Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce

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> All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;* nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]
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> "[C]itizenship means something."[2]

This Article suggests that the Fourteenth Amendment's Privileges or Immunities Clause constitutionalizes various privileges of civil and political participation. Although it is a well-rehearsed theory of judicial review that self-dealing elected majorities should not be trusted to legislate rules that remove insular minorities from political and civil processes,[3] the participation-oriented privileges attending these theories have long been a matter of only "intratextual"[4] inference from the "textual relationships"[5] among separate constitutional clauses. For example, the

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[1] U.S. CONST. amend. XIV, § 1 (emphasis added).

[2] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114 (1873) (Bradley, J., dissenting).

[3] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88–104 (1980) (discussing constitutional value of rights of participation generally).

[4] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (viewing different constitutional provisions in a holistic scheme that yields constitutional rights enumerated in no one clause). *See also* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999) (offering intratextual theory to glean structural inferences from different clauses viewed together).

[5] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 40–43 (1969).

Court's constitutional standard, articulated in *Reynolds v. Sims*,[6] of "one person, one vote"[7] relied, in part, on an equal protection norm for the disenfranchised and, in part, on a due-process-type right of political participation. However, as a doctrinal matter, a person whose vote counts as a fraction of another's may not qualify for suspect class protection and may not have had a fundamental right infringed. As a result, *Reynolds* somehow relied on the converging norms of both the Equal Protection Clause and the Due Process Clause, but on the literal text of neither. This Article investigates the textual source of these privileges of political and civil participation,[8] locating that source not in many clauses put together, but in one clause alone—the Privileges or Immunities Clause—in order to suggest a more workable clause-bound analytic for participatory privileges and to accommodate more accurately the clause's original meaning.

Viewing the privileges or immunities as participatory privileges of citizenship, rather than personal rights of individual liberty, challenges both of the prevailing interpretations of the clause. Minimalist renditions by Justices Miller,[9] Frankfurter,[10] and Chief Justice Rehnquist[11] render the clause a nearly empty set, including only the barest rights of national citizenship: the rights of free access to seaports, use of the nation's navigable waters, the benefit of rights secured by treaties, and the writ of habeas corpus, rights that "owe their existence to the Federal government."[12] In the other interpretive corner, Justices Bradley[13] and Black,[14] as well as recent commentators,[15] read richer unenumerated rights into the clause,

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[6] 377 U.S. 533 (1964).

[7] *Id.* at 558 (internal citations omitted).

[8] *See* ELY, *supra* note 3.

[9] *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873) ("[T]he privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and . . . they are left to the State governments for security and protection . . . .").

[10] *See, e.g.*, Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring). Justice Frankfurter referred to "the mischievous uses to which that [privileges or immunities] clause would lend itself if its scope were not confined to that given it [by Justice Miller]." *Id.* at 61. Although Frankfurter's opinion—that the privilege against self-incrimination was not a privilege or immunity under the Fourteenth Amendment—has not been expressly rejected, the *Adamson* Court's holding that states are not bound by the Fifth Amendment has been overruled. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

[11] *See* Saenz v. Roe, 526 U.S. 489, 511 (1999) (Rehnquist, C. J., dissenting) (opposing the Court's decision to "breathe new life into the previously dormant" clause).

[12] *The Slaughter-House Cases*, 83 U.S. at 79.

[13] *See, e.g., id.* at 116–18 (Bradley, J., dissenting).

[14] *See, e.g., Adamson*, 332 U.S. at 68 (Black, J., dissenting).

[15] *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); JAMES EDWARD BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997); Michael Kent Curtis, *The Curious History of Attempts to Suppress Anti-Slavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785 (1995); Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1147–50 (1997). *Compare* Richard L.

hinting that a modern judiciary could protect these substantive rights not just pursuant to current due process analysis, but with the Privileges or Immunities Clause as well. These commentators argue that returning the fundamental rights doctrine of due process to its proper textual location would not leave countless unenumerated rights in its wake.[16]

Both of these rival interpretations of the Privileges or Immunities Clause may be inaccurate and for the same reason. These two conflicting accounts overlook a middle position: that the normative content of the "privileges or immunities of citizens of the United States"[17] is embedded in conceptions of structural participation of self-government rather than in more general notions of personal liberty. When the clause's ratifiers and first commentators referred to privileges or immunities as fundamental rights, they did not mean to embrace the fundamental, state-of-nature rights of individual autonomy. Rather, they held privileges or immunities to a narrower, more politically structural predicate: the participatory privileges that make up a citizen's architectural role in the political and judicial process of civil government.

This Article begins by connecting two reference points for privileges or immunities—first, the privileges put forward in the 39th Congress (which drafted the Fourteenth Amendment) and, second, the privileges of propertied white male citizens already protected before the Civil War. Both notions of privileges focus on participatory citizenship rather than personal liberty. This structural theme of privileges was washed out as reconstructionist ideals receded and the Supreme Court became fearfully preoccupied with boundless rights of personal autonomy, rather than focusing on the participatory citizenship that the framers had in mind at the high tide of the clause's passage. The Court's interpretive anxiety in the *Slaughter-House Cases*,[18] *United States v. Cruikshank*,[19] and *Paul v. Virginia*[20] obscured the fact that the privileges protected by the Fourteenth Amendment, like those of its Article IV analogue,[21] were not originally intended to encompass the individual rights of personal freedom that be-

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Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) *with* Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 3, 38 (Amy Gutmann ed., 1997).

[16] *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1988); Michael Kent Curtis, *Resurrecting the Privileges and Immunities Clause and Revising* The Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C.L. REV. 1 (1996).

[17] U.S. CONST. amend. XIV, § 1, cl. 2.

[18] 83 U.S. (16 Wall.) 36 (1873).

[19] 92 U.S. 542 (1875).

[20] 75 U.S. (16 Wall.) 168 (1868).

[21] U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."). The Fourteenth Amendment's similar phrasing was intentional, and the amendment's ratifiers in the 39th Congress frequently looked to early judicial interpretations of Article IV in debating the Fourteenth Amendment's word choice. *See* discussion *infra* Part I.

longed to the Due Process Clause. As a result, these dueling interpretations, seeking arguments for and against a class of personal liberty rights, are both on the wrong interpretive trail. Their conceptions collapse the positive freedoms of participatory citizenship with the negative freedoms of private autonomy, a conflation neither intended by the drafters nor tolerated by early precedent. On the contrary, the 39th Congress aimed to put into writing a structural priority both narrower and deeper than the two prevailing theories of Privileges or Immunities Clause jurisprudence suggest—narrower, because the clause initially applied to only a subset of all citizens[22] and deeper, because the clause was intended to embrace richer privileges, such as the privileges to sue, to assemble, to have assistance of counsel, and to vote, all privileges with hints of national protection and some accented by state law opposition. The Fourteenth Amendment and the subsequent voting amendments may be viewed as constitutionalizing the clause's broader application to various groups of citizens, ensuring that this grouping of structural rights would no longer be conditioned away according to income,[23] domicile,[24] or movement.[25] Even so, that privileges or immunities initially had a selective application is interpretively important because it allows the phrase to sound in participatory structure, while accommodating a legislative history that does not imply that suffrage was meant as a privilege for all citizens in 1868. Accordingly, the clause did not provide any constituency with suffrage or any other structural rights, although, for some constituencies (for example, propertied white men more than twenty-one years old) it protected against the abridgement of these rights.

Current theories of the clause have left "representative-reinforcing," politically structural access privileges without literal support in the Fourteenth Amendment.[26] Their textual (and so conceptual) grounding in

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[22] Initially, this subset consisted mainly of propertied white males. However, this class of citizens has been broadened to include black men, *see* U.S. CONST. amend. XV, women, *see* U.S. CONST. amend. XIX, and 18- to 21-year-old people, *see* U.S. CONST. amend. XXVI.

[23] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down poll taxes); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring state appointment of counsel in all felony cases).

[24] See Reynolds v. Sims, 377 U.S. 533 (1964) (requiring that seats in a state legislature be appointed based on population).

[25] *See* Saenz v. Roe, 526 U.S. 489 (1999) (striking down state law that conditioned welfare benefits on duration of residence).

[26] Earlier renditions of this category of rights have also hinted at their structural nature, described as "a category that focuses neither on the *substantive* content of policies already chosen nor on the *procedural* devices selected for enforcing those policies but rather on the *structures through which policies are both formed and applied, and formed in the very process of being applied.*" Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R-C.L. L. REV. 269 (1975) (emphasis in original). These renditions are grounded either in Due Process (*see id.*) or a structural equal protection. *See generally* Keith E. Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection*, 27 CAP. U.L. REV. 337 (1999). They are flawed, however, in that they leave out important historical research.

the Constitution has been left to either due process or equal protection. This textual placement of these political and civil access privileges in the recent *Romer v. Evans*[27] and *Chicago v. Morales*[28] cases, as well as in older cases, such as *Gideon v. Wainwright*,[29] *Shapiro v. Thompson*,[30] and *Harper v. Virginia State Board of Elections*,[31] has prompted harsh criticism from the dissenting justices. This Article is, in part, a response to those critiques. Those dissents' originalist criticisms of access-reinforcing theory missed the mark: antebellum precedent and legislative history reveal that the participatory privileges at stake in these cases were bound up in the original intent of the Fourteenth Amendment's privileges or immunities of national citizenship.

In three parts, this Article suggests that the privileges or immunities of national citizenship constitute a citizen's unique architectural role in our civil and political structure. Part I examines text and early interpretation to show that the Fourteenth Amendment's phrasing was borrowed from Article IV to reflect structural guarantees referred to by both sides in the ratification debate and in antebellum precedent. The ratifying Congress developed a structural interpretation of the phrase "privileges or immunities" from cases like *Corfield v. Coryell*.[32] Part II chronicles the history of how the *Slaughter-House* Court, preoccupied with guarantees of personal liberty in the wake of slavery, bleached out the ratifiers' interpretive analytic. Part II also illustrates how the Fourteenth Amendment's faded structural promises to the nation's newest citizens have continued, nonetheless, to be a prolific source of constitutional protection, under one doctrinal pseudonym or another. These structural privileges of citizenship (rather than the liberty rights of due process) worked as a strong undercurrent in many participatory rights decisions of the Warren Court and have worked more subtly in decisions since.

Part III shows how, as a matter of doctrine, the recent narrowing of the Equal Protection Clause has endangered the structural, access-oriented protections of the Privileges or Immunities Clause. In *Saenz v. Roe*, the Court reconceived of *Shapiro*'s equal protection rights as fundamentally structural. This new direction may help to reconcile the majority and dissenting opinions in *Romer* and *Morales* by highlighting the 39th Congress' notion of structural participation as distinct from antidiscrimination principles and fundamental rights.

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[27] 517 U.S. 620, 633 (1996) (striking down Colorado's Amendment 2, which excluded gays, lesbians, and bisexuals from protection by Colorado's antidiscrimination laws). *See* COLO. CONST. art II, § 30b.

[28] 527 U.S. 41 (1999) (striking down a city ordinance allowing police officers to order the dispersal of any group that they believed included a member of a criminal street gang).

[29] 372 U.S. 335 (1963).

[30] 394 U.S. 618 (1969).

[31] 383 U.S. 663 (1966).

[32] 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

Finally, this Article argues that leaving the unique protections of citizenship to the Due Process and Equal Protection Clauses has caused problematic conflations with potentially wider autonomy-oriented rights and narrower antidiscrimination-oriented prerogatives.[33] Relocating these structural priorities back to their textual home—the Privileges or Immunities Clause—might ameliorate the current Court's difficulty in finding a basis for structurally oriented, political-access rights.[34]

I. Textual Irony

The Privileges or Immunities Clause of the Fourteenth Amendment was meant, in some measure, to replicate the access-reinforcing language of Article IV, which guaranteed to foreign citizens the same "Privileges and Immunities" held by state citizens.[35]

Adopting much of Article IV's phrasing, the Fourteenth Amendment targeted racial discrimination as Article IV had targeted geographically based discrimination. Both adopted structural antidiscrimination norms to protect politically powerless citizens. Early judicial interpretations of Article IV, as well as the 39th Congress that referred to them, described the privileges and immunities of national citizenship as contractualist rights of participatory citizenship, rather than as a laundry list of fundamental rights of personal autonomy. In short, Article IV's Privileges and Immunities Clause was less about restricting the substantive content of

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[33] *See, e.g.*, Coalition for Economic Equity v. Wilson, 122 F.3d 692, 711 (9th Cir. 1997) (upholding Proposition 209 (California Civil Rights Initiative), CAL. CONST. art. I, § 31(a)). The Ninth Circuit conceded that it was "a little perplexed" by the Supreme Court's lack of equal protection analysis regarding political access in *Romer*. However, that court mistook *Romer* to be a cue to reject equal protection, political access analysis. *See id.* at 704; *supra* note 20 and accompanying text.

[34] *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). Even Professor Tribe's most recent piece does not proffer a concept of participatory rights detached from due process and equal protection. *See* Tribe, *supra* note 4. As a result, Professor Tribe's piece employs the term "structural" differently than does this Article. By "structural inference," Professor Tribe derives interprovisional inferences by combining concepts from various constitutional provisions (such as equal protection and due process). *See id.* at 154. Rather than using structural inference, this Article focuses on the potential of a single clause to provide textual support for participatory privileges of citizenship. *Cf. id.* at 157.

Furthermore, Professor Tribe uses "structural inference" in service of both individual rights and states' rights. For example, *Alden v. Maine*, 527 U.S. 706 (1999), relied on concepts of federalism derived from both the Tenth and Eleventh Amendments, but located in the text of neither. *See* Tribe, *supra* note 4, at 158. This piece calls into question this sort of structural inference at the expense of individual rights.

[35] U.S. CONST. art. IV, § 2.

state laws and more about monitoring the structural methods of their enactment.

Recent attempts to show greater normative equivalence between the text of the Privileges or Immunities Clause and other constitutional text, however, center on the nearby Due Process and Equal Protection Clauses, rather than on Article IV. These attempts elide the conceptual and textual differences between the beneficiary classes of these three Fourteenth Amendment clauses. While the Privileges or Immunities Clause covers "citizens of the United States,"[36] its neighboring clauses more broadly address "any person."[37] Part I's focus on the unrealized potential of the Privileges or Immunities Clause attempts to explain the significance of this textual difference rather than ignore it.[38]

The first major exposition of privileges and immunities occurred long before the passage of the Fourteenth Amendment. In *Corfield v. Coryell*,[39] a Pennsylvania citizen brought suit to vindicate his right to dredge for oysters off the New Jersey coast. Justice Bushrod Washington analyzed Article IV's text to decide whether New Jersey's prohibition violated a privilege of national citizenship. Although the Justice said no, his exposition proffered a bright future for privileges and immunities, defining them as those privileges

> which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate .... The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state ... to which may be added, the elective franchise, as regulated and established by the laws and constitution of the state in which it is to be exercised.[40]

Of course, Justice Washington's holding included none of this grand contractualist theory. The court found only that oyster beds in New Jersey's tide-waters were its citizens' property and that local fishing practice

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[36] U.S. CONST. amend. IV, § 1, cl. 2.

[37] U.S. CONST. amend. XIV, § 1, cl. 3 & 4.

[38] *See, e.g.*, Baldwin v. Franks, 120 U.S. 678 (1887) (interpreting "citizen" in a strict sense, as contrasted with "alien," and not as synonymous with "resident," "inhabitant," or "person").

[39] 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

[40] *Id.* at 551–52.

was like voting in New Jersey, or serving in its militia, both of which were uncontestedly reserved for its inhabitants. Yet, the great puzzle of Washington's opinion is not its theoretical ambition, but its apparent holding that "professional pursuits" and even the "elective franchise" in New Jersey were fundamental rights held even by citizens just travelling through the state.

Read this way, the opinion attempted to describe personal liberties of all citizens no matter where they are and, read this way, critics are right that the decision is flawed.[41] Yet, by 1823, only state citizens of New Jersey could vote in their elections. What intelligible interpretive principle might Justice Washington have had in mind? The answer seems important, first, in deciphering why those on both sides of the Fourteenth Amendment's ratification debate quoted *Corfield* ritually[42] and, second, in understanding how recent commentators have misunderstood Washington's structural agenda as one based in autonomy, leaving these commentators certain "[that] Justice Washington's words, as reported, far overleaped his thought."[43]

In reading *Corfield*, these critics make precisely the same mistake that later judicial interpreters make in reading the phrase in its Fourteenth Amendment incarnation.[44] With no interpretive limits on how a judge could shape these liberty interests that they supposed that Justice Washington had offered, critics suggest *Corfield* erroneously trusted judges to fashion a consistent pattern of privileges and immunities with no textual guidelines. Actually, for Washington, the clause had a narrower, more politically structural meaning: it did not enunciate unenumerated personal liberties, but rather sketched out the structural role of citizens in a representative government.

That is why Washington's opinion is rooted in contractualist, nearly political talk about rights, "which belong, of right, to the citizens of all

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[41] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 40–43 (2d ed. 1997); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 181 (1990); Charles Fairman, *Reconstruction and Reunion, 1864–1888, Part One*, *in* 6 OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1122 (Paul A. Freund ed., 1971).

[42] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard); *Id. at* 474–75 (statement of Sen. Trumbull); *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992) (noting Trumbull's "obligatory quotation from *Corfield*").

[43] Fairman, *supra* note 41, at 1123.

[44] *See, e.g.*, Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting) ("The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and utility of government."). Justice Brewer's dissent criticized paternal theories of government that underprotected liberty. Given his inclination towards the "fullest possible protection to [the individual] and his property," *id.*, legislation that blocked citizens' access to court might have garnered Justice Brewer's disapproval, as well.

free governments."[45] His governing theory of American state and federal constitutionalism allowed for such broad privileges because they did not constitute a particular class of substantive rights embedded in the Constitution. Instead, these privileges addressed structure and defined the role of being governed in general. Washington viewed lengthening this architectural list of structural privileges as an interpretive job "more tedious than difficult."[46] Lengthening a list of constitutionally protected personal rights presented the opposite problem—it would be more tough than boring, as the *Slaughter-House Cases* proved.

Moreover, reading *Corfield* to protect only participatory rights of government allows out-of-towners to be kept out of local elections and referenda. *Corfield* secured "elective franchise," but only as "regulated and established by the laws and constitution of the state in which it is to be exercised."[47] If voting were a liberty interest, *Corfield*'s deference to state regulation would seem to unravel the opinion's protections: a state could simply disenfranchise any group or race, without any federal consequences. However, if *Corfield* stood for the proposition that elective franchise was distinctively a right of citizenship, it could be regulated via residency requirements or poll taxes, but it could not be denied once established as a matter of citizenship.

Critics are wrong to conclude that Washington's formal conception of citizenship did not square with our contemporary one. They claim that Washington's conception proved too much, because it would have allowed those just visiting the state to become part of the electorate. On the contrary, Washington's conception proved too little. His enumeration would have allowed poll taxes, grandfather clauses, and property requirements. As a substantive floor for the franchise, Washington's formal conception of citizenship did not offer the guarantees that the Nineteenth, Twenty-Fourth, or Twenty-Sixth Amendments each sewed into the structure of citizenship.[48]

To illustrate the difference between Washington's view and our contemporary conception, consider how the Justice might have decided *Minor v. Happersett*,[49] which denied women's enfranchisement in 1875. Notwithstanding the scare tactics employed by critics of *Corfield*, such as Professors Bork and Fairman, Justice Washington would not have dissented from the unaminous *Happersett* Court or let the Citizenship Clause[50] do the normative work of women's enfranchisement. Rather, just

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[45] *Corfield*, 6 F. Cas. at 551.

[46] *Id.*

[47] *Id.* at 552.

[48] *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (holding that state poll tax violated equal protection).

[49] 88 U.S. 162 (1875).

[50] The Citizenship Clause, U.S. CONST. amend. XIV, § 1, cl. 1 "an underutilized constitutional provision if ever there was one," is still taken to establish national citizenship for individuals born within the country. Tribe, *supra* note 4, at 126–27.

as he concluded that only a subset of the nation's citizens should dredge New Jersey's coastline or vote for its governor, Washington might have easily decided that only a subset of the nation's citizens should participate in the political process. That he would have denied the vote to women would not have been due to some interpretive mistake or to reading the words "privileges or immunities" to mean a substantive laundry list of personal rights relating to autonomy. His decision would have been based on the contractualist, participatory resonance of the clause, owing to the fact that its class of beneficiaries would not grow to include women until 1920[51] or to include those between eighteen and twenty-one years of age until 1971.[52]

Recognizing that Justice Washington's structural privileges guaranteed political and structural access, rather than substantive, individual liberty rights, helps to clear up his apparent confusion as to whether he wanted to offer a fundamental rights rendition of Article IV or wanted to articulate an antidiscrimination norm. In trying to offer either reading alone, Justice Washington would have succeeded at neither. If, on the one hand, Washington's ambition had been to secure fundamental individual rights, leaving them vulnerable to state regulation would have seemed to undue their protection.[53] On the other hand, if the opinion was an equality provision, it would not have made sense to guarantee this class of rights only for travelling citizens. If Justice Washington had been enunciating a proto-suspect-classification, then wouldn't any legal deprivation involving that class of rights have triggered his proto-strict-scrutiny?

However, a more consistent reading of Washington's opinion would be as a limited enumeration securing the structural, access-reinforcing rights of citizenship, which sketched a theory grounded in norms primarily related to social contract and only derivatively related to natural law rights. Therefore, as current debates wear on about whether the Privileges or Immunities Clause is founded on natural law or an antidiscrimination norm,[54] Justice Washington might have suggested that the clause contains a doctrinal dose of both. Washington's analysis spelled out a class of participatory privileges, nonfundamental in the context of personal rights

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[51] U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

[52] U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

[53] *See* Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

[54] *Compare* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989) (arguing that a natural law understanding of the Privileges or Immunities Clause is the best defense for limited government, separation of powers, and judicial restraint), *with* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 100 (1986) (arguing that the drafters of the Fourteenth Amendment imported fundamental rights theory into the Privileges or Immunities Clause), *and* Harrison, *supra* note 42 (asserting that the Privileges or Immunities Clause should be construed as an antidiscrimination provision).

but uniquely fundamental (in other words, not to be deprived by laws) as positive rights of citizenship. Part III of this Article suggests that this concern for the participatory privileges or immunities of citizenship was also present (although under a variety of doctrinal aliases) in cases like *Gideon v. Wainwright*[55] and *Bodie v. Connecticut*[56] and, more recently, in *Romer v. Evans*[57] and *City of Chicago v. Morales*.[58]

Unlike other efforts to breathe life into the Privileges or Immunities Clause, this Article rejects the conclusion that Justice Washington was using its Article IV analogue to "import the natural rights doctrine into the Constitution."[59] Rather, Washington's approach explored a different kind of structural predicate: "citizens of all free governments."[60] Indeed, the idea that Washington was mapping natural rights onto the Constitution, which arguably could have transformed privileges and immunities into substantive restraints on state legislation, was a product of northern Democratic scare tactics in the 39th Congress. In fact, the Democrats' caricature of the Privileges or Immunities Clause had its intended effect, making the clause appealing only to immoderate Republicans after ratification. Eventually, on the heels of its passage, only outlying Supreme Court dissents made use of this radical reading of *Corfield*.[61]

By the time of the 39th Congress, Justice Washington was not alone in viewing privileges and immunities as structural. Antebellum judicial rhetoric from a wide range of cases identified privileges at the state and constitutional level that were inherently structural and participatory. These cases described privileges as consisting of more than the right to interstate travel and the writ of habeas corpus, the few national citizenship privileges that even Justice Miller conceded in *Slaughter-House*.[62]

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[55] 372 U.S. 335 (1963) (guaranteeing free counsel). *See also* Douglas v. California, 372 U.S. 353 (1963) (guaranteeing free counsel on appeal, as well).

[56] 401 U.S. 371 (1971) (waiving court access fees).

[57] 517 U.S. 620 (1996) (invalidating a state constitutional provision that precluded both legislative and judicial protection for individuals based on sexual orientation or practices).

[58] 527 U.S. 41 (1999) (invalidating antiloitering ordinance that left standardless discretion to police).

[59] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 529 (2nd ed. 1988) ("*Corfield* can 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.").

[60] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

[61] *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116–18 (1873) (Bradley, J., dissenting) (focusing on fundamental rights protected in the original Constitution against invasion by the federal government).

[62] *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79–80 (1873).

Early nineteenth-century courts identified the privileges of some white citizens to file suit,[63] assemble and petition,[64] have counsel,[65] and vote.[66] Some of these participatory rights were embedded in the legislative history of, and contemporary commentary on, the Privileges or Immunities Clause, which include discussions of allowing African Americans to file suit,[67] give testimony[68] and assemble.[69] However, as for those

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[63] In 1821, Article IV's Privileges and Immunities Clause came before the Delaware Chancery Court. Justice Ridgely held, for a unanimous court, that "[o]ur constitution has declared that all courts shall be open, and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by due course of law, without sale, denial, or unreasonable delay or expense." Douglas v. Stevens, 1 Del. Ch. 465, 472 (1821). By the time that Washington wrote his opinion in *Corfield*, two years later, it was not unprecedented with regard to the right of a citizen "to institute and maintain actions of any kind in the courts." *Corfield*, 6 F.Cas. at 552. Justice Taney's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), also had linked the privilege of litigation to citizenship, holding that noncitizens lacked this privilege along with "any of the privileges and immunities of a citizen." *Id.* at 394. A scathing dissent during the Court's 1837 term reminded the majority that "[i]t has been held by this court, for more than forty years, that an express averment of citizenship is necessary to enable a citizen of one state to sue in the federal court of another; that is a special privilege, conferred by the constitution and the judiciary act . . . ." Livingston's Executrix v. Story, 36 U.S. 351, 414 (1837) (Baldwin, J., dissenting). *See also* Blight v. Fisher, 3 F.Cas. 704 (C.C.D.N.J. 1809) (No. 1542) (holding that the privilege claimed was in derogation of the right of the other party to sue).

[64] *See infra* notes 71–77 and accompanying text.

[65] *See infra* notes 88–95 and accompanying text.

[66] *See infra* notes 79–83 and accompanying text.

[67] By 1864, Speaker of the House Thaddeus Stevens had begun a constitutional campaign within Congress, through the Civil Rights Act of 1866, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981–1982 (1994), to ensure African Americans a "means of redress" through the judicial process. CONG. GLOBE, 38th Cong., 1st Sess. 25 (1864). Supporting Speaker Stevens was another senior Representative, John Broomall of Pennsylvania, who alerted the next Congress that, for over 30 years, citizens from other states had been denied the right to sue in southern state courts. *See id.* at 158. Senator John Henderson of Missouri also argued that the Civil Rights Act secured equal access to "the process of the courts," *id.* at 2962, as did his colleague Daniel Clark of New Hampshire, who asked, "[s]hould not the courts of justice be equally opened to [African American men] ?" *Id.* at 833. The Fourteenth Amendment was widely understood to constitutionalize this new statutory right; Representative Robert Schenck told his constituents that the Amendment's adoption would bring equality "in regard to the right of suing and being sued." CINCINNATI COMMERCIAL, Aug. 20, 1866, at 2. *See also* Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force . . . . It is one of the highest and most essential privileges of citizenship . . . ."); *Corfield*, 6 F. Cas. at 546; *Douglas*, 1 Del. Ch. at 465.

[68] The concept of a federally protected right to testify flowing from the Fourteenth Amendment generated a more polarized debate than the right to litigate generally. Represenative Leonard Myers of Pennsylvania noted, "[N]ot one of the rebel States allows a Negro to give testimony against a white man." CONG. GLOBE, 39th Cong., 1st Sess. 1622 (1866). Representative Garrett of Kentucky, during that same session, stated that "by the laws of Kentucky a Negro is not permitted to give evidence in a suit in which a white man is a party." *Id.* at 157. Even so, many leaders in the ratifying Congress were proponents of an African American citizen's right to testify in all cases: "If colored persons cannot testify against white persons, what protection can they have against outrage? The White person may perpetrate any brutality upon colored persons with impunity." CHARLES SUMNER, THE WORKS OF CHARLES SUMNER 43 (1st ed., Lee & Shepard 1874). Members of the Judiciary Committee reported to the House that Congress had the Constitutional power to allow African Americans as witnesses in state courts and recommended that the House do so. *See*

participatory rights that are absent from, or criticized in, the legislative history, it is important to underline the source of these privileges' contemporary protection. Often, they were conspicuously secured not because of state law, but rather despite it. The somewhat inconsistent protections of the rights to assembly, white male suffrage, and assistance of counsel were not recognized as flowing from state constitutions, as *Slaughter-House* would have mandated. In fact, federal recognition of these privileges in the face of state abridgement prior to the adoption of the Fourteenth Amendment, even if they applied only to white men of a certain age, suggests an originalist basis for federal protection of structural rights.

Against the historical backdrop of protecting only some citizens, the original meaning of privileges and immunities has remained unchanged, even if the speeches of the 39th Congress revealed that the drafters had meant to withhold certain structural rights from African American men and all women. Some privileges (for example, suffrage) for African American men and all women had to wait for additional constitutional amendments. This does not derogate the structural import of the clause's privileges, but rather describes the beneficiary class of these privileges. Early interpretations revealed a sliding scale of citizenship, along which Article IV and the Fourteenth Amendment did not offer the complete set of privileges to all citizens. This approach reconciles the Fourteenth Amendment's supporters' seemingly competing strategies: it could have been meant as an enforcement of privileges already guaranteed, or, alternatively, as a nationalization of privileges previously neglected. Both renditions were somewhat right. For propertied white citizens more than twenty-one years old, the Privileges or Immunities Clause merely provided congressional enforcement power for privileges that they already had. For the Union's newest citizens, the clause created constitutional privileges from scratch.

The Fifteenth Amendment, for example, reflected a new substantive value. It brought these different genres of citizenship closer together, just as the Nineteenth Amendment did with regard to women and the Twenty-Sixth Amendment to eighteen- to twenty-year-olds. These groups of citizens, like the newly enfranchised African Americans in 1870, were not simply an old type of citizen with a new privilege. Rather, each became a new sort of citizen with a long established set of privileges, as the following paragraphs illustrate. In other words, the participatory citizenry

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CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866). After the Amendment's passage, Governor Humphreys of Mississippi, in his message to the 1866 State Legislature, conceded that "Public Justice to both races demands the admission of Negro testimony in all cases." VICKSBURG DAILY HERALD, Oct. 17, 1866, at 2. *See also* United States v. Smith, 27 F. Cas. 1233, 1236 (C.C.D.N.Y. 1806) (No. 16,342A) ("The adverse counsel admit they are bound to prove the fact, but they refuse to us the privilege of disproving it.").

[69] *See supra* text accompanying notes 59–63.

was indeed a larger crowd after each of the voting amendments was adopted; more people voted in elections, sat on juries, and sued in courts. The ways in which they participated conformed to a rigid structural mold glazed by the Privileges or Immunities Clause and its Article IV predecessor. Enfranchisement amendments merely brought different genres of citizenship closer together: the Nineteenth Amendment welcomed women into a civil and political fold from which they had previously been excluded; the Twenty-Sixth Amendment did the same for eighteen- to twenty-year-old citizens.

Though the following discussion pieces together an analytical underpinning of many antebellum decisions, revealing the narrower and deeper predicates of participation that allowed citizens to assemble, vote, have access to counsel, and testify, it is not the purpose of the following paragraphs to chronicle each antebellum judicial recognition of a privilege and to impute its source to Article IV, section 2.[70]

The drafters considered the right to assemble to be a privilege or immunity of the Fourteenth Amendment. Representative James Wilson, Chairman of the House Judiciary Committee and manager of the Civil Rights Act of 1866,[71] commented that the rights of the Act included "the rights of assemblage for the purpose of petitioning."[72] Senator Howard, who sponsored the Fourteenth Amendment, said that it would secure, "the right of the people peaceably to assemble . . . ."[73] Even the *Philadelphia North American and United States Gazette* told its readers that "[t]he privileges and immunities are those . . . of holding meetings or conventions for lawful purposes."[74] Yet, the Supreme Court, only nine years later, saw the right to assemble quite differently. In *United States v. Cruikshank*,[75] the Court held that the right to assemble was a fundamental, natural right and was not within the scope of the Privileges or Immunities Clause, which contained only more positive rights of citizenship.[76]

The context in which the Fourteenth Amendment's drafters and *Cruikshank*'s revisionism considered the right to assemble proves a more important analytical point than an historical one. The Court interpreted these postbellum privileges or immunities by sectioning off natural or personal rights from the more conventional, bargained-for privileges of social contract theory. The *Cruikshank* Court ignored the fact that the clause's drafters had envisioned a convergence of natural and positive

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[70] *See, e.g.*, CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT (1997); Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997).

[71] 14 Stat. 27 (current version at 42 U.S.C. §§ 1981–1982 (1994).

[72] CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

[73] *Id.* at 2765.

[74] PHILA. N. AMER. AND U.S. GAZETTE, Sept. 28, 1866, at 2.

[75] 92 U.S. 542 (1875).

[76] *See id. But see* Hauge v. Comm. for Indus. Org., 307 U.S. 496 (1939).

protections, giving the right of assembly not less protection, but more.[77] As the next section illustrates, *Cruikshank*'s error was in viewing each of the Fourteenth Amendment's normative clauses as either with or without a basis in the bright-line concepts of natural rights, rather than as more positive rights of civil and political community. This error is reminiscent of the Court's preoccupation in the *Slaughter-House Cases*.[78]

Securing white men's right to vote was also justified not on the basis of state constitutional law, but as a national privilege. In *United States v. McCormick*,[79] decided thirteen years before the ratification of the Fourteenth Amendment, a D.C. Circuit Court considered a city ordinance requiring all registered voters to have resided in the District for at least one year. The election commissioners had interpreted this ordinance to require one year of citizenship, rather than mere residence. The court struck down this interpretation, noting that "the term 'resident' does not relate to [one's] political character as a citizen of the United States . . . ."[80]

After the Fourteenth Amendment's ratification, the Court, in *Murphy v. Ramsey*,[81] considered a Utah statute disenfranchising polygamists. The Court upheld the statute because its aim was to protect the "the idea of the family . . . . And to this end no means are more directly and immediately suitable than those provided by this act . . . ."[82] However, the Court also stated that, in the absence of such a legitimate state goal, or a less "direct and immediate" tailoring of means to ends, those citizens could not be denied "the privileges of elective franchise."[83]

Even so, in 1871, when suffragette Victoria C. Woodhull tried to persuade Congress to enfranchise women, pointing to the Privileges or Immunities Clause,[84] northern Democrats and Republicans together rejected the petition. They referred to the Fourteenth Amendment debates, emphasizing that the right to vote was not considered one of the privileges or immunities of all citizens of the United States. The language of the 41st Congressional Committee's rejection of women's suffrage was clear: the clause "did not add to the privileges or immunities before mentioned" in *Corfield v. Coryell*.[85]

The committee's reference to *Corfield* seems illogical, especially because that case spelled out voting as a fundamental right within the scope

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[77] *See, e.g.*, United States v. Sanges 48 F. 78, 85 (C.C.N.D. Ga. 1891) ("The right [to assemble] was not created by the amendment . . . . For their protection in its enjoyment, therefore, the people must look to the states." (internal citations omitted)).

[78] *See infra* notes 116–133 and accompanying text.

[79] 26 F. Cas. 1066 (C.C.D.C. 1855) (No. 15,663A).

[80] *Id.* at 1068.

[81] 114 U.S. 15 (1885).

[82] *Id.* at 45.

[83] *Id.*

[84] *See* H.R. REP. No. 41-22, at 1 (1871).

[85] *Id.*

of the privileges of national citizenship in Article IV. Yet, the reference makes perfect sense if one considers not just the kinds of privileges embedded in the clause, but also the kinds of citizens that Justice Washington had had in mind.

As a result, *Minor v. Happersett*,[86] which denied women suffrage after the adoption of the Fourteenth Amendment, was correct on the day that it was decided, because privileges or immunities seemed to have meant disenfranchisement by default for this constituency. Citizenship, when it came to women at that time, meant the membership of a nation and nothing more, just as it would mean today for someone not quite eighteen years old that attempted to vote.[87] These different understandings of citizenship may help to explain why the drafters of the Fourteenth Amendment chose not to make the clause applicable to any citizen, despite the fact that the Due Process and Equal Protection Clauses applied to "any person."[88]

The constitutional right to assistance of counsel underwent similar analytical revisionism. It was not clear to early colonists, for example, whether local charter guarantees to counsel should also guarantee court appointment in the event that a defendant could not retain counsel for financial or other reasons. Almost a century before the Constitution was adopted in 1787, Pennsylvania abided by a Charter of Privilege, which provided that "all criminals shall have the same Privilege, of Witnesses and Counsil [sic] as their Prosecutors."[89] Perhaps more importantly, South Carolina's robust right to counsel (including the appointment of counsel) relied on nonstatutory language, requiring that criminal proceedings follow the "law of the land."[90] The failure of other colonial charters to specify a right to counsel did not impact the right's protoconstitutional force. For example, although North Carolina's constitution did not secure the right to counsel until 1868, a 1777 state statute declared that "every person accused of any crime or misdemeanor whatsoever, shall be entitled to counsel."[91]

The fact that all defendants were entitled to counsel did not always square with state law. The interpretive moments in which courts recognized the privilege of having the assistance of counsel in the face of state law to the contrary gave the clearest view of the privilege's national character.[92]

Even so, after postbellum interpretations had made the Privileges or Immunities Clause almost useless, plaintiffs' invocations of its text to

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[86] 88 U.S. 162 (1875).
[87] *See* U.S. CONST. amend. XXVI, § 1.
[88] U.S. CONST. amend. XIV.
[89] WILLIAM M. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 16 (1972).
[90] *Id.* at 19.
[91] *Id.* at 16.
[92] *See Ex parte* Craig, 6 F.Cas. 710, 711 (C.C.E.D. Pa. 1827) (No. 3321).

secure this venerable privilege of citizenship fell upon deaf ears. Twice during the Court's 1892 term, parties argued, unsuccessfully, for the right to counsel as a matter of federal constitutional law. In the first case, an African American man "without counsel or means of procuring counsel" was convicted of murder.[93] Again, the defendant relied on "the privileges and just rights of citizens of the United States," rather than on New York's state constitution, to vindicate his right to counsel in state court.[94] In the second case, a defendant without counsel was convicted of murder.[95] Rather than relying on Illinois constitutional law to vindicate his right to counsel, the defendant referred to the "privileges and immunities guaranteed by the [federal] constitutional provisions" to provide the affirmative entitlement.[96]

This judicially recognized group of structural aims for citizens in the several states were not forgotten, even though the 39th Congress had inherited momentum from the 37th Congress, which was obsessively preoccupied with enumerating substantive civil rights—rights that more closely resembled the personal rights of *Cruikshank*[97] than the participatory privileges delineated by Representative Bingham.[98]

Some members of the 39th Congress, and many commentators of the time, expressed the idea that the Fourteenth Amendment, in general—and the Privileges or Immunities Clause, in particular—embodied the Civil Rights Act of 1866,[99] authored by the 37th Congress. This interpretive strategy assumed that the Fourteenth Amendment did not confer more concrete rights upon freedmen because the political consensus of the previous year was no longer intact.[100] This conventional interpretive tack seems dubious, however, particularly since the Civil Rights Act's aims are quite different from those of the Privileges or Immunities Clause. In contrast to the Fourteenth Amendment, the Act did not borrow the phrasing of Article IV. Rather than referring to privileges and immunities, the Act protected "civil rights or immunities," guaranteeing people of all races "the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and

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[93] Wood v. Brush, 140 U.S. 278, 279 (1891).

[94] *Id.* at 280.

[95] *See* Fielden v. Illinois, 143 U.S. 452 (1892).

[96] *Id.* at 454.

[97] *See supra* text accompanying notes 75–78.

[98] *See infra* text accompanying notes 104–105.

[99] 14 Stat. 27 (current version at 42 U.S.C. §§ 1981–1982 (1994).

[100] *See* Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1071 (1956) (asserting that Bingham questioned "the power to pass" the Civil Rights Bill by the time of the 39th Congress); *see also* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 61 (1962) ("[A]n explicit provision going further than the Civil Rights Act would not have carried in the 39th Congress.").

proceedings for the security of person and property, and shall be subject to like punishment . . . ."[101]

The Fourteenth Amendment's Privileges or Immunities Clause is notably different from its statutory predecessor in two ways. First, although the debate surrounding the Amendment's adoption also was weighed down with distinctions between political privileges and civil rights, the distinction was not present in the Fourteenth Amendment's text (unlike that of the 1866 Act).[102] Thus, the civil rights enumerated in the 1866 Act did not invigorate the Privileges or Immunities Clause. Rather, they confined the constitutional provision's full normative meaning.

Second, the 1866 Act envisioned a different set of beneficiaries than the Amendment did. The Amendment returned to the language of citizenship, the language of structure interpreted by *Corfield*. On the other hand, the civil rights enumerated in the 1866 Act inured to the "inhabitants of every race."[103]

These two distinctions, coupled with Part II's legislative research, provide a response to Professor Berger's taunt that "[n]o activist has attempted to explain why Bingham, after strenuously protesting against the oppressive invasion of the States' domain by 'civil rights,' embraced in the lesser 'privileges' of the Amendment the very overbroad scope he had rejected in the Bill."[104] Professor Berger is curious as to how the privileges of section 1 could have meaningful scope if its drafter had recently rejected a bill that included only a list of civil rights. However, Professor Berger's proposal is only difficult if one writes off, as he does, the possibility that Bingham may well have had a robust set of privileges in mind, but only those privileges that inhered in political and civil-access rights of citizenship. For Bingham, these privileges were fundamentally unlike a laundry list of substantive civil rights that could easily have voided a state majority's sovereignty. Indeed, securing structural privileges of political access would not merely have allowed Bingham to quell concerns about majority sovereignty; through the Privileges or Immunities Clause, he was able to guarantee it.

The Civil Rights Act's text sketched a list of enumerated rights. Even old-line Republicans in the 37th Congress agreed to the Act's specification of "civil rights or immunities," [105] making a stronger inter-

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[101] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

[102] *See, e.g.*, Senator Fessenden's comments that an amendment including suffrage for freedmen would not have "the slightest probability . . . [of being] adopted by the States." *Id.* at 704. Senator Doolittle said, "and out of New England there are not three States in this Union . . . that will vote for an amendment . . . by which negro suffrage shall be imposed upon the states." *Id.* at 2143.

[103] *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981–1982 (1994)).

[104] BERGER, *supra* note 41, at 46–47.

[105] § 1.

pretive case for excluding political and social rights.[106] Members of the 39th Congress harkened back to the meaning of the terms used by the 37th Congress. Senator Thayer conceded that "the words themselves are 'civil rights and immunities,' not political privileges . . . ."[107] The Civil Rights Act's different language stemmed from its different political motivation. The Act was meant to void substantive provisions of the recent Black Codes, which Senator James Wilson described as "barbaric and . . . inhuman."[108] Debating the Civil Rights Act, Senator Henderson pointed out that, "[t]hough nominally free," a freed slave could be made "yet a slave" by "discriminating legislation."[109]

Perhaps most interesting were Senator Clark's ill-defined but pronounced structural concerns about the access-oriented harms imbedded in the Codes: "[These laws] will shut [an African American] off from the courts, seal his mouth as a witness."[110] It was these same structural concerns that produced constitutional text just two years later.

Even if those denying the structural meaning of the Civil Rights Act had an interpretive leg to stand on,[111] the text of the Privileges or Immunities Clause deliberately adopted different wording. The inclusion of the structural language of Article IV's "privileges" rather than the Act's "civil rights" was noteworthy; it injected a phrase into debate that previously had been associated with political and judicial access.

The distinction was not lost on other members of Congress. Senator Trumbull later commented that the Act had nothing to do with suffrage or any other kind of political privilege but merely concerned itself with civil rights.[112] In contrast, Senator Thayer used a cautionary tone when defending the 1866 Act's modesty: "[T]he words themselves are 'civil rights and immunities,' not political privileges . . . ."[113]

Significantly, however, the fact that the language of the clause was conspicuously altered from that of its statutory predecessor did not mean that the clause's mention of "privileges" secured suffrage for African American men or women. The term, although perhaps more controversial

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[106] *See id.*

[107] CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866).

[108] *Id.* at 1118.

[109] *Id.* at 3034.

[110] *Id.* at 834.

[111] Henry Wilson, Chairman of the House, gave a restricted reading of the Act's "civil rights and immunities." He asked:

> What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed . . . . Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities.

Id. at 1117. Chairman Wilson went on to suggest that these were social rights. *See id.*

[112] *Id.* at 599.

[113] *Id.* at 1151.

for its lingering political resonance, was less controversial for its higher level of generality. Instead of presenting an uphill argument that the Amendment secured suffrage for African American men or women as citizens, too, this section suggests that its text was aimed at a narrower class of citizens for whom privileges of citizenship meant something more.

After all, the 1866 Act's provision and the Fourteenth Amendment inured to inherently different groups. It is a wrong turn to apply a natural rights analysis to the Privileges or Immunities Clause. Although *Corfield* explored what rights were fundamental, its discussion was always fastened to citizens' rights. It is for this reason that Justice Thomas's recent scholarly account is misdirected in its attempt to look to the natural law political philosophy of the founding fathers to nail down "natural rights of all men" in order to define the content of the Privileges or Immunities Clause.[114] This natural law agenda is more fitting, as a conceptual and textual matter, in discussing the Civil Rights Act, whose enumerations were bestowed on all persons, not just citizens.

Other accounts also elide the clause's reference to citizenship, such as Professor Antineau's, who selectively quotes Bingham to make his drafting of the first section suggest "those rights common to all men."[115] In trying to adopt an expansive reading of the clause by dubbing in the Civil Rights Act's inclusion of all inhabitants for the Amendment's actual text of citizens, Professor Antieau's broader reading, grounded in autonomy, endangers the clause. As Part II shows, dislodging the fundamental rights of citizenship from the structure of government and instead defining them by reference to notions of personal liberty ultimately precluded post-Civil War judges from taking them seriously.[116] Thus, the irony of this early jurisprudence is that attempts to widen the clause's normative application soon proved to narrow its practical effect.[117] As events would soon bear out, the vagueness that provided the potential force of the Privileges or Immunities Clause was of far greater interpretive use to antagonists of its development.

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[114] *See* Thomas, *supra* note 54, at 63.

[115] ANTIEAU, *supra* note 70, at 59 (quoting Bingham's original draft, which read: "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within the jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any state"). *Id.* Of course, Antieau's exhaustive account could cut the other way: natural-law-type protection for all inhabitants was not lost on the Framers of the 14th Amendment. It was considered in earlier drafts and abandoned. *See generally id.* at 50–110.

[116] *See infra* text accompanying notes 120–162.

[117] *See* Campbell v. Morris, 3 H. & McH. 535, 554 (Md. 1797) (broadening Article IV.'s privileges and immunities to include "personal rights" and, thus, necessarily giving "a particular and limited operation . . . to these words").

II. Analytical Revisionism

The preceding section begins to put forward a unifying theory of the Fourteenth Amendment's privileges or immunities. It presents a structural rendition of the clause that tries to reconcile its robust interpretation in *Corfield* with the comments of the Fourteenth Amendment's drafters. This rendition also serves to distinguish the clause from the Civil Rights Act and its laundry list of substantive, rather than structural, rights. Having presented a partly analytical, partly historical account of the text's structural contours, this section chronicles how the ratifiers' interpretive analytic was revised by the postwar Supreme Court—a Court preoccupied with guarantees of personal liberty in the wake of the slavery experience. This section also discusses the manner in which the Fourteenth Amendment's structural privileges persisted, subtly, as a source of constitutional protection.

A. Transformation

Perhaps most damaging to structural interpretations of privileges, as applied to the Fourteenth Amendment, were not the Justices on the *Slaughter-House* Court, but the plaintiffs. After all, the Privileges or Immunities Clause did not make its judicial debut on behalf of a freed slave; rather, it was raised by a group of an indignant Southern white butchers, protesting carpetbag legislation. The right that the plaintiffs sought was an economic liberty, not a political one: they wanted to keep slaughtering cattle unimpeded by a legislatively granted monopoly to the largest slaughterhouse conglomerate in town, and they complained that their ability to do so was a privilege or immunity of national citizenship.[118]

This scenario was far from what anyone had had in mind during the high-minded debates of the 39th Congress. Republican discourse had been majestic in its exegeses about freedom, God, and the meaning of citizenship; Democratic discourse had been furiously defiant in its allegiance to state sovereignty and its frank, racist talk about the mental incompetence of nonwhites. Yet, the first case that squarely challenged the scope of the Privileges or Immunities Clause[119] related to none of the political, social, or civil implications that took the drafters of the Fourteenth Amendment a full year to discuss. Worse yet, this case's interpretive value is questionable because the lower courts viewed the case as being about bribery, not economic or political liberty at all. The *Slaughter-House* trial court found that the most apparent difficulty with the Louisi-

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[118] *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 59–60 (1873).

[119] The *Slaughter-House Cases* were not the first to invoke the clause. In *Worthy v. Comm'rs*, 9 U.S. (1 Wall.) 611 (1869), the Court mentioned the clause for the first time in securing for a sheriff candidate the office to which he had been elected. *See also* Steines v. Franklin County, 14 U.S. (1 Wall.) 15 (1871).

ana statute was its enactment due to graft in Louisiana. According to the trial court, "other parties occupying official positions in the city of New Orleans were bribed . . . [and] the Governor's signature to that bill was obtained by the same soft sawder."[120]

In fact, the *Slaughter-House* lower court opinions are significant in that they illustrate a different, more structurally oriented rendition of the clause that was successful at the trial level and affirmed by the circuit. The historical background of the case may offer some insight into the shifting interpretation of the clause as the case passed from the trial court through appeal and, finally, to the Supreme Court's rejection of a structural, citizen-centered reading of the Privileges or Immunities Clause.

In striking down the law, the trial court did not reach the constitutional question of whether it violated the Fourteenth Amendment. It was so taken aback by the statute's corrupt legislative history that it easily found for the plaintiffs. The court swiftly held that "the ground from which this action springs was a fund created for purpose of corrupting . . . members of the Legislature . . . ."[121]

On appeal, however, the Federal Circuit went straight to the constitutional matter. The headnotes to the opinion state that "[s]ection 1 of the fourteenth amendment to the constitution applies to white as well as colored persons, as citizens of the United States . . . ." The headnotes continued, "[t]hese privileges and immunities do not consist merely in being placed on an equality with others; but embrace all the fundamental rights of a citizen."[122] This is noteworthy because it shows the circuit court drifting away from a participation-oriented view of the clause, which would have secured only access-oriented fundamental rights of citizenship. Interestingly, had the Court taken a participation-oriented view of the clause, the decision might have been the same, since a Louisiana legislature paid off by special interests was not amenable to the concerns of smaller butchers that did not have comparably deep pockets.

The circuit court first adopted an interpretive commitment to securing "to all citizens equal capacities before the law" and then rejected this for a more substantive alternative, asking "[w]hat are the privileges and immunities of citizens of the United States? Are they capacities merely? Are they not also rights?"[123] This willingness to admit into the group of privileges and immunities not only privileges vis-a-vis the political process but also rights more closely tethered to personal liberty reflected a turning point in the judicial deliberation of the meaning of privileges. While riding circuit in Louisiana, Justice Bradley coincidentally sat on the panel hearing the *Slaughter-House Cases*. He wrote:

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[120] NEW ORLEANS BEE, Mar. 19, 1872.

[121] Durbridge v. Slaughter-House Co., 27 La. Ann. 676 (1875).

[122] Live Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649 (C.C.D.La. 1870) (No. 8408).

[123] *Id.* at 654.

> It was very ably contended, on the part of the defendants, that the Fourteenth Amendment was intended only to secure to all citizens equal capacities before the law. That was at first our view of it. But it does not so read .... What are the privileges and immunities of citizens of the United States? Are they capacities merely? Are they not also rights?[124]

The court framed this discussion of fundamental rights as one about citizenship, although it is clear that the Court saw them as having a more substantive interpretive role. The court concluded that "there is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner."[125]

In siding so strongly with the plaintiffs, Justice Bradley's circuit court opinion was, in many ways, off-putting to a Supreme Court particularly sensitive to attacks on state sovereignty. As a result, Bradley's generous reading of the clause had a whipsaw effect. Plaintiffs' counsel, confident due to the sweeping language used by the lower court, advanced to the Supreme Court an interpretive gambit that in the end contributed to the Court's drastic interpretation of the clause. The plaintiffs asked the Court for a robust, liberty-based reading of the clause, so as to include all civil rights, rather than just a structural reading confined to the participatory, access privileges unique to citizenship. To the plaintiffs' dismay, and to the dismay of all with high regard for the Clause, this unbounded interpretation is precisely what they got.

The plaintiffs' brief entirely conflated participatory privileges of citizenship with the natural rights of people. Plaintiffs' counsel petitioned the Court to read into the clause broader notions of liberty, calling the Civil War a "mighty revolution" that made the word "citizen" into "a word of large significance, and comprehended great endowments of privilege, immunity, of right."[126]

These legal tactics proved unfortunately successful. In deep contrast to the high-minded, almost fanciful, suggestions for the clause advanced by the plaintiffs, the city's lawyer from Louisiana humbly pointed to the legislative history of the Fourteenth Amendment. He quoted members of the 39th Congress's Joint Committee on Reconstruction—Representatives Trumbull, Bingham, Kelly, Hale, and Stevens—all senior Republicans. At oral argument, he responded freely with cites from Representatives Garfield, Raymond, and Poland. The Louisiana lawyer stated: "So far as can be judged by public debates upon the subject, it was certainly never intended or contemplated that this Amendment should receive such

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[124] *Id.*
[125] *Id.* at 652.
[126] FAIRMAN, *supra* note 41, at 1346.

a construction. Have Congress and the whole nation been deceived, misled, mistaken? Have they done that which they did not intend to do?"[127]

At no point did Louisiana's interpretation of the legislative history point away from a limited, structurally participatory vision of the clause. Plaintiffs' counsel decided to go for broke with a substantive vision of natural rights that could subordinate every state ordinance, while the defendant used history merely to challenge this interpretive hyperbole. In fact, in his opinion, Justice Miller cited a contemporary precedent that affirmed *Corfield*'s contractualism, hinting at the clause's structural import:

> This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward v. The State of Maryland* .... The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are in the language of Judge Washington, those rights which are fundamental.[128]

Justice Miller might have explored further this intermediate position bound up in the structure of organized government and the political access of its citizens. Instead, Justice Miller was taken in by a view that forced him to fear the boundless potential substance of the clause. He complained:

> Was it the purpose of the 14th Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the Federal government?[129]

It is notable that not even Justice Miller's version of *Corfield* threatened this usurpation of state sovereignty on the matter of all civil rights.[130] Justice Miller responded to the plaintiffs' arguments with an equally drastic interpretation, giving his own historical narrative a strik-

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[127] *Id.* at 1356.

[128] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 76 (1872).

[129] *Id.* at 77.

[130] *See supra* Part I (attempting to reconcile Justice Washington's concern with securing fundamental rights against state intrusion while giving them so much rope by arguing that *Corfield*'s protective power extended to fundamental rights that were not guards against the substance of all state legislation, but only that which implicated political and civil access privileges).

ingly northern Democratic feel. The lower court had chronicled the South's indifference to countless rights during the slavery experience and Reconstruction. However, Justice Miller's opinion did not refer to the slavery experience or to the systemic disregard for the civil rights of freedmen in the aftermath of the Civil War. In fact, Justice Miller's references to emancipation are sterile and starkly nonjudgmental: "In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict."[131] Not surprisingly, his account described the high stakes of the Civil War as pertaining to state sovereignty. "[T]he true dangers of the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government."[132] Justice Miller conceded that *Dred Scott v. Sandford*[133] had been unambiguously overruled by the Fourteenth Amendment but, for him, "the privileges and immunities . . . belong to the citizens of the states . . . and . . . are left to the state governments for security and protection."[134] For Justice Miller, if states defaulted in their protection of these privileges, there was still no federal remedy. While the lower court forcefully had concluded that the Fourteenth Amendment's adoption had reinvigorated the Constitution's watchfulness over state encroachment, Justice Miller's account apologized for the hyperactive sovereignty intrusions of the national government.

In other words, Justice Miller constructed a narrative that supported the rationale of *Barron v. Baltimore*,[135] holding that the Bill of Rights did not apply to the states. Unlike Justice Field, in dissent, Justice Miller sought to maintain the "even hand"[136] of federalism by clarifying *Barron*'s constitutional asymmetry rather than by repairing it.

Given what seemed to be two choices for Justice Miller, his decision—although wrong headed—was not as revisionist as it might otherwise seem. Rather than recognizing "the entire domain" of rights petitioned for by plaintiffs' counsel, he went to the next recognizably determinate set of rights: rights that "owe their existence to the Federal government, its National Character, its Constitution, or its laws."[137] Not coincidentally, those national rights were scant, with controlled examples, such as the right to access seaports and the writ of habeas corpus. Perhaps anticipating Justice Frankfurter's anxiety, Miller was fully convinced of the "mischievous uses" of an unbridled Privileges or Immuni-

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[131] *The Slaughter-House Cases*, 83 U.S. at 68.

[132] *Id.* at 82.

[133] 60 U.S. 393 (1856) (invalidating the Missouri Compromise because neither slaves nor freedmen could be citizens).

[134] *The Slaughter-House Cases*, 83 U.S. at 78.

[135] 32 U.S. (1 Pet.) 243 (1833).

[136] *The Slaughter-House Cases*, 83 U.S. at 82.

[137] *Id.* at 79.

ties Clause,[138] or, perhaps, the plaintiffs' argument was so far removed from the intended normative force of the Amendment that it resulted in Justice Miller's interpretive overcompensation, which ultimately left the plaintiffs unprotected by the clause.

Either way, *Slaughter-House* and its progeny[139] successfully reshaped the clause, making it appear as an uncontrollably interventionist tool, or, in the alternative, the experiences of the *Slaughter-House* Court—via legal tactics and its conclusory historical research—transformed the clause's structural meaning into a means of controlling the substantive values of state legislation. As Justice Miller expressed in a later decision, for him, an animated Privileges or Immunities Clause was one "that would simply test the merits of the legislation on which such a decision may be founded."[140]

Eventually, the strains of post-Civil War industrialization and corporate consolidation demanded sweeping legislative responses.[141] However, having disabled the Privileges or Immunities Clause and its structural reference to citizenship, the Court seemed unable to locate textual boundaries in the Constitution on which to base a rejection of the legislation.[142]

By 1875, even Justice Miller had written an opinion invalidating a state statute. In *Loan Association v. Topeka*,[143] the Court struck down a local ordinance authorizing the issuance of municipal bonds for the benefit of private enterprise. One passage in the opinion—with an almost sad sense of interpretive rehabilitation—tried to prop up language like *Corfield*'s, which Justice Miller had crippled just five years before. In the opinion, Justice Miller wrote that there are

> rights in every free government beyond the control of the State .... There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not

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[138] *Compare* Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring) (referring to the "mischievous uses" to which the Privileges or Immunities Clause would lend itself).

[139] *See, e.g.*, Bradwell v. Illinois, 83 U.S. (1 Wall.) 130 (1872) (holding that admission to the Illinois Bar, denied to the plaintiff because of her gender and marital status, was not a right to which citizens are entitled under the Privileges or Immunities Clause).

[140] Davidson v. New Orleans, 96 U.S. 97, 103–05 (1877).

[141] *See generally* BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988).

[142] *See* Smyth v. Ames, 169 U.S. 466 (1898) (employing stricter standards for regulation); R.R. Comm'n Cases, 116 U.S. 307, 331 (1886) (beginning deferential judicial scrutiny of rate regulation); In the Matter of Jacobs, 98 N.Y. 98 (1885) (striking down state law restricting cigar manufacture).

[143] Loan Assoc. v. Topeka, 87 U.S. (20 Wall.) 655 (1874).

> exist, and which are respected by all governments entitled to the name.[144]

However, Justice Miller could not go home again; he failed to tie his opinion to any particular constitutional provision, leaving his structural intuitions without textual support and his *Slaughter-House* decision unreversed.[145] It seems that Miller, who would not read constitutional text to allow judicial freewheeling, somehow thought it more restrained to allow freewheeling with no text at all.

Two years later, the Court's hold on judicial restraint began to slip. In *Munn v. Illinois*,[146] the Court narrowly rejected an attack on a state law regulating grain elevator rates, holding that the defendant's regulated property was affected with a public interest.[147] The Court no longer even hinted that the Fourteenth Amendment offered textually based guidance for its legislative recommendations. Instead, Chief Justice Waite relied on seventeenth-century English writings to determine whether the parties had "clothed the public with an interest in their concerns."[148] Following Justice Miller's lead, Chief Justice Waite was unapologetic about citing no constitutional text.[149]

The Waite Court's decision in *Allgeyer v. Louisiana*[150] hastened the post-Civil War Court's slow drift across constitutional provisions, from Privileges or Immunities to Due Process. The Court found that a Louisiana statute closing the life insurance market to newcomers violated the Fourteenth Amendment because it "deprive[d] the defendants of their liberty without due process of law."[151] Strangely, however, the scope of the Court's rationale lay somewhere between the two clauses. Writing for the *Allgeyer* Court, Justice Peckham made a substantive legislative recommendation not just for "any person," but on behalf of "the citizen," noting that

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[144] *Id.* at 662–63.

[145] Indeed, the states subsequently took Justice Miller's failure to cite a constitutional provision as a cue to hold legislation unconstitutional without offering a textual reason. For example, in *Jacobs*, 98 N.Y. at 98, a New York court held unconstitutional a law that prohibited the manufacture of cigars in tenement houses. The court held that the ordinance intruded on "the profitable and free use . . . [of] personal liberty" but, following Miller's lead, cited no constitutional provision at all. *Id.* at 105. *See also* Godcharles v. Wigeman, 113 Pa. 431 (1886) (invalidating regulation of wage payment methods).

[146] 94 U.S. 113 (1876).

[147] *See id.* at 134.

[148] *Id.* at 133.

[149] *Id.* Ten years later, in *Mugler v. Kansas*, 123 U.S. 623 (1887), the Court signaled its willingness to second-guess whether state statutes were, in fact, legitimate exercises of police power if they resulted in "a palpable invasion of rights secured by the fundamental law." *Id.* at 661.

[150] 165 U.S. 578 (1897).

[151] *Id.* at 589.

> [t]he liberty mentioned in [the Fourteenth Amendment] means not only the *right of the citizen* to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the *right of the citizen* to be free in the enjoyment of all his faculties . . . .
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> . . .
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> In the *privilege* of pursuing an ordinary calling or trade and of acquiring, holding, and selling property must be embraced the right to make all proper contracts in relation thereto.[152]

Justice Peckham's subliminal tribute was short lived. In *Allgeyer*'s sister case, *Lochner v. New York*,[153] the Court's rhetoric shifted; *Allgeyer*'s notion of a citizen's privilege was now part of "the liberty of person."[154] Justice Peckham's complete shift to a universalist tone is traceable to *Maxwell v. Dow*,[155] a critical case that he decided between *Allgeyer* and *Lochner*.

In *Maxwell*, Justice Peckham denied that a plaintiff's Fifth Amendment rights were derived from national citizenship and so protected against state abridgement by the Fourteenth Amendment. Justice Peckham predictably cited the *Slaughter-House Cases* at length, calling it "one of the leading cases" on the Privileges or Immunities Clause.[156] As a result, Justice Peckham's opinion was short—just long enough to recap *Slaughter-House*. He cited the case for the proposition that the Privileges or Immunities Clause did not "radically change[ ] the whole theory of the relations of the state and Federal governments to each other . . . ."[157] He also quoted Justice Miller in arguing that, if the rights of state citizenship "heretofore belonging exclusively to the States" were brought within the power of Congress,[158] the resulting federal power would "constitute this court a perpetual censor upon the legislation of the states."[159]

At some level of generality, Justice Peckham's doctrinal groundwork in *Lochner* and the dissents in *Slaughter-House* were much alike: both realized that the states were able to endanger their inhabitants as much as the federal government was able to endanger the states.[160] Also, like the *Slaughter-House* dissents, *Lochner* followed an interpretive trajectory of

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[152] *Id.* at 589–91 (emphasis added).
[153] 198 U.S. 45 (1908).
[154] *Id.* at 53–54.
[155] 176 U.S. 581 (1900).
[156] *Id.* at 591.
[157] *Id.* at 590.
[158] *Id.* at 589.
[159] *Id.* at 590. This fear of the Court acting as a censor is ironic given Justice Peckham's opinion five years later in *Lochner*, 198 U.S. at 45.
[160] "This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase." *Lochner*, 198 U.S. at 63.

fundamental rights theory, based not on the Privileges or Immunities Clause, but on the apparently less menacing Due Process Clause.[161] As the Court's vision unfolded, that proved to be a textual trick of light; the apparently procedural hue of the Due Process Clause's guarantees made its application more expansive, not less.

This interpretive migration, from the potentially vast expanse of the Privileges or Immunities Clause of the Fourteenth Amendment to the seemingly narrower lowlands of due process, demonstrated two things: that the Court had left behind the Privileges or Immunities Clause for the wrong reason and the irony of where the Court settled instead. The Due Process Clause's panoramic views of "liberty" and "property" allowed the Court to chart values not specifically stated in the Constitution, although its interpretations were not even confined by the structure of citizenship located within the text of the Privileges or Immunities Clause.

The Court's effort to relocate these privileges of political and civil access has more recently brought it to the only landscape left in the Fourteenth Amendment, the Equal Protection Clause.[162] This framing of structural protection, based on a sense that governmental classifications are inherently suspect, has proven to be too narrowly process oriented. Perhaps more interesting, though, is that, en route to the Court's current (albeit endangered) structural equal protection doctrine, the Warren Court began prolifically protecting access privileges using both equal protection and due process norms.

B. Posthumous Legacy

Burying the Privileges or Immunities Clause did not smother its interpretive force, but the Court did hide it well. If the Court's five-to-four decision in *Adamson v. California*,[163] holding that the Fifth Amendment's privilege against self-incrimination did not apply to the states, was a close call, it was not because self-incrimination was one of the privileges or immunities of citizens of the United States. Rather, the Court's decision came from the conclusion that bearing witness against oneself was consistent with due process. In other words, for Justices Reed and Frankfurter, protecting self-incrimination through the Fifth Amendment was just an extra precaution taken by anxious drafters of the Bill of Rights,

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[161] *See* TRIBE, *supra* note 59, at 533 ("In spite of the shift in focus [from categorizing fundamental rights to justifying discriminatory classifications], the fundamental rights approach has not been purged from privileges or immunities clause analysis.") (internal citations omitted); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1247 (1998) (arguing that the Framers' fundamental rights view of the Privileges or Immunities Clause "turns out to resemble the doctrine that would blossom into the fundamental rights strand of equal protection analysis in the 1960s").

[162] U.S. CONST. amend XIV, § 1, cl. 4 ("nor deny to any person within its jurisdiction the equal protection of the laws").

[163] 332 U.S. 46 (1947).

not an essential element of due process. In this way, the Court held that the "due process clause of the Fourteenth Amendment . . . does not draw all the rights of the federal Bill of Rights under its protection."[164] The Court was apparently reacting against a broad due process definition like the one in *Allgeyer*. The Court stayed closer to the Fourteenth Amendment's text in thinking about the procedural ingredients of fair trial, rather than the range of liberties that the clause might protect. Yet, this closer reading of the text did not save the *Adamson* Court from committing the same two interpretive mistakes of *Allgeyer* that it had meant to condemn. First, *Adamson*'s discussion of what constituted "civilized decency" in a court proceeding allowed the Court to constitutionalize its own conceptions of "fundamental [principles of] liberty and justice."[165] Second, the Court sustained a substantive reading of the Privileges or Immunities Clause that was, by the time of *Adamson*, an interpretive straw man, passed down from *Twining v. New Jersey*.[166] Had the *Adamson* Court followed Justice Black's lead in challenging the *Twining* decision, they also might have explored whether the privilege against self-incrimination was bound up in a structural, access-oriented notion of citizenship, rather than some judicial conception of liberty unbounded by narrower concepts of participation.

Justice Black realized the structural potential of the Privileges or Immunities Clause. He looked to the clause not to advance some notion of specific natural law, but to reject it. Justice Black's view of the privileges or immunities of national citizenship sounded in structure, allowing him to distinguish a freewheeling natural law formula of constitutional decision making from a more principled, textually based application of the Privileges or Immunities Clause.[167]

Accordingly, for Justice Black, a citizen's participatory role in defending her rights against prosecution was separate from whatever fundamental rights might merit protection under a judicial concept of "ordered liberty."[168] Not coincidentally, by the end of his dissent, Justice Black's contractualism had worked its way into his rhetoric. For him, the Fifth Amendment targeted "the same kind of human evils that have emerged from century to century . . . . [T]he people of no nation can lose their liberty so long as a Bill of Rights like ours survives."[169]

Although scholars often call *Adamson* a heated interpretive bout between Justices Frankfurter and Black, the Justices seem not to go toe-to-toe even once. They are looking at entirely different textual joints of

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[164] *Id.* at 53.
[165] *Id.* at 54 n.13 (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).
[166] 211 U.S. 78 (1908).
[167] *See Adamson*, 332 U.S. at 69–70, 73–76 (Black, J., dissenting).
[168] *See id.* at 65 (Frankfurter, J., concurring).
[169] *Id.* at 89 (Black, J., dissenting).

the Fourteenth Amendment (due process and privileges or immunities) to determine federal control over state law.

Justice Frankfurter conceded that he had dismissed the plausibility of incorporation only by way of the due process provision,[170] having "put to one side the Privileges or Immunities Clause of that amendment" because of the "mischievous uses to which that clause would lend itself . . . ."[171] Justice Frankfurter also misread Justice Cardozo's *Palko v. Connecticut*[172] opinion to imply that the scope of the Privileges or Immunities Clause mirrored that of the Due Process Clause. Justice Cardozo, unlike Justice Frankfurter, seemed to employ a two-tiered analysis. Facing issues of incorporation, Justice Cardozo claimed to view the Privileges or Immunities Clause differently; he read it as a statement about national citizenship, rather unlike the Due Process Clause:

> We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption . . . . If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.[173]

Although Justice Cardozo's rigidly formal notions of liberty and justice suggested that he would not put his own money on incorporation, he, like Justice Black, at least considered the Privileges or Immunities Clause a long shot. Justice Frankfurter's concurrence did not respond; in the wake of *Lochner*'s abuse of due process, he was concerned with a different clause altogether.

Perhaps one could argue that Justice Black's reading was no different and that his conception was substantive as well. What was liberty for Justice Frankfurter might have been participation for Justice Black, who was merely laundering his own substantive recommendations for state legislatures through different, open-ended constitutional text in the Fourteenth Amendment. However, Justice Black's interpretive principle

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> The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains "nor shall any State deprive any person of life, liberty, or property, without due process of law," was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, [or] must have a trial by a jury of 12 in criminal cases . . . is that it is a strange way of saying it.

Id. at 63 (Frankfurter, J., concurring). Justice Frankfurter never discussed whether privileges or immunities might have been a more natural expression of the idea of incorporation.

[171] *Id.* at 61.

[172] 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

[173] *Palko*, 302 U.S. at 326.

is unlike Frankfurter's, because Black's operated through principles of state sovereignty, not against them. Black's process-perfecting view would have resonated with Representative Bingham, for whom the substantive restraints of the Civil Rights Bill of 1866 were problematic in ways that the structural guarantees of the Fourteenth Amendment were not.[174] Much like the structural undertones that Professor Amar has recently described in the Bill of Rights,[175] privileges or immunities are also majoritarian, securing rights like trial by jury, assembly, and petition. These majoritarian processes protect against potential self-dealing by a small number of empowered representatives.[176]

Eventually, other Justices began writing opinions to guard a few privileges of political and civil access, and they began to adopt Justice Black's interpretive method. A majority of the Court (which had become the Warren Court) began to employ Justice Washington's structural method, as conceived in *Corfield* and referenced by many of the Fourteenth Amendment's drafters. To illustrate these jurisprudential similarities, however, it is important first to examine not the Warren Court's flourishing structural undergrowth, but rather an earlier Justice's rhetorical offshoot.

Justice Stone's celebrated footnote in *United States v. Carolene Products*[177] did not concern merely the process of vindicating protected rights in court. The note was about the larger decision-making processes necessary to assure that the machinery of democratic government ran as it should: "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[178]

Detractors of the Warren Court characterize its strategy as an attempt to map substantive personal liberties onto the Constitution. To be sure, *Lochner* was a distant relative of Justice Stone's opinion, although Stone focused in the footnote on structural concerns. My aim here is to reveal a more reputable interpretive heritage.

The *Carolene Products* footnote spoke the language of equal access, not substantive values. It did not suggest that there were substantive entitlements that citizens were guaranteed pursuant to these "general prohi-

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[174] *See supra* text accompanying note 104 (responding to Professor Berger's puzzlement over Bingham's vote against the 1866 Bill when compared to his support for the Fourteenth Amendment). Contrary to Professor Berger's suggestion, these privileges, for Bingham, did not create a list of substantive civil rights that could easily be used to void a state majority's sovereignty. Indeed, securing structural privileges of political access would have allowed Bingham to guarantee majority sovereignty.

[175] *See* AMAR, *supra* note 15, at 81–120.

[176] *See id.*

[177] 304 U.S. 144 (1938).

[178] *Id.* at 152 n.4 (internal citations omitted).

bitions."[179] The Warren Court took this bit of advice to heart, relocating its protections for access privileges to the Equal Protection Clause. Although it is not important to discern whether Stone's footnote and his new consensus were causal, it is quite important to note that the Court was on the move again. Moving from the Privileges or Immunities Clause to the Due Process Clause, the *Lochner*-era Court tried permanently to stave off a future that it unreasonably feared. With a strong dose of jurisprudential irony, that Court's embrace of the Due Process Clause enabled far more judicial overreaching than a proper reading of the Privileges or Immunities Clause ever could have.

The Warren Court viewed the Equal Protection Clause much as Justice Washington had in *Corfield*. Washington had read the provision to accommodate bare structural entitlements—the same sort of entitlements that the Warren Court sought to accommodate. Both Courts, roughly one hundred and fifty years apart, formulated a definition of privileges guided by an antidiscrimination norm in favor of the politically powerless. In the case of *Corfield*, the discrimination prevented was classification based solely on geography; the Warren Court sought to prevent discrimination motivated by economic,[180] racial,[181] and, perhaps most revealingly, educational[182] factors. While dusting off Justice Washington's structural concerns about equality, the Warren Court took a different textual route.[183]

The Warren Court's application of equal protection's "more exacting standard"[184] contained a structural floor of constitutional entitlement that could be called a privilege or immunity of national citizenship. These participatory privileges were sewn into the fabric of citizenship, just as they were for Justice Washington in *Corfield*. Yet, the doctrinal tactic of protecting these privileges via the Equal Protection Clause forced the Warren Court to evaluate covertly a given classification's purpose, as

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[179] *Id.*

[180] *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Douglas v. California, 372 U.S. 353 (1963).

[181] *See* Hunter v. Erickson, 393 U.S. 385 (1969). *But cf.* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

[182] *See* Katzenbach v. Morgan, 384 U.S. 641 (1966). Unlike *Gideon*, which did not involve a suspect classification or a fundamental right, *Morgan* dealt with structural political protections rather than civil ones. Political protection definitely was a point of contention in *Morgan*. Justice Brennan's invalidation of literacy tests in the voting context depended on a garbled theory about voting as a prophylactic measure and deferred to Congress as a fact-finding body; he found the Voting Rights Act, 42 U.S.C. § 1973 (1994), constitutional. *See Morgan*, 384 U.S. at 657–58. *But cf.* City of Boerne v. Flores, 521 U.S. 507 (1997).

[183] The Equal Protection Clause had not been a favorite of the Court's prior to the Warren era. In *Buck v. Bell*, 274 U.S. 200, 208 (1927), Justice Holmes called equal protection doctrine "the usual last resort of constitutional arguments," and for good reason. Concurring in *Railway Express Agency v. New York*, 336 U.S. 106 (1949), Justice Jackson explained that legislative classifications only had to show "some reasonable differentiation fairly related to the object of regulation." *Id.* at 112 (Jackson, J., concurring).

[184] Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 633 (1969).

well as its rational congruence with that purpose.[185] Its rhetoric took on a familiar contractualist tone regarding citizenship: modified equal protection analysis applied to "fundamental matter[s] in a free and democratic society,"[186] privileges that were "an essential part of the concept of a government of laws and not men."[187]

Justice Harlan, however, adopted a rigidly historical approach to the Fourteenth Amendment with regard to various political rights via the Equal Protection Clause. He attached a forty-two page dissent to *Reynolds v. Sims*,[188] which invalidated state malapportionment statutes that allowed some state districts to be underrepresented in both state legislatures and in Congress. For Justice Harlan, the penalties for disenfranchisement at the state level provided in section 2 of the Fourteenth Amendment[189] were a clear sign that restricting suffrage was the state's business. The federal government could be stingy with federal representation as a disincentive but, by penalizing the practice of disenfranchisement among men, the Fourteenth Amendment's framers had decided that it would not be outlawed.[190] His analysis did not once mention the structural norms at work in the ratifying debates, as his focus was exclusively on antidiscriminatory norms. However, a closer look at Bingham's words reveals affirmative structural norms, as well antidiscriminatory ones. Bingham argued that:

> [t]he second section excludes the conclusion that by the first section suffrage is subjected to congressional law; *save, indeed, with this exception, that as the right in the people of each State to a republican government* and to choose their Representatives

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[185] Predictably, this did not go unnoticed. Justice Harlan's dissent in *Shapiro v. Thompson*, 394 U.S. 618 (1969), decried the majority's opinion as an "expansion of the comparatively new constitutional doctrine that some state statutes will be deemed to deny equal protection of the laws unless justified by a 'compelling' governmental interest." *Id.* at 655.

[186] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

[187] *Id.* at 568.

[188] *See id.* at 589 (Harlan, J., dissenting).

[189] *See id.* at 593. Section 2 of the Fourteenth Amendment provides that:

> *[W]hen the right to vote . . . is denied* to *any of the male inhabitants* of such State, being twenty-one years of age, and citizens of the United States, *or in any way abridged*, except for the participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added).

[190] *Reynolds*, 377 U.S. at 594 (Harlan, J., dissenting). Justice Harlan failed to note a statement by Senator Bingham that appears to have been almost a direct response to this logic: "The construction insisted on [by Mr. Higby] amounts to this, that a law inflicts a penalty or works a forfeiture for doing an act, by implication authorizes the act to be done for doing which the penalty is inflicted." CONG. GLOBE, 39th Cong., 1st Sess. 431–32 (1866).

> in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a cause supposed by Madison, where treason might change a State government from a republican to a despotic government, *and thereby deny suffrage to the people.*[191]

Contrary to Justice Harlan's inference from the same language, Bingham was ambiguous here: it is plausible to suppose that he considered disenfranchisement either inherently violative of republican government and so regulated by Section 1 of the Fourteenth Amendment and the Republican Form of Government Clause or violative of Article I, Section 2's structural provision that "[t]he House of Representatives shall be composed of members chosen every second year by the People of the several States."[192] Even so, Justice Harlan took Bingham's comments to concede that Section 2 confirmed that state voting requirements could not be controlled by any constitutional provision, although, in the passage above, Bingham mentioned at least three.

Even more clearly, Senator Higby asked Bingham "whether under the amendment we propose to adopt . . . a state could not, by virtue of the provision which contains have a right to disfranchise any class of citizens on the account of race or color?"[193] Bingham's answer clearly considered voting rights not only in the name of antidiscrimination, but in the name of citizenship:

> I say that the proviso is a penalty, and nothing but a penalty, inflicted on the State if its ruling class disregard . . . the free people therein, being male citizens of the United States of full age, to participate in the choice of electors, by imposing on any part of one class special disabilities not imposed on the other class.
>
> The guarantee in the first article of the second section of the Constitution rightly interpreted is, as I claim, this, that the majority of the male citizens of the United States of full age in each State shall forever exercise the political power of the State with this limitation, that they shall never by caste legislation

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[191] CONG. GLOBE, 39th Cong., 1st Sess. 431–32 (1866).

[192] Harlan's response merely restated his conclusion: "It is evident from the context of a reference to a republican government that Bingham did not regard limitations on the right to vote or the denial of the vote to specified categories of individuals as violating the guarantee of a republican form of government." *Reynolds*, 377 U.S. at 599 n.21 (Harlan, J., dissenting).

[193] CONG. GLOBE, 39th Cong., 1st Sess. 431–32 (1866).

> impose disabilities upon one class of free male citizens to the denial or abridgment of equal rights.[194]

Bingham's response was not about discrimination; for him, the stakes of voting were about "the political right of all the male citizens of the United States of full age to participate."[195] As he put it in an earlier response to Higby, "the majority of the free male citizens in every State shall have the political power."[196] The importance of voting for Bingham was about not just the antidiscriminatory effects of franchisement but also its structural aspect. As a result, his high regard for a constitutionally protected voice in a representative democracy required a protective doctrine operating not only on the basis of race. After all, for him, "caste legislation" was the gravamen for the Fourteenth Amendment's application. [197] To be sure, he could not have meant that all "caste legislation" that amounted to the denial or abridgement of equal rights was of constitutional dimension. Had the state omitted the *Reynolds* plaintiffs' districts from the phonebook (rather than diluting their votes), the claim would have been weaker for the Court and for Bingham.

This is because Bingham's priority for equal rights was bound up in "a republican form of government," the sort that allowed "a majority of male citizens of full age in each State [to] govern, not however, in violation of the Constitution of the United States or of the rights of the minority."[198] While the structural resonance of Bingham's position did not require that the majority be given a legislative voice through franchise, the clause did protect minorities, securing for them, through judicial voice, a jury seat.[199] The views of Bingham and his Republican colleagues prepared us for the modern Court's structural intuitions in favor of judicial and political access—access which has been expanded to the right to counsel,[200] to waiver of court fees,[201] and to equal access to the political process.[202] In fact, preclusion from the judicial process was a recognized evil in the 39th Congress. Representative Thaddeus Stevens said that only a "partial and oppressive" law would allow "the white man to testify in court" and not "the man of color to do the same."[203] These were civil

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[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *See* Strauder v. West Virginia, 100 U.S. 303 (1879).
[200] *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Douglas v. California, 372 U.S. 353 (1963).
[201] *See* Boddie v. Connecticut, 401 U.S. 371 (1971).
[202] *See* Hunter v. Erickson, 393 U.S. 385 (1969) (overturning statute that required one group to seek referendum when other individuals needed merely to petition the school board). *But cf.* Washington v. Seattle Sch. Dist. Number 1, 458 U.S. 457 (1982).
[203] CONG. GLOBE, 39th Cong., 1st Sess. 2459–60 (1866).

rights crucial to the structural, participatory voice of a minority: "Whatever means of redress is afforded to one shall be afforded to all."[204]

Therefore, similar to the Bill of Rights' dual purpose—to reinforce majority, populist sentiment, as well as to protect individual rights[205]—the Fourteenth Amendment provided individual protections as well as structural ones. The Fourteenth Amendment not only curbed state sovereignty through substantive judgments about the meaning of equal protection or due process from an individual rights perspective; it also provided majority-reinforcing mechanisms through the Privileges or Immunities Clause. In this way, the clause may be viewed in counterpoise to the two subsequent individual rights clauses of Due Process and Equal Protection.

In short, the speeches of the 39th Congress and contemporary precedent reveal an aversion to discrimination not just against African American citizens but to political discrimination against any group of male citizens by "caste legislation."[206] They reveal concerns about political structure, not just race. Senators of the 39th Congress made speeches about the importance of structural, participatory protection in general, rather than voting rights for freed slaves in particular. This concern for antiparticipatory government classifications suggests an original intent supportive of the results in cases like *Gideon*, *Shapiro*, and *Harper*, as well as other participatory decisions from the Warren Court.

Critics of *Corfield* and the Warren Court have their agendas wrong. Justices Miller, Peckham, and Frankfurter imputed such decisions to a doctrinal ambition to widen fundamental rights of personal liberty. This criticism ignored the fact that neither *Corfield* nor the Warren Court decisions discussed above could have depended on a natural law or fundamental rights rationale in the first place. Justice Washington's opinion and those opinions from more recent Courts have long been misunderstood on this score because they have drawn upon a third doctrinal rationale. This third doctrine provides for equality-based protections, but with a structural floor; such constitutional entitlements may accurately be called privileges or immunities of national citizenship.

This Article demonstrates the strong functional equivalence between a doctrine of structural entitlement, in the name of privileges or immunities, and politically structural equal protection, as developed by the Warren Court. Because of its textual and historical infirmity, the latter doctrine should be traded in for a theory based on privileges or immunities, with that clause's stronger textual and historical support. This change would have made recent decisions, such as *Romer* and *Morales*, more coherent. Such a trade would have helped these cases in much the same

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[204] *Id.*

[205] *See generally* AMAR, *supra* note 15.

[206] CONG. GLOBE, 39th Cong., 1st Sess. 431–32 (1866).

way that the doctrine aided *Saenz* and *Zobel v. Williams*,[207] both of which excavated the language of privileges or immunities. Preserving *Romer*'s current framework of one part fundamental right and one part equal protection problematizes structural entitlements because it frames them as either structural due process, on the one hand, or structural equal protection, on the other. Part III discusses the problems of both conceptualizations as applied doctrinal matters.

III. Interpretive Truce

The interpretive problem for the Warren Court was, in part, historical. Although the structural rights that the Court's jurisprudence defended were constitutionalized by the drafters of the Fourteenth Amendment, the textual foothold for these rights was washed out as reconstructionist ideals receded. The Supreme Court became fearfully preoccupied with boundless rights of personal autonomy, rather than focusing on the participatory citizenship that the framers had had in mind for the clause at the high tide of the Fourteenth Amendment's passage. As an applied matter, the use of the Due Process and Equal Protection Clauses as textual and conceptual fronts for structural rights has been problematic.

Protections emanating from a concept of structural due process are too wide because they collapse positive freedoms of participatory citizenship with negative freedoms of private autonomy, something neither *Corfield* nor the 39th Congress meant to do, at least under the Privileges or Immunities Clause. Structural protections emanating from equal protection are too narrow because they relate only to process-oriented deficiencies, per se. Having explored a unifying structural heuristic, as applied to the text, early precedent, and legislative history of the Privileges or Immunities Clause, presents an opportunity to rout the textual dilemmas of both the Equal Protection and Due Process Clauses.

First, privileges or immunities protections are slimmer than those of due process; the discussion of citizenship in early cases allows a distinction between notions of self-government and private autonomy. Structural rights from a clause with textual perimeters of citizenship help us to steer clear of too broad a view of self-government. This part argues that an all-things-private-are-then-privileges approach was merely the rhetorical gambit of the northern Democrats in the 39th Congress, of Justice Miller in *Slaughter-House*, and of Justice Frankfurter in *Adamson*.

Second, the clause's protection is more robust than equal protection. It can be implicated by statutes beyond those that facially discriminate. For example, under equal protection doctrine, facially neutral statutes that alter the political process and have a disproportionate impact are

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[207] 457 U.S. 55 (1982).

subject to strict scrutiny.[208] As a textual matter, equal protection offers no structural guideposts to say when a class is process handicapped, per se. This indeterminacy limits the capacity of equal protection doctrine to provide protections for political rights of access.[209]

As a corrective doctrinal measure, one might defend a now teetering structural equal protection doctrine by first putting to one side the Warren Court's participatory decisions examined above. More recent cases share a similar structural rationale. For example: (1) *Reitman v. Mulkey*,[210] which struck down California's Proposition 14, which prohibited local government from preventing persons from selling, leasing, or renting their residential property to any buyer in their discretion; (2) *Hunter v. Erickson*,[211] which struck down an Ohio housing ordinance that made its protections against racial discrimination subject to approval by referendum; and (3) *Washington v. Seattle School District No. 1*,[212] which invalidated an ordinance forcing all racially integrative busing proposals to be approved by the state legislature or by referendum, rather than just a school board vote. For the Court, those statutory manipulations of political access and its rhetoric used a structural theory grounded in equal protection,[213] but the Court recently seems to have called into question the workability of its interpretive renaissance for participatory rights. Long gone is the *Seattle School District* Court, stating unabashedly that "[t]he Fourteenth Amendment also reaches 'a political structure that treats all individuals as equals.'"[214]

For example, in *Romer v. Evans*,[215] the Court did not even mention political access theory or the previous collection of cases, even though the lower court's decision was replete with such references. The Colorado Supreme Court had commented that the state constitution's newest amendment violated the plaintiff's fundamental right "to participate in the process of government."[216] The Colorado Supreme Court had refused

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[208] *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (overturning a state law that removed racially integrative busing authority from local school boards).

[209] *See, e.g.*, Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997). The Ninth Circuit conceded that it was "a little perplexed" by the absence of the Supreme Court's equal protection analysis to protect political access in *Romer*. *Id.* at 704. The Ninth Circuit mistook that case to be a cue to reject equal-protection-based political access analysis, which is precisely what it did in upholding Proposition 209. *See id.* at 692.

[210] 387 U.S. 369 (1967).

[211] 393 U.S. 385 (1969).

[212] 458 U.S. 457 (1982).

[213] *But cf.* Gordon v. Lance, 403 U.S. 1, 7 (1971) (upholding a statute preventing a town from increasing taxes unless approved by referendum, not because the deprived class was not recognized as suspect, but because there was not "any identifiable class" at all).

[214] *Seattle Sch. Dist.*, 458 U.S. at 467 (quoting Mobile v. Bolden, 446 U.S. 55, 84 (1980)).

[215] 517 U.S. 620 (1996).

[216] Evans v. Romer, 854 P.2d 1270, 1276 (Colo. 1993).

to decide that homosexuals constituted a suspect class, but suggested that classifications along a participatory axis were suspect.[217]

The Supreme Court avoided this avenue. Its rhetoric conspicuously did not constitutionalize equal participation as a substantive value, as if aware of the irony of espousing a procedurally perfecting view of the Constitution that relies on the substantive value of participation. Perhaps the Court was not comfortable with the lower court's vague analysis of "[t]he right of citizens to participate in the process of government [as] a core democratic value which has been recognized from the very inception of our Republic up to the present time."[218] Perhaps the Court was even more uncomfortable with the complete absence of constitutional text on which to hang these rights, having instead to rely on an interpretