

Article IV did not define the rights attendant to national citizenship or mandate that states continue to give their citizens the same rights they had as British subjects. The Constitution recognized Americans as at once being citizens of the United States and of particular states.⁹⁴ The rights of Americans as national citizens were provided by the Constitution itself and statutes enacted pursuant to it. State law determined the privileges and immunities of state citizens. But by requiring that states extend to citizens from other states the same rights they gave their own, the result would be a large measure of uniformity in how Americans were treated around the union. There were common assumptions about the legal rights of citizens versus aliens that tended to minimize differences among the states, which is the subject of the next section.

II. DEFINING THE “PRIVILEGES AND IMMUNITIES OF CITIZENS”

What constituted “the Privileges and Immunities of Citizens?” At best, the Convention and ratification records left only hints. The few remarks that have been preserved related almost entirely to unfair treatment of outsiders in state courts and in taxation and regulation of trade.⁹⁵ However, those were the issues of the moment, which does not exclude broader

93. On the purpose of the Privileges and Immunities Clauses as replacing the rights of British subjects, see Bogen, *CASE*, *supra* note 18, at 861 (“The privileges and immunities clause was intended to secure the former intercolonial privileges of movement, citizenship, and trade.”); *see also* BOGEN, *PRIVILEGES*, *supra* note 18, at xvii–xviii, 11–17; Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 *CAMPBELL L. REV.* 7, 101–02 (2011–2012) (“[The drafters of the Articles] did not want fellow colonists to be aliens in the other colonies. In other words, as a starting point, colonists, post-Independence, retained all the rights, liberties, privileges, immunities, and advantages of *natural-born Englishmen* in the other colonies . . .” (emphasis added)).

94. In several places, the Constitution refers to either U.S. citizenship or state citizenship without defining either. *See* U.S. CONST., art. I, § 2, cl. 2 (requiring Representatives in Congress to have at least seven years of U.S. citizenship); *id.* at art. I § 3, cl. 3 (requiring Senators to have at least nine years of U.S. citizenship); *id.* at art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States . . . shall be eligible to the Office of President.”); *id.* at art. III, § 2, cl. 1 (allowing jurisdiction of federal courts over “Controversies . . . between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”); *id.* at art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *see also id.* at amend. XI (disallowing federal jurisdiction over lawsuits “commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”).

95. *See supra* text accompanying notes 28–30, 40, 43–44, 61, 76, 78–81 (detailing instances of states’ discriminatory treatment in the areas of trade, commerce, and freedom of movement against citizens of other states).

coverage. The clause guaranteed not just some, but *all* the privileges and immunities of citizenship. In modern terms, it mandated both an economic common market in which trade restrictions were removed, and political integration of the states by assuring Americans that they would be treated like local citizens wherever they went.

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

Whether taken as separate words or together in a phrase, “privileges” and “immunities” were used frequently in legal and political discourse in the eighteenth century and earlier. As discrete words, they could be synonyms in both everyday language and legal usage. Samuel Johnson defined each with the other word. Johnson also stated that a “privilege” was a “[p]eculiar advantage” or an “[i]mmunity; right not universal,” which captured the core idea of a privilege: an advantage, benefit, or freedom from government that was restricted to certain people, entities, or places.⁹⁶ Similarly, “immunity” was defined by Johnson as the “[d]ischarge from any obligation” or an “exemption from onerous duties.”⁹⁷ To have a privilege, in other words, meant that a person was allowed to do something or could refuse to act in some way, and thus would have immunity—or freedom—from adverse consequences. In legal dictionaries used by American lawyers in the eighteenth century, a privilege typically was defined as a law that “exempted” “a private Person or Corporation . . . from the Rigour of the Common Law, or it is some Benefit or Advantage granted or allowed to any Person contrary to the Course of Law. [I]t is sometimes used for a place which hath a special Immunity.”⁹⁸ The common law recognized a “writ of privilege,” by “which a privileged Person brings to the Court” a claim “for his exemption, by reason of some Privilege.”⁹⁹

As with many dictionary definitions of legal terms, however, these were generalizations that did not entirely capture the varied meanings of privileges and immunities in Anglo-American legal and political history.

96. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785) (unpaginated, entry for “privilege”) [hereinafter JOHNSON].

97. *Id.* (entry for “immunity”); see THE STUDENT’S LAW-DICTIONARY; OR COMPLEAT ENGLISH LAW-EXPOSITOR (London, Nutt & Gosling 1740) (unpaginated, entry for “immunities”) (stating that possessing an immunity meant “to be free from certain Burdens”).

98. 2 GILES JACOB, A NEW AND COMPLETE LAW-DICTIONARY (London, H. Woodfall & W. Strahan 8th ed. 1762) (unpaginated, entry for “privilege”).

99. JOHN COWELL, THE INTERPRETER OF WORDS AND TERMS (London, Nutt & Gosling 1701) (unpaginated, entry for “writ”). Blackstone explained that a privileged person who was improperly arrested would be released “on motion” without need for a writ of privilege. 1 BLACKSTONE, *supra* note 19, at *iv (Supp. 1765).

Taking into account the types of printed material available to the public in the eighteenth century—newspapers, pamphlets, books, charters, grants, statutes, law cases, and constitutions—there were thousands of references to privileges and immunities, either as separate terms, a pair of words, or part of a phrase including terms such as “right” and “liberty.” Context mattered greatly; the words took on very different meanings depending on the purpose of the writing. For Article IV and its predecessor in the Articles, the context was the privileges and immunities of *state citizens*. Many of the dictionary definitions were not entirely apposite to this setting, and can even be misleading to modern readers. Although the “peculiar advantages” that came from citizenship were “not universal” in the sense of natural rights, they certainly applied to almost every free person in America, as well as to subjects in Great Britain. Often the privileges and immunities of citizens or subjects had nothing to do with relieving a person from the restrictions of the common law. For example, as will be developed, trial by jury was widely regarded as a privilege of citizenship; it was not an exemption from a duty otherwise owed by a citizen or subject.¹⁰⁰ Another privilege, habeas corpus, assured that the common law was applied to stop an unlawful detention.¹⁰¹

In ordinary legal usage, privileges and immunities ran the gamut from routine government permissions, “used much as the terms ‘license’ or ‘permit’ are used today,” to the entitlements of the aristocracy.¹⁰² Legislative or royal grants of property frequently bestowed on the recipients various privileges and immunities of ownership.¹⁰³ Various trades, occupations, and businesses were entitled by statute to special legal benefits, including exclusive rights to deal in specific products and to limit entry by competitors.¹⁰⁴ In trading agreements with other nations, a

100. See *infra* text accompanying notes 249, 375, and notes 250, 253 (recognizing that trial by jury was recognized as a privilege of citizenship).

101. See *infra* text accompanying note 251 and note 252 (habeas corpus recognized as privilege of citizenship).

102. Natelson, *supra* note 18, at 1140.

103. See *infra* notes 152, 156 (describing specific grants of property under the Grant of New Hampshire and Masonia in 1635 and the Charter of Massachusetts Bay in 1691); see, e.g., Charter of Pennsylvania, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3035, 3036–37 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] (granting William Penn the territory of the colony and numerous privileges, such as fishing and mining).

104. See FORREST McDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776–1790, at 17–18 (1979) (detailing monopoly privileges); Burrell, *supra* note 93, at 92 (“Royal privileges and immunities to merchants and entities historically included an element of exclusivity.”); Natelson, *supra* note 18, at 1160 (describing various business privileges); see *infra* text accompanying notes 109–11 (giving examples of rights afforded to certain economic pursuits).

provision might give a country's merchants "all the privileges and immunities which are granted to the most favoured nations."¹⁰⁵

Legislative approvals of incorporation, Blackstone explained, created "artificial persons"¹⁰⁶ with "privileges and immunities,"¹⁰⁷ including ones that no natural person could possess. The most important of these was the ability to hold property in perpetuity—a corporation was "but one person in law, a person that never dies."¹⁰⁸ At that time in Great Britain and America—both before and after the Revolution—all corporations, whether for-profit or not, were created via special legislative enactments. These grants often gave the corporation a monopoly over a particular field or permitted it to operate with limited competition while subject to continuing regulation. A typical instance was a 1788 statute in South Carolina establishing a company for the purpose of opening certain rivers to navigation by erecting "locks, dams or canals."¹⁰⁹ The application for incorporation requested that the legislature invest the company "with ample powers, privileges and immunities for carrying their purpose into speedy effect."¹¹⁰ In approving the application, the legislature authorized the company not only to build the requisite facilities, but as well to set and collect tolls up to a specified limit.¹¹¹

Legislatures also incorporated religious societies, usually church congregations, vesting them with a range of powers, including the right to sue and be sued, receive charitable donations, own property, and operate schools. For example, when incorporating an Episcopal congregation in 1786, the Pennsylvania assembly granted it specific powers like these, and added a general investment of "such powers and privileges as are enjoyed by other religious and charitable Societies incorporated within this State."¹¹² A Maryland law in 1785 incorporated a charitable body to

105. THOMAS BANKES, ET AL., *A NEW, ROYAL, AND COMPLETE SYSTEM OF UNIVERSAL GEOGRAPHY, ANTIEN AND MODERN* 207 (London, J. Cooke c. 1790).

106. 1 BLACKSTONE, *supra* note 19, at *455.

107. *Id.* at *456.

108. *Id.*

109. An Act to Establish a Company for Opening the Navigation of Broad and Pacolet Rivers (Feb. 29, 1788) [hereinafter An Act to Establish a Company], *reprinted in* PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 458 (John Fauchereaud Grimké ed., Phila., Robert Aitken 1790); *see also* An Act for Building a Bridge Across Ashley River (Mar. 13, 1788), *reprinted in* PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA, *supra*, at 490–91 (authorizing Bridge proprietors to collect tolls and enjoy "the several rights, privileges and immunities" granted in a prior law).

110. An Act to Establish a Company, *supra* note 109, at pmbl.

111. *See id.* § 3 (authorizing the collection of tolls).

112. An Act for Removing the Protestant Episcopal Chapel of St. Thomas, in Carnarvan township, and for Incorporating the Congregation Thereof, ch. 13, § 1, *reprinted in* LAWS ENACTED IN THE SECOND SITTING OF THE TENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 40 (Phila., Thomas Bradford 1786); *see also* An Act to Incorporate the Episcopal Congregation Belonging to St. Peter's Church, ch. 13, § 3, *reprinted in*

provide for the relief of widows and children of clergy, giving it a variety of legal powers, and “in general [to] have and exercise all such rights, franchises, privileges and immunities, as by law are incident and necessary to corporations of this kind.”¹¹³ Similar provisions appeared in university incorporations, such as the one for Harvard College, which was re-chartered in the Massachusetts Constitution of 1780, affirming that its president and fellows “in their corporate capacity . . . shall have, hold, use, exercise, and enjoy, all the powers, authorities, rights, liberties, privileges, immunities, and franchises which they now have.”¹¹⁴

Certain types of people and places were entitled to privileges and immunities under various statutes and the common law. Ambassadors from foreign countries—and their personal servants—possessed many, including immunity from most civil suits or criminal prosecutions.¹¹⁵ Blackstone wrote that “the rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions.”¹¹⁶ The common law and various statutes in Great Britain and America protected these rights in great detail because their infringement could produce an international incident. Civil process executed against an ambassador, his property, or servants was “null and void,” Blackstone recounted, and anyone doing so “shall be deemed violaters of the law of nations,” subject to criminal prosecution by statute.¹¹⁷ After independence, American states also enacted protective legislation of this sort, such as a Connecticut statute making it a crime to violate “the Immunities of Ambassadors, or other public Ministers, . . .

LAWS ENACTED IN THE SECOND SITTING OF THE TENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, *supra*, at 38 (granting a newly incorporated church “all and singular like powers, authorities, rights, privileges and immunities” given by statute in 1783 to a Philadelphia church); An Act to Incorporate the Vestry and Church-Wardens of the Episcopal Parish of St. George’s, 1789 S.C. Acts 29 (pmb.) (Dorchester) (establishing that a parish was incorporated “and vested with all the powers, privileges and immunities which any of their sister churches enjoy”).

113. An Act to Provide a Fund for the Relief of the Widows and Children of the Clergy of the Protestant Episcopal Church in the State, ch. 78, § 4, *reprinted in* 1784 LAWS OF MARYLAND, *supra* note 48, at 426, 427.

114. MASS. CONST. of 1780, art. I, ch. 555, § 1; *see also* An Act for Amending and Establishing the Charter of the College of New-Jersey, ch. 191, § 2 (Mar. 13, 1780), *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 121 (Trenton, Isaac Collins 1784) (declaring that trustees of College of New-Jersey were to “forever . . . have, hold and enjoy, all . . . the Advantages, Privileges, and Immunities, granted” in its charter).

115. *See generally* ABRAHAM DE WICQUEFORT, THE RIGHTS, PRIVILEGES, AND OFFICE OF EMBASSADORS AND PUBLICK MINISTERS (John Digby trans., London, Charles Davis 1740) (treatise on “the Rights and Privileges” of ambassadors).

116. 1 BLACKSTONE, *supra* note 19, at *246.

117. *Id.* at *248.

under the Limitation allowed by the Laws and Usages of Nations.”¹¹⁸

Churches and clergy possessed “numerous privileges and immunities,”¹¹⁹ David Hume wrote in his *History of England*, which he thought accounted for why religious authorities were able to preserve “Roman learning”¹²⁰ through the “barbarous ages.”¹²¹ The coronation oath for British kings, as described by Blackstone, required swearing “to preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain to them.”¹²² These were “Divine Rights or Privileges,”¹²³ not derived from municipal law, Rev. John Turner argued in 1707.¹²⁴ Churches operated “ecclesiastical courts” that “decide[d] many questions which are properly of temporal cognizance,” Blackstone wrote.¹²⁵ These included actions to compel payment of tithes,¹²⁶ recover dues owed to clergy for their services,¹²⁷ order repair of neglected church property,¹²⁸ adjudicate “matrimonial causes”¹²⁹ such as divorce and spousal maintenance,¹³⁰ and determine inheritances.¹³¹ Cases in these courts were “regulated according to the practice of the civil and canon laws; or rather according to a mixture of both.”¹³² Individual clergy, and especially bishops, possessed an array of personal and property rights, such as income from benefices and exemption from some taxes, that were referred to as privileges and immunities, or like terms. Bishops, who were entitled to sit in the House of Lords, had “the same Privileges with Temporal Barons,”¹³³

118. An Act for Securing to Foreigners in this State, their Rights, According to the Laws of Nations, and to Prevent any Infractions of Said Laws, *reprinted in* ACTS AND LAWS OF THE STATE OF CONNECTICUT 83 (New-London, Timothy Green 1784).

119. 3 DAVID HUME, *THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, at 297 (London, T. Cadell 1789).

120. *Id.*

121. *Id.* at 296.

122. 1 BLACKSTONE, *supra* note 19, at *228.

123. JOHN TURNER, *A VINDICATION OF THE RIGHTS AND PRIVILEGES OF THE CHRISTIAN CHURCH* 91 (London, John Wyat 1707).

124. *Id.*

125. 3 WILLIAM BLACKSTONE, *COMMENTARIES* *98–*99 (Oxford, 1768).

126. *Id.* at *88.

127. *Id.* at *89.

128. *Id.* at *91–*92.

129. *Id.* at *93.

130. *Id.* at *94.

131. *Id.* at *96.

132. *Id.* at *100.

133. WILLIAM NELSON, *THE RIGHTS OF THE CLERGY OF THAT PART OF GREAT-BRITAIN ‘CALL’D ENGLAND* 117 (London, Nutt & Gosling 1732); *see* Burrell, *supra* note 93, at 19–20 (describing privileges and immunities of a bishop).

including the “Privilege of Hunting in the King’s Forests.”¹³⁴

“The *privileges* of parliament are likewise very large and indefinite,”¹³⁵ Blackstone wrote, the greatest of which was the right of “parliament itself” to determine the extent of its own privileges.¹³⁶ The open-ended nature of parliamentary privileges was “in great measure”¹³⁷ responsible for preserving “[t]he dignity and independence of the two houses.”¹³⁸ However, two privileges stood out among the rest. First, under the English Bill of Rights, members were entitled to “privilege of speech,”¹³⁹ meaning that what they said in debates and proceedings “ought not be impeached or questioned in any ‘court or place out of parliament.’”¹⁴⁰ Second, members of Parliament, as well as their personal servants and horses, could not be arrested for most crimes or subjected to civil suit during the legislative term and for a period thereafter, which were “immunities as antient as Edward the confessor” in the eleventh century.¹⁴¹ Assaulting a member or his servants was not just a crime, but “a high contempt of [P]arliament, and there punished with the utmost severity.”¹⁴² These protections were instrumental to the development of parliamentary independence. Blackstone thought that they safeguarded legislators “not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown.”¹⁴³ Both the Articles of Confederation and the Constitution contained similar shields for those serving in Congress.¹⁴⁴

The right to exploit government-owned or controlled resources was

134. Burrell, *supra* note 93, at 19–20; *see also* JOHN ADAMS, *THE FLOWERS OF MODERN HISTORY* 45 (London, G. Kearsley 1790) (“The Christian emperors had enriched the church. They had lavished on it privileges and immunities.”); NELSON, *supra* note 133, at 59 (discussing the special “Privileges” of the Archbishop of Canterbury).

