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## ARTICLES

### THE UNDERUSED AND OVERUSED PRIVILEGES AND IMMUNITIES CLAUSE

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#### ABSTRACT

*In this Article, the authors argue that Article IV's Privileges and Immunities Clause has been seriously underused due to a series of puzzling and highly dubious Supreme Court decisions imposing artificial and counterproductive limitations on the Clause's reach. They urge that with the removal of these harmful and misguided doctrinal restrictions, the Clause would serve the important function it was intended to serve: the avoidance of interstate friction and the prevention of the degeneration of the nation's federal system. At the same time, the authors warn against the dangerous and unsupportable efforts by libertarian scholars to misuse the doctrine growing out of this Clause's interpretation to create a constitutional portal by which the Clause can be manipulated into a textual source of unenumerated individual rights that would seriously threaten core notions of American democracy. Careful examination of both the Clause's constitutional text and doctrine, as well as the relevant historical context, demonstrates that the libertarian approach unjustifiably transforms a structural provision designed to deal exclusively with issues of constitutional federalism into a sweeping judicial power to create individual rights found nowhere in the Constitution's text. It is, then, only by avoiding the doctrinal underuse and the scholarly overuse that the Privileges and Immunities Clause can serve the valuable structural role it was clearly intended to serve.*

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## INTRODUCTION

When the Constitutional Convention met in Philadelphia in the spring of 1787, one of the primary dangers facing the newly founded United States was the very real risk that the loosely configured Union established by the Articles of Confederation would soon break apart. From its beginning, the confederation contemplated by the Articles was just that—a loosely connected group of sovereign states, uneasily joined together by little more than their combined victory over Great Britain.<sup>1</sup> Many citizens still considered themselves citizens of their state first and of their nation second (if at all).<sup>2</sup> And the Articles of Confederation had done preciously little to seek to change those attitudes. It purposely declined to establish a strong federal government, effectively giving in to (or protecting, depending on the perspective of the individuals who had created the document) the concept of vigorous state sovereignty.<sup>3</sup> It was thus not surprising that, in the nation's years under the Articles' rule, individual states were often far more concerned with their own economic survival than with that of the nation as a whole.<sup>4</sup>

It is almost a cliché of U.S. history that one of the fatal defects of the Articles of Confederation was the absence of any ability of the federal government to enforce its directives.<sup>5</sup> Yet, while much has been written about this shortcoming, far less attention has been paid to the equally disconcerting scarcity of sufficient mechanisms for either preventing or resolving interstate disputes within the Confederation. Despite this disproportionate fixation in the scholarly literature

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<sup>1</sup> See JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* 89 (2007) (“The dominant view of most prominent and ordinary American colonists in 1776 was that they were joining together in common cause to defeat the British leviathan, but this union was a temporary necessity, less a marriage than a forced friendship.”).

<sup>2</sup> See *id.* at 88-89 (“[I]t is essential to remember that the term ‘United States’ began as a plural rather than singular noun, more like the modern-day European Union than a latter-day Roman Empire. Allegiances remained primarily local . . . . The only thing that had held the states together, and only barely, was their mutual opposition to the authority of the British Empire. Now that the war was won, the states began to go their separate ways.”).

<sup>3</sup> Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 *SAN DIEGO L. REV.* 249, 255 (1997) (“The states as entities were the sole source of the political authority of the federal government under the Articles, whereas under the Constitution, the federal government derived its authority directly from the states as well as the people.”).

<sup>4</sup> See *infra* Section I.C (discussing interstate trade disputes as incentive for Privileges and Immunities Clause).

<sup>5</sup> See, e.g., Smith, *supra* note 3, at 253-54 (“The Articles of Confederation were often criticized by Federalists, and even Antifederalists, as creating a relatively weak general government that was unable to exert its supremacy over the state governments. This is the standard view of the general government under the Articles held by modern commentators as well.” (footnotes omitted)).

on federal enforcement capabilities, the goal of those attending the Constitutional Convention was not only to build a more effective federal government, but also to create the tools of interstate dispute resolution that the Articles of Confederation so sorely lacked.<sup>6</sup>

The Framers included several provisions in the new Constitution designed to help knit the nation more tightly together and lessen many of the interstate tensions that had persisted under the Articles. Assigning the power to control interstate commerce to the federal government is a prime example of this type of provision.<sup>7</sup> Similarly, the insertion of prohibitions on the ability of states to apply tariffs to exports and imports was designed to improve interstate relations.<sup>8</sup> Perhaps the most important provision in the Constitution for managing interstate relations is Article IV,<sup>9</sup> which includes the Full Faith and Credit Clause,<sup>10</sup> the Fugitive Slave Clause,<sup>11</sup> and, the subject of this Article, the Privileges and Immunities Clause.<sup>12</sup>

The Privileges and Immunities Clause is a holdover from one of the few provisions in the Articles of Confederation designed to promote a sense of national unity.<sup>13</sup> The parallel provision in the Articles included a preamble, which declared that the intention of the provision was to “better . . . secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union.”<sup>14</sup> In its final form, in Article IV of the Constitution, the Clause reads: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>15</sup> That the Clause was intended to serve the same pro-interstate harmony purpose as its predecessor in the Articles of Confederation was confirmed by Charles Pinckney, who reminded the

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<sup>6</sup> See *infra* Part I (describing one purpose of Privileges and Immunities Clause as preventing or addressing interstate disputes).

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

<sup>8</sup> *Id.* art. 1, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s [sic] 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 Control of the Congress.”).

<sup>9</sup> See John M. Gonzales, *The Interstate Privileges and Immunities: Fundamental Rights or Federalism?*, 15 CAP. U. L. REV. 493, 499 (1986) (“All of article IV, except perhaps for section 3, clause 2, prohibits in one way or another state imposed obstacles to effective federalism.” (footnote omitted)).

<sup>10</sup> U.S. CONST. art. IV, § 1.

<sup>11</sup> *Id.* art. IV, § 2, cl. 3.

<sup>12</sup> *Id.* art. IV, § 2, cl. 1.

<sup>13</sup> See *infra* Section I.C (examining unifying function of predecessor clause of Privileges and Immunities Clause found in Articles of Confederation).

<sup>14</sup> ARTICLES OF CONFEDERATION of 1777, art. IV; see also *infra* Section I.C.

<sup>15</sup> U.S. CONST. art IV, § 2, cl. 1.

Convention that the Privileges and Immunities Clause was “formed exactly upon the principles of the 4th article of the present Confederation.”<sup>16</sup> That the Clause was seen as a vital tool for holding the young country together was confirmed by Alexander Hamilton, who wrote in the Federalist Papers that “it may be esteemed the *basis of the Union* that ‘the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.’”<sup>17</sup> Yet, despite this emphasis the Framers put on the federalism-preserving function of the Clause, it has not often been used for its intended purpose. To the contrary, invocation of the Privileges and Immunities Clause is the exception, not the rule, even in situations of potentially serious interstate friction or conflict.<sup>18</sup>

The main reason that the Clause has failed to develop into a significant protector of a healthy interstate federalism is, simply, that the judiciary has significantly underused the Clause for its intended purpose. For reasons never adequately explained (to put it mildly), the Court has superimposed nontextual, artificial limitations on the Clause’s supervisory scope. Early in the nation’s history, the courts limited the Clause’s protections to include only those rights deemed sufficiently “fundamental,” even though nothing in the provision’s text even suggests, much less dictates, such a limitation.<sup>19</sup> One hundred twenty-five years later, the courts allowed the states to deny even fundamental rights to noncitizens provided they could demonstrate the existence of a sufficiently significant state interest.<sup>20</sup> But perhaps most puzzling is the Supreme Court’s continued insistence that the Clause is inapplicable to regulations imposed on corporations, even though corporations have long been deemed “citizens” for other constitutional purposes.<sup>21</sup>

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<sup>16</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (Max Farrand ed., 1911); see also David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 795 (1986) (“[The Privileges and Immunities Clause] was derived from article IV of the Articles of Confederation which James Wilson described at the Constitutional Convention as ‘the Article of Confederation making the Citizens of one State Citizens of all.’” (quoting NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 441 (A. Koch ed., 1966))).

<sup>17</sup> THE FEDERALIST NO. 80, at 463 (Alexander Hamilton) (Am. Bar Ass’n 2009) (emphasis added).

<sup>18</sup> See *infra* Part II (examining courts’ underuse of Privileges and Immunities Clause, by which they reserve use for protection of “fundamental rights”).

<sup>19</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (finding act prohibiting noncitizens from gathering oysters during certain months did not infringe upon Privileges and Immunities Clause because it did not address fundamental rights).

<sup>20</sup> *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

<sup>21</sup> See, e.g., U.S. CONST. art. III, § 2, cl. 1 (extending federal judicial power to cases arising between “citizens” of different states). The Court has never hesitated to treat corporations as “citizens” for this purpose. See, e.g., *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 61 (1809), *overruled in part on other grounds by Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844) (agreeing that corporations are citizens for purposes

Rather than recognize the important role the Clause was intended to play as a tool for preserving interstate harmony, the courts have instead mysteriously chosen to focus on finding ways to cabin the Clause's ability to enable federal judicial oversight of state legislation that threatens to give rise to interstate friction or conflict. This failure to grasp the purpose the Clause was so obviously designed to serve led to the provision's dramatic underuse by the federal judiciary, which continues to this very day. This in turn resulted in a significant gap in enforcement of the constitutional efforts to preserve interstate harmony. In one of the strangest perversions of American constitutionalism, apparently in order to make up for its own artificially created limitations on the protective power of the Privileges and Immunities Clause, the Court developed an entirely atextual doctrine known as the Dormant Commerce Clause, primarily to prevent the very type of interstate discrimination that was the initial target of the Privileges and Immunities Clause.<sup>22</sup> In what is perhaps the height of perverse irony, the Court has "construed" this nonexistent clause to restrict state legislative authority in ways far more invasive than a principled construction of the Privileges and Immunities Clause would have allowed.<sup>23</sup> Because a constitutional doctrine grounded nowhere in text naturally imposes no limitations on the Court's ability to "interpret" it, the Court has allowed itself to invade state sovereign legislative power in ways that adherence to the text would never permit. This Article's suggested solution is simple: (1) remove the artificial, counterproductive, nontextual limitations on the Privileges and Immunities Clause that the Court has created over the years, and (2) replace the illegitimate, nontextual, unrestrained Dormant Commerce Clause as the primary constitutional guarantor of interstate federalism with this more principled, textually grounded, and disciplined version of a *real* constitutional provision.

In what adds irony on top of irony, while the Court has all but gutted the Privileges and Immunities Clause as an effective or meaningful constitutional provision, a number of important libertarian constitutional theorists have sought to *overuse* the Clause by misleadingly using the restrictive manner in which the Court has construed it as a basis for construing the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>24</sup> These scholars have done so in order to constitutionalize protections for Lockean "natural rights," which are nowhere mentioned in the text of the Constitution. They achieve this end by drawing on the Court's delineation of "fundamental" rights—to which the Court confines

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of diversity jurisdiction, but holding that citizenship is determined by state of incorporation, rather than by citizenship of shareholders), *superseded by statute*, Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415, *as recognized in* *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

<sup>22</sup> See *infra* Part IV (comparing scope of Privileges and Immunities Clause to that of Dormant Commerce Clause).

<sup>23</sup> See *infra* Part IV (citing cases in which Court has struck down burdensome state regulation that is not discriminatory).

<sup>24</sup> U.S. CONST. amend. XIV, § 1.

Article IV's Privileges and Immunities Clause—as a means of defining, for purposes of the Fourteenth Amendment's Privileges or Immunities Clause, what makes up the “privileges or immunities of citizens of the United States” that states are constitutionally prohibited from invading.<sup>25</sup> These scholars have reasoned that because the Supreme Court has construed the words “privileges *and* immunities” of Article IV to include only fundamental rights, the use of somewhat similar language in the “Privileges *or* Immunities” Clause is appropriately construed to refer to the exact same fundamental rights.<sup>26</sup>

To be sure, a superficial textual similarity appears to exist between the two provisions: both include the words “privileges” and “immunities.” Moreover, there is some historical basis on which to conclude that the drafters of the Fourteenth Amendment intended to draw on interpretation of the earlier provision.<sup>27</sup> But this suggested fungibility of the two provisions willfully ignores the important textual differences between them. Article IV refers to the privileges and immunities of “citizens of the several states,” while the Fourteenth Amendment provision refers to privileges or immunities of “citizens of the United States.”<sup>28</sup> One cannot, of course, interpret the words “privileges” and “immunities” in a vacuum; before one can interpret their meaning, one must know the referent—i.e., privileges and immunities of *what* or *whom*? For example, to conclude that the privileges or immunities of citizens of the United States are fungible with privileges or immunities of citizens of the Soviet Union, simply because both include the same predicate phrase, would obviously be ridiculous. In effect, however, that is what these constitutional scholars do. That the rights of citizens of the several states on the one hand and of citizens of the United States on the other hand are necessarily identical is by no means obvious.

More importantly, these libertarian scholars neglect the vitally important contextual differences between the Court's use of fundamental rights in interpreting the two provisions. In limiting privileges and immunities of citizens of the several states, as provided for in Article IV, to “fundamental” rights, the Court was *expanding* state legislative power by *restricting* the Constitution's restraint of that legislative power.<sup>29</sup> But while the judiciary confined the reach of the Privileges and Immunities Clause to fundamental rights in order to limit the unelected judiciary's ability to interfere with democratically enacted state regulation, libertarian scholars seek to employ the concept of fundamental rights in order to *expand* the Constitution's *restriction* of democratically accountable state legislative power. From the perspective of constitutional democratic theory, these are diametrically opposite purposes and results. Yet despite these overwhelmingly important differences, these scholars have sought to insert a

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<sup>25</sup> See *infra* Part III.

<sup>26</sup> See *infra* Part III.

<sup>27</sup> See WILLIAM B. GLIDDEN, CONGRESS AND THE FOURTEENTH AMENDMENT 37 (2013).

<sup>28</sup> U.S. CONST. art. IV, § 2, cl. 1; *id.* amend. XIV, § 1.

<sup>29</sup> See *infra* Section II.A.

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square peg into a round hole: they employ a constitutionally limiting and democratically expansive concept contained in one provision in order to expand countermajoritarian restrictions reducing democratic power in interpreting another provision. In doing so, they attempt to subvert the democratic process and retroactively amend the Constitution to include protections for a whole array of undefined, “unenumerated” rights.<sup>30</sup>

This Article rejects both the judicial underuse and academic overuse of the Privileges and Immunities Clause. It seeks to invest in the Clause the power to serve as an important tool to assure interstate harmony and reduce interstate friction. Part I lays out what we believe to be the correct interpretation of the Privileges and Immunities Clause. It takes the position that the Privileges and Immunities Clause, properly construed, does not provide free-standing substantive protections for any particular set of rights. Rather, it does nothing more than prohibit states from discriminating against out of state residents in *any* manner that is likely to engender animosity between two (or more) states. Part I defends this suggested interpretation by examining the text of the Clause, its place within the structure of the Constitution, and the purpose that led the Framers to include the Clause in the first place. This inquiry reveals that the Clause was written in relativistic language, was placed in a section of the Constitution that dealt exclusively with interstate relations rather than with individual rights, and was intended to promote interstate harmony by deterring retaliatory actions between states.<sup>31</sup> In other words, the Clause was included in the Constitution to help balance each state’s relationship within the newly formed nation and to ensure that each individual state respected both the sovereignty of its neighbors and the limits of its own powers, consistent with sound notions of interstate federalism.<sup>32</sup>

Part II discusses how the courts have significantly underused the Clause by reining in its broad antidiscrimination command. The jurisprudence of the Clause has artificially limited its scope by restricting it to only those discriminatory acts or policies that affect “fundamental rights.”<sup>33</sup> The courts have also carved out additional exceptions allowing states to pass discriminatory legislation as long as the state can show that there is a “valid independent reason” for the legislation and that “the degree of discrimination bears a close relation”

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<sup>30</sup> See *infra* Part III.

<sup>31</sup> See *infra* Part I (analyzing Clause according to text and linguistic and historical context).

<sup>32</sup> See Samuel C. Kaplan, “*Grab Bag of Principles*” or *Principled Grab Bag?*: *The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 475 (1998) (“[There is] a particular kind of federalism that one might call lateral federalism, which involves privileging the traditions of a great number of states over those of the few.”); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 921 n.406 (2013) (relying on Kaplan’s discussion to define “issue of ‘lateral federalism’ between states”).

<sup>33</sup> See *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230). Judicial underuse is discussed more fully *infra* Part II.



to that reason.<sup>34</sup> This additional restraint on the antidiscrimination command of the Clause has exacerbated its judicial underuse. Additionally, the courts have excluded corporations from the Clause's protections.<sup>35</sup> We will show that this exclusion not only is inconsistent with judicial treatment of corporations in many other areas of constitutional law, but also undermines the very purpose of the Clause.<sup>36</sup>

Part III introduces the opposite end of the misinterpretation of the Clause, exploring its significant overuse by many in the legal academy. This Part critiques the seriously flawed way libertarian constitutional scholars have sought to employ the Clause as a means of constitutionalizing protection for "natural rights."

In this Article, we propose a revised interpretation of the Privileges and Immunities Clause that rejects the artificial and undermining restrictions the Court has imposed over the years and replaces it with a simpler construction designed to reflect both the textually dictated structure and the well-accepted purposes the Clause was designed to serve. We conclude by considering how judicial adoption of our interpretation of the Clause could be used to replace the renegade and undisciplined Dormant Commerce Clause.

#### I. THE PRIVILEGES AND IMMUNITIES CLAUSE AS A TOOL OF INTERSTATE FEDERALISM

The words of the Privileges and Immunities Clause expressly prohibit one state from denying to citizens of other states the privileges and immunities it extends to its own citizens.<sup>37</sup> By preventing states from discriminating against nonresidents, the Clause was designed to prevent the type of state actions that would aggravate a state's neighbors and lead to retaliatory responses. Put simply, the Clause was included in the Constitution simultaneously to encourage interstate cooperation and deter interstate friction due to retaliatory discrimination. The type of interstate harmony contemplated by the Clause demands that states both recognize the limits of their own sovereignty and respect the sovereignty of their neighbors. As this Part will show, an examination of the text of the Clause, its position within the structure of the Constitution, and the underlying purpose behind its insertion into the document, supports reading the Clause as an important tool of interstate federalism concerned more with promoting interstate harmony than with protecting any identifiable set of "rights."

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<sup>34</sup> See *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

<sup>35</sup> See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), *overruled on other grounds by* *United States v. Se. Underwriters Ass'n*, 322 U.S. 533 (1944).

<sup>36</sup> See *infra* Section II.B.

<sup>37</sup> U.S. CONST. art. IV, § 2, cl. 1.

A. *Textual Analysis*

We begin our analysis by examining what the text of the Privileges and Immunities Clause actually says. The full text of the Clause reads as follows: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>38</sup> What interpretive clues, if any, does this sentence provide? The first point to note is that while the Clause applies only to “citizens,” it applies equally to the citizens of “each state.”<sup>39</sup> This language clearly dictates that *all* citizens are protected by the Clause, and they are protected regardless of whether they are citizens of New York, Pennsylvania, South Carolina, or Virginia. The particular state in which a resident claims citizenship is irrelevant in determining whether the Clause applies.

Second, the text states that the citizens referred to at the beginning of the Clause are “entitled” to something, and that “something” is identified by the phrase “privileges and immunities.”<sup>40</sup> This section of the text has perhaps proven the most troublesome for judges and scholars alike. There is a tendency to want to assign a concrete definition to the meaning of the phrase “privileges and immunities” and to limit the protection of the Clause to this identifiable set of “privileges” and “immunities.” Some scholars argue that the phrase “privileges and immunities” included those rights previously referred to as the “Rights of Englishmen.”<sup>41</sup> Others posit that the most natural understanding is that “privileges and immunities” are akin to Lockean natural rights.<sup>42</sup> This attempt to define the phrase seems to make sense on its face: How can we know if citizens have been deprived of something to which they are “entitled” if we don’t know what that something is?

An example of this definitional quest is a 2009 article by originalist scholar Robert Natelson.<sup>43</sup> Professor Natelson reached the conclusion that the phrase did not refer to any *specific* set of rights or protections, but rather that it referred to any dispensation granted by the positive law of the state.<sup>44</sup> Notably, Professor

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 100-06 (2011).

<sup>42</sup> As discussed *infra* Part III, this idea of a Lockean meaning behind the phrase is employed by many originalist scholars who argue that the Privileges or Immunities Clause of the Fourteenth Amendment incorporates substantive protections for Lockean rights into the Constitution.

<sup>43</sup> See generally Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009).

<sup>44</sup> *Id.* at 1187 (“Under the original meaning of the Comity Clause, if a state bestowed a benefit (other than mere recognition of a natural right) on its citizens as an incident of

Natelson ultimately agrees with our position that the Clause does not require a state government to *provide* any particular substantive right, but rather only *prohibits* discriminatory treatment based on residency once a state has chosen to grant dispensation as a matter of positive law to its own citizens.<sup>45</sup>

Professor Natelson's historical inquiry is, in many ways, well supported. For example, references to the idea of privileges and immunities date back to medieval England and initially referred to special favors or exemptions granted by the Crown.<sup>46</sup> Under the English feudal system, all land was owned by the Crown and was granted to certain individuals in exchange for feudal services.<sup>47</sup> Typically, the recipient of a land grant would owe military service to the crown, but sometimes land would be granted in exchange for other services, rents, or displays of loyalty.<sup>48</sup> The Crown could grant landowners exemptions from their feudal service in the form of either a privilege—such as the right to hold a manorial court, a monopoly on holding a market within a certain area, or the ability to engage in some forms of limited self-government—or an immunity, such as exemption from taxation or suspension of the feudal dues previously owed.<sup>49</sup>

The drafters of town (and later colonial) charters began including language guaranteeing residents that they would have the same privileges and immunities as certain other “model” towns.<sup>50</sup> This charter language reinforces the idea that “privileges and immunities” were positive grants from the Crown, rather than natural rights.<sup>51</sup> If the phrase was intended to refer only to *fundamental* or *natural* rights to which every Englishman was entitled, there would be no need to positively grant them through charter. Rather, they would be protected through the English common law. Therefore, the very fact that charters expressly included such language provides further support for the idea that the phrase was understood to refer to grants of positive law. Additionally, the comparative language to other towns would not make sense if the phrase referred to the “fundamental rights” protected by the Magna Carta, for there would be no need to claim the same privileges and immunities as a neighboring town if the phrase were intended to refer to rights possessed by all English subjects. Yet even this appealing interpretation of the phrase “privileges and immunities” not only is

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citizenship, then that state was required to extend the same benefit to American citizens visiting from other states.”).

<sup>45</sup> *Id.*

<sup>46</sup> Burrell, *supra* note 41, at 8.

<sup>47</sup> *Id.* at 11.

<sup>48</sup> *Id.* at 11-12.

<sup>49</sup> *Id.* at 8-9 (“Royal privileges and immunities to municipalities and merchant associations gave authority, for example, to have markets and fairs, to trade, and to exercise self-government.”).

<sup>50</sup> *See id.* at 97.

<sup>51</sup> *Id.* at 88-89.

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unnecessary as a means of understanding the Clause's impact, but also establishes an interpretive framework entirely inconsistent with the Constitution's unambiguous refusal, except in the rarest cases, to impose restrictions on a state's ability to deal with its own citizens.

On the four corners of the Clause, the fatal flaw in the "natural rights" interpretation is that it interprets the words "privileges and immunities" in a textual vacuum. Those words do not float in the air; they are, rather, a part of an entire sentence that necessarily enriches, clarifies, and limits the meaning of those words. Even a cursory examination of the words that immediately follow demonstrates that the Clause is actually framed in relative terms, not in absolutes. The phrase "privileges and immunities" is inextricably connected to the subsequent words "of the several states."<sup>52</sup> This language necessarily transforms the inquiry from, "What are 'privileges and immunities'?" into, "What are the 'privileges and immunities of citizens of the several states'?" These words make the definitional inquiry an inherently relativistic one. In effect, the Clause incorporates by reference only those privileges and immunities each state chooses to provide to its citizens. To be sure, those states may choose to determine the content of those privileges by reference to some notion of natural rights, but the fact remains that unless the governing structure of the particular state chooses to recognize and enforce those natural rights, they are, as a practical matter, of no constitutional significance. When the dust settles, then, the Clause, by its terms, leaves it up to each state to decide which "privileges and immunities" it will offer to its citizens and makes no demand that the state provide any specific "privilege" or "immunity." What the Clause does require is that whatever "privilege" or "immunity" each individual state chooses to grant to its citizens, the "citizens of each state" cannot be denied that same "privilege" or "immunity" when they come within that state's jurisdiction. In other words, by its terms, the Clause prohibits a state from discriminating against noncitizens by denying them some right or benefit that it offers to its own citizens. And that is all that it does.

Because on its face the text itself employs only a relativistic antidiscrimination command, it does not require an in-depth historical analysis in order to discern this textual meaning. Yet it is exactly this type of inquiry into the content of what was meant by the phrase "privileges and immunities" that has led to the types of under- and overuse criticized throughout this Article. Our suggested interpretation of the Clause, however, draws from the text its explicit prohibition on discrimination based on citizenship and combines this textual imperative with a structural and purposive analysis in order to arrive at an understanding of the Clause as an essential tool of interstate federalism—nothing more, and nothing less.

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<sup>52</sup> U.S. CONST. art. IV, § 2, cl. 1.

B. *Structural Analysis*

If one is not convinced by reliance on the unambiguous directives of the four corners of the Clause's text that the Clause in no way imposes any free-standing substantive restrictions or obligations on state power to deal with its own citizens, surely one must be convinced by an examination of the structure of the Constitution itself. It was not until almost a century later that the Constitution was amended to impose generally phrased limits on a state's ability to deny specific rights to its own citizens.<sup>53</sup> No one would deny that, at the time of the document's original drafting and ratification, there appeared in constitutional text virtually no direct limits on the government's ability to invade individual rights. It was not until enactment of the Bill of Rights—the first ten amendments to the document—that even the *federal* government was constitutionally obligated to respect an array of individual rights. And the Supreme Court made clear early on that those provisions had absolutely no impact on states' power over their citizens.<sup>54</sup> As the Court recognized, the goal of the Constitutional Convention was to create an acceptable structure of a new *federal* government—one that would avoid the pitfalls that plagued the Articles of Confederation, while at the same time preserving a significant role for the states and preventing a return to the tyranny of King George.<sup>55</sup> With this end in mind, the document produced by the Convention constituted a blueprint for how to form and restrain a federal government of limited powers. It was not a list of demands upon the state governments. Instead, the basic premise undergirding the entire endeavor was that the new Constitution would give specific powers to the federal government, and that any powers not given would remain with the people and the states.<sup>56</sup> The bulk of the document was dedicated to setting up a structure for using and separating these powers. In fact, the only direct commands given to the states were provided in the negative. States could not, for example:

enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.<sup>57</sup>

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<sup>53</sup> *Id.* amend. XIV, § 1.

<sup>54</sup> *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (“[The Bill of Rights] contain[s] no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g.*, THE FEDERALIST NO. 84, at 498 (Alexander Hamilton) (Am. Bar Ass’n 2009) (arguing that Bill of Rights was unnecessary because Constitution created government of limited powers, and there was no need to “declare that things shall not be done which there is no power to do”); *see also* U.S. CONST. amend. X (reserving to states and people powers not given by Constitution to federal government).

<sup>57</sup> U.S. CONST. art. I, § 10.

They must also accept the supremacy of federal law and the federal Constitution.<sup>58</sup> And they must comply with the relativistic clauses included in Article IV. Thus, the idea that any provision of the original Constitution would impose obligations on states to guarantee a litany of individual rights to its citizens is wholly anachronistic.

The relativistic interpretation of the Clause also fits better within the framework of Article IV itself. As a whole, Article IV deals almost exclusively with the relationships among the states or the relationship between the states and the federal government. It governs potentially divisive interstate topics such as the recognition owed by a state to the legal decrees of other states,<sup>59</sup> the duty to extradite fugitives (including, initially, fugitive slaves),<sup>60</sup> the methods of adding new states to the union and the division or joinder of existing states,<sup>61</sup> the delegation of control over “territories” to the national government,<sup>62</sup> and a directive that the federal government would guarantee to each individual state a republican form of government.<sup>63</sup> Each of the problems dealt with in this provision potentially threatens the success of a united country, and each was dealt with in the same Article that contains the Privileges and Immunities Clause. When viewed in its structural context, it seems clear that Article IV is very much concerned with the idea of preserving harmony, both among the states and between the states and the federal government. Thus, the Clause’s

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<sup>58</sup> *Id.* art. VI, cl. 2.

<sup>59</sup> *Id.* art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

<sup>60</sup> *Id.* art. IV, § 2, cl. 2-3 (“A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

<sup>61</sup> *Id.* art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

<sup>62</sup> *Id.* art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

<sup>63</sup> *Id.* art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

words, read as a whole, as well as its constitutional structure and the surrounding constitutional and political ether, demonstrate beyond question that the Privileges and Immunities Clause is concerned exclusively with the need to achieve and preserve interstate harmony and has no relevance whatsoever to a state's obligation to guarantee to its citizens so-called "natural rights."

C. *Purposive Analysis: Preventing Interstate Disputes*

While the text of the Privileges and Immunities Clause and the structural clues discussed above provide substantial support for the idea that it was adopted exclusively to serve as a tool of interstate federalism, an examination of the political context surrounding its promulgation strongly reinforces the notion that the Framers also viewed the Clause as an essential device to help keep the new nation intact. Judges, scholars, and commentators may disagree on the scope of the protections offered by the Clause, but most agree that the underlying purpose motivating its inclusion in the Constitution was a desire to prevent interstate disputes brought about by discriminatory state regulations.<sup>64</sup> This understanding of the purpose of the Clause stems in part from the existence of its predecessor provision in the Articles of Confederation. On its face, that provision stated that it was intended to "better . . . secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union . . ." <sup>65</sup> During the Constitutional Convention, James Wilson singled out this forerunner and

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<sup>64</sup> See, e.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978) ("Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States."); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939) ("The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own."); LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* 1250-51 (3d ed. 2000) ("Courts and commentators from the beginning have agreed that the clause facilitates national unification by promising federal protection for citizens who venture beyond the borders of their own state.").

<sup>65</sup> ARTICLES OF CONFEDERATION of 1781, art. IV. The full text of the clause reads as follows:

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

*Id.* For an extensive discussion of the various drafts of this clause and what implications they may have for its interpretation, see Burrell, *supra* note 41, at 218-26.

emphasized its unifying function by declaring it “the Article of Confederation making the Citizens of one State Citizens of all.”<sup>66</sup> Charles Pinckney confirmed that the Clause in Article IV of the new Constitution was “formed exactly upon the principles of the 4th article of the present Confederation.”<sup>67</sup> And Alexander Hamilton wrote that “[i]t may be esteemed the *basis of the Union* that ‘the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.’”<sup>68</sup> Even the judiciary, which, as will be discussed below, has long cabined the scope of the Clause to only those rights it deems “fundamental,” has acknowledged the underlying purpose of the Clause as promoting a national peace and avoiding interstate disputes of the type that constantly harried the Confederation.<sup>69</sup>

Further support for the idea that the purpose of the Clause was to prevent interstate friction can be gleaned from the context in which the Constitution was written. Trade disputes between states were a constant source of dissension under the Confederation and weighed heavily upon the minds of the Framers during the convention. James Madison, for example, questioned the efficacy of the proposed constitution to ease these types of disputes, asking:

Will it prevent trespasses of the States on each other? Of these enough has been already seen. He 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.<sup>70</sup>

The Federalist Papers echo this concern about the potential danger to the Union to which protectionist state action may give rise. In addition to Hamilton’s position that preventing interstate discrimination was the “basis of the union,”<sup>71</sup> James Madison warned that federal control over commerce was necessary to prevent the “serious interruptions of the public tranquility” that would result from discriminatory trade practices.<sup>72</sup>

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<sup>66</sup> Bogen, *supra* note 16, at 795.

<sup>67</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 16, at 112.

<sup>68</sup> THE FEDERALIST NO. 80, *supra* note 17, at 463 (emphasis added) (quoting U.S. CONST. art. 4, § 2, cl. 1).

<sup>69</sup> Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (“Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.”), *overruled on other grounds by* United States v. Se. Underwriters Ass’n, 322 U.S. 533 (1944).

<sup>70</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 16, at 317.

<sup>71</sup> THE FEDERALIST NO. 80, *supra* note 17, at 463.

<sup>72</sup> See, e.g., THE FEDERALIST NO. 42, at 238 (James Madison) (Am. Bar Ass’n 2009) (“A very material object of this power [to regulate commerce between the states] was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and



Other scholars have noted this backdrop of contentious interstate trade relations under the Articles of Confederation and have theorized about its impact on the drafting of the Privileges and Immunities Clause.<sup>73</sup> Professor Stewart Jay, for example, argues that trade disputes continued to plague the states during the period of Confederation.<sup>74</sup> Professor Jay points to various mechanisms used by different states to maximize their trade economy. Pointing to port location as one example, he writes: “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.”<sup>75</sup>

Countering this traditionally accepted view, historian Merrill Jensen has argued that the need to reduce interstate friction had largely dissipated by the time of the Constitution’s framing.<sup>76</sup> The story of pervasive interstate trade

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State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.”). While this passage relates to the Commerce Clause, the concerns raised would also apply to the Privileges and Immunities Clause. *See infra* Part IV (discussing overlap in rationale between Dormant Commerce Clause and Privileges and Immunities Clause).

<sup>73</sup> Professor Laurence Tribe, for example, acknowledged that the Framers were concerned with the destructive potential of discriminatory interstate trade policies. *See* TRIBE, *supra* note 64, at 1044 (asserting that “biased accountability of state governments” caused states to favor local interests over national and other state interests). However, he raises this concern in the context of the Commerce Clause (and in particular the Dormant Commerce Clause), rather than as a justification for the Privileges and Immunities Clause. *See id.* at 1044-45 (stating that Madison and Marshall conceived Congress’s commerce power as exclusively federal, but that states could pursue other legitimate state goals that impacted interstate commerce). Such a distinction ignores the fact that Article IV of the Articles of Confederation served not only as a blueprint for the Privileges and Immunities Clause, but also for the Commerce Clause itself. The purposive preamble in the Confederation Article—noting that the intent of Article IV was to “better . . . secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union”—applies equally to both aspects of the Clause as separated in the Constitution. ARTICLES OF CONFEDERATION of 1781, art. IV.

<sup>74</sup> Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship Under Article IV*, 45 LOY. U. CHI. L.J. 1, 11-14 (2013) (describing discriminatory trade practices which often resulted in retaliation and harm to other states, even if originally adopted “for the good reasons”).

<sup>75</sup> *Id.* at 12.

<sup>76</sup> MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, at 339 (1950).

disputes, he contended, is overblown and based on only a few limited actions.<sup>77</sup> Jensen points out that most “protective tariffs” passed by states at this time recognized specific exemptions for American-made goods.<sup>78</sup> While Jensen’s assertion is accurate as far as it goes, we should note that these exemptions would have had no effect on foreign-made goods being transported from state to state. Thus, his point is irrelevant as to those particular transfers. Considering that most manufactured goods at the time came from foreign countries,<sup>79</sup> these tariff laws would likely have had a significant impact on interstate trade, even with an “American goods” exception.

Even if we were to accept, solely for purposes of argument, Jensen’s contention that actual interstate friction had been greatly reduced under the Articles, this in no way undermines the idea that the Privileges and Immunities Clause was aimed at assuring the continued achievement of that end.<sup>80</sup> In addition to the explicit reference in the preamble to “mutual friendship and intercourse,”<sup>81</sup> the history of trade in the colonies provides additional support for acceptance of the interstate friction model. Even Jensen admitted that intercolonial trade practices often did cause tension through discriminatory application of tariffs, imposts, and the like.<sup>82</sup> The drafters of the Articles of Confederation would have been concerned that these colonial disputes would morph into interstate disputes in the new Confederation.<sup>83</sup> Therefore, the inclusion of the Privileges and Immunities Clause in the Constitution was likely aimed at resolving these problems, thereby reducing the dangers of interstate friction.

Moreover, regardless of which version of interstate trade disputes we accept, both provide support for the idea that the Clause was designed to prevent

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<sup>77</sup> *Id.* at 340 (“The idea that is plain if one looks at the trade laws of the states is the idea of reciprocity between state and state. The general rule was that all American goods were exempted from state imposts. American ships paid no higher tonnage duties in the ports of a state than did the shipowners of that state. Trade ‘barriers,’ contrary to the tradition, were the exception rather than the rule.”).

<sup>78</sup> *Id.* at 340-41 (analyzing tariffs passed by Connecticut, Georgia, Massachusetts, New York, Pennsylvania, Rhode Island, and South Carolina).

<sup>79</sup> *See id.*

<sup>80</sup> As Professor Jay notes when discussing Jensen’s contrary position:

Regardless of who is correct about the actual significance of conflicting trade policies . . . 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 . . . .

Jay, *supra* note 74, at 14.

<sup>81</sup> ARTICLES OF CONFEDERATION of 1781, pmbl.

<sup>82</sup> *See* JENSEN, *supra* note 76, at 337-38 (admitting that “[t]here had been such [trade] barriers in colonial times”).

<sup>83</sup> Burrell, *supra* note 41, at 218-26 (discussing drafters’ concerns of interstate trade, commerce, and navigation disputes).

discriminatory actions by the states. If, as Professor Jay suggests, interstate trade disputes continued to cause significant problems during the Confederation, it would make sense for the Constitution's Framers to continue to be concerned with the need to curb this friction. Inclusion of the Privileges and Immunities Clause in Article IV of the Constitution represented one method by which the Framers sought to achieve this end.<sup>84</sup> The other important method of avoiding these frictions, of course, was the vesting of the commerce power in Congress.<sup>85</sup> But while that authority could be subjected to the political pressures that the states sought to impose on Congress, the Privileges and Immunities Clause provided a constitutional baseline immune from potential state political pressures.

Although the persistence of interstate trade disputes in the face of the Privileges and Immunities Clause contained within the Articles of Confederation arguably demonstrates the inability of an antidiscrimination clause to ease interstate tensions, in reality this was likely due more to the absence of an enforcement mechanism within the Articles. Because the Articles of Confederation lacked a federal court system that could adjudicate any disputes that may have arisen based on unequal treatment of residents and nonresidents, the clause in the Articles of Confederation represented essentially little more than an aspirational guideline.

If, on the other hand, Jensen's account of general interstate harmony by the time of the Constitution's adoption is correct, that merely demonstrates that the inclusion of an antidiscrimination clause in the Articles of Confederation may have been successful in easing interstate tension. If so, it would make perfect sense for the Framers to include a similar clause in the U.S. Constitution, which contained several additional tools to help create "a more perfect Union."<sup>86</sup> For example, the Full Faith and Credit Clause<sup>87</sup> and the Fugitive Slave Clause<sup>88</sup> (both of which also appear in Article IV), as well as the prohibitions on state impositions of tariffs,<sup>89</sup> all provide checks on state actions that potentially engender interstate animosity. Additionally, the absence of any substantial debate over the drafting or adoption of the Privileges and Immunities Clause may provide further support for the effectiveness of its predecessor during the Confederation.<sup>90</sup> If the Clause had indeed helped secure "mutual friendship" between the states without a federal enforcement mechanism, its inclusion as an effective tool of interstate federalism would not have stirred up significant objections.

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<sup>84</sup> See *supra* notes 64-75 and accompanying text.

<sup>85</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>86</sup> *Id.* pmb.

<sup>87</sup> *Id.* art. IV, § 1.

<sup>88</sup> *Id.* art. IV, § 2, cl. 3.

<sup>89</sup> *Id.* art. I, § 10, cl. 2.

<sup>90</sup> See *supra* notes 66-68 and accompanying text.

In light of the history of substantially strained trade relations among the states, combined with both the clues easily gleaned from the drafting history and the ratification debates pointing towards a concern with promoting interstate harmony, it is appropriate to infer that the purpose of the Privileges and Immunities Clause was to prohibit the types of discriminatory legislation that would almost inevitably engender interstate animosity. Pairing this purposive analysis with the textual and structural explorations described above provides significant support for our position that the Clause was intended as nothing more or less than an important tool of interstate federalism designed to help unify the emerging nation.

## II. JUDICIAL UNDERUSE OF THE PRIVILEGES AND IMMUNITIES CLAUSE

In contrast to the textual, structural, and purposive analysis laid out above supporting an interpretation of the Privileges and Immunities Clause as an important tool of interstate federalism, the courts have interpreted the Clause in a manner that has led to its significant underuse. The courts have limited the scope of the Clause by confining it to only those rights deemed “fundamental” enough to deserve protection.<sup>91</sup> This restriction to only fundamental rights fails to give full effect to the Clause because it ignores whole swaths of state regulations that may discriminate based on citizenship, thereby engendering the very type of interstate animosity the Clause was designed to prevent, even though they happen not to affect rights deemed fundamental by the courts. Even as the Supreme Court has altered its Privileges and Immunities Clause jurisprudence<sup>92</sup> and introduced new restrictions on the Clause’s protective reach, the judicial focus on the nature of the right impacted by a challenged state action, rather than the impact of that action on the systemic relation of state to state, has remained largely intact.

### A. *Corfield and “Fundamental Rights”*

The judicial limitation of the Clause to fundamental rights was most clearly articulated in *Corfield v. Coryell*,<sup>93</sup> an 1823 case decided by Justice Bushrod Washington while riding circuit as a lower federal court judge. Containing what is undoubtedly the best-known discussion of the limits on the reach of the Clause’s power to police interstate discrimination, Justice Washington’s opinion in *Corfield* upheld a New Jersey law prohibiting nonresidents from harvesting oysters in the state.<sup>94</sup> The plaintiff argued that the law violated the Privileges and

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<sup>91</sup> See, e.g., *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>92</sup> See *infra* Section II.B (discussing *Toomer* “tailoring” test, which even allows states to discriminate against out-of-state citizens’ fundamental rights if state’s interest is substantial).

<sup>93</sup> 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>94</sup> *Id.* at 550.

Immunities Clause of Article IV.<sup>95</sup> Justice Washington rejected the plaintiff's claim,<sup>96</sup> and, in doing so, introduced the idea of "fundamental rights" as a limiting principle on the extent of the Clause's restraining authority on state regulatory power, writing:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in *confining these expressions to those privileges and immunities which are, in their nature, fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.<sup>97</sup>

What Justice Washington was saying is this: The Clause imposes no limits on a state's ability to discriminate against out-of-state citizens as long as the rights or interests affected by the state's discrimination are not characterized as "fundamental." Justice Washington chose to impose this limit on the Clause's reach, even though nothing in the Clause says anything about such a limitation, and even though the fact that the rights are characterized as nonfundamental in no way means that the discrimination will not give rise to the very interstate friction the Clause was designed to prevent.

Justice Washington's effort to flesh out what constituted "fundamental rights" relied heavily upon Lockean concepts of natural rights, though, once again, nothing in the Clause's text makes explicit reference to natural rights. Moreover, as we have shown, there is no basis on which to conclude that the Clause's adoption had anything to do with preservation of a citizen's individual rights of any kind against his state, much less some vague notion of natural rights.<sup>98</sup> Justice Washington's description of what constitutes such fundamental rights has proven to be so important to the judicial understanding of the Clause that it is worth quoting in full:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of

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<sup>95</sup> *Id.* at 549.

<sup>96</sup> *Id.* at 551.

<sup>97</sup> *Id.* (emphasis added).

<sup>98</sup> See *supra* Part I (asserting that Clause's purpose was concerned more with promoting interstate harmony than with protecting any identifiable set of rights).

the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, *and many others which might be mentioned*, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”<sup>99</sup>

*Corfield* has been criticized by several scholars as an illegitimate attempt to constitutionalize Lockean natural rights,<sup>100</sup> and it has been relied upon by others to show that the Privileges or Immunities Clause of the Fourteenth Amendment did in fact write Locke into the Constitution.<sup>101</sup> However, both of these arguments, though on opposite sides of the issue, ignore one simple but vitally important fact: as gratuitous, inappropriate, and improper as Justice Washington’s reference to fundamental rights was, *he did not construe the Privileges and Immunities Clause to require that states respect fundamental rights*; rather, he was merely *attempting to limit the Clause’s authority to restrain state political action*.<sup>102</sup> Far from imposing a constitutional straightjacket on state legislative power, *Corfield* dramatically freed states from constitutional restraint, thereby *expanding* state legislative power by removing

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<sup>99</sup> *Corfield*, 6 F. Cas. at 551-52 (emphasis added) (quoting ARTICLES OF CONFEDERATION of 1781, art. IV).

<sup>100</sup> See, e.g., TRIBE, *supra* note 64, at 1252 (“*Corfield* can best be understood as an attempt to import the natural rights doctrine into the Constitution by way of the Privileges and Immunities Clause of Article IV. By attaching the fundamental rights of state citizenship to the Privileges and Immunities Clause, Justice Washington would have created federal judicial protection against state encroachment upon the ‘natural rights’ of citizens.” (footnote omitted)).

<sup>101</sup> See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 61-68 (rev. ed. 2014) (asserting that privileges and immunities were understood to include fundamental rights and that including “privileges” and “immunities” in Fourteenth Amendment compelled States to respect all citizens’ fundamental rights). For a fuller discussion of this “overuse” of the Privileges and Immunities Clause, see *infra* Part III.

<sup>102</sup> Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause: Michael Perry’s Justification for Judicial Activism or Robert Bork’s Constitutional Inkblot?*, 10 SETON HALL CONST. L.J. 321, 326 (2000) (“[*Corfield*’s] reference [to fundamental rights] was unmistakably intended to limit the scope of the Comity Clause for the very purpose of ensuring that it would not be read as encompassing ‘all’ rights created by state law.”).

what would otherwise have been a constitutional limit on that power. Instead of restraining state power to discriminate against out-of-staters in *all* cases, after *Corfield*, the Clause imposes that constitutional restraint only when the rights subject to the discrimination are deemed fundamental.<sup>103</sup> As a matter of constitutional democratic theory, then, *Corfield*'s impact is one hundred eighty degrees away from what both the critics and the supporters of *Corfield* think the decision accomplishes.

Justice Washington's focus on the individualist concern of rights-based analysis led him to ignore the overriding purpose of the Clause as a vital tool of attaining and preserving a healthy system of interstate federalism. Restricting the scope of the Clause to apply only when the discrimination against out-of-state citizens impacts fundamental rights ignores the fact that interstate friction and retaliation can (and do) arise when states discriminate against nonresidents in any number of "nonfundamental" areas. Indeed, the facts of *Corfield* provide a perfect example of such a situation.<sup>104</sup> Because harvesting oysters was not deemed a "fundamental" right, the state regulation discriminating against nonresident oyster farmers was found to be constitutionally permissible.<sup>105</sup> But the mere fact that regulations fail to impinge on the types of quasi-natural rights that Justice Washington deemed worthy of protection does not mean that the discriminatory effect of the regulation will fail to cause significant harm to interstate relations. States whose citizens are victims of discrimination in the harvesting of oysters could suffer serious economic consequences as a result. A state's imposition of discriminatory regulations on the harvesting of oysters by out-of-staters would therefore likely trigger retaliatory responses by other states—the very result the Clause was designed to prevent.<sup>106</sup> Even in situations in which the consequences of discrimination are not as serious as those in *Corfield*, the danger of interstate friction and instability could be significant. This danger lies in the very fact of a state's discrimination against out-of-state citizens, not necessarily in the impact of the discrimination on the individual citizen. Thus, as long as the Clause is triggered only by regulations limiting access to fundamental rights, as *Corfield* dictates, states remain free to engage in interstate discriminatory actions in any number of areas, which, though perhaps not considered constitutionally fundamental, will nevertheless likely give rise to interstate friction and incur a retaliatory response.

The response could be fashioned that *Corfield*'s fundamental rights limitation does flow from a plausible textual analysis of the Clause. After all, by its terms the Clause applies only to interstate discrimination in the availability of

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<sup>103</sup> See *Corfield*, 6 F. Cas. at 551.

<sup>104</sup> *Id.* at 547 (describing New Jersey law prohibiting noncitizens from gathering oysters during certain months).

<sup>105</sup> *Id.* at 551.

<sup>106</sup> See *supra* Part I (discussing purpose of Privileges and Immunities Clause).

“privileges and immunities,”<sup>107</sup> so in confining the Clause’s reach to fundamental rights Justice Washington was merely construing those words. But as we have conclusively demonstrated previously, when placed in textual, political, and structural context, those words establish nothing more than a relativistic limitation on state power.<sup>108</sup> The Clause was surely not designed to impose on the states the constitutional obligation to provide to their citizens some grouping of so-called natural rights—a result that would have radically transformed the body of the original document into a substantial imposition of obligations on states to guarantee individual rights, when nothing could have been further from the Framers’ minds at the time.<sup>109</sup> Rather, as the phrase that immediately follow the words “privileges and immunities” clearly demonstrates,<sup>110</sup> the Clause did no more than impose a relativistic obligation on the states to provide to citizens of other states the same rights and benefits that they voluntarily chose to provide to their own citizens.

Many Supreme Court decisions that were decided in 1823 or later on a variety of subjects have been overturned in the decades that follow their initial issuance. This is true even of full decisions of the Supreme Court in opinions authored by some of the most respected Justices in American history.<sup>111</sup> But for reasons that remain unclear, the opinion of a single Supreme Court Justice written while he was riding circuit as the equivalent of a lower federal court judge in the very early years of our nation’s history has been viewed by later Supreme Courts as virtually sacrosanct. For almost two centuries following the *Corfield* decision, the Court’s Privileges and Immunities Clause jurisprudence has focused almost exclusively on limiting the application of the Clause to those rights deemed “fundamental.” Opinions responding to Privileges and Immunities challenges recognized various rights as fundamental, such as the right to travel between states, to acquire property, and to pursue happiness.<sup>112</sup> This same line of

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<sup>107</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>108</sup> See *supra* Part I.

<sup>109</sup> See *supra* Section I.C (describing Framers’ concerns of interstate friction).

<sup>110</sup> Recall that the Clause refers specifically to “privileges and immunities of citizens of the several states.” U.S. CONST. art. IV, § 2, cl. 1.

<sup>111</sup> See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) (Story, J.) (holding federal courts exercising diversity jurisdiction are not required to apply state common law), *overruled* by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938) (“[I]n applying the [*Swift v. Tyson*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.”).

<sup>112</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) (“It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them *the right of free ingress into other States, and egress from them*; it insures to them in other States the same freedom possessed by the citizens of those States in the *acquisition and enjoyment of property and in*



reasoning also led the courts to uphold the validity of laws affecting areas that the Court did not consider fundamental, such as laws regulating the retail sale of liquor.<sup>113</sup>

While the Supreme Court has on rare occasion stated in dicta that the *Corfield* interpretation is inaccurate because it fails to recognize the inherently relativistic nature of the Clause,<sup>114</sup> it has mysteriously failed to question that decision's vitality in any meaningful way. Instead, the Court has repeatedly confined the scope of the Clause's antidiscrimination command to "fundamental" rights.<sup>115</sup> In the middle of the twentieth century, however, the Court introduced a new wrinkle into its Privileges and Immunities analysis and began finding new ways to justify discriminatory state regulation that seemed to impinge even on fundamental rights. It is to an examination of this issue that we now turn.

B. *Toomer's Tailoring Test: Further Artificial Restrictions on the Scope of the Privileges and Immunities Clause*

The Supreme Court's 1948 decision in *Toomer v. Witsell*<sup>116</sup> substantially altered its Privileges and Immunities Clause jurisprudence by creating what amounted to a "tailoring" test that would allow states to discriminate against nonresidents when the Court determined that the state had a valid reason for singling out nonresidents and the discriminatory regulation was no more

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*the pursuit of happiness*; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." (emphases added)), *overruled on other grounds* by *United States v. Se. Underwriters Ass'n*, 322 U.S. 533 (1944).

<sup>113</sup> *Crowley v. Christensen*, 137 U.S. 86, 91 (1890) ("There is *no inherent right* in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States." (emphasis added)).

<sup>114</sup> *See, e.g., Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939) ("At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington. While this description of the civil rights of the citizens of the States has been quoted with approval, it has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." (footnotes omitted)).

<sup>115</sup> *See, e.g., Crowley*, 137 U.S. at 91 (rejecting Privileges and Immunities challenge to liquor licensing scheme because selling retail liquor was not a fundamental right).

<sup>116</sup> 334 U.S. 385 (1948).

burdensome than necessary to accomplish the state's legitimate goal.<sup>117</sup> Whatever one thinks of the use of a balancing test in the abstract in this context, its use in *Toomer* must be deemed unacceptable. As applied, the *Toomer* exception attacked the very heart of the Clause by potentially authorizing discriminations against out-of-state citizens openly designed to give preference to in-state citizens. In establishing this limit on the reach of the Clause, the *Toomer* Court formulated the following test:

[The Privileges and Immunities Clause] does bar discrimination against citizens of other States where there is *no substantial reason* for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are *perfectly valid independent reasons* for it. Thus the inquiry in each case must be concerned with *whether such reasons do exist and whether the degree of discrimination bears a close relation to them*.<sup>118</sup>

The Court failed to point to any textual basis for importing a balancing test into its Privileges and Immunities Clause jurisprudence. But even if one were to concede, purely for the purposes of argument, the possibility of a compelling governmental interest to justify discrimination against out-of-staters, surely the kind of competing interest recognized by the *Toomer* Court's dicta is objectionable. For the Court there accepted as a potentially sufficient justification for discrimination against out-of-staters the fact that competition by out-of-state citizens could deprive in-state citizens of economic advantages.<sup>119</sup> In other words, the Court recognized as a possible justification for discrimination against out-of-staters the fear that in-state citizens might lose out to those out-of-staters. Yet the avoidance of such state-imposed protections of in-state citizens against out-of-state competition is exactly the type of interstate economic discrimination that leads to interstate friction and the retaliation by other states that inevitably follows—the very kind of pathological interstate federalism that the Privileges and Immunities Clause was designed to prevent. It was the intended role of the Clause to unify the states into an integral nation by preventing the kind of interstate hostility that flows from state-imposed discrimination against out-of-state citizens. Thus, the Court's dicta recognized a possible exception that effectively consumed the Clause's essence.

The statute at issue in *Toomer* required commercial shrimping boats to be licensed by the state in order to fish South Carolina's coastal waters.<sup>120</sup> Boats owned by residents could be licensed for a fee of twenty-five dollars while nonresident owners were required to pay a two thousand five hundred dollar

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<sup>117</sup> *Id.* at 396.

<sup>118</sup> *Id.* (emphases added).

<sup>119</sup> *Id.* at 396-97 (“By that statute South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its practical effect is virtually exclusionary.”).

<sup>120</sup> *Id.* at 389.

licensing fee.<sup>121</sup> Even under the restrictive fundamental rights test established by *Corfield*,<sup>122</sup> this legislation would likely have been struck down as unconstitutional under the Privileges and Immunities Clause because it infringed upon a nonresident's ability to make a living in South Carolina for no reason other than he was a citizen of another state.<sup>123</sup> However, while ultimately striking down the legislation, the Court in *Toomer* left open the possibility that a similar regulatory scheme would have been deemed acceptable if the disparity between the resident and nonresident licenses had not been so great.<sup>124</sup>

The Court continues to accept the idea that states may discriminate if they can provide a sufficient justification for doing so. In *Hicklin v. Orbeck*,<sup>125</sup> for example, the Court struck down a statute that required that any entity receiving a license to construct an oil or gas pipeline must give hiring preference to Alaskan residents.<sup>126</sup> In explaining why the statute violated the Privileges and Immunities Clause, Justice Brennan's opinion for the Court pointed to the lack of a sufficient justification for the discrimination.<sup>127</sup> The very existence of this blatant, facial discrimination against out-of-state citizens was apparently insufficient, in and of itself, to invalidate the law under the Privileges and Immunities Clause. The law was unconstitutional not because it blatantly discriminated against nonresidents, but because the discrimination was not tied

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<sup>121</sup> *Id.*

<sup>122</sup> *See supra* Section II.A.

<sup>123</sup> It is possible that, because the statutes related to a "public good," the Court could have upheld the legislation under the "police power" exception that was carved out by Justice Washington in *Corfield*, but the *Toomer* Court did not rely on this rationale.

<sup>124</sup> *Toomer*, 334 U.S. at 398-99 ("The State is not without power, for example, . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay."). Subsequently, some lower courts facing similarly discriminatory regulations have upheld the difference between resident and nonresident licensing fees because the difference between the fees was much smaller than those at issue in *Toomer*. *See, e.g.,* *Marilley v. Bonham*, 844 F.3d 841, 850-52 (9th Cir. 2016) (en banc) (upholding California licensing scheme that charged nonresident commercial fishermen between two and four times more than residents for various licenses in part because differential was much smaller than that in *Toomer* and other licensing schemes that had been found to violate Privileges and Immunities Clause).

<sup>125</sup> 437 U.S. 518 (1978).

<sup>126</sup> *Id.* at 520 ("The key provision of 'Alaska Hire,' as the Act has come to be known, is the requirement that 'all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party' contain a provision 'requiring the employment of qualified Alaska residents' in preference to nonresidents.").

<sup>127</sup> *Id.* at 531 ("We believe that Alaska's ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes *insufficient justification* for the pervasive discrimination against nonresidents that the Act mandates." (emphasis added)).

to a government interest sufficiently important to justify it. But most troubling about the Court's analysis was its assertion that a negative economic impact on in-state citizens might have outbalanced the Clause's antidiscrimination purpose.<sup>128</sup> The primary reason the state law was invalidated was the Court's conclusion that the prevention of out-of-state competition would not have improved the in-state unemployment problem, which resulted from factors other than out-of-state competition.<sup>129</sup>

This judicial restriction of the Clause's reach represents an even more troubling underuse of the Clause than the one adopted in *Corfield*. At least under *Corfield*, there were certain fundamental rights that simply could not be denied based on a person's citizenship status within a state.<sup>130</sup> It is true that this interpretation exempted far too much discriminatory legislation from the scope of the Clause without the slightest justification. But far more troubling is the Court's recognition of a limitation on the Clause that, like the one imposed in *Toomer*, inherently rejects the foundational premise of the Clause itself. This restriction on the scope of the Clause, then, underscores the fact that the judiciary simply fails to employ the Clause effectively to achieve its unambiguous purpose of preventing interstate friction.

Puzzling, in light of the Court's creation of counterproductive exceptions that subvert the Clause's purpose, is the Court's occasional recognition of the very purpose that it so blatantly undermines. In *Austin v. New Hampshire*,<sup>131</sup> for example, a challenge to a taxation scheme raised no questions as to the "fundamental nature" of the rights infringed by the statute.<sup>132</sup> However, the Court did confirm the important role the Clause plays in preserving the federal system, writing: "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the *structural balance essential to the concept of federalism*."<sup>133</sup> The *Austin* Court also described the purpose underlying the Clause as one of preventing interstate disputes.<sup>134</sup> Despite the Court's

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<sup>128</sup> *Id.* at 526-27 (emphasizing that state made no showing that non-state residents were major cause of state's high unemployment).

<sup>129</sup> *Id.*

<sup>130</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (listing categories of fundamental rights, including "[p]rotection by the government; the enjoyment of life and liberty, . . . and to pursue and obtain happiness and safety").

<sup>131</sup> 420 U.S. 656 (1975).

<sup>132</sup> *Id.* at 661 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) for proposition that "an exemption from higher taxes or impositions than are paid by the other citizens of the state" is clearly one of the "fundamental privileges and immunities protected by the Clause").

<sup>133</sup> *Id.* at 662 (emphasis added) (footnote omitted).

<sup>134</sup> *Id.* at 660 ("The origins of the Clause do reveal . . . the concerns of central import to the Framers. During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread.").

recognition in *Austin* of the Clause's importance in preserving the union, it has continually failed to recognize the inescapable tension between this interpretation of the Clause and the insupportable exceptions it has created.

C. *Exclusion of Corporations*

Not only have the courts failed to give effect to the underlying purpose of the Privileges and Immunities Clause by limiting its scope and shielding even intentionally interstate discriminatory legislation from judicial invalidation, but they have also underused the Clause by expressly excluding corporations from its protections for out-of-state "citizens." A century-and-a-half ago, the Supreme Court held that corporations do not qualify as citizens within the meaning of the Privileges and Immunities Clause. In the Court's words:

The answer which readily occurs to the objection founded upon the first clause [of Article IV] consists in the fact that corporations are not citizens within its meaning. The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.<sup>135</sup>

The Court seemed to base its decision to exclude corporations partially on the fact that states had no obligation to create corporations in the first place and therefore could not be required to allow out-of-state corporations to do business on the same terms as resident corporations.<sup>136</sup> Such a position, even if one were to accept its internal logic, would seemingly apply more to resident corporations than to nonresident ones. The state that is discriminating against a corporation because of its nonresident status is, by definition, not the state that "created" the corporation. Moreover, the entire basis of this "greater-includes-the-lesser" type of logic is flawed and inconsistent with traditional constitutional practice concerning corporations. By this logic, were a state to permit incorporation it could remove all constitutional rights from the corporations whose creation it had authorized. After all, if we adopt the "greater-includes-the-lesser" logic, then the state could condition all corporate creations on the loss of all

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<sup>135</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869), *overruled on other grounds by* *United States v. Se. Underwriters Ass'n*, 322 U.S. 533 (1944); *see also* Stewart Jay, *The Curious Exclusion of Corporations from the Privileges and Immunities Clause of Article IV*, 44 HOFSTRA L. REV. 79, 79-81 (2015) (discussing *Paul* Court's finding that corporations are not "citizens" for purposes of Privileges and Immunities Clause). Contrary to the Supreme Court's opinion in *Paul*, there is substantial evidence (including statements in Blackstone's *Commentaries*, *see infra* note 151) that the term "privileges and immunities" was routinely applied to the powers and protections granted by charter to corporations, first by the Crown and subsequently the colonial assemblies. *See* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1253-54 (2010).

<sup>136</sup> *Paul*, 75 U.S. (8 Wall.) at 181.

constitutional rights. Yet corporations are routinely deemed to possess constitutional rights that can be asserted against the very state that authorized their creation.<sup>137</sup> There exists no principled basis on which to distinguish the protections of the Privileges and Immunities Clause, even if we were to ignore the simple fact that when that Clause is applicable, the state seeking to discriminate against a corporation has not created that corporation in the first place.

Most devastating to the Court's recognition of an exception for corporations in receiving the Clause's protection is its inability to grasp the relationship between its exception and the underlying DNA of the Clause. The Privileges and Immunities Clause is not about protecting individual rights.<sup>138</sup> Rather than evincing a concern over the "micro" relationship between government and individual, as the individual-rights provisions of the Bill of Rights do, the Privileges and Immunities Clause concerns the "macro" relationship of state to state and the relationship of those states to the broader union of which they are a part.<sup>139</sup> Thus, in determining whether the Clause protects out-of-state corporations as well as out-of-state individuals, the Court has mistakenly viewed the question as a matter of the relationship between government and private entity.

Nothing could have been further from the appropriate analytical mode. If the Court had viewed the Clause from the perspective of its true purpose—avoidance of interstate friction—it would have realized that corporations are the primary vehicles of private industry. If they were not at the time of the Court's exclusion of out-of-state corporations from the provision's protective scope, they surely are today. Yet the Court continues to adhere to its categorical exclusion of corporations. But once one recognizes the obvious importance of corporations to a state's economy, it is easy to see how a state's discrimination against corporations from another state could negatively impact the other state's economy. The result of such discrimination will almost inevitably be retaliatory economic action by the other state, causing the exact type of interstate friction the Clause was designed to avoid. Thus, the issue is not whether the private corporation is an appropriate recipient of constitutional protection. It is, rather, whether discrimination against out-of-state corporations will trigger the very same interstate pathologies against which the Clause protects. The answer, of course, is yes.

Perhaps the Court could mount a textual defense for its exclusion of corporations from the scope of the Privileges and Immunities Clause. The Clause

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<sup>137</sup> See cases cited *infra* notes 145-49 (discussing recognition of corporations as "citizens" in contexts including jurisdiction determinations; First, Sixth, and Seventh Amendment issues; and enforcement of separation of powers).

<sup>138</sup> See *supra* Section I.B (analyzing structure of Article IV to demonstrate that it deals with relationships between states rather than individuals).

<sup>139</sup> See *supra* Section I.B.

does, after all, specifically refer to “citizens,” and if one were to conclude that a corporation is not a citizen, then the Court’s interpretive hands would presumably be tied.<sup>140</sup> But the fact that private corporations have routinely been characterized as citizens for purposes of the Diversity of Citizenship Clause of Article III renders any such argument hypocritical.<sup>141</sup>

Equally perplexing is the contradiction in treatment of citizens for purposes of the Privileges and Immunities Clause in Article IV and the Supreme Court’s consistent treatment of corporations as “persons” under the Due Process Clauses of the Fifth and Fourteenth Amendments. In fact, just twenty years after the *Paul* Court excluded corporations from the protections of the Privileges and Immunities Clause, Justice Harlan declared that it was a “settled” principle that “[a] . . . corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>142</sup> Even more perplexing is that the Court identified

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<sup>140</sup> U.S. CONST. art. III, § 2, cl. 6 (stating that federal judicial power extends to controversies between “citizens” of different states).

<sup>141</sup> See, e.g., *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 404 (5th Cir. 1987) (“[A] corporation is deemed to be a citizen of both the state of its incorporation and the state of its principal place of business.”).

<sup>142</sup> *Smyth v. Ames*, 169 U.S. 466, 526 (1898), *overruled on other grounds by* *Fed. Power Comm’n v. Nat’l Gas Pipeline Co. of Am.*, 315 U.S. 575 (1942). The extent to which this question was settled by 1898 may be debatable as the first opinions recognizing that corporations fell within the scope of the Due Process and Equal Protection Clauses were issued less than a decade earlier. See *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 33-34 (1889) (Due Process Clause); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 181 (1888) (Equal Protection Clause). The first acknowledgement by the Court that Section 1 of the Fourteenth Amendment applied to corporations appears to have come from a statement by the Chief Justice Waite prior to oral arguments for *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), in which he stated:

The Court does not wish to hear arguments on the question whether the provision in the fourteenth amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does.

BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865-1867*, at 27 (Negro Univ. Press 1969) (1914). This statement was not included in the opinion of the case, yet *Santa Clara County* has become canonized as the first case to recognize the extension of the Fourteenth Amendment to corporations.

Two years later, when recognition that the Equal Protection Clause applied to corporations made its way into the language of an actual opinion, it was to distinguish between the protections offered to “persons” through the Due Process and Equal Protection Clauses and those offered to “citizens” under the Privileges or Immunities Clause. See *Pembina*, 125 U.S. at 188-89; see also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 514 (1939) (“Natural persons, and they alone, are entitled to the privileges and immunities which § 1 of the

preventing discrimination as a core component of the Equal Protection Clause, writing:

The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included.<sup>143</sup>

Yet the Court found that this antidiscrimination command did not extend to the Privileges or Immunities Clause.<sup>144</sup>

Adding to the confusion created by the Court's decision to exclude corporations from the scope of the Clause is the fact that corporations are considered citizens in some contexts. Corporations are, for example, citizens for purposes of jurisdiction.<sup>145</sup> Courts have also found that corporations are protected by other constitutional provisions that protect individual rights, including free speech protections under the First Amendment<sup>146</sup> and the jury trial guarantees of the Sixth<sup>147</sup> and Seventh Amendments.<sup>148</sup> Additionally, courts have recognized a corporation's right to sue to enforce the separation of powers provided for in the Constitution. Corporations have, for example, successfully litigated challenges to the constitutional limitations on Congress's ability to delegate judicial functions to Article I courts.<sup>149</sup> Yet, for the purpose of

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Fourteenth Amendment secures for 'citizens of the United States.'").

<sup>143</sup> *Pembina*, 125 U.S. at 188-89.

<sup>144</sup> *Id.* at 189 ("The state is *not prohibited from discriminating in the privileges it may grant to foreign corporations* as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce." (emphasis added)).

<sup>145</sup> *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 497 (1844), *superseded by statute*, Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415, *as recognized in* *Hertz Corp. v. Friend*, 559 U.S. 77 (2010); *see also* *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 328-29 (1854) (limiting idea of corporate "citizenship" to jurisdictional context), *superseded by statute*, Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415, *as recognized in* *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

<sup>146</sup> *Citizens United v. FEC*, 558 U.S. 310, 315 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

<sup>147</sup> *S. Union Co. v. United States*, 567 U.S. 343, 346 (2012) (allowing corporation to use Sixth Amendment to challenge criminal fine as violation of *Apprendi* doctrine).

<sup>148</sup> *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (permitting corporation to use Seventh Amendment to challenge denial of jury trial over claim for equitable relief).

<sup>149</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 50-52 (1982) (plurality opinion) (affirming grant of corporation's motion to dismiss lawsuit on grounds that Bankruptcy Act of 1978 unconstitutionally granted Article III judiciary power to bankruptcy court judges), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 99-554, 98 Stat. 333, *as recognized in* *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).



challenging discriminatory state legislation, the courts have declared that corporations are simply not citizens, without providing any basis on which to distinguish those situations where corporations have in fact been held to possess constitutional protection.<sup>150</sup>

Moreover, while the courts have excluded corporations from the scope of the Clause based on an artificially narrow conception of the term “citizen,” they have ignored ample contextual support for the idea that privileges and immunities were often granted to corporations.<sup>151</sup> Under English common law, privileges and immunities language was included in charters governing “religious societies, colleges and universities, and municipalities,”<sup>152</sup> as well as joint-stock corporations. In fact, the original recipients of “privileges and immunities” on American soil were the colonies, which were themselves incorporated.<sup>153</sup> Colonial charters were the first legal documents to transport the concept of privileges and immunities to the New World.<sup>154</sup>

The uniform exclusion of corporations from the Clause’s scope gives rise to a significant enforcement problem. With corporations excluded, only individuals can have standing to enforce the Clause. But the ability of individual litigants to challenge discriminatory state treatment is limited by three primary factors: First, the Supreme Court’s insistence on a showing of injury-in-fact as part of its standing doctrine limits the pool of individual litigants who will have standing to invoke the Court’s jurisdiction.<sup>155</sup> Because individuals are much less likely to engage in business across state lines, they are equally less likely to be able to show that a particular discriminatory regulation has impacted them. Corporations, on the other hand, frequently do business in multiple jurisdictions and are therefore subject to regulations imposed by various states, including

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<sup>150</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869), *overruled on other grounds by* *United States v. Se. Underwriters Ass’n*, 322 U.S. 533 (1944).

<sup>151</sup> Lash, *supra* note 135, at 1253-54 (“Just as rights at the time of the Founding referred to an extremely broad range of activities, sources, and bearers, so too one can find privileges and immunities associated with everything from individual rights to corporate powers—sometimes in the same source. For example, in one section of his *Commentaries*, Blackstone uses the individual terms ‘privileges’ and ‘immunities’ in reference to individual natural rights, while in a different section of the same book he uses the combined phrase ‘privileges and immunities’ to refer to the government-conferred collective rights of corporations.” (footnote omitted)).

<sup>152</sup> Natelson, *supra* note 43, at 1138 (footnotes omitted).

<sup>153</sup> See Burrell, *supra* note 41, at 69-71 (describing corporate aspects of early colonization efforts in America).

<sup>154</sup> See *id.* at 62 n.310 (quoting colonial charters of Baltimore, Massachusetts, New England Council, and Virginia).

<sup>155</sup> See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”’” (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))).

regulations that discriminate based on resident status. Second, individual litigants often lack the financial means to pursue litigation even if they do feel its discriminatory effect. Corporations, on the other hand, are often in possession of sufficient resources to challenge these types of state actions. Corporations will therefore be far more effective litigants than individuals in implementing the directive of the Privileges and Immunities Clause. Regardless of how one views corporations, then, it just makes sense to view them as injured parties as a result of a state's violation of the Privileges and Immunities Clause.<sup>156</sup>

D. *Legitimate Limitations on the Scope of the Clause*

Taken literally, the Clause's text would seem to suggest that states may *never* discriminate against nonresidents when providing "privileges or immunities." If our prescriptive analysis as to how the Clause should be construed were to end at this point, it would be reasonable to assume that we advocate such an unwavering application of the Clause's textual directive. And for the most part, that is exactly our position. However, at some point, common sense dictates recognition of an important qualification on such an unwavering anti-discriminatory command, lest the Clause counterproductively be allowed to consume itself. For such a rigid antidiscrimination command would necessarily prevent states from even restricting the right to vote in state elections to its own citizens, limiting jury pools to state residents, or even requiring candidates for public office to reside in the state they seek to represent. These limitations on a state's ability to provide adequate protection to ensure its own self-government fly in the face of the entire idea of a federal system of representative government.

Different explanations for why these areas must be deemed exempt from the scope of the Clause have been offered. Some courts have posited that the "fundamental rights" protected by the Clause refer to individual natural rights that are not granted by the state, as opposed to political rights that only exist because of the formation of a state government.<sup>157</sup> But there is near unanimity in recognizing that political rights are not covered by the Clause.<sup>158</sup>

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<sup>156</sup> For a detailed theoretical discussion of the role of corporate litigants as enforcers of constitutional directives, see generally Martin H. Redish & Peter B. Siegal, *Constitutional Adjudication, Free Expression, and the Fashionable Art of Corporation-Bashing*, 91 TEX. L. REV. 1447 (2013) (book review).

<sup>157</sup> See, e.g., *Murray v. McCarty*, 16 Va. (2 Munf.) 393, 398 (1811) ("[A]lthough a citizen of one state may hold lands in another, yet he cannot interfere in those rights, which, from the very nature of society and of government, belong exclusively to citizens of that state. Such are the rights of election and of representation . . .").

<sup>158</sup> See, e.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978) ("No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State."); *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. Gen. Ct. 1797) ("It is agreed [privileges and immunities] does not mean the right of election, the right of holding offices, the right of being elected.").

If one views the Clause as performing an important interstate-harmony-preserving function, it becomes much easier to justify these electoral exceptions. What could be more detrimental to interstate harmony than allowing the citizens of another state to control a state's democratic process through voting and running for office? Under our interpretation of the Clause, discriminatory treatment based on residency for those functions deemed essential to a state's self-government are rightly deemed beyond the scope of the Clause. Such interference from nonresidents in the internal governance of a state would likely cause significant resentment,<sup>159</sup> well beyond what we would expect from discriminatory trade laws or licensing requirements.

### III. ACADEMIC OVERUSE OF THE PRIVILEGES AND IMMUNITIES CLAUSE

In contrast to the judiciary's underuse of the Privileges and Immunities Clause, many in the legal academy wish to drastically overuse it. The majority of academic overuse involves a manipulation of *Corfield's* limitation of Article IV's use of the words "privileges and immunities" to protection of so-called fundamental rights<sup>160</sup> as an indirect means of imposing a litany of countermajoritarian "natural rights" on the exercise of a state's democratically ordained lawmaking power. They seek to do this, despite the failure of the Bill of Rights, incorporated through the Fourteenth Amendment's Due Process Clause,<sup>161</sup> to include protection for those rights. Because the words "privileges" and "immunities" are also employed in the Privileges or Immunities Clause of the Fourteenth Amendment,<sup>162</sup> scholars who advocate use of original meaning as the controlling mode of constitutional interpretation seek to view the words in the two provisions identically, despite significant linguistic and contextual differences between them.

This argument generally takes the following form: *Corfield* defined the term "privileges and immunities" to include only "fundamental rights," then provided a description of those rights.<sup>163</sup> Because the words "privileges" and "immunities" in the Fourteenth Amendment are identical to the words included in Article IV, they must have identical meanings. It is an argument the logic of which is, at least in part, fundamentally Euclidean: things equal to the same thing

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<sup>159</sup> See, e.g., Ethan DeWitt, *N.H. House Passes Bill for Controversial Change to Voter Eligibility*, CONCORD MONITOR (Mar. 6, 2018, 9:31 PM) <http://www.concordmonitor.com/New-Hampshire-voting-bill-to-tighten-residency-passes-House-16031281> (describing New Hampshire law designed primarily to prevent college students from voting in New Hampshire election if they failed to satisfy state's resident requirement).

<sup>160</sup> See *supra* Part II (describing *Corfield's* judicially created limitation to Privileges and Immunities Clause).

<sup>161</sup> U.S. CONST. amend. XIV, § 1, cl. 2.

<sup>162</sup> *Id.* amend. XIV, § 1, cl. 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

<sup>163</sup> See *supra* Section II.A.

are equal to each other. Such an argument represents a type of noncontextual textualism: the same words mean the same thing, regardless of context. But the contexts, of course, are completely opposite. In *Corfield*, Justice Washington confined the protective reach of Article IV's Privileges and Immunities Clause only to fundamental rights.<sup>164</sup> In so doing, he freed the democratic processes of the states from countermajoritarian constitutional restriction. The decision, then, *augmented* democracy by decreasing the reach of limits on that process. In contrast, the Fourteenth Amendment's Privileges or Immunities Clause is, by its terms, a *restriction* on state democratic choices: they may not violate whatever rights are deemed to fall within that Clause. Thus, to lift from *Corfield*'s definition of "fundamental rights," used as a means of *augmenting* democracy, standards for *restricting* democracy makes no sense.

The other linguistic problem with invocation of this Euclidean axiom for interpretive purposes is that it ignores the words that follow the words "privileges" and "immunities" in both provisions. In Article IV, the words are followed by the phrase, "of citizens of the several states."<sup>165</sup> In contrast, the words in the Fourteenth Amendment are followed immediately by the words "of citizens of the United States."<sup>166</sup> It is not clear, then, why interpretation of words in one provision, viewed in a linguistic vacuum, should control interpretation of the same words used in a different context in another provision.

In fairness, we should make clear that the scholarly argument for construing the Fourteenth Amendment's Privileges or Immunities Clause to protect all of the natural rights enumerated in *Corfield* goes beyond mere linguistic identity. In a search for historically accurate meaning, scholars have focused on historical evidence to reveal the intent of the drafters to view the words in the two provisions identically. This pursuit of a historically accurate interpretation has intuitive appeal and indeed has long been part of the legal landscape. Of course, it is also true that many scholars and jurists have openly rejected such a narrow, stifling approach, preferring to view the Constitution as a living, growing document.<sup>167</sup> And if such a view were to be adopted, then reliance on cherry-picked bits and pieces of the historical record would mean little, if anything. Far more important would be recognition of the obvious differences between the contexts of the words in the two clauses from the perspective of democratic constitutionalism.

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<sup>164</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>165</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>166</sup> *Id.* amend. XIV, § 1.

<sup>167</sup> See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1484, 1493 (2012).

In any event, reliance on the fact that the congressional records associated with the drafting of and debate regarding the Fourteenth Amendment contain many references to the *Corfield* decision<sup>168</sup> ignores significant problems with reliance on these references in interpreting the Amendment's Privileges or Immunities Clause. First, this argument presents the same archaeological problem that appears in many veins of originalist scholarship: How can one discern the original meaning of a text composed by many authors and ratified by hundreds of individuals in numerous state legislatures? Second, it was the words of the Clause, not external statements of the drafters (which may or may not have been widely known), that proceeded through the ratification process. Third, as already noted, this interpretation of the Clause fails to take account of the clear textual differences between the two clauses. The "privileges and immunities" referred to in Article IV are those of the "citizens in the several states,"<sup>169</sup> while those protected in the Fourteenth Amendment are the "privileges and immunities" of the "citizens of the United States."<sup>170</sup> If the two clauses protected the same rights, as the originalist interpretation would suggest, why is the qualifying language following the phrase "privileges and immunities" so different? When one adds the diametrically opposite implications for democratic processes that flow from use of the same construction in both contexts, the fatal flaws in the originalist perspective on the relationship between these two constitutional provisions should be evident. Yet originalist scholars have consistently pointed to the reliance on the *Corfield* opinion by the drafters of the Fourteenth Amendment as evidence of the identity between the two clauses.<sup>171</sup> It is true that a number of the drafters drew this comparison. But it is by no means clear that the ratifying state legislatures were fully aware of this fact or had even ever heard of *Corfield*.

At the very least, there is surely no evidence that the populace at large understood such an esoteric theory of interpretation. Thus, at best, the interpretive theory underlying the alleged equation between the two clauses amounts to a version of the largely discredited (even among originalists) theory of original *intent*, rather than the currently accepted theory of original public meaning.<sup>172</sup> Thus, neither text, logic, nor history provides a persuasive basis for equating the meaning of the words "privileges" and "immunities" in the two

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<sup>168</sup> See GLIDDEN, *supra* note 27, at 32 n.5, 35 n.13, 37 n.15 (cataloging references to *Corfield* in Congressional Globe records related to passage of Fourteenth Amendment).

<sup>169</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>170</sup> *Id.* amend. XIV, § 1, cl. 2.

<sup>171</sup> BARNETT, *supra* note 101, at 65-66.

<sup>172</sup> See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) (distinguishing original intent theory as focusing on intention of authors and original meaning theory as focusing on understanding of ratifiers and public); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704-09 (2009) (examining originalism's shift from focusing on subjective intent of Constitution's authors to interpreting Constitution from public's point of view).

clauses. Indeed, to do so dangerously confuses a judicial effort to free states from constitutional restriction—e.g. Justice Washington’s opinion in *Corfield*—with an effort to employ the Constitution as a stranglehold on the democratic process.

IV. THE RELATIONSHIP BETWEEN  
THE PRIVILEGES AND IMMUNITIES CLAUSE  
AND THE DORMANT COMMERCE CLAUSE

Some might question the need to reinvigorate the Privileges and Immunities Clause in light of the fact that the Dormant Commerce Clause, as currently construed, effectively performs much the same function. The Dormant Commerce Clause prohibits the states from regulating interstate commerce in certain circumstances, even in the absence of preempting congressional legislative regulation. To a certain extent, we readily concede this practical reality, though the Dormant Commerce Clause has been construed to restrict state regulatory power far beyond what even an invigorated Privileges and Immunities Clause would. But the structural and conceptual problems with the Dormant Commerce Clause are very real, and those difficulties have led to interpretive pathologies that seriously undermine the relationship between the unelected federal judiciary and the political branches of the states. It is only through rejection of the very concept of the Dormant Commerce Clause and its replacement with a revitalized Privileges and Immunities Clause that the relationship between the federal judiciary and state governments can achieve a structural and practical equanimity.

The first and most important point to note about the Dormant Commerce Clause is, simply, that no such “clause” exists. There is, to be sure, a Commerce Clause in the Constitution, empowering Congress to legislate for the purpose of regulating commerce among the states, with foreign nations, and with Indian tribes.<sup>173</sup> But to characterize what makes up the so-called Dormant Commerce Clause as a “clause” is nothing more than a lie.

It is true that if and when Congress chooses to exercise its commerce power to legislate, the Supremacy Clause embodied in Article VI<sup>174</sup> renders those federal enactments supreme, thereby preempting all state laws found to be inconsistent with them. But no text in the Constitution, on its face, even arguably prohibits the states from regulating interstate commerce in the *absence* of conflicting federal regulation. Yet the Supreme Court has held that the Dormant Commerce “Clause,” in many circumstances, invalidates such state laws.<sup>175</sup> In

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<sup>173</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>174</sup> *Id.* art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

<sup>175</sup> See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 662 (1981) (plurality opinion); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 429-30 (1980); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 137 (1970); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 520 (1959).

short, this so-called “clause” is little more than a constitutional phantom. Complicating matters even further is the fact that the Supreme Court has devoted precious little attention to determining the constitutional source of the doctrine. On occasion, the doctrine has been grounded in an inference of congressional intent from congressional failure to exercise its commerce power: If Congress had wanted the area in question to be regulated, it would have done so itself; since it did not do so, it follows inexorably that Congress did not want the area regulated.<sup>176</sup> Thus, if the state chooses to regulate the area, it is violating the Supremacy Clause by conflicting with the congressional judgment against regulation.<sup>177</sup> This rationale is consistent with the recognized power of Congress to legislatively reverse Supreme Court findings of a state’s violation of the Dormant Commerce Clause.<sup>178</sup> But such a rationale makes no sense, on a number of grounds. First, it is absurd to assert that a congressional failure to legislatively regulate a particular area of commerce amounts to a legislative decision that the particular area of commerce should be free of regulation. As a matter of legal process, this reasoning improperly transforms a failure to legislate into the equivalent of legislation, even though this “nonlegislation” has never satisfied the bicameralism and presentment requirements of Article I<sup>179</sup>—requirements the Supreme Court has recognized have great importance to the preservation of the constitutional democratic system.<sup>180</sup> Moreover, it is just as likely that Congress has never even considered the issue, or that Congress has implicitly chosen to defer to state discretion in economic regulation of the area in question.

A specious argument could also be fashioned that the very grant of the commerce power to Congress, in and of itself, automatically excludes state regulatory power. But this “zero-sum-game” approach to federalism, often referred to as “dual federalism,”<sup>181</sup> has long been rejected by the modern Supreme Court,<sup>182</sup> and with good reason, for the theory is inconsistent with the terms of the Constitution itself.<sup>183</sup> In any event, this reasoning would fail to

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<sup>176</sup> See Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 588-89 (1987).

<sup>177</sup> *Id.* at 589.

<sup>178</sup> See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 409 (1946).

<sup>179</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>180</sup> *INS v. Chadha*, 462 U.S. 919, 959 (1983) (“There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.”).

<sup>181</sup> See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (noting consolidation of power in national power as opposed to separation between national level and state level following Great Depression and World Wars).

<sup>182</sup> See, e.g., *United States v. Darby*, 312 U.S. 100, 100-01 (1941) (permitting federal government to fix minimum wages and maximum hours of employees producing goods for interstate commerce).

<sup>183</sup> For a detailed explanation of the textual and logical flaws of the dual federalism model,

textually rationalize modern Dormant Commerce Clause doctrine, which has often upheld state regulatory power of interstate commerce under specified circumstances.<sup>184</sup> Beyond these two poor excuses for textual and theoretical grounding, there is nothing. Perhaps more importantly, as one of us has explained in some detail elsewhere, the Dormant Commerce Clause is not only atextual, it is also *countertextual*.<sup>185</sup> It reverses a careful balance achieved by the Framers in Article I, Section 10<sup>186</sup> that places the inertia in favor of state regulatory power over interstate commerce, requiring Congress to overcome the built-in inertia against legislative action in order to preclude state regulation of interstate commerce.<sup>187</sup> Under the Dormant Commerce Clause, all that is required to shut down state economic regulation of interstate commerce is a judicial decision, and at that point Congress must overcome the built-in inertia *against* state regulation—the very opposite of the approach clearly contemplated by Article I, Section 10.

More important as a practical matter is the fact that Dormant Commerce Clause doctrine reaches far beyond the anti-discriminatory role that the Privileges and Immunities Clause was designed to play. In addition to performing this function, the Dormant Commerce Clause has been weaponized as a constitutional protection against unduly burdensome state regulation, even when it is not discriminatory.<sup>188</sup> But there exists no textual basis to support such limitations. Because the Dormant Commerce Clause lacks any textual grounding, it is the equivalent of the constitutional Wild West—a dangerous practice for democracy, given that it empowers the unelected federal judiciary to sweep away state regulation best left to Congress to police.

In light of its perversely limited current interpretive state, the Privileges and Immunities Clause could not possibly serve the beneficial anti-discriminatory

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see MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 63-97 (1995).

<sup>184</sup> See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 69-70 (1987) (upholding Indiana statute separating voting rights from acquisitions of corporate shares that brought acquirer above particular threshold voting power); *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986) (upholding Maine statute that prohibited importation of live baitfish into Maine).

<sup>185</sup> See Redish & Nugent, *supra* note 176, at 588-90.

<sup>186</sup> See U.S. CONST. art. I, § 10.

<sup>187</sup> See Redish & Nugent, *supra* note 176, at 592.

<sup>188</sup> See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 662 (1981) (plurality opinion) (invalidating Iowa statute prohibiting use of double-trailer trucks longer than sixty-five feet within Iowa); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 429-30 (1980) (invalidating Wisconsin statute prohibiting trucks longer than fifty-five feet or pulling multiple vehicles without permit in Wisconsin); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 137 (1970) (invalidating Arizona order prohibiting Arizona company from shipping cantaloupes outside Arizona unless cantaloupes were packed in Arizona-approved containers); *Bibb v. Navajo Freight Lines, Inc.* 359 U.S. 520, 520 (1959) (invalidating Illinois statute requiring trucks operating in Illinois to be equipped with particular mudguard that would be illegal in Arkansas and different from mudguards permitted in forty-five other states).



policing function now served by the Dormant Commerce Clause. None of the artificial, countertextual straightjackets that currently plague interpretation of the Privileges and Immunities Clause—its restriction to fundamental rights,<sup>189</sup> the balancing away of the Clause’s key interstate antidiscrimination function,<sup>190</sup> and the exclusion of corporations from its protective reach<sup>191</sup>—plague interpretation of the Dormant Commerce Clause. Thus, if today the Dormant Commerce Clause were to disappear, the nation would be left with woefully inadequate protection against the serious political pathology of interstate discrimination. But if, as we argue it should be, the Privileges and Immunities Clause is empowered to effectively police interstate discrimination by categorical rejection of all of these gratuitous limitations imposed by the courts, the need for the Dormant Commerce Clause largely disappears. As a result, our constitutional structure would be restored in a manner that preserves the proper relation between unelected federal courts and democratically accountable state governments, and policing of nondiscriminatory state regulations of interstate commerce would be left to the political branches of the federal government, as the Constitution so clearly intended.

#### CONCLUSION

In this Article, we have shown that the Privileges and Immunities Clause has been misinterpreted by judges and scholars alike, much to the nation’s distress. The federal judiciary has imposed artificial limitations on the Clause’s protective reach, restricting its antidiscrimination command to state actions impinging on only a vague set of “fundamental rights,” despite the fact that the dangers that the Clause is designed to prevent are likely to arise even when the state regulation impacts only citizen interests not falling within the category of rights deemed “fundamental.”<sup>192</sup> This gross judicial underuse has allowed states to discriminate based on residency for any number of “nonfundamental” purposes. Additionally, the Court’s seemingly unjustifiable decision to exclude corporations from the protections of the Clause has significantly limited the ability of those most affected by residency-based discrimination to challenge such actions in the federal courts.<sup>193</sup> Conversely, certain academics have sought to overuse the Clause, arguing for incorporation by reference of the listing of fundamental rights mysteriously inferred from the Privileges *and* Immunities Clause into the Fourteenth Amendment’s Privileges *or* Immunities Clause, even though from the perspective of constitutional democracy the consequences of the use of fundamental rights in the two contexts is diametrically opposite.<sup>194</sup>

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<sup>189</sup> See *supra* Section II.A.

<sup>190</sup> See *supra* Section II.B.

<sup>191</sup> See *supra* Section II.C.

<sup>192</sup> See *supra* Section II.A.

<sup>193</sup> See *supra* Section II.C.

<sup>194</sup> See *supra* Part III.

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What those employing both of these interpretative devices have missed, however, is that the Privileges and Immunities Clause was included in the Constitution to serve a very important and specific function—one far beyond what the federal courts have contemplated, and one nowhere approaching what libertarian scholars have proposed. It was, rather, designed as an essential constitutional tool of interstate federalism that would deter disputes among the states brought on by discriminatory action by a state against out-of-state citizens, thereby helping to keep the young nation from splitting apart. The experience of the nation under the Articles of Confederation had demonstrated all too clearly the dangers inherent in allowing states to compete through processes of discrimination, and convinced the Framers that national unity was essential if the republic was to survive. This constitutionally dictated interstate federalism that the Clause was designed to foster has been greatly undermined by all of the gratuitous and unjustified restrictions imposed by the federal judiciary on the Clause's reach.

Reinvigorating the interstate federalism component of the Privileges and Immunities Clause would not only realign the jurisprudence surrounding the Clause with its proper constitutional purpose and interpretation; it could also render unnecessary the existence of the wholly unjustified, undisciplined, and atextual Dormant Commerce Clause.<sup>195</sup> Adopting our interpretation of the Clause would significantly expand the ability of corporations to help police unconstitutional discrimination and prohibit states from engaging in protectionist practices that are deemed insufficiently important to receive constitutional protection. And, as previously noted, our suggested interpretation of the Privileges and Immunities Clause also rebuts the originalist contention that the Clause can be employed indirectly to justify constitutional protections of natural rights. Achievement of these goals, we believe, would do much to restore proper notions of constitutionally dictated interstate federalism and end the need for countertextual constitutional doctrines lacking any conceivable basis in constitutional text. Finally, as a matter of interpretive theory, acceptance of our approach would have the beneficial effect of preventing a provision focused exclusively on the need to police relations among states from being perverted into a device that allows unrepresentative, unaccountable federal courts from imposing the atextual straightjacket of natural rights on democratically elected state governments. Achievement of any one of these goals, much less all of them, would constitute a significant advance for the constitutional values of interstate federalism.

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<sup>195</sup> See *supra* Part IV.