135. 1 BLACKSTONE, *supra* note 19, at *159.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at *160 (quoting Eng. Bill Rts., 1689, 1 W. & M., c. 2, § 9 (Eng.)).

141. *Id.*

142. *Id.*

143. *Id.* at *159.

144. The Constitution provided that members of Congress were “privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same,” unless the charge was “Treason, Felony and Breach of the Peace.” U.S. CONST. art. I, § 6, cl. 1. Likewise, they “shall not be questioned in any other Place” regarding any Speech or Debate in either House.” *Id.* The Articles had a similar provision, protecting members of Congress from “arrests or imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of peace.” ARTICLES OF CONFEDERATION of 1781, art. V, para. 5. On the importance of these immunities to parliamentary independence, see Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1122–35 (1973).

commonly termed a privilege in the eighteenth century. The term frequently appeared in treaties, grants and statutes—as well as commentaries about them—that authorized use of public resources such as fisheries;¹⁴⁵ shore lands for catching bait,¹⁴⁶ drying and processing fish,¹⁴⁷ forests for hunting¹⁴⁸ and cutting wood,¹⁴⁹ pasturage for farm animals,¹⁵⁰

145. See, e.g., WILLIAM BOLLAN, *THE ANCIENT RIGHT OF THE ENGLISH NATION TO THE AMERICAN FISHERY* 50 (London, S. Baker 1764) (describing how the French had “direct[ed] [its] fisherman to proceed and fish upon the banks left to the *English* [by treaty], in order to support her pretensions, and make to themselves a privilege of fishing where they pleased by force of custom”); *id.* at 82 (describing a treaty article granting “[t]he privilege for the *Spanish* nation to fish upon the banks of *Newfoundland*”); *id.* at 92 (referring to “[t]he important privilege granted by” a treaty, whereby “under certain limitations and restrictions to the subjects of *France* for fishing and drying their codfish on a certain part of the banks of *Newfoundland* has not been refused by *Great Britain*”); WILLIAM PEPPERRELL, *AN ACCURATE AND AUTHENTIC [SIC] ACCOUNT OF THE TAKING OF CAPE-BRETON, IN THE YEAR MDCCCLV* 29 (London, J. Staples 1758) (describing how the French had made “themselves a privilege, as it were, of fishing almost where they pleased” in the *Newfoundland* fishery); *id.* at 37 (“[S]upposing the French entirely excluded this Fishery . . . and allows them no longer any privilege at *Newfoundland*.”); REASONS WHY THE SOUTH SEA COMPANY SHOULD NOT NOW ENDEAVOUR TO REGAIN THE WHALE FISHERY (London, c. 1725) (describing how a group of merchants had been given “the exclusive Privilege” of the *Greenland* whale fishery); JOHN ROSE, *AN ESSAY UPON THE BRITISH FISHERIES* 32–33 (Edinburgh, W. Creech 1785) (describing “what value the Swedes put upon the privilege of fishing in our seas”).

146. See, e.g., GRIFFITH WILLIAMS, *AN ACCOUNT OF THE ISLAND OF NEWFOUNDLAND, WITH THE NATURE OF ITS TRADE, AND METHOD OF CARRYING ON THE FISHERY* 23 (London, Thomas Cole 1765) (describing a “Patent for a Man to have the sole Privilege of drawing Baite at a certain Beech”).

147. See, e.g., An Act for the Encouragement of the Fisheries Carried on from Great Britain, Ireland, and the British Dominions in Europe, and for Securing the Return of the Fishermen, Sailors, and Others Employed in the Said Fisheries, to the Ports Thereof, at the End of the Fishing Season, 15 Geo. 3, cc. 31, § 4 (1775) (restricting “the Privilege or Right of drying Fish on the shores of *Newfoundland* . . . [to] his Majesty’s Subjects arriving in *Newfoundland*, from any other Country except from *Great-Britain*, or one of the *British* Dominions of *Europe*”); WILLIAMS, *supra* note 146, at 16 (“[N]one but the Inhabitants of *Great-Britain*, *Newfoundland*, with *Jersey* and *Guernsey* . . . should have the Privilege of being possessed of any Fish Rooms, or Plantations in the Island of *Newfoundland*.”).

148. See FRAME OF GOVERNMENT OF PENNSYLVANIA, art. XII (Feb. 2, 1683) (“[T]hat the Inhabitants of this Province . . . [shall have] liberty to fowl and hunt upon the Lands they hold, and all other Lands therein not enclosed; and to fish, in all Waters in the said Lands, and in all Rivers and Rivulets in and belonging to this Province and Territories thereof, with Liberty to draw his or their Fish on Shore on any Man’s Lands, so as it be not to the Detriment, or Annoyance of the Owner thereof.”); An Act for Prevention of Misunderstanding between the Tributary Indians, and Other His Majesty’s Subjects of this Colony and Dominion (1705) [hereinafter An Act for Prevention of Misunderstanding], reprinted in ROBERT BEVERLEY, *AN ABRIDGMENT TO THE PUBLIC LAWS OF VIRGINIA, IN FORCE AND USE, JUNE 10, 1720*, at 90, 91 (London, F. Fayram, J. Clark, & T. Saunders 2d ed. 1728) (“The *Indian* shall likewise enjoy their wonted Convenience of Oystering and Fishing, and of gathering [various wild plants] on the Lands belonging to the *English*”); WILLIAM DOUGLASS, *A SUMMARY, HISTORICAL AND POLITICAL, OF THE FIRST PLANTING, PROGRESSIVE IMPROVEMENTS, AND PRESENT STATE OF THE BRITISH SETTLEMENTS IN NORTH-AMERICA* 200 (London, R. & J. Dodsley 1755) (describing agreement granting Indian tribes “the privilege of hunting, fowling, and fishing”).

149. See, e.g., WILLIAM NELSON, *THE LAWS CONCERNING GAME* 251 (London, F.

lands for harvesting wild plants,¹⁵¹ mining,¹⁵² or obtaining salt.¹⁵³ Treaties specified that the subjects of signatory nations could exercise these privileges.¹⁵⁴

Americans during the Confederation period were particularly concerned about access to one of the greatest natural resources of the day: fisheries, especially those in the North Atlantic that had been effectively closed during the Revolution. When Americans were still British subjects, the harvesting of fish and whales from this region was referred to as “the original right of the *English* nation,” protected by “*British* naval power,” and diminished only “by royal grants, encroachments and cessions.”¹⁵⁵ These were the concerns of treaties just alluded to, which treated access to fisheries as rights afforded to the subjects of signatory states. In late 1781, not long after the decisive victory at Yorktown, the Boston town meeting turned its attention to fisheries with a lengthy instruction to its legislative representatives. Emphasizing “how vast an importance the preservation of this trade is to every part of the Commonwealth,” the instructions asserted that “the Fishery,”¹⁵⁶ which “uninterruptedly enjoyed by our Ancestors

Richardson & C. Lintot 6th ed. 1762) (describing a case in which a fine was imposed for cutting wood from a nobleman’s forest; the court rejected the “Claim of a Privilege to fell *Wood* in the Forest, without Licence or View of the Foresters”); *see also* Letter from Thomas Pelham-Holles to Ricardo Wall (July 4, 1754), *quoted in* Lawrence Henry Gipson, *British Diplomacy in the Light of Anglo-Spanish New World Issues, 1750–1757*, 51 AM. HIST. REV. 627, 640 (1946) (remonstrance from Duke of Newcastle, First Lord of the Treasury, to the Spanish ambassador to Great Britain, about an attack by Spain on British woodcutting operations in the Honduras, saying: “We are entitled to that Privilege by the Word & Meaning of the Treaty of Utrecht”).

150. An Act for Dividing and Inclosing Several Commons or Wastes, and also Several Common Fields, Meadows, Pastures, and Waste Grounds, Lying within the Manor of Wimeswould, in the County of Leicester, 30 Geo. 2, cc. 53, cl. 2 (1757) (granting certain individuals “an exclusive Right, Liberty, or Privilege, to turn and depasture their Beasts, Sheep, and commonable Cattle, upon the said several Commons, Fields, and waste Grounds”); JAMES ANDERSON, OBSERVATIONS ON THE MEANS OF EXCITING A SPIRIT OF NATIONAL INDUSTRY; CHIEFLY INTENDED TO PROMOTE THE AGRICULTURE, COMMERCE, MANUFACTURES, AND FISHERIES, OF SCOTLAND 100 (Edinburgh, Charles Elliot 1777) (“These large flocks of sheep have each, by law, a privilege of pasturage in certain districts . . .”).

151. *See, e.g.*, An Act for Prevention of Misunderstanding, *supra* note 148, at 91 (providing that Indians could gather various wild plants on specified lands).

152. *See, e.g.*, Grant of New Hampshire and Masonia (April 22, 1635), *reprinted in* 29 N.H. STATE PAPERS 64 (Albert Stillman Batchellor ed., Concord, Edward N. Pearson 1896) (granting a man title to all “mines & Mineralls as well as Royal mines of Gold and Silver as other mines minerals pretious stones quarreys & all . . . other . . . Royaltys & privileges ffranchises & preheminenes” on the specified lands and waters”).

153. *See, e.g.*, DOUGLASS, *supra* note 148, at 89 (referring to the British “privilege of making and carrying salt from the island of Salt Tortugas,” granted by the Spanish in a treaty); *id.* at 200 (describing an agreement with Indian nations granting them “the privilege of hunting, fowling, and fishing as formerly”).

154. *See supra* notes 145, 147 (referring to treaty provisions).

155. BOLLAN, *supra* note 145, at 1.

156. Instructions of Boston Town Meeting 1, ¶4 (Dec. 14, 1781) (Boston, Benjamin Edes &

from time immemorial, and secured to them by charter,” was “an ancient privilege, and one of those liberties, for the security of which, that firm league of friendship was entered into by the Thirteen States.”¹⁵⁷ To preserve this privilege, the representatives were told to demand that Congress “give positive instructions to their Commissioners for negotiating a peace to make the right of the United States to the FISHERY *an indispensable article of treaty.*”¹⁵⁸ Article three of the Treaty of Paris accomplished this end, as it was agreed that “the People of the United States shall continue to enjoy unmolested the Right to take Fish of every kind” off of Newfoundland and “at all other places in the Sea where the Inhabitants of both Countries used at any time heretofore to fish.”¹⁵⁹

These varied usages of privileges and immunities represented more than a list of rights. They illustrated a characteristic of Anglo-American law: an endless array of legal differentiations among people and their occupations that carried corresponding rights and duties.¹⁶⁰ This was especially so in Great Britain, where hereditary distinctions and social rankings among subjects correlated with specific legal entitlements. For example, a British commentator in 1776 referred to “the *lords*” as “[n]ext in rank to the king,” who had the “privilege of sitting in parliament in their own rights.”¹⁶¹ Most of these privileges and immunities were not bestowed on everyone in Great Britain, yet only subjects could possess them. Other privileges and immunities were commonly held by all subjects, as the next section shows.

Sons 1781). The Charter of Massachusetts Bay in 1691 granted access to various “Fishings” to the governing council of New England, along with “Lands Soiles Grounds Havens Ports Rivers Waters . . . Mines and Mineralls as well Royall Mines of Gold and Silver as other Mines and Mineralls Pretious Stones Quarries and all and singular other Comodities Jurisdiccons Royalties Priviledges Franchises and Preheminences both within the said Tract of Land upon the Main and alsoe within the Islands and Seas adjoining.” 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 1870.

157. Instructions of Boston Town Meeting, *supra* note 156, at 2, ¶6.

158. *Id.* at 2, ¶7.

159. Definitive Treaty of Peace, art. III, Sept. 2, 1783, *reprinted* in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 151, 153 (David Hunter Miller ed., 1931). Limited privileges also were given to “American Fishermen . . . to dry and cure Fish” on specified British territories. *Id.* at 153–54.

160. See Burrell, *supra* note 93, at 11–97 (detailing numerous legal rights and duties enjoyed by various British subjects).

161. FRANCIS STOUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND (London, Edward Dilly, Charles Dilly & Joseph Johnson 2d ed. 1776). Members of the British peerage had “many privileges,” including seats in the House of Lords, exemption from arrest (as mentioned earlier in the text), as well as the right to be tried for crimes only by the Lords. See AN ACCOUNT OF THE CONSTITUTION AND PRESENT STATE OF GREAT BRITAIN 120 (London, John Newbery 1759) [hereinafter AN ACCOUNT OF THE CONSTITUTION].

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

The privileges and immunities of subjects and citizens pertained to a very different context than most of the usages just considered. Because they applied to virtually all free inhabitants, these rights were the opposite of the special benefits conferred on select people, institutions, or occupations within a state or nation. Indeed, in America, the notion of conferring special rights on subgroups of the population conflicted with republican conceptions of equality. Joseph Priestley wrote in 1788: “Personal privileges and immunities, which are not necessary for the good of the whole, are always justly offensive.”¹⁶² Two state constitutions included provisions to thwart conferring special privileges, particularly the type associated with hereditary rights. The North Carolina Declaration of Rights in 1776 provided: “That no hereditary emoluments, privileges, or honors ought to be granted or conferred in this state.”¹⁶³

The rights of subjects under English law in the eighteenth century can be determined from two different perspectives. The first approach is negative: consider the legal treatment of aliens, those “born out of the king’s dominions, or allegiance,” in contrast to the rights of natural subjects.¹⁶⁴ Americans had insisted prior to the Revolution on being treated as British subjects, not aliens; consequently it makes sense that they would not want to be regarded as aliens when visiting or trading in other states after independence.¹⁶⁵ As Blackstone commented, though aliens were entitled by the common law and statutes to many of the rights held by British subjects, “their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove.”¹⁶⁶ The second way to

162. JOSEPH PRIESTLEY, LECTURES ON HISTORY, AND GENERAL POLICY 258 (Dublin, P. Byrne 1788).

163. N.C. DECLARATION OF RIGHTS OF 1776, art. XXII; *see also* Va. BILL OF RIGHTS OF 1776, § 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.”).

164. 1 BLACKSTONE, *supra* note 19, at *361.

165. *See* Burrell, *supra* note 93, at 103 (noting that the Privileges and Immunities Clause “may be viewed as serving a citizenship function nominally related to the former ‘privileges and immunities of Englishmen’ concept”).

166. 1 BLACKSTONE, *supra* note 19, at *359; *see* CLIVE PARRY, NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH AND OF THE REPUBLIC OF IRELAND 29–30 (1957) (noting the disparity in customs rates between aliens and subjects, as well as aliens’ inability to hold land at common law); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 459 (Boston, Little Brown & Co. 2d ed. 1899); Burrell, *supra* note 93, at 56–58 & nn.173–75 (citing, *inter alia*, 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 93–94 (3d ed. 1944)) (discussing rights bestowed

discern the rights of subjects is positive, by examining contemporaneous descriptions of their content.

1. The Legal Rights and Disabilities of Aliens

Only “alien-friends, or such whose countries are in peace with ours,” had any “rights” or “privileges” at all, Blackstone wrote.¹⁶⁷ “Alien-enemies” possessed none, “unless by the king’s special favour, during time of war.”¹⁶⁸ Aliens usually could have no ownership rights in real estate, although they were permitted to rent a house for “habitation” or acquire “personal estate” that was “of a transitory and moveable nature.”¹⁶⁹ It was impossible for an alien to own land in Great Britain, Blackstone explained, because of the inherent tie between “a permanent property in lands” and “allegiance” to the king.¹⁷⁰ However, the king could declare an alien to be a “denizen,” with many of the rights of subjects, including the ability to purchase land.¹⁷¹ Aliens were allowed to “trade as freely as other people,” Blackstone claimed, although official discrimination against them was common, such as being “subject to certain higher duties at the custom-house.”¹⁷² In the past, certain “alien artificers” had been forbidden “to work for themselves” in England, but those restrictions had been “virtually repealed” when Blackstone wrote in 1765.¹⁷³ Aliens could “bring an action” in court “concerning personal property,” and “make a will, and dispose of his personal estate”—again, land was excluded.¹⁷⁴ They could not serve on the king’s executive council or in Parliament, nor could they hold “any office of trust, civil or military, or be capable of any grant from the crown.”¹⁷⁵ These were the “principal lines” of distinction between subjects and aliens, Blackstone wrote, but there were many other statutes either imposing constraints on aliens or giving them permission to do something otherwise restricted to subjects.¹⁷⁶

Subjects or citizens, by definition, possessed privileges and immunities denied to aliens and denizens. Thus, a list of rights belonging to subjects can be produced by counting everything that aliens and denizens were

on aliens by Henry VII in 1501 Charter to Warde).

167. 1 BLACKSTONE, *supra* note 19, at *360–61.

168. *Id.* at *361.

169. *Id.* at *360.

170. *Id.*

171. *Id.* at *362. Blackstone described denizens as being “in a kind of middle state between an alien, and natural-born subject, and partakes of both of them.” *Id.*

172. *Id.* at *360.

173. *Id.*

174. *Id.*

175. *Id.* at *362.

176. *Id.* at *359; see Burrell, *supra* note 93, at 55 n.275 (“Restricting alien trade in the colonies was a theme throughout the colonial experience.”).

denied by English law: “the right to travel and reside; the right to acquire, hold, and convey real estate, including the right to inherit and transmit by inheritance such property; the freedom from other trade and commercial restrictions customarily imposed on aliens; and the rights to elect and be elected to public office.”¹⁷⁷

This inventory corresponds well with later judicial interpretations of the privileges and immunities of state citizenship, such as in *Corfield v. Coryell*.¹⁷⁸ Nevertheless, it is incomplete in stating the rights possessed by a subject or a citizen. Many of the rights extended to aliens were also the privileges and immunities of subjects or citizens. Subjects or citizens received them en masse at birth or upon naturalization, along with a panoply of other rights. Other rights were gained by grants and statutes. Aliens gained only those that were bestowed on them, and these fluctuated depending on policy considerations. For example, there generally were no barriers to aliens owning personal property in Great Britain, which Blackstone termed an “indulgence to strangers” that was “necessary for the advancement of trade.”¹⁷⁹ British subjects had the right to reside and do business anywhere within the kingdom—not as an indulgence, but as a birthright. “Colonial inhabitants were all originally the King’s subjects, and no colony treated the inhabitants of other colonies as aliens.”¹⁸⁰

2. Affirmative Depictions of the Rights of Subjects and Citizens

A different way of determining the privileges and immunities of either subjects or citizens is to examine the affirmative depictions of those rights. This requires considering a variety of legal and political contexts in which privileges and immunities were recognized based on citizenship or residence. Colonial charters, laws establishing municipalities and the rights of residents, and naturalization statutes all referred to privileges and immunities. Moreover, revolutionary literature, declarations, and early state constitutions commonly invoked the rights and privileges of the people as either British subjects or citizens of the new American states.

Colonial charters included provisions that were close analogues to the protections for privileges and immunities in the Confederation and the Constitution.¹⁸¹ A key component of these charters was the assurance that

177. David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1493 (2005).

178. See *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (1823) (listing rights protected by Privileges and Immunities Clause).

179. 1 BLACKSTONE, *supra* note 19, at *360.

180. Bogen, CASE, *supra* note 18, at 861.

181. See *id.* at 800 (“These charter guarantees resemble the article IV provisions of the Constitution.”); Burrell, *supra* note 93, at 47–89 (describing charter privileges and immunities). Colonial charters, whether royal, corporate or proprietary, also authorized local governance.

settlers and their children would be considered British citizens—not aliens or denizens—and thus receive all the attendant protections and benefits of English law. The first charter for Virginia, granted by James I in 1606, assured colonists that they would “have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.”¹⁸² The Maryland Charter, granted by Charles I in 1632, bestowed on colonists “all Privileges, Franchises and Liberties of this our Kingdom of England,” as if they “were born within our said Kingdom of England.”¹⁸³ The charters for Connecticut and Rhode Island, granted in 1662 and 1663 by Charles II, provided that the colonies’ residents “shall have and enjoy all Liberties and Immunities of free and natural Subjects” in England.¹⁸⁴ North Carolina’s 1655 charter similarly granted colonists “all liberties, franchises, and privileges” of citizens in England—the same terms used in Delaware’s 1701 charter.¹⁸⁵ William Penn’s Charter of Privileges in 1701 extended to inhabitants of Pennsylvania the “Liberties, Privileges and Benefits, granted jointly to them in this Charter,” which included religious freedom, an elected assembly, the right of criminal suspects to “the same Privileges of Witnesses and Council as their Prosecutors,” the determination of property rights by the “ordinary Course of Justice,” and even provisions for licensing and regulation of public houses.¹⁸⁶

Although the terminology employed in these charters varied somewhat, there was no apparent difference in meaning among them. “Throughout the late eighteenth and early nineteenth centuries, one finds countless

Burrell, *supra* note 93, at 65–72; *see id.* at 75 (“[C]olonial governance, like borough governance” in England, “depended on and was governed by royal privileges and immunities.”).

182. First Virginia Charter (1606), para. 15, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 3788.

183. Charter of Maryland (1632), art. X, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 1681.

184. Charter of Connecticut (1662), para. 6, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 533; *see* Charter of & Rhode Island & Providence Plantations (1663), para. 10, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 3220 (“[Colonists] shall have and enjoye all libertyes and immunityes of . . . naturall subjects . . . borne within the realme of England.”).

185. Charter of Carolina (1665), para. 7, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 2765 (granting colonists “all liberties, franchises, and privileges, of this our kingdom, . . . as our liege people, born within the same”).

186. Charter of Privileges Granted by William Penn to the Inhabitants of Pennsylvania and Territories (1701), art. I–VII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 3076–79; *see also* Charter of Delaware (1701), pmbl., *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 558 (“I the said William Penn do declare, grant and confirm, unto all the Freemen, Planters and Adventurers, and other Inhabitants in this Province and Territories, these following Liberties, Franchises and Privileges . . .”).

examples of the terms ‘rights,’ ‘advantages,’ ‘liberties,’ ‘privileges,’ and ‘immunities’ used interchangeably, and often at the same time.”¹⁸⁷ These charter provisions offered the reverse protection of the later Privileges and Immunities Clauses: those migrating to the colonies or born there retained the rights of English-born citizens. Nonetheless, the substance of the rights protected was similar.¹⁸⁸ Just as English colonists thought themselves entitled to the protections of British law, so too visitors from one American state to another could expect to be treated like citizens for legal purposes. Both contributed to nation-building—or empire-building in the case of the British—by extending to citizens the same rights throughout the land.

In establishing municipalities, legislation enacted by Parliament and the American states used similar terms to depict the powers entrusted to the local governments being established as well as the rights of their residents. A representative example is a 1790 New York statute that established the new limits of two towns, and then broadly provided that they “shall enjoy all the rights, privileges and immunities which are granted to other towns within this State.”¹⁸⁹ The great majority of enabling statutes for municipalities, whether in America or England, followed this formula, which built upon the unspecified preexisting laws for other cities and towns. Some statutes gave municipalities “peculiar immunities and privileges,” as did a 1784 New Jersey law establishing Perth-Amboy as a “commercial cit[y] . . . with such powers, privileges, jurisdictions and immunities, as shall conduce to the encouragement of commerce.”¹⁹⁰ According to the act, “commercial cities require a peculiar mode of

187. Kurt T. Lash, *Origins of the Privileges or Immunities Clause, Part I: “Privileges And Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1252 (2010); see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64–65 (1986) (noting that “rights, liberties, privileges, and immunities, seem to have been used interchangeably”); *id.* (giving examples of these terms being used interchangeably); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1094–98 (2000) [hereinafter Curtis, *Historical*] (same); see also CHESTER JAMES ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT 38 (1981) (“The American generations that ratified the Constitution . . . used the terms, ‘rights,’ ‘liberties,’ ‘privileges,’ and ‘immunities’ as virtual synonyms.”); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 166–69 (1998) (including numerous examples of synonymous uses of the terms privileges, immunities, rights, and freedoms); *id.* at 169 (noting that Blackstone used “the words privileges and immunities . . . to describe various entitlements in the landmark English charters of liberty”).

188. On colonial charters as antecedents to the Privilege and Immunity Clauses, see Bogen, CASE, *supra* note 18, at 796–810; Lash, *supra* note 187, at 1254–55 (discussing the meaning of “privileges and immunities” when paired together).

189. An Act for Dividing the Town of Watervliet and the Town of Cocksakie (Mar. 8, 1790), 1789–90 N.Y. Laws 127, in 3 LAWS OF THE STATE OF NEW-YORK 13, 13 (New York City, 1790).

190. Act of Dec. 21, 1784 (Dec. 11, 1784), prml., *reprinted in* LAWS OF THE STATE OF NEW-JERSEY 64 (William Patterson ed., Newark, 1800) (incorporating City of Perth-Amboy).

government, for maintaining their internal police, and commercial transactions require more expeditious and summary tribunals than others.”¹⁹¹ The legislation then set up a mayor-council form of government for the city, with specific powers relating to business, including a “commercial court” to adjudicate “all causes of a commercial matter . . . in the most summary way.”¹⁹²

A related type of statute conferred rights on municipal residents. New York, for example, passed a law in 1785 creating the city of Hudson, which provided that every freeman residing there for four months and paying taxes “shall be entitled to every freedom, right, privilege and immunity of the said city, and be considered, to all intents and purposes, a free citizen thereof.”¹⁹³ Similar provisions were enacted in many other states, and these traced to language in colonial statutes creating towns, which themselves were analogous to acts of Parliament recognizing the privileges and immunities of boroughs, counties, and other types of local government.¹⁹⁴ Whatever terms were used in laws to depict the benefits of

191. *Id.*

192. *Id.* § 13.

193. An Act for Incorporating the Inhabitants Residing Within the Limits Therein Mentioned (Apr. 22, 1785), in 1 LAWS OF THE STATE OF NEW-YORK 197 (New York City, 2d ed. 1798).

194. *See, e.g.*, An Act for Incorporating Part of the Town of Stratford (Oct., 1800), in 1 THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT ch. 1, 106, 107 § 4 (Hartford, 1808) (stating that inhabitants of those towns who held “real Estate” or did “regular business” in new borough were “entitled to all the privileges of Freemen of said Borough”); An Act for an Addition to George-town, in Montgomery County (Nov. 1784), reprinted in 1 LAWS OF MARYLAND, ch. 45 (William Kilty ed., Annapolis, 1799) (stating that the addition of land to an existing town was “entitled to . . . all the immunities, privileges and advantages, which do or shall appertain to the said town”); An Act for Dividing the Town of Concord, and Erecting a New Town There by the Name of Acton (May 28, 1735), in ACTS AND LAWS PASSED BY THE GREAT AND GENERAL COURT OR ASSEMBLY OF . . . MASSACHUSETTS-BAY IN NEW ENGLAND 499, 548 (Boston, 1733) [hereinafter ACTS AND LAWS, MASSACHUSETTS-BAY] (vesting “Inhabitants” of new town “with all the Powers, Privileges and Immunities that the Inhabitants of the other Towns within this Province are or by Law ought to be vested with”); An Act for Erecting the Lower Plantation at Houssatnock into a Township, by the Name of Sheffield (May 30, 1733), in ACTS AND LAWS, MASSACHUSETTS-BAY, *supra*, at 499 (Boston, 1733) (granting “the Inhabitants” of new town “all Powers, Privileges, Immunities and Advantages which other Towns in this Province by Law, have and enjoy”); An Act for Appointing a Town on the . . . West Side of Matchapungo River (Mar. 6, 1728), reprinted in A COLLECTION OF THE PRIVATE ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH-CAROLINA 6, 6 (Newbern, N.C., 1794) (creating new town “with all the privileges and immunities, hereafter mentioned and expressed, for ever”); An Act for Establishing A Parish in Craven County by the Name of All Saints (Mar. 16, 1778), reprinted in PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA, *supra* note 109, at 289 (establishing a town and providing that “the inhabitants thereof shall use, exercise and enjoy all the rights, privileges and immunities, that the inhabitants of any other parish” possess “by the laws of this state”); An Act for Establishing a Town on the Lands of Willoughby Tebbs, in the County of Prince William (Nov. 27, 1788), in ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA., ch. 26, 14, 14 (Richmond, 1789) (“The purchasers of lots in the said town, so soon as they have built upon the same, . . . shall . . . have and enjoy, all the rights,

town residents, they had the same purposes: to give the residents of newly-established towns the same rights as the inhabitants of other municipalities and to provide that newcomers received the same rights as established residents. Moreover, it must have been assumed that anyone reading these laws would know the substance of these rights, which predated independence.

In the same fashion as these laws recognizing the rights of municipal residents, states enacted naturalization statutes providing that new citizens would be treated equally with established ones. A South Carolina statute in 1789 granted citizenship to ten men and their descendants, giving them “all the rights, privileges and immunities which the naturel born citizens of the state . . . do enjoy.”¹⁹⁵ General naturalization statutes in that state and others used similar language. A Maryland law granted new residents who took an oath of citizenship “all the immunities, rights and privileges, of a natural born subject of this state,” except for a seven-year waiting period before the person was eligible for a “civil office” or elected position.¹⁹⁶ South Carolina required both an oath and a year’s residency before a person was “entitled to all the rights, privileges, and immunities” of state citizenship.¹⁹⁷ None of these statutes defined “privileges” or “immunities,” or distinguished them from “rights.” Rather, they extended all the benefits of citizenship equally to new citizens, at least once a waiting period was

privileges, and immunities which the freeholders and inhabitants of other towns in this state, . . . hold and enjoy.”); An Act for Establishing a Town on the Lands of William Anderson in the County of Botetourt (Nov. 15, 1788), in ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, ch. 16, 11, 11 (Richmond, 1789) (same provision); An Act for Establishing a Town, and An Inspection of Tobacco (Nov. 13, 1788), in ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, ch. 11, 8, 8 (Richmond, 1789) (same provision); An Act to Establish a Town in the County of Bourbon (Dec. 11, 1787), in ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, ch. 91, 45, 45 (Richmond, 1788) (same provision). On colonial charters providing for incorporation of towns, see, e.g., The Charter of Carolina (1665), reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 2767 (empowering the creation of ports “with such jurisdictions, privileges and franchises, unto the said ports belonging, as . . . shall seem most expedient”); The Charter of Maryland (1632), art. XIV, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 103, at 1683 (granting to Lord Baltimore and his heirs the right to create towns “with suitable Privileges and Immunities, according to the Merits of the Inhabitants, and Convenience of the Places.”). On the English antecedents to charters for American towns, see Burrell, *supra* note 93, at 39–48; *id.* at 45 (“Generally, incorporation of a borough was the crown’s formal recognition of preexisting municipal privileges.”).

195. An Act for Naturalizing Richard Wrainch, et al. (Mar. 13, 1789), in ACTS, ORDINANCES, AND RESOLVES, OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH-CAROLINA 48, 48 (Charleston, 1789).

196. An Act for Naturalization (July 1779), in 1 THE LAWS OF MD. 362, 363 (Baltimore, Virgil Maxcy ed., Philip H. Nicklin & Co. 1799).

197. An Act to Confer Certain Rights and Privileges on Aliens (Mar. 22, 1786), reprinted in PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA, *supra* note 109, at 412.

satisfied.

The opposite of naturalization also occurred in enactments stripping Loyalists of their citizenship rights in a state or community. The town meeting of Worcester, Massachusetts, for example, passed several resolutions against Loyalists who had fled during the Revolution, including a declaration that that “this town cannot conceive it to be their duty, or their interest, ever to provide for the return of such ingrates, to naturalize them, or admit them to the privileges and immunities of citizens.”¹⁹⁸

Revolutionary literature was replete with complaints about the British administration denying Americans their “privileges,” often coupling that term with “rights,” “liberties,” or similar words. In 1776, for example, the Continental Congress stated in a letter to the residents of Canada, “we have been forced” to take up arms “for the defence of our dearest privileges.”¹⁹⁹ The Declaration of Rights of the First Continental Congress resolved that the colonists were “entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England,”²⁰⁰ as well as “to all the immunities and privileges granted & confirmed to them by royal charters.”²⁰¹

Several of the rebelling states employed these terms in their first constitutions to justify breaking ties with Great Britain. New Hampshire’s Constitution, promulgated in 1776, declared that an independent government was justified by the “many grievous and oppressive acts of the British Parliament, depriving us of our native and constitutional Rights and Privileges.”²⁰² In 1768, the Massachusetts House of Representatives informed the Earl of Shelburne, one of the king’s principal secretaries of state, that “exclusive of any consideration of their Charter,” the colonists were “entitled to the Rights and Privileges of the British constitution in common with their fellow subjects in Britain.”²⁰³ The assembly based this claim upon “the common law, . . . as well as sundry Acts of Parliament” dating to Edward III.²⁰⁴ Earlier, during the Stamp Act dispute in 1765, the

198. THE WORCESTER SOCIETY OF ANTIQUITY, WORCESTER TOWN RECORDS: FROM 1753 TO 1783, at 441 (Franklin P. Rice ed., 1882) (providing records of a town meeting that occurred on May 19, 1783).

199. Letter to the Inhabitants of the Province of Canada (Jan. 24, 1776), *reprinted in* 4 J. CONT. CONG. 1774–1789, at 85, 85 (Worthington Chancey Ford et al. eds., 1904).

200. *Declaration and Resolves of the First Continental Congress* (Oct. 14, 1774), *reprinted in* 1 J. CONT. CONG. 1774–1789, at 63, 68 (Worthington Chancey Ford et al. eds., 1904).

201. *Id.* at 69.

202. N.H. CONST. of 1776, pmb1.

203. Letter from the Massachusetts House of Representatives to the Earl of Shelburne (Jan. 15, 1768), PA. GAZETTE, Apr. 14, 1768, at 1.

204. *Id.*; *see also* Letter from the Massachusetts House of Representatives to the Earl of Chatham (Feb. 2, 1768), PA. GAZETTE, Apr. 14, 1768, at 2 (asserting that under the colonial charter the inhabitants were granted “all the rights, liberties, privileges and immunities of his

Virginia House of Burgesses resolved that the first colonists “brought with them, and transmitted to their posterity, . . . all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of *Great Britain*.”²⁰⁵ In addition, Virginia claimed that by their colonial charters the inhabitants of the colony were entitled to “all Liberties, Privileges, and Immunities” of those “abiding and born within the Realm of *England*.”²⁰⁶ During the same period, the Pennsylvania assembly resolved: “That the inhabitants of this Province are entitled to all the Liberties, Rights and Privileges of his Majesty’s Subjects in Great-Britain.”²⁰⁷ Most importantly, it was “the inherent Birth-right, and indubitable Privilege, of British Subject, to be taxed only by his own Consent, or that of his legal Representatives.”²⁰⁸ Shortly thereafter, the Stamp Act Congress resolved in 1765 that the colonists were “entitled to all the inherent rights and privileges of his natural born subjects born within the kingdom of Great Britain.”²⁰⁹

In all of these writings, the operative words were highly general, but evidently their authors expected readers to comprehend their meaning. Even an American with relatively little education—i.e., most of the population at the time—would likely understand the basic elements of their rights as subjects or citizens. Details were unimportant. Americans demanded that the British government extend them *all* of the rights of subjects in England.

3. Blackstone’s Depiction of the Rights of Subjects

The most-recognized authority on the rights of subjects was Blackstone, who alternately used the terms rights, liberties, privileges, and immunities to describe the protections afforded British citizens by their constitution. His depiction of the British constitution was conventional and widely

natural subjects, born within the realm”).

205. Virginia Resolves (May 30, 1765), *reprinted in* 10 JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1761–1765, at 360 (John Pendleton Kennedy ed., 1907).

206. *Id.*

207. Resolves of the Pennsylvania Assembly on the Stamp Act (September 21, 1765), *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 51, 51 (Edmund S. Morgan ed., 1959).

208. *Id.*

209. Resolves of the Stamp Act Congress (Oct. 19, 1765), *reprinted in* JOURNAL OF THE FIRST CONGRESS OF THE AMERICAN COLONIES 27, 28 (New York, E. Winchester 1845); *see, e.g.*, Resolutions of the Boston Town Meeting (Sept. 13, 1768) (granting, via charter, colonial inhabitants “all liberties and immunities of free and natural subjects, . . . as if they and every of them were born within the realm of England”). Other state constitutions, such as New York’s in 1777, condemned “the many tyrannical and oppressive usurpations of the King and Parliament of Great Britain on the rights and liberties of the people of the American colonies,” with no substantive difference from those complaining about loss of “privileges.” N.Y. CONST. of 1777, pmbl.

accepted on both sides of the Atlantic.

“The absolute rights of every Englishman, . . . which, taken in a political and extensive sense, are usually called their liberties,” Blackstone wrote, were “founded on nature and reason.”²¹⁰ Blackstone organized the absolute rights into three divisions. First, there was “[t]he right of personal security,” that is, “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”²¹¹ Second, “the law of England regards, asserts, and preserves the personal liberty of individuals,” which meant “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place of one’s own inclination may direct; without imprisonment or restraint.”²¹² Moreover, this liberty had “[a] natural and regular consequence, . . . that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law.”²¹³ Third, there was “the sacred and inviolable rights of private property,”²¹⁴ “which consists in the free use, enjoyment, and disposal” of a person’s “acquisitions, without any control or diminishment, save only by the laws of the land.”²¹⁵

The term “absolute rights”²¹⁶ may suggest to a modern reader that these liberties could not be altered even by legislation enacted for the public good. Blackstone meant no such thing: all of these absolute rights could be regulated and defined by Parliament. Every right, including to life itself, was subject to control “by due process of law,”²¹⁷ which referred to two things. First, rights could be limited by standing laws applicable to everyone—“the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without express warrant of law.”²¹⁸ Second, the application of these established rules, whether derived from the common law or parliamentary action, could only occur “by due process of law,” which required regular judicial procedures.²¹⁹ This was one of the most important concessions from King John in Magna Carta. “To bereave a man of life, or by violence to confiscate his estate, without accusation or trial,” Blackstone wrote, “would be so gross and notorious an act of

210. 1 BLACKSTONE, *supra* note 19, at *123.

211. *Id.* at *125.

212. *Id.* at *130.

213. *Id.* at *133.

214. *Id.* at *135.

215. *Id.* at *134. See generally Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1220–22 (1992) (discussing how Blackstone used the terms “privileges” and “immunities” to describe various entitlements).

216. 1 BLACKSTONE, *supra* note 19, at *123.

217. *Id.* at *130.

218. *Id.* at *129.

219. *Id.* at *130.

despotism, as must at once convey the alarm of tyranny throughout the whole kingdom.”²²⁰

The absolute rights themselves were but a “dead letter,” Blackstone continued, without a means “to secure their actual enjoyment.”²²¹ To assure that “the three great and primary rights, of personal security, personal liberty, and private property” were respected, “certain other auxiliary subordinate rights of the subject” had been “established” by British law. By his count, there were five such subordinate rights recognized by the constitution. All were privileges or immunities of subjects. They were not natural rights in themselves; rather, they were codified concessions wrested from the crown that enabled subjects to realize the liberties they were entitled to by natural law.²²²

The first subordinate right identified by Blackstone was the “[t]he constitution, powers, and privileges of parliament.”²²³ It was through Parliament that the people prevented the executive from “enact[ing] tyrannical laws, and execut[ing] them in a tyrannical manner,” because “where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of it’s own independence, and therewith of the liberty of the subject.”²²⁴

The second subordinate right consisted of limits on “the king’s prerogative” powers—his ability to act without legislative assent—that constrained the monarch “by bounds so certain and notorious, that it is impossible he should exceed them without the consent of the people.”²²⁵ Prerogative powers could threaten the liberties of the subjects, for example, if the King tried to expand his traditional sources of revenue by intruding on Parliament’s control over taxes and appropriations.

The third subordinate right was “that of applying to the court of justice for redress of injuries.”²²⁶ This was the essence of Magna Carta’s promise that the people could not be “put out of the protection and benefit of the laws, but according to the law of the land.”²²⁷ The king may have been entitled to “erect new courts of justice; but then they must proceed according to the old established forms of the common law.”²²⁸ Should

220. *Id.* at *131–32.

221. *Id.* at *136.

222. *See id.* at *123–24 (describing origin of British rights in various statutes exacting concessions from the crown).

223. *Id.* at 136.

224. *Id.* at *142.

225. *Id.* at *137.

226. *Id.*

227. *Id.* at *138.

228. *Id.*

“the ordinary course of law” prove “too defective to reach” an “uncommon injury,” “or infringement of the rights beforementioned,”²²⁹ a citizen could exercise a fourth right, “petitioning the king, or either house of parliament, for the redress of grievances.”²³⁰

The fifth subordinate right was very different from the other “auxiliary right[s] of the subject,” as it consisted “of having arms for their defence, suitable to their condition and degree, and such as are allowed by law.”²³¹

Even though Blackstone and most other Anglo-American constitutional commentators regarded the absolute liberties of the people as grounded in natural law, they nonetheless were “defined by these several statutes.”²³² Those enactments expressed the basic rights of the people, which were none other “than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.”²³³

The statutes Blackstone referenced were not commonplace acts of Parliament, nor were they rights that conferred minor advantages. Rather, Blackstone said that they consisted of the “great charter of liberties,” principally Magna Carta in 1215 and “subsequent corroborating statutes,” the Petition of Right extracted from Charles I in 1628, the Habeas Corpus Act enacted under Charles II in 1679, the Bill of Rights passed by Parliament in 1689, and the Act of Settlement of 1701.²³⁴ Other treatises on the British constitution likewise equated the rights of Britons with these statutes, sometimes adding others to the list, such as several laws defining—and limiting—the crime of treason. Works such as *British Liberties, or the Free-born Subject's Inheritance*, published in 1766, consisted largely of commentaries on these milestone enactments.²³⁵

Although ultimately laws like Magna Carta were intended to preserve personal freedoms, and they did recognize certain individual rights, for the

229. *Id.* at *139.

230. *Id.* at *138–39.

231. *Id.* at *139.

232. *Id.* at *125; *see also* Petition of Right, 3 Car. 1, cc. 1 (1638), *reprinted in* 5 STATUTES OF THE REALM 23, 23–24 (London, G. Eyre & A. Strahan 1819); Habeas Corpus Act, 31 Car. 2, cc. 2 (1679), *reprinted in* 5 STATUTES OF THE REALM, *supra*, at 935–38; Bill of Rights, 1 Gul. & Mar., Sess. 2, cc. 2 (1688), *reprinted in* 6 STATUTES OF THE REALM, *supra*, at 142–45; Act of Settlement, art. IV, XII & XIII Gul. III., c. 2 (1701), *reprinted in* 7 STATUTES OF THE REALM, *supra*, at 636–38.

233. 1 BLACKSTONE, *supra* note 19, at *125.

234. *Id.* at *123.

235. BRITISH LIBERTIES, OR THE FREE-BORN SUBJECTS INHERITANCE (London, H. Woodfall & W. Strahan 1766); *see also* A GUIDETO THE KNOWLEDGE OF THE RIGHTS AND PRIVILEGES OF ENGLISHMEN (London, J. Williams & W. Bingley 1771) (discussing statutes ranging from the Magna Carta to the Act of Settlement).

most part they established the powers of Parliament, the supremacy of its statutes under English law, and the independence of the judiciary. These laws served “the principal aim of society,” Blackstone wrote, “to protect individuals in the enjoyment of those absolute rights, which are vested in them by the immutable laws of nature.”²³⁶ Over the course of English history, there had been occasions when these natural rights were “depressed by overbearing and tyrannical princes,”²³⁷ yet “the vigour of our free constitution has always delivered the nation from these embarrassments.”²³⁸ That delivery did not come by courts declaring laws unconstitutional, but by popular resistance to royal rule that resulted in the adoption of additional written protections. Most of all, English liberties were thought secured by the rise of parliamentary power as a counterweight to arbitrary monarchical rule.

4. The Privileges of Political Representation and Judicial Protection

“[T]he first Fundamental Privilege” of the people, according to numerous English authorities throughout the century, was choosing “Members to represent them in Parliament,” even if this glossed over the fact that only a small minority of the adult populace was eligible to vote due to property requirements and exclusion of women from the polls.²³⁹ The absence of American representation in Parliament lay at the heart of revolutionary complaints, for as the Continental Congress claimed, “the foundation of English liberty” was the “right in the people to participate in their legislative council.”²⁴⁰ The English were “a Free People,” the Connecticut General Assembly wrote in a 1764 protest to Parliament against the Stamp Act, precisely because they held “this general Privilege, that ‘NO LAWS CAN BE MADE OR ABROGATED, WITHOUT THEIR CONSENT, BY THEIR REPRESENTATIVES IN PARLIAMENT.’”²⁴¹ Numerous authorities

236. 1 BLACKSTONE, *supra* note 19, at *120.

237. *Id.* at *123.

238. *Id.*

239. HUMPHREY MACKWORTH, AN ABSTRACT OF A TREATISE, INTITULED, FREE PARLIAMENTS 3 (London, John Nutt 4th. ed. 1705) (Mackworth was a knight and member of the House of Commons).

240. Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), *reprinted in* 1 J. CONT. CONG., *supra* note 199, at 68.

241. Reasons Why the British Colonies in America Should Not be Charged with Internal Taxes, by Authority of Parliament (Hartford, 1764) [hereinafter *Reasons Why*], *reprinted in* 12 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 653, 653 (Charles J. Hoadly ed., Hartford, Press of the Case 1881) (pamphlet on the taxation of British colonies in America); *see also* 2 THE FITCH PAPERS: CORRESPONDENCE AND DOCUMENTS 307 (Connecticut Historical Society, 1918–1920) (noting that the assembly ordered Gov. Thomas Fitch to prepare and transmit the Stamp Act protest to Parliament).

likewise referred to voting as a privilege.²⁴²

Paralleling the importance of legislative representation was “[t]he great and fundamental privilege of trials by juries,” Thomas Mortimer claimed in a 1780 tract.²⁴³ Blackstone called trial by jury “the glory of the English law,” and “the most transcendent privilege which any subject can enjoy,” one that had “secured the just liberties of this nation for a long succession of ages.”²⁴⁴ Americans viewed the institution as indispensable to popular control of government—and hence home rule for the colonies—because juries effectively controlled the operation of the law by their authority to issue general verdicts that resolved both the factual and legal issues in the case. Forrest McDonald has written that on an “everyday” basis American “juries *were* the government, and it was upon them that the safety of all rights to liberty and property depended.”²⁴⁵ The New York Assembly sent a petition to George III in 1775, declaring in part that transporting Americans outside their colonies for trials without juries in admiralty courts was “grievous and destructive of our rights and privileges.”²⁴⁶ Trial in the vicinage—the place where the crime occurred—was “the grand security and birthright of Englishmen.”²⁴⁷ Among the specific assertions of the Continental Congress was that the colonies were “entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”²⁴⁸ In resolving to take up arms against the British in 1775, one of the specific grievances cited by the Continental Congress was “depriving us of the accustomed and inestimable privilege of trial by jury.”²⁴⁹ The Declaration of Independence accused the British of “depriv[ing] of the inestimable privilege of trial by jury,” and “transporting us beyond Seas to be tried for pretended offences.”²⁵⁰

242. On voting as a privilege, see Natelson, *supra* note 18, at 1156–57 (“Suffrage and representation were characterized as ‘privileges’ in state constitutions, the state ratifying conventions, and in publications such as THE FEDERALIST.”).

243. THOMAS MORTIMER, *THE ELEMENTS OF COMMERCE, POLITICS AND FINANCES* 450 (London, R. Baldwin 1780).

244. 3 BLACKSTONE, *supra* note 125, at *379.

245. MCDONALD, *supra* note 104, at 40 (emphasis added).

246. Petition of New York General Assembly to George III (March 25, 1775), *PA. GAZETTE*, Apr. 26, 1775, at 2.

247. *Id.*

248. Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), *reprinted in* 1 J. CONT. CONG., *supra* note 199, at 69.

249. Declaration of the Causes and Necessities for Taking Up Arms (July 6, 1775), *reprinted in* 2 J. CONT. CONG. 1774–1789, 128, 132 (Worthington Chancey Ford et al. eds., 1904).

250. THE DECLARATION OF INDEPENDENCE, paras. 20–21 (U.S. 1776). For other references to trial by jury as a “privilege,” see, e.g., An Act to raise, by voluntary Enlistment, four hundred and fifty Men, for completing the Quota of Troops belonging to this State, in the Service of the United States §16 (June 25, 1781), *in* ACTS OF THE COUNCIL AND GENERAL ASSEMBLY OF THE

The steady application of standing rules by courts was essential to preserving the rule of law, according to Blackstone and many other jurists. The various procedures associated with judicial processes frequently were termed privileges. Most important of all was the one inserted in the Constitution, habeas corpus, a common feature of state constitutions and widely referred to as among the most important of privileges: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”²⁵¹ This “great and efficacious writ,” Blackstone explained, authorized a common law court to determine whether the government illegally detained a person, and if so, to command the prisoner’s release.²⁵² Numerous other judicial processes were also routinely termed privileges.²⁵³

5. Other Substantive Privileges

Other liberties described as privileges or immunities in the eighteenth century were substantive protections of individuals, including ones that a number of writers considered natural rights. This is apparent from some of the examples already given, such as Blackstone’s list of British “rights.” Consider freedom of press, for example. Prominent writers, such as Noah

STATE OF NEW-JERSEY 205, 210 (1784) (“every Person shall have the same Privilege of Appeal and Jury”); AN ACCOUNT OF THE CONSTITUTION, *supra* note 161, at 110 (“the privilege of being tried by their peers [is] enjoyed by the meanest subject.”); AN APPEAL TO THE PUBLIC; STATING AND CONSIDERING THE OBJECTIONS TO THE QUEBEC BILL 34 (London, T. Payne & M. Hingeston 1774) (“our Privilege of trial by jury”); OBADIAH HULME, AN HISTORICAL ESSAY ON THE ENGLISH CONSTITUTION 169 (London, Edward Dilly & Charles Dilly 1771) (“this great privilege of the English people of trial by Jury”); HENRY FIELDING, A CHARGE DELIVERED TO THE GRAND JURY AT THE SESSIONS OF THE PEACE HELD FOR THE CITY AND LIBERTY OF WESTMINSTER, &C. ON THURSDAY THE 29TH OF JUNE, 1749, at 15 (Dublin, George Faulkner 1749) (“[T]he Subject” had “that great Privilege of being indicted and tryed by a Jury of their Countrymen.”); Thomas Salmon, *The Trial of John Gibbons . . . for High Treason* (July 18, 1651), in A CRITICAL REVIEW OF THE STATE TRIALS 240, 241 (London, William Mears 1735) (“the Privilege of a Trial by a Jury, according to the antient Laws of England”).

251. U.S. CONST. art. I, § 9, cl. 2.

252. 3 BLACKSTONE, *supra* note 125, at *131. Habeas corpus was frequently referred to as a privilege in early constitutions, writings, and public statements. See Natelson, *supra* note 18, at 1163–64 & nn.238–41 (acknowledging that Habeas Corpus was deemed a privilege).

253. According to one modern account, “the procedures repeatedly referred to as ‘privileges’” included trials, trials by jury, challenges to empanelling biased jurors, appeal processes, procedures granting criminal defendants the same access to witnesses and counsel that the prosecution enjoyed, confrontation by an accused of the accusers and of the witnesses against him, the opportunity to call for evidence on one’s own behalf, and the limitation on forfeiture to the life of the criminal. Natelson, *supra* note 18, at 1164–65; see, e.g., GA. CONST. of 1777, art. LVII (“This is not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause.”); N.J. CONST. of 1776, art. XVI (“That all criminals shall be admitted to the same Privileges of Witnesses and Counsel, as their Prosecutors are or shall be entitled to.”).

Webster, considered the right to publish a “fundamental privilege.”²⁵⁴ Decades earlier, the great opposition writer Algernon Sidney similarly described freedom of the press as “one of the most fundamental Privileges of the Subject.”²⁵⁵ When introducing the Bill of Rights in Congress, Madison extolled “the freedom of the press and rights of conscience” as “those choicest privileges of the people.”²⁵⁶ The New Jersey Constitution of 1776 provided “[t]hat no Person shall . . . be deprived of the inestimable Privilege of worshipping Almighty God in a Manner agreeable to the Dictates of his own Conscience.”²⁵⁷ It also guaranteed adherents of any “Protestant sect . . . every Privilege and Immunity, enjoyed by . . . their Fellow Subjects.”²⁵⁸ The sanctity of the home from unwanted intrusions was closely associated with the natural liberty to possess property, yet the right often was called a privilege or immunity. Blackstone said that “the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity.”²⁵⁹ In 1761, James Otis argued in a Massachusetts court against the constitutionality of writs of assistance—general search warrants issued without “good Grounds of suspicion”—because they infringed on

254. NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 31–32 (Phila., Prichard & Hall 1787).

255. 1 ALGERNON SIDNEY, OF THE USE AND ABUSE OF PARLIAMENTS 127 (London, F. Freeman 1745).

256. James Madison, 1 ANNALS CONG. 453 (June 8, 1789). On other references to liberty of press as a privilege, see, e.g., JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 295 (London, G.G.J., J. Robinson & J. Murray 1790) (stating, “the freedom of the press” was “a privilege . . . finally established”); JOSEPH CAVENDISH, THE ARGUMENTS OF THE TWO GENTLEMEN, WHO WERE OF COUNCIL FOR JOSEPH CAVENDISH, ON HIS TRIAL FOR PUBLISHING A LIBEL AGAINST THE LATE LORD T-N 22 (Dublin, 1783) (referencing “the liberty of the press; that invaluable privilege”); FRANCIS MASERES, AN ENQUIRY INTO THE EXTENT OF THE POWER OF JURIES, ON TRIALS OF INDICTMENTS OR INFORMATIONS, FOR PUBLISHING SEDITIOUS, OR OTHER CRIMINAL WRITINGS 3 (London, J. Debrett 1785) (recognizing “that most valuable privilege of English subjects, the *Liberty of the Press*”); THOMAS ROCH, THE CANTERBURY PATRIOT: OR, THE LATE MAYOR’S NEW MODE OF DEFENDING LIBERTY, PROPERTY, AND THE PRIVILEGE OF THE PRESS 48, 55, 95, 98 (London, T. Smith 1773) (acknowledging the “privilege of the press”); Junius, *Letter No. LXI* (Oct. 17, 1771), in 2 THE LETTERS OF JUNIUS 281, 284 (London, Henry S. Woodfall 1772) [hereinafter LETTERS OF JUNIUS] (“The liberty of the press is, after all, a *valuable privilege*.”); Speech of John Hynd Cotton, House of Commons (Feb. 3, 1737), in 10 HISTORY & PROCEEDINGS OF THE HOUSE OF COMMONS FROM THE RESTORATION TO THE PRESENT TIME 37, 37 (London, Richard Chandler 1742) (“Whigs . . . esteemed the Liberty of the Press to be the most valuable Privilege of a free People.”); *The Trial of Mr. Richard Francklin* (1731) (argument of Francklin’s counsel), in 9 FRANCIS HARGRAVE, A COMPLETE COLLECTION OF STATE-TRIALS 255, 267 (London, T. Wright 1778) (“[T]he Liberty of the Press . . . hath been always esteemed as a great Privilege, and of great Advantage to this Nation.”).

257. N.J. CONST. of 1776, art. XVIII.

258. *Id.* at art. XIX.

259. 4 WILLIAM BLACKSTONE, COMMENTARIES *223 (Oxford, 1769).

“the Privilege of House,” one of “the fundamental Principles of Law.”²⁶⁰

Freedom of speech also frequently was termed a privilege, as when Blackstone wrote that members of Parliament were afforded “privilege of speech” by statute as one of the “liberties of the people.”²⁶¹ In this context, the right of speech was a peculiar liberty, because eighteenth-century law in England and America gave very weak legal protections for speech of the citizenry—and scarcely better for the press.²⁶² The safeguards for speech were primarily indirect, such as the Constitution’s requirement that the crime of treason against the United States consist of acts rather than words—“in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”²⁶³ Or free expression was allowed, but restricted to specifically authorized channels, the most important of which was the petition for redress of grievances—Blackstone’s fourth subordinate right, referred to variously by writers as a privilege or natural right of citizens. Junius chided the government in 1770 for creating an atmosphere that “threatens to punish the subject for exercising a privilege, hitherto undisputed, of petitioning the Crown.”²⁶⁴ A political association in Great Britain calling for parliamentary reform in 1781 urged that “[t]he right to petition Parliament for a redress of grievances, is a fundamental right of the British people,” the exercise of “which is prohibited by no positive statute,” and thus could not “be unlawful.”²⁶⁵

260. The Writs of Assistance Case (Mass. Bay Super. Prov. Ct. 1761) (argument of counsel, James Otis), in 1 JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 469, 471 (Boston, Little, Brown, & Co. 1865) (John Adams’ contemporaneous notes of the case).

261. 1 BLACKSTONE, *supra* note 19, at *160.

262. See Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WILL. MITCH. L. REV. 773, 783–803 (2008) (describing early legal protections for freedom of speech). Nine states protected freedom of press in their new constitutions, but only Pennsylvania covered freedom of speech. See *id.* at 787.

263. U.S. CONST. art. III, § 3; see Jay, *supra* note 262, at 789.

264. Junius, *Letter No. XXXVII* (Mar. 19, 1790), in LETTERS OF JUNIUS, *supra* note 256, at 183.

265. Address of the Committee of Association for the County of York (Jan. 4, 1781), in SOUND REASON AND SOLID ARGUMENT FOR A REFORM IN PARLIAMENT; AND THE ABOLITION OF BRIBERY, CORRUPTION, ROTTEN BOROUGH, AND OTHER ABUSES 72, 72 (London, D.I. Eaton c. 1795) [hereinafter SOUND REASON AND SOLID ARGUMENT]. On other references to speech as a privilege for legislators, see, e.g., Junius, *Letter No. XLIV* (Apr. 22, 1771), in LETTERS OF JUNIUS, *supra* note 256, at 232 n.* (“[I]n all the addresses of new-appointed Speakers to the Sovereign, the utmost privilege they demand is liberty of speech.”); 5 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 225 (London, T. Cadell 1789) (paraphrasing Peter Wentworth, a leading Puritan member of Parliament in 1576, stating “that freedom of speech in that house [of Parliament was] a privilege, so useful both to sovereign and subject”); FRANCIS PLOWDEN & JURA ANGLORUM, THE RIGHTS OF ENGLISHMEN 456 (London, E. & R. Brooke 1792) (“Some

As Leonard Levy has written, the eighteenth-century witnessed a transformation in the popular understanding of free expression in both Great Britain and America. While the law formally continued to regard freedom of speech as a “privilege of parliamentarians,” increasingly it was referred to in political writings and declarations as a “personal right of citizens . . . based on natural rights.”²⁶⁶ Regardless of the limited legal protections for free expression, American republicans agreed with John Trenchard and Thomas Gordon, the authors of the famed *Cato’s Letters*, who wrote more than fifty years before the Revolution, that “all Liberty depends upon Freedom of Speech, and Freedom of Writing, within the Bounds of Manners and Discretion.”²⁶⁷ Yet Trenchard and Gordon also described free speech as a “sacred Privilege . . . so essential to free Governments.”²⁶⁸ A Philadelphia newspaper published an essay by one Tacitus in 1767, who felt “fortunate as to exist in these *blessed Times*, when we are happy in the unlimited Enjoyment of that most *precious Privilege* ‘of thinking what we please, and of speaking what we think.’”²⁶⁹

By the time the Constitution was written, many Americans believed that the freedoms of press and speech were natural rights. Patrick Henry complained about the absence of protections for the press in the proposed Constitution, telling the Virginia ratifying convention that publishing was

however of the more notorious privileges of the members of either house are privilege of speech, of person, of their domestics, and of their lands and goods.”); JOHN TRUSLER, A CONCISE VIEW OF THE COMMON LAW AND STATUTE LAW OF ENGLAND 24 (London, W. Nicoll c. 1781) (stating that “speech” was one of the “principal . . . privileges” of Parliament); 9 THE PARLIAMENTARY OR CONSTITUTIONAL HISTORY OF ENGLAND 102 (London, T. Osborn & W. Sandby 1753) (quoting Francis Seymour, member of Parliament in 1640, stating that “the greatest Privilege is Liberty of Speech”). On other references to petitioning as a right or privilege, see, e.g., London Corresponding Society, Conclutory Address, *in* THE CORRESPONDENCE OF THE LONDON CORRESPONDING SOCIETY REVISED AND CORRECTED 82, 82 (London, London Corresp. Soc’y 1795) (“Has it not always been . . . the right of Britons to petition for a Redress of their Grievances?”); SAMUEL HORSLEY, A SERMON, PREACHED BEFORE THE LORDS SPIRITUAL AND TEMPORAL 21 (Jan. 30, 1793) (London, T. Payne & Son 1793) (noting that “the private Citizen” possessed “the Right of petition for redress of grievances”); JOHANN WILHELM VON ARCHENHOLZ, A PICTURE OF ENGLAND: CONTAINING A DESCRIPTION OF THE LAWS, CUSTOMS AND MANNERS OF ENGLAND 29 (Dublin, P. Byrne 1790) (describing the “privilege of public remonstrances”); Address of the Committee of Association for the County of York (Jan. 4, 1781), *in* SOUND REASON AND SOLID ARGUMENT, *supra*, at 72 (“The right to petition Parliament for a redress of grievances, is a fundamental right of the British people.”); THE HISTORY OF THE WAR IN AMERICA, BETWEEN GREAT BRITAIN AND HER COLONIES 400 (Dublin, Co. of Booksellers 1779) (“All of the assemblies on the continent . . . asserted the right of the subject to the petition for the redress of grievances.”).

266. LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 292 (1993).

267. 3 JOHN TRENCHARD & THOMAS GORDON, CATO’S LETTERS 304 (London, W. Wilkins et al. 1724).

268. 1 *id.* at 97.

269. Tacitus, PA. GAZETTE, Apr. 23, 1767, at 2.

among “the rights of human nature” and a “palladium of our liberties.”²⁷⁰ It was not uncommon to refer to freedom of press and speech as being privileges based on natural law. A Baltimore essayist named Uncus wrote in 1787 that “liberty of the press” was “what the people . . . look upon as a privilege, with which every inhabitant is born;—a right which Nature, and Nature’s God, has given.”²⁷¹ A supporter of ratification, Uncus defended the absence of a press clause in the Constitution on the ground that it was “too sacred to require being mentioned.”²⁷² Popular attitudes like these translated into the refusal of juries to convict fellow citizens for criticizing the government.²⁷³

6. Political Rights as Privileges and Immunities

Interpreting Article IV as protecting all of the rights afforded by a state to its citizens does produce one seemingly anomalous result. If states must treat outsiders exactly as they would their own, then that would apply to voting and qualifications for state offices. As mentioned, voting commonly was referred to as a privilege of the people.²⁷⁴ Recall authorities proclaiming that voting for representatives in Parliament was “the first Fundamental Privilege of the *Commons of England*.”²⁷⁵ Gouverneur Morris made a similar point when proposing that a person must be a citizen of the United States for fourteen years before being eligible for the Senate. Foreigners visiting the United States had numerous “privileges,” he said, but there were necessary limits, such as “being eligible to the great offices of Government.”²⁷⁶ The Convention agreed to a nine-year residency requirement for Senators, and seven years for Representatives, while also limiting the presidency to “natural born” citizens.²⁷⁷ Article IV, by contrast, made no distinction among privileges—it covered “all” of them.

Would nonresidents then be entitled under Article IV to cast a ballot in another state’s election or stand for election there? Or to hold office? (The

270. Patrick Henry, Remarks at Virginia Ratifying Convention (June 14, 1778), in 3 ELLIOT’S DEBATES, *supra* note 43, at 449.

271. Uncus, MD. ADVERTISER (Baltimore), Nov. 8, 1787, at 2.

272. *Id.*

273. See MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 46 (2000) (stating that “[g]rand juries refused to indict; and petit juries refused to convict” Americans on seditious libel charges).

274. See *supra* note 242 and accompanying text.

275. MACKWORTH, *supra* note 239, at 186.

276. Gouverneur Morris (Aug. 9, 1787), 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 238 (Max Farrand ed., 1911).

277. See U.S. CONST. art. I, § 2, cl. 2 (establishing the seven years’ residency requirement for Representatives); *id.* at art. I § 3, cl. 3 (establishing the nine years’ residency requirement for Senators); *id.* at art. II, § 1, cl. 4 (requiring that the President be “natural born”).

mainstream answer since at least the mid-nineteenth century has been resoundingly no.²⁷⁸) During the Confederation, some states enacted citizenship requirements for voting and holding public offices.²⁷⁹ Whether the Privileges and Immunities Clause was intended to override those provisions is not entirely clear as the record is so skimpy, and as a practical matter it never was more than a theoretical issue, if that. In what was likely the first general account of the privileges of citizenship, David Ramsay wrote in 1789 that “oaths of fidelity to the states were respectively administered soon after the declaration of independence, to all above a certain age. By these oaths, a compact was established between the state and the individuals; and those who took them acquired or confirmed their citizenship,” and thereby “acquired a right to the privileges and protection of citizens.”²⁸⁰ Ramsay also contended that “[c]itizenship confers a right of voting at elections, and many other privileges not enjoyed by those who are no more than inhabitants.”²⁸¹

And therein lay the problem. Thomas Burke, a North Carolina delegate to the Continental Congress, worried in 1777 that under the proposed Articles “the Inhabitants of our Neighboring States [would] have the privileges of Citizens in ours [to] insist upon the right of voting for Members of Our Legislature.”²⁸² Burke regarded this result as a “political absurdity,” urging that an amendment was necessary to avoid this result.²⁸³ Nevertheless, North Carolina agreed to the Articles, perhaps realizing that there were plenty of ways for states to assure that political privileges were

278. See *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371, 383 (1978) (“It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual’s identification with a particular State. . . . The same is true as to qualification for an elective office of the State.”); see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1417 & nn.128–29 (1992).

279. See, e.g., GA. CONST. of 1777, art. XIV (stating that voters must take oath or affirmation of allegiance); MD. CONST. of 1776, art. XXXV (requiring that holders of “any office of trust or profit” take an “oath of support and fidelity to this State”); N.Y. CONST. of 1777, art. VII (same as Georgia); N.C. CONST. of 1776, art. XII (stating that legislators and holders of “any office or place of trust” must “take an oath to the State”); *id.* at art. XL (adding that a “foreigner” who takes oath of allegiance is deemed a citizen after one year); S.C. CONST. of 1778, art. XXXVI (requiring oath for holders of “any office or to any place of trust, civil or military”); An Act to Confer Certain Rights and Privileges on Aliens, § 1 (Mar. 22, 1786), *reprinted in* PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA, *supra* note 109, at 4 (establishing that aliens could become citizens after residing in the state one year and taking an oath or affirmation of allegiance).

280. DAVID RAMSAY, A DISSERTATION ON THE MANNERS OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN 5 (Charleston, 1789).

281. *Id.* at 3.

282. Thomas Burke, *Notes on the Proposed Articles* (Nov. 1777), *reprinted in* AMERICA’S FOUNDING CHARTERS: PRIMARY DOCUMENTS OF COLONIAL AND REVOLUTIONARY ERA GOVERNANCE 869 (Jon L. Wakelyn ed., 2006).

283. *Id.*

not abused by noncitizens. The problem would be avoided by residency requirements for voting or office-seeking, which were common among the states at the time, and thereafter, including North Carolina.²⁸⁴ For example, South Carolina's constitution imposed a ten years' residency requirement for election as governor or commander-in-chief, five years residency for election to its privy council and senate, and three years to the house; voters must have been in residence for one year.²⁸⁵ Maryland imposed residency requirements varying from one to three years for certain civil and political offices.²⁸⁶ States also typically required voters to be property owners and taxpayers in the state.²⁸⁷

A person who lived for several years in a state, owned property there, and paid local taxes, would almost certainly be eligible for citizenship. If not, that person still would have forged substantial enough ties to the state to at least be considered a competent elector. In eighteenth-century thinking, office-holding was reserved for those with substantial and

284. N.C. CONST. of 1776, art. V (establishing one year residency requirement for Senate election); *id.* at art. VI (establishing one year residency requirement for House of Commons election); *id.* at art. XV (establishing five year residency requirement to be Governor). These residency requirements persisted into the nineteenth century and were recognized by courts. *See* *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 92–93 (1827) (“[The Privileges and Immunities Clause] is necessarily limited and qualified, for it cannot be pretended that a citizen of Rhode Island coming into this State to live, is *ipso facto* entitled to the full privileges of a citizen if any term of residence is prescribed as preliminary to the exercise of political or municipal rights.”). The same would be true with regard to the right of jury service. In *Ex Parte Virginia*, Justice Field wrote in dissent that “it was never contended that jury duty or jury service was included” among the privileges and immunities of citizenship. 100 U.S. 339, 366 (1879). However, juries traditionally were drawn from the vicinage as a matter of due process, which would have prevented noncitizens without residential ties to the community from serving. *See* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1660 (2000) (“Our law always has presumed that the defendant would be tried by representatives of the vicinage . . .”).

285. S.C. CONST. of 1778, art. XII (establishing seven year residency requirement for senate election); *id.* at art. XIII (requiring that voters for senate and house of representatives have been “a resident and inhabitant” for one year, own property and pay taxes; three years' residency was required for election to the House); *see* DEL. CONST. of 1792, art. IV, § 1 (establishing two year residency requirement to vote for president or legislators); GA. CONST. of 1777, art. IX (establishing six months' residency requirement for voting); VT. CONST. of 1777, ch. 222, § 6 (establishing one year residency requirement for voting).

286. MD. CONST. of 1776, art. II (establishing one year residency in county requirement and property ownership requirement for voting rights and election to house of delegates); *id.* at art. VI (requiring the same for senators); *id.* at art. XXVI (requiring three years of state residency and property ownership for election to council to the Governor); *id.* at art. XLII (requiring county residency and property ownership to vote for sheriffs).

287. *See, e.g.*, DEL. CONST. of 1792, art. IV, § 1 (requiring tax payment to vote for Governor or legislators); GA. CONST. of 1777, art. IX (requiring property ownership and tax liability for voting); MD. CONST. of 1776, art. II (establishing property requirements for voting and office-holding); S.C. CONST. of 1778, art. XII (requiring property qualification for Senate election); *id.* at art. XIII (requiring voters for Senate and House of Representatives to own property and pay taxes, and requiring property ownership for House election).

permanent connections to the state, and long-time residents with property and who paid taxes would surely qualify.²⁸⁸ One example is John Dickinson, who played a prominent role in drafting the Privileges and Immunities Clause of the Articles. Dickinson owned extensive properties in Pennsylvania and Delaware, and in the Confederation period he alternated between holding high offices in each, including simultaneously serving as President of the two states. At different times, he represented both states in the Continental Congress.²⁸⁹

No case ever arose testing the political rights of noncitizens under the clause. Early courts reached opposite conclusions about the question, but only in dicta. For example, Justice Washington in *Corfield* thought that “the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised,” was a privilege of citizenship protected by Article IV.²⁹⁰ By contrast, an influential Maryland decision concluded that the clause did not protect “the right of election, the right of holding offices, [or] the right of being elected.”²⁹¹ At a time when people did not relocate often or travel back and forth between states with frequency, the likelihood of the issue surfacing was next to nothing. This perhaps explains why the Framers chose not to create an exception to the Privileges and Immunities Clause for voting and office-holding, and why Burke’s concern did not produce any recorded stir of opposition. Just as they chose to jettison the Article’s exception for “paupers, vagabonds and fugitives,” the Framers may have decided the states had ample means to deal with the issue without tainting the ideal stated in the clause: unqualified equality. Then again, perhaps they did not even consider the issue—Burke’s comment came a decade before the Constitution, and no one else seemed to have been concerned.²⁹²

In summary, the words “subjects” and “citizens” meant the people of a

288. The eligibility of a longtime, property-owning, tax-paying resident to vote is evident from the various constitutional provisions for exercising the franchise. See *supra* notes 284–87.

289. See 6 AMERICAN NATIONAL BIOGRAPHY 567–68 (noting Dickinson’s various offices in Delaware and Pennsylvania); MILTON EMBICK FLOWER, JOHN DICKINSON: CONSERVATIVE REVOLUTIONARY 211 (1983) (“[F]or two months [in 1782] Dickinson was president of both Pennsylvania and Delaware.”).

290. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823).

291. *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. Gen. Ct. 1797), *rev’d on other grounds*, 3 H. & McH. at 576 (Md. Ct. App. 1800).

292. Natelson argues that suffrage was a “privilege,” but “not a privilege incident to citizenship.” Natelson, *supra* note 18, at 1157. He reasons that the franchise could not be a privilege of citizenship inasmuch as no state allowed all of its citizens to vote. But that was not a distinction anyone made at the time the Constitution was being considered, and the explanation does not fit well with the relationship between citizenship and voting. States had varying qualifications for suffrage, but they all required voters to be either citizens or residents with permanent attachment to the state.

state, either those who were born there or who had been granted that status. Although the privileges and immunities of citizens certainly included all of the legal mechanisms associated with preserving natural rights, they also encompassed more prosaic advantages, especially those associated with trade. In ordinary language at the time, a reference to the privileges and immunities of citizens or subjects meant all of the advantages that flowed from being a member of the polity. American republican ideology added an element not present in British constitutionalism: forbidding special privileges for classes of people. Republican citizenship was premised on equality, David Ramsay emphasized: “Each citizen of a free state contains, within himself, as much of the common sovereignty as another.”²⁹³

The disputes of the 1780s that were the immediate focus of the Privileges and Immunities Clause were not over the types of rights that underlay revolutionary demands or those described by Blackstone. Instead, they involved discriminatory trade regulations. That the proponents of the Constitution would view such biases as denials of privileges and immunities of citizenship is proof of a basic point: that the clause was intended to give Americans the same benefits they had as members of the British empire. They were to be treated not as aliens when in other states, but as fellow citizens. No matter where Americans roamed, did business, or owned property within the United States, they would be afforded the same legal protections and advantages that the citizens of those states possessed.

At a minimum, “privileges and immunities” signified the right to travel, residency, property, and equal commerce. But “privileges and immunities” also encompassed much more: all of the freedoms and benefits a state granted to its people. The natural rights to life, limb, liberty and property were abstractions; what counted was the actual enforcement of those rights through the institutions of government. For that reason, Blackstone could say that the “rights and liberties” themselves were “defined by these several statutes.”²⁹⁴ They were either natural liberties not sacrificed upon entering society, or liberties provided by the state as substitutes for those rights.²⁹⁵

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

The fact that both terms, “privileges” and “immunities,” were applied to all sorts of liberties belonging to the people, including natural rights like freedom of conscience, does raise a question about word usage. Why

293. RAMSAY, *supra* note 280, at 3.

294. 1 BLACKSTONE, *supra* note 19, at *125.

295. *Id.*

would the Framers employ “privilege” to describe a God-given liberty such as the right of free conscience, when to eighteenth-century speakers the word implied something granted by the government? Several commentators recently have argued that the “Privileges and Immunities” referred to in Article IV and the Articles were entirely distinct from natural rights. According to this view, privileges and immunities were “legal benefits granted to citizens or groups by official grace,” and thus “represented a very different juristic category from natural rights,”²⁹⁶ which “were inherent in one’s humanity.”²⁹⁷ Whereas “privileges and immunities were . . . bestowed,”²⁹⁸ “[n]atural rights, to the extent their exercise did not harm others, were inalienable.”²⁹⁹ A 1765 pamphlet, written by Stephen Hopkins (the Rhode Island governor and a future signer of the Declaration) would seem to support this interpretation, as he concluded that “the *British* subjects in *America*, have equal rights with those in *Britain*; that they do not hold those rights as a privilege granted them, nor enjoy them as a grace and favor bestowed; but possess them as an inherent, indefeasible right”³⁰⁰ For this reason, it has been contended that the Framers deliberately did not include the words “liberties” or “rights” in Article IV. In the debates over the Articles, Congress considered and rejected a draft, probably by John Dickinson, that would have provided: “The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies.”³⁰¹ Congress also deliberately chose “privileges and immunities,” rather than “rights and privileges.”³⁰² This occurred in 1776–77, a decade before the Philadelphia Convention, and no record was left to explain the choice.

The argument that the “privileges and immunities” protected by Article IV did not encompass natural rights has serious flaws, starting with the

296. Natelson, *supra* note 18, at 1166.

297. *Id.* at 1168.

298. *Id.* at 1174.

299. *Id.* at 1166.

300. STEPHEN HOPKINS, *THE RIGHTS OF COLONIES EXAMINED* 9 (Providence, William Goddard 1765). Hopkins’ pamphlet was reprinted in London in 1766 under the title, *THE GRIEVANCES OF THE AMERICAN COLONIES CANDIDLY EXAMINED* (J. Almon 1766).

301. ARTICLES OF CONFEDERATION AND PERPETUAL UNION (John Dickinson’s proposed draft) (July 12, 1776), art. VI, *reprinted in* 5 J. CONT. CONG. 1774–1789, at 546, 547 (Worthington Chancey Ford et al. eds., 1904), *quoted in* Natelson, *supra* note 18, at 1168–69. For unknown reasons, Congress omitted the quoted provisions in the next draft of the Articles. *See* 5 J. CONT. CONG., *supra*, at 676 (Aug. 20, 1776) (This draft struck the comity proposals in the Dickinson draft entirely, probably because Congress was working on an alternative.); 9 J. CONT. CONG., *supra*, at 899 (Nov. 13, 1777) (adopting “privileges and immunities,” rather than “rights and privileges,” without explanation).

302. *See* 9 J. CONT. CONG., *supra* note 301, at 888–89 (Nov. 11, 1777) (showing that “rights and privileges” appeared in alternative drafts of Articles).

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

One answer to why the word “privileges” could be understood as encompassing natural rights was its traditional usage, derived from a past in which rights had been wrested from the crown and were tightly constrained by law. Or it may have been used to reflect the reservation in *Cato’s Letters*, that liberties like free speech must be exercised “within the Bounds of Manners and Discretion.”³⁰³ The likeliest explanation, however, is that these were familiar terms used by eighteenth-century writers to depict all the advantages of being a citizen or subject. In political literature, the words “rights” and “privileges” often had the same meaning, as in several examples given above from state constitutions and congressional resolutions. As we have seen, a common application of these terms was to summarize colonists’ claims against the British, namely that Americans were entitled to the same legal protections and advantages as subjects residing in England.³⁰⁴

The decisive question, then, is what Americans understood to be the rights of citizenship, rather than the precise labels that were used to describe them. The status of citizen or subject was tied to the mythic social contract between the government and the people, in which individuals entered society in order to protect their personal liberties and property. The Vermont Constitution of 1777 reflected this philosophy: “That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community.³⁰⁵ [E]very member of society hath a right to be protected in the enjoyment of life, liberty and

303. 3 TRENCHARD & GORDON, *supra* note 267, at 304.

304. See *supra* text accompanying notes 200–09 and note 209 (providing examples of the use of “privileges” and “immunities” as summaries of rights demanded by Americans).

305. VT. CONST. of 1777, art. VI.

property.”³⁰⁶ Above all, citizens were entitled to the rule of law and its established processes. The Massachusetts Constitution of 1780 was one of several providing that “no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law.”³⁰⁷ Government officials were charged with assuring the protection of their people. The Georgia Constitution in 1777 required the governor to take an oath promising to “use my utmost endeavors to protect the people thereof in the secure enjoyment of all their rights, franchises, and privileges.”³⁰⁸ Pennsylvania legislators likewise were obliged to swear not to “lessen or abridge” the “rights and privileges” of the people, “as declared in the constitution of this state.”³⁰⁹

Being a citizen or subject thus entailed that the government was obligated to respect and protect that person’s rights. The close association between the protections that went with citizenship, and the liberties ultimately being protected, may be the reason why writings of the period usually did not distinguish between the two. This is why Blackstone could write that “rights and liberties”³¹⁰ “consist in a number of private immunities,” as defined “by these several statutes.”³¹¹ Both legal and popular writers used the terms as comprehensive depictions of the rights of subjects or citizens. For legal documents, terms like “privileges and immunities” were boilerplate expressions signifying that everything was included, as in the various charters and grants already discussed.

State constitutions also did not always distinguish carefully between the natural and positive sources of rights and privileges. Georgia provided in its 1777 constitution that “Americans, as freemen,” were asserting “the rights and Privileges they are entitled to by the laws of nature and reason,” the last three words of which could have been lifted straight from Blackstone.³¹² Drafters also knew how to qualify such terms with limiting

306. *Id.* at art. IX.

307. MASS. CONST. of 1780, pt. 1, art. XII; *see* N.H. BILL OF RIGHTS, art. XV (1784). For provisions similar to the Massachusetts constitution, *see* MD. CONST. of 1776, art. XXI (“That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.”); N.C. BILL OF RIGHTS, art. XII (1776) (“That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.”); S.C. CONST. of 1778, art. XLI (substantially same as Maryland Constitution, *supra*).

308. GA. CONST. of 1777, art. XXIV.

309. PA. CONST. of 1776, “Plan or Frame of Government,” § 10.

310. 1 BLACKSTONE, *supra* note 19, at *125.

311. *Id.*

312. GA. CONST. of 1777, pmb.; *see also* N.H. CONST. of 1776, pmb. (noting that the British had deprived Americans “of our natural and constitutional rights and privileges”). On

words, as in Vermont's 1786 constitution: "The declaration of the *political* rights and privileges of the inhabitants of this State, is hereby declared to be a part of the Constitution of this Commonwealth; and ought not to be violated on any pretence whatsoever."³¹³ Article IV's coverage was limited only by its requirement that the rights be ones pertaining to state citizenship.

The popular understanding of "privileges and immunities" in relation to subjects or citizens paralleled these technical usages, as a reference to the totality of advantages a person gained from that status. In an English novel published in 1771, the author posed a character imploring another to "at least allow, that by the union the Scots were admitted to all the privileges and immunities of English subjects; by which means multitudes of them were provided for in the army and navy, and got fortunes in different parts of England, and its dominions."³¹⁴ Catherine Macaulay, the eighteenth-century English historian and supporter of radical causes, wrote in a 1775 tract about the plight of "[t]he poor Canadians," who "instead of being put in possession of all the privileges and immunities of English subjects," had found their "civil and religious rights" subject to the "indulgence" of the crown, leaving the colonists "in a more abject state of slavery than when they were under the French government."³¹⁵

To counter the many examples of privileges and immunities used to depict natural rights, one commentator has argued that a shift in definitions was underway, starting during the agitation of the 1760s that eventually led to the Revolution, whereby "liberty" began to be "applied exclusively to natural liberty," while "right" could either mean a natural right or legal privilege.³¹⁶ "After Independence, people routinely distinguished between rights and privileges," he claimed.³¹⁷ Aside from the Hopkins quotation above, which predated the Revolution, the only example offered of such a distinction was from an 1805 book by Mercy Warren, in which she wrote that the "principles" of the American Revolution were grounded in the "rights of men, the privileges of Englishmen, and the claim of Americans."³¹⁸ Neither of these writers was addressing whether the "Privileges and Immunities of Citizens" could include rights that ultimately

Blackstone's very similar phrasing, see *supra* text accompanying note 210.

313. VT. CONST. of 1786, § 39 (emphasis added).

314. TOBIAS SMOLLETT, THE EXPEDITION OF HUMPHRY CLINKER 104 (London, Harrison & Co. 1771).

315. CATHARINE MACAULAY, AN ADDRESS TO THE PEOPLE OF ENGLAND, SCOTLAND, AND IRELAND, ON THE PRESENT IMPORTANT CRISIS OF AFFAIRS 16 (Bath, R. Cruttwell 1775).

316. Natelson, *supra* note 18, at 1141–42.

317. *Id.* at 1142.

318. *Id.* at 1142 n.129 (quoting MERCY OTIS WARREN, 2 HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION 306 (Boston, Manning & Loring 1805)).

were based on natural law. Rather, as will be explained more fully, they were making broad claims about the validity under natural law of the colonists' demands or the Revolution itself.³¹⁹

As the earlier discussion showed, there were many instances during and after the Revolution in which Americans referred to natural rights as privileges. When the Continental Congress asserted that Americans were fighting for “our dearest privileges,” for example, they had in mind the entire constellation of rights owed to British citizens, including property rights.³²⁰

The rights associated with property were universally referred to in the Anglo-American world as natural liberties, “sacred and inviolable,” as Blackstone said, not benefits given by grace.³²¹ The title to all real property in America might theoretically run backward to the king, as in England, but that did not make ownership dependent on the continued indulgence of the crown (especially not ownership of personal property).³²² “For it is a part of the liberties of *England* . . . that the King may not enter upon or seise any man’s possessions upon bare surmises without the intervention of a jury.”³²³ If Article IV did not protect property rights, it would mean that the rights of American citizens venturing into sister states would be inferior to aliens under British law, who at least were allowed to own personal property while on British soil. But the clause must have extended to property rights of all types—as courts consistently have held³²⁴—for otherwise an American could be treated as an alien while venturing into a sister state.

Property rights illustrate why Americans and Britons could refer to them both as privileges of citizenship guaranteed by the state, as well as natural liberties. The underlying right was based on natural law; the privilege was the entitlement of citizens or subjects to own property in the state and have it be protected by the government. Tench Coxe, a well-known public

319. *See infra* text accompanying notes 339–43.

320. Letter to the Inhabitants of the Province of Canada, *supra* note 199, at 85.

321. 1 BLACKSTONE, *supra* note 19, at *135.

322. Natelson has contended that “[u]nder English law, tenure of land was a privilege because all land nominally belonged to the Crown.” Natelson, *supra* note 18, at 1165. None of the sources he cites terms property ownership a “privilege.” As explained in the next paragraph of text, the privilege was the right of citizens to own property in the state, but the underlying right to ownership of the property was a natural right of persons. *See infra* text accompanying note 325.

323. 2 THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW, IN THEORY AND PRACTICE; DEFINING AND INTERPRETING THE TERMS OR WORDS OF ART (London, Giles Jacob & T.E. Tomlins eds., Strahan 1797) (unpaginated, entry for “Inquest”).

324. *See, e.g.*, *McBurney v. Young*, 133 S.Ct. 1709, 1716 (2013) (quoting *Corfield v. Coryell*, 6 F.Cas. 546, 552 (C.C.E.D. Pa. 1823)) (noting that the right “to ‘take, hold and dispose of property, either real or personal,’ has long been seen as one of the privileges of citizenship”).

figure and author on political economy who had been a member of the Continental Congress and served in the Washington administration, wrote in 1795 that Pennsylvania granted “foreigners” “[a] privilege, almost peculiar to this state,” namely “that of buying and holding lands and houses within this commonwealth, without relinquishing their allegiance to the country in which they were born.”³²⁵ The privilege, in other words, was the right to purchase and possess property in the state, which usually was reserved for citizens. Once the property was owned by someone, that person had a natural right to keep it and the government was obligated to protect that ownership as a privilege of citizenship.

The right of conscience was also recognized in many of the first state constitutions as a natural liberty enjoyed by all people,³²⁶ and it would be surprising to find anyone saying that this freedom could be denied to visitors. In order to “guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind,” New York’s constitution asserted “that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, *to all mankind*.”³²⁷ Georgia’s constitution provided: “*All persons*

325. TENCH COXE, *A VIEW OF THE UNITED STATES OF AMERICA* 67 (Dublin, P. Wogan et al. 1795); see Curtis, *Historical*, *supra* note 187, at 1098–104 (noting the synonymous use of “rights,” “privileges,” and “immunities” during the ratification debates and in the First Congress); see also Virginia Resolves on the Stamp Act, Virginia House of Burgesses (May 29, 1765), *reprinted in* 10 *JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA, 1761–1765*, at 358, 360 (John Pendleton Kennedy ed., 1907) [hereinafter *Virginia Resolves on the Stamp Act*] (claiming that Virginia colonists were entitled to “all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of *Great Britain*,” as declared by their charters with James I).

326. See, e.g., DEL. DECLARATION OF RIGHTS of 1776, § 2 (“That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings.”); GA. CONST. of 1777, art. VI; KY. CONST. of 1792, art. XII, § 3 (“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.”); MD. CONST. of 1776, art. XXXIII (“[I]t is the duty of every man to worship God in such manner as he thinks most acceptable to him.”); N.H. BILL OF RIGHTS, art. V (1784) (“Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason.”); N.Y. CONST. of 1777, art. XXXVIII; N.C. CONST. of 1776, art. XIV (same as Georgia); PA. DECLARATION OF RIGHTS, art. II (1776) (same as Georgia); PA. CONST. of 1790, art. IX, § 3 (“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.”); VT. DECLARATION OF RIGHTS, ch. 1, art. III (1777) (“That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding . . . and that no authority can . . . interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.”); VT. DECLARATION OF RIGHTS, ch. 1, art. III (1786) (substantially the same as ch. 1 art. III of 1777 constitution); VA. BILL OF RIGHTS, art. XVI (1776) (“[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience . . .”).

327. N.Y. CONST. of 1777, art. XXXVIII (emphasis added).

whatever shall have the free exercise of their religion.”³²⁸ These were typical of state conscience clauses.³²⁹ Other rights delineated as inalienable by state constitutions almost always were described as belonging to every person.³³⁰

As with property, the abstract natural right of conscience³³¹ was implemented through constitutions and charters. A majority of early state constitutions went beyond declaring freedom of conscience as a principle, to expressly protecting the right of all individuals to “worship” or to the “free exercise of religion.”³³² Some forbade or regulated specific practices: official establishments or compelled support of religion,³³³ forcing people

328. GA. CONST. of 1777, art. LVI (emphasis added).

329. *See supra* note 326 (providing examples of conscience clauses in state constitutions).

330. *See* KY. CONST. of 1792, art. XII, § 1 (“[A]ll men, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community but in consideration of public services.”); *id.* at art. XII, § 2 (stating that the people “have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper”); MASS. CONST. of 1780, pt. 1, art. I (“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”); N.H. BILL OF RIGHTS, art. II (1784) (“All men have certain natural, essential, and inherent rights, among which are—the enjoying and defending life and liberty; acquiring, possessing and protecting property—and, in a word, of seeking and obtaining happiness.”); PA. DECLARATION OF RIGHTS, art. I (1776) (“That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”); *id.* at art. V (“And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.”); PA. CONST. of 1790, art. IX, § 1 (substantially same as Articles 1 and 5 of 1776 declaration of rights); VT. DECLARATION OF RIGHTS, ch. 1, art. I (1777) (“That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”); *id.* at art. VI (“[T]hat the community hath an indubitable, unalienable and indefeasible right, to reform, alter or abolish government, in such manner as shall be, by that community, judged most conducive to the public weal.”); VT. DECLARATION OF RIGHTS, ch. 1, art. I (1786) (substantially the same as art. I of 1777 constitution); *id.* at art. III (substantially the same as art. III of 1777 constitution); *id.* at art. VII (same as art. VI of 1777 constitution); VA. BILL OF RIGHTS, § 1 (1776) (“[A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”); *id.* at § 3 (“[W]hen any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”).

331. *See supra* note 326 (providing examples of conscience clauses in state constitutions).

332. *See supra* note 326 (providing examples of protections for religious exercise in state constitutions).

333. *See, e.g.*, DEL. CONST. of 1776, art. XXIX; N.J. CONST. of 1776, art. XIX; N.C. CONST.

to attend religious services outside their faith,³³⁴ requiring religious tests to hold public office,³³⁵ or otherwise depriving a person of civil rights on account of religious belief.³³⁶ The Constitution likewise barred religious tests for federal offices and specified that affirmations could be given instead of oaths, the latter being offensive to some religions.³³⁷ Every one of these items reflected a specific history of religious discrimination and of hard-fought privileges established to overcome such intolerance. The delineated privileges were what really counted, not the abstract natural rights they protected. Privileges were specific undertakings by the state, which often were commitments to act in ways that would safeguard or at least not interfere with the realization of natural rights. They were not uniform across the country, as the varying state provisions attest.

American thinking about the nature of government underwent profound change in the course of the Revolution, but not in ways that would affect the meaning of Article IV. The break from England did not greatly alter the substance of individual rights that Americans claimed they were owed by their governments or even the means for their protection. As earlier described, on both sides of the Atlantic the rights to life, limb, liberty, and

of 1776, art. XXXII; PA. DECLARATION OF RIGHTS, art. II (1776) (providing examples of constitutional limits on religious establishments). South Carolina's constitution designated the "Christian Protestant religion" as "the established religion of this State," but provided that all other denominations "shall enjoy equal religious and civil privileges." S.C. CONST. of 1778, art. XXXVIII. Georgia provided that no one could be obliged to "support any teacher or teachers except those of their own profession." GA. CONST. of 1777, art. LVI; *see also* MD. CONST. of 1776, art. XXXIII (enabling legislature to impose general tax "for the support of the Christian religion," and stating that individuals could designate "any particular place of worship or minister" to receive their remittances, or they could specify that it be used "for the benefit of the poor").

334. *See, e.g.*, DEL. DECLARATION OF RIGHTS, § 2 (1776); PA. DECLARATION OF RIGHTS, art. II (1776); VT. DECLARATION OF RIGHTS, ch. 1, art. III (1777) (providing examples of constitutional limits on requiring religious practices).

335. *See, e.g.*, MD. CONST. of 1776, art. XXXV; N.C. CONST. of 1776, art. XXXII; PA. CONST., "Plan or Frame of Government," § 10 (1776) (providing examples of bans on religious tests). Georgia, however, required members of the state assembly to be Protestants. GA. CONST. of 1777, art. VI.

336. *See, e.g.*, DEL. DECLARATION OF RIGHTS, § 3 (1776); PA. DECLARATION OF RIGHTS, art. II (1776); MD. CONST. of 1776, art. XXXIV (allowing affirmations rather than oaths); N.J. CONST. of 1776, art. XIX; PA. CONST., "Plan or Frame of Government," § 10 (1776) ("[R]eligious societies or bodies . . . for the advancement of religion or learning, or for other pious and charitable purposes, shall [enjoy] the privileges, immunities and estates which they were accustomed to enjoy. . . under the laws and former constitution . . ."); S.C. CONST. of 1778, art. XXXVIII (allowing affirmations instead of oaths); VT. DECLARATION OF RIGHTS, ch. 1, art. III (1777). Some states forbade ministers from public office. *See, e.g.*, N.Y. CONST. of 1777, art. XXXIX.

337. U.S. CONST. art. VI, cl. 3 (prohibiting religious tests); *id.* at art. I, § 3, cl. 6 (stating that the Senate "shall be on Oath or Affirmation" in impeachment trials); *id.* at art. II, § 1, cl. 7 (requiring that the President take specified "Oath or Affirmation"); *id.* at art. VI, cl. 3 (requiring that Senators and Representatives give an "Oath or Affirmation, to support this Constitution").

property were thought to be founded on natural law, rather than being the products of social convention.³³⁸ However, Americans adopted the radical view that some—but not all—of these natural rights were inalienable, that is, not subject to legislative limitation.

When the statements of Hopkins, Warren, and others in a similar vein are examined in context, they all assert that the British had broken their contract with Americans, which the British were obligated to honor as a matter of natural law. John Adams posited that the king had “enter[ed] into a contract with his subjects, and stipulate[d] that they should enjoy all the rights and liberties of Englishmen forever, in consideration of their undertaking to clear the wilderness, propagate Christianity, pay a fifth part of ore, &c.”³³⁹ If the king abrogated “the contract of state,” he continued, the people “were released from their allegiance as soon as he deprived them of their liberties.”³⁴⁰ The colonists would then “recur to nature,” and reconstruct society by consent of the people.³⁴¹

Hopkins, in referring to the “inherent indefeasible right” of Americans, meant that they “and their ancestors, were free-born subjects, justly and naturally intitled to all the rights and advantages of the *British* constitution,” which he also termed its “privileges and advantages.”³⁴² He could not understand why, given the many sources of revenue available to Parliament, it would choose “to abridge the privileges, and lessen the rights of the most loyal and dutiful subjects . . . who have long enjoyed, and not abused or forfeited their liberties.”³⁴³ Hopkins based his argument partly on natural law. The Stamp Act and related excise laws, he explained, were regarded by colonists as “a manifest violation of their just and long enjoyed rights,” because “they who are taxed at pleasure by others, cannot possibly have any property, can have nothing to be called their own; they who have no property can have no freedom, but are indeed reduced to the most abject slavery.”³⁴⁴ This was precisely the point of the famous Massachusetts Circular Letter of 1768, in which the House of Representatives of the colony asserted “an essential, unalterable right, in nature, engrafted into the British constitution, as a fundamental law, and ever held sacred and

338. See *supra* text accompanying notes 211, 214–15, 306, and notes 307, 330; see also *infra* text accompanying note 367 (providing examples of recognizing natural rights to life, liberty and property).

339. John Adams, *Novanglus, or A History of the Dispute with America (VIII)*, BOSTON GAZETTE, Mar. 6, 1775, reprinted in 4 THE WORKS OF JOHN ADAMS 121, 126 (Charles Francis Adams, ed., Boston, Little & Brown Co. 1851).

340. *Id.*

341. *Id.*

342. HOPKINS, *supra* note 300, at 9.

343. *Id.* at 22.

344. *Id.* at 31.

irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own.”³⁴⁵

In these statements, the natural right of property was linked with a privilege owed to all British citizens: representation in the body that taxed them. “The position, that taxation and representation are inseparable, is founded on the immutable laws of nature,” the Massachusetts legislature wrote in a 1768 letter to the British Chancellor.³⁴⁶ Whatever its ultimate justification, the principle that a person could not be taxed without consent was firmly rooted in the history of successful parliamentary protests against the king’s efforts to extract taxes and other revenue impositions by his own authority. David Hume, in his history of England, described the attempts by Charles I to raise funds “without consent of parliament, and even increasing them at pleasure,” as “such an incongruity in a free constitution, where the people, by their fundamental privileges, cannot be taxed but by their own consent,” that it “could no longer be endured by these jealous patrons of liberty.”³⁴⁷ The result was the Petition of Right, in which Charles I agreed to Parliament’s demand not to compel “any Guift, Loane, Benevolence, Tax, or such like Charge, without comon consent by Acte of Parliament.”³⁴⁸ Parliament grounded its claims on “their Rights and Liberties according to the Lawes and Statutes of this Realme.”³⁴⁹ Blackstone noted that a subsequent statute enacted under William and Mary strengthened Parliament’s claim by providing that it was “illegal” for the crown to impose levies for money “by pretence of prerogative, without grant of parliament.”³⁵⁰

Essayists and public councils throughout America proclaimed that there were “unalienable rights,” over which “the supreme power hath no controul”—as a county convention of delegates considering a proposed Massachusetts constitution declared in 1778.³⁵¹ State constitutions likewise delineated some, but not all natural rights as inalienable. “Among the natural rights,” the New Hampshire bill of rights declared in 1784,

345. Massachusetts Circular Letter (Feb. 11, 1768), in DOCUMENTS OF AMERICAN HISTORY 66, 67 (Henry Steele Commager ed., 1948) [hereinafter DOCUMENTS OF AMERICAN HISTORY].

346. Letter from Mass. House of Representatives to Earl of Camden, Lord High-Chancellor of Great-Britain (Jan. 29, 1768), PA. GAZETTE, Apr. 14, 1768, at 2.

347. 5 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 392 (London, T. Cadell 1789).

348. 5 STATUTES OF THE REALM, *supra* note 232, at 24.

349. *Id.*

350. 1 BLACKSTONE, *supra* note 19, at *136.

351. RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX 10 (Newbury-Port, Mass., John Mycall 1778) [hereinafter ESSEX RESULT] (*The Essex Result*, drafted by Theophilus Parsons, later the Chief Justice of Massachusetts, was the resolution of delegates from Essex County, Massachusetts, at a 1778 county convention to consider a proposed state constitution.).

“some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.”³⁵² In making these claims, Americans recognized the difference between entitlements based on legal rights—such as those contained in charters and statutes—and natural rights, which existed irrespective of positive enactments. In a 1775 essay, John Adams asked the question: “How, then, do we New Englandmen derive our laws?” Answering himself, Adams contended that colonial laws came “not from parliament, not from common law, but from the law of nature, and the compact made with the king in our charters.”³⁵³

These references to natural law invoked highly abstract principles—the rights of consent to legislation and to property. When it came to specific grievances, however, what Adams and others demanded was nothing other than the legal rights they traditionally had as British subjects. This is why “rights and liberties,” or similar expressions, were used by Americans as summations of their claims against the British. Adams wrote that “[t]he patriots of this province desire nothing new; they wish only to keep their old privileges.”³⁵⁴ The Connecticut assembly resolved in 1764 that Americans had “a Right, to the general and essential Privileges of the *British Constitution*, as well as the rest of their Fellow-Subjects,” and with regard to the colony of Connecticut in particular, to the “general Privileges and Immunities . . . granted and declared” in its charter.³⁵⁵ The Stamp Act, regarded by Americans as an internal tax imposed without the consent of the colonies, would “take way Part of our Antient Priviledges,” wrote Thomas Fitch, Connecticut’s elected governor.³⁵⁶ The New York Assembly pled to George III in 1775 that “we wish only to enjoy the rights of Englishmen, and to have that share of liberty, and those privileges secured to us, which we are entitled to upon the principles of our *free and happy Constitution*.”³⁵⁷ Being treated as a British subject meant receiving all the protections and advantages of English law, regardless of its source.

All of the liberties of the British people were protected by statute or charter, and hence were concessions of the King, theoretically subject to modification. “The famous English *Magna Charta* is but an act of

352. N.H. BILL OF RIGHTS., art. IV (1784).

353. Adams, *supra* note 339, at 122.

354. *Id.* at 131.

355. Reasons Why, *supra* note 241, at 655.

356. Letter from Thomas Fitch to Richard Jackson (Dec. 7, 1764), in 2 THE FITCH PAPERS: CORRESPONDENCE AND DOCUMENTS 303, 304 (Conn. Historical Soc’y ed. 1920).

357. Petition of New York General Assembly to George III (March 25, 1775), PA. GAZETTE, Apr. 26, 1775, at 2; *see also* Virginia Resolves on the Stamp Act, *supra* note 325, at 360 (stating that colonists were entitled to “all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of Great Britain”).

parliament,” Roger Sherman pointed out in an essay during the ratification debates of 1787, “which every subsequent parliament has had just as much constitutional power to repeal and annul, as the parliament which made it had to pass it at first.”³⁵⁸ Nevertheless, it was these statutes that defined the “private immunities”³⁵⁹ of Britons; they embodied the “*residuum* of natural liberty” not sacrificed by individuals entering society.³⁶⁰ Blackstone stated that the political or civil liberties “of a member of society” were “no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.”³⁶¹ It was unlikely in the extreme that these laws would be repudiated, or that charters would be repealed. They were the law of the land, and Americans were demanding that the crown and Parliament respect them.

Long after the Constitution went in effect, American courts began to distinguish between “constitutional rights,” and mere “privileges” granted by the government—the difference between what the government must grant and what it may bestow at discretion.³⁶² In American law, that distinction was understandable as courts recognized that the Constitution was a freestanding basis for legal claims, dependent on no statute for its authority. British constitutionalism, as explained, did not distinguish the two when it came to determining a person’s rights—all rights were based on statute or common law. Americans thus needed to make a determination unnecessary in British law; whether a claim was valid as a matter of constitutional right, as opposed to being based on statutory or common law—a “privilege” in the sense that it was revocable.

The right-privilege distinction would cause enough grief for later generations, but it did not befoul Article IV. The clause was not intended to distinguish between constitutionally-mandated rights—which would include natural rights—and benefits given to citizens by the grace of the state. Rather, its purpose was to assure that visitors from other American states would be treated like local citizens, not as aliens. And those citizens

358. Roger Sherman, *A Countryman (II)*, NEW HAVEN GAZETTE, Nov. 22, 1787, reprinted in *ESSAYS ON THE CONSTITUTION*, *supra* note 40, at 219.

359. 1 BLACKSTONE, *supra* note 19, at *125.

360. *Id.*

361. *Id.* at *121. Blackstone followed conventional social contract theory: “[b]ut every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase.” *Id.*; see also N.H. BILL OF RIGHTS, art. III (1784) (“When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others; and, without such an equivalent, the surrender is void.”).

362. See generally William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (providing background on the right-privilege distinction in early American cases before arguing that the dichotomy is not viable in light of subsequent developments in law and society).

lived under state constitutions that protected their rights, some of which were grounded ultimately in natural law.

In the context of Article IV, it made no difference whether a “privilege and immunity” was a universal right of humankind, or one only for the citizens of a state. If the right at issue was based on natural law, a state presumably would extend it to the visitor as a human right—the same treatment given to state citizens. This was reflected in the wording of state constitutional provisions protecting rights that were identified as natural and inalienable. As we have seen with regard to rights of conscience, these instruments declared the right to be inherent in “mankind,” belonging to “all persons,” or similar words denoting universality of coverage.³⁶³ And since the privileges and immunities of citizenship included access to courts and entitlement to equal treatment under the law, Article IV would require that any natural right that a state recognized for its own citizens be extended to all other Americans. In this manner, Article IV protected the property and personal liberties of nonresident traders or investors by giving them the same status as state citizens before the law.

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

Omitting natural rights from the ambit of privileges and immunities also would have produced difficult interpretive problems. As noted above, natural rights were divided into two types, “the alienable and unalienable rights of mankind.”³⁶⁴ There was broad agreement among Americans at the time about the existence of inalienable rights and their origin in natural

363. See *supra* text accompanying notes 211, 214–15, 306, and notes 307, 330; see also *infra* text accompanying note 367 (examples recognizing natural rights of all persons to life, liberty and property).

364. ESSEX RESULT, *supra* note 351, at 10.

law.³⁶⁵ However, only a few rights were by consensus deemed natural and inalienable: equality of all persons, conscience, property, and the freedom to reform, alter, or abolish the government.³⁶⁶ With the exception of liberty of conscience, the rights usually cited as inalienable corresponded to the absolute rights detailed by Blackstone. The Declaration of Independence asserted that “all men are created equal”—which Blackstone did as well—and identified “life, liberty, and the pursuit of happiness” as “among” the “unalienable rights” that were “endowed by their Creator.”³⁶⁷ State bills of rights, where they existed, were similar in identifying inalienable rights, with several adding a provision that the people had the right “to reform, alter, or abolish, government.”³⁶⁸

As to other rights, there was much less concurrence about whether they were based on natural law, common law, or some other conventional source. Gordon Wood has written that the dramatic events of the last quarter of the eighteenth century—the return of the American colonies to a state of nature followed by adoption of written constitutions by thirteen sovereignties—created “a peculiar confusion in the American mind about the nature of law.”³⁶⁹ Constitutions, written instruments with prescriptive force, were in one way decidedly modern—they had the force of law “as the command of a sovereign will”—while at the same time they were intended to establish natural justice, an ancient concept rooted in religious precepts.³⁷⁰ Similarly, the common law was an exercise in gradually recognizing, over the course of generations, the commands of natural law. Jurists would sometimes use the terms interchangeably and also equated natural law with the law of nations.

The “alienable” natural rights were ones that could be surrendered “[W]HEN THE GOOD OF THE WHOLE REQUIRES IT,” according to a typical political resolution.³⁷¹ Public interest could trump all but the most “sacred

365. See R. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401, 403 (2007) (“During the early years of our Republic, the existence and relevance of natural law was taken for granted by virtually all serious writers about the law.”).

366. See *supra* text accompanying notes 326–29, 352, and notes 326, 330 (examples of natural and inalienable rights).

367. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see 1 BLACKSTONE, *supra* note 19, at *48 (“[A]ll the members of society are naturally equal . . .”); see also *supra* text accompanying notes 211, 214–15.

368. PA. DECLARATION OF RIGHTS, art. V (1776). For other examples of state-declared inalienable rights, see *supra* text accompanying notes 326–29, 352, and notes 326, 330.

369. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 292 (1969).

370. *Id.*

371. ESSEX RESULT, *supra* note 351, at 14.

and irrevocable” of rights, the Massachusetts Circular Letter contended.³⁷² State constitutions did not differentiate between natural and positive rights, except in declaring that inalienable rights were natural or inherent. They also varied greatly in the rights they covered. Likewise, the federal Bill of Rights likewise did not identify rights by their pedigree. Following the pattern of state constitutions, some of its protections were labeled “rights”—for example: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”³⁷³ Or no descriptor was used, as in the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”³⁷⁴ Some of the protected rights were often regarded as natural and inalienable, such as free exercise of religion and liberty of press. Most of its guarantees, however, were ones commonly referred to as privileges, even though the Bill of Rights labeled them “rights.” Examples include the “right” of trial by jury in civil and criminal cases, as well as some of the procedural protections for criminal suspects such as “the right to a speedy and public trial.”³⁷⁵ When debating the proposed bill of rights in Congress, Madison commented that its purpose was “securing the rights and privileges of the people of America.”³⁷⁶

If the coverage of Article IV turned on whether a right was natural or conventional, that determination would have to be made in every case. But there was no authoritative source to answer this question.³⁷⁷ State judicial decisions would provide little guidance since the distinction was irrelevant to legal disputes. People had opinions about which rights were natural, but they were expressed in different contexts than discerning the privileges and immunities protected by Article IV. For practical purposes, such as drafting a bill of rights, there was no point in labeling a right to be natural or not, so long as it was recognized as a constitutional guarantee.

Consider liberty of press, which some writers referred to as a natural right, while others called it a privilege, and some even used both words. State constitutions equivocated on its status. Some referred to press rights generally, as when Georgia declared in 1789 that “[f]reedom of the press . .

372. DOCUMENTS OF AMERICAN HISTORY, *supra* note 345, at 66.

373. U.S. CONST. amend. IV.

374. *Id.* at amend. I.

375. *See id.* at amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”); *id.* at amend. VII (stating that “the right of trial by jury shall be preserved” in common law cases for more than twenty dollars).

376. Madison, *supra* note 256, at 738 (Aug. 15, 1789).

377. *See* Helmholz, *supra* note 365, at 413 (finding that a “definitive list” of natural rights did not exist, “neither in the cases nor in the treatises”).

. shall remain inviolate.”³⁷⁸ Others stated that “the people” were entitled to liberty of press, which could imply that it was reserved for members in the polity.³⁷⁹ Only Delaware, in its 1792 constitution, specifically limited press rights to state citizens.³⁸⁰ The different wording for the press provisions compared to those for expressly declared inalienable rights could have stemmed from uncertainty over their status as natural rights. Regardless, ascertaining whether these press protections were meant to secure natural rights or conventional privileges would be challenging. It is hard to imagine that the coverage of the Privileges and Immunities Clause was meant to depend on such determinations. Writers frequently published books and pamphlets outside their home states, and articles were reprinted in newspapers up and down the coast as well as across the sea. Later generations of Americans worried about the writings of outside agitators, notably in the Southern resistance to Northerners mailing abolitionist literature to their states.³⁸¹ But this was not an issue in the 1780s. In any event, Southern states would not allow abolitionist writings by their own citizens.³⁸²

Another example of the difficulty in distinguishing natural and conventional rights is the right to bear arms. Blackstone termed it an auxiliary right, “a public allowance, under due restrictions, of the natural right of resistance and self-preservation.”³⁸³ The English Bill of Rights provided that “the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.”³⁸⁴ Only four states provided constitutional guarantees for the right to bear arms, and

378. GA. CONST. of 1789, art. IV, § 3; *see also* MD. CONST. of 1776, art. XXXVIII (“[L]iberty of the press ought to be inviolably preserved.”); N.H. BILL OF RIGHTS, art. XXII (1784) (“Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved.”); N.C. DECLARATION OF RIGHTS, art. XV (1776) (“[F]reedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained.”); S.C. CONST. of 1778, art. XLIII (“[L]iberty of the press be inviolably preserved.”); VA. BILL OF RIGHTS, § 12 (1776), (“[F]reedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.”).

379. *See* PA. DECLARATION OF RIGHTS, art. XII (1776) (“[T]he people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”); VT. DECLARATION OF RIGHTS, ch. 1, art. XIV (1777) (“[T]he people have a right to freedom of speech, and of writing and publishing their sentiments.”).

380. *See* DEL. CONST. of 1792, art. I, § 5 (“The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty.”).

381. *See* Jay, *supra* note 262, at 805–07.

382. *See* MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 158 (2000) (describing Southern statutes prohibiting publication of abolitionist papers).

383. 1 BLACKSTONE, *supra* note 19, at *139.

384. ENG. BILL OF RIGHTS, 1 W. & M., c.2, § 7 (1689).

these mainly concerned militia service, and none said the right was inalienable.³⁸⁵ Some provisions for bearing arms actually were obligations of citizenship. New York's Constitution of 1777 made it the "duty" of every man "to be prepared and willing to defend" the state, and then declared that the militia must be "armed and disciplined, and in readiness for service."³⁸⁶

Should the liberty to possess and use firearms be characterized as a privilege, inasmuch as it was "a public allowance" and regulable by law? Or was it a natural right based on protecting the right to defend oneself? Answering that question would be unavoidable if "privileges" under Article IV could not be natural rights. Such an exercise, however, would miss the point of how privileges and immunities functioned in early American society. In the abstract, people had the natural right of self-defense. Instruments like the English or American bills of rights enforced the right by recognizing the privilege of bearing arms. Thus, the right to bear arms was both rooted in natural law and considered a privilege—if not a duty—of citizenship.

CONCLUSION

The "Privileges and Immunities of Citizens" most likely was understood at the time of its creation and ratification as a shorthand expression for all the rights a state afforded its citizens, regardless of their origin. With independence, Americans lost all the rights they had as British subjects, which included the privileges of residing, owning property, or engaging in trade most anywhere in the empire. As separate sovereigns after the Revolution, the individual states could and did discriminate against citizens of other states in ways that would have been impermissible when Americans were British subjects. Article IV was intended to forbid such discriminations, as part of a larger plan to restore the privileges Americans

385. See MASS. CONST. of 1780, pt. 1, art. XVII ("The people have a right to keep and to bear arms for the common defence."); N.C. DECLARATION OF RIGHTS, art. XVII (1776) ("That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace."); PA. CONST. of 1790, art. IX, § 21 ("That the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned."); VT. DECLARATION OF RIGHTS, ch. 1, art. XV (1777) ("That the people have a right to bear arms for the defence of themselves and the State."); VT. CONST. of 1786, ch. 1, art. XVIII (same).

386. N.Y. Const. of 1777, art. XL. The full provision reads:

And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; . . . the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.

Id.; see also VA. BILL OF RIGHTS, § 13 (1776) ("That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state.")

had before Independence. It did not break new ground—the Articles of Confederation did the same, albeit with more verbiage. But whereas the Articles provided no means to enforce its comity clause, the Constitution enabled the creation of a federal judiciary with power to do so.

This explanation of the clause fits the historical record perfectly. It avoids the messy interpretive tangles that would follow if natural rights were excluded from Article IV's protection, as some scholars have argued. And it escapes the subjectivity involved in deciding whether a right is sufficiently "fundamental" in the sense of being "basic to the maintenance or well-being of the Union."³⁸⁷ Moreover, it elucidates why the Framers did not include the word "rights" in the clause. Doing so would have been redundant in this context. (One of the dictionary definitions of "right" in the eighteenth century was "privilege"³⁸⁸). The "Privileges and Immunities" of citizenship were not inalienable natural rights per se. Rather, they encompassed every right and advantage that a state bestowed on its citizens, including those essential to protecting natural rights.

387. *Baldwin v. Fish & Game Com'n of Mont.*, 436 U.S. 371, 388 (1978).

388. See JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN (unpaginated, entry for "right") (London, J. Rivington & Sons 1782) (including "privilege" as one definition of "right"); JOHNSON, *supra* note 96 (unpaginated, entry for "right") (including "immunity" and "privilege" as alternative meanings for "right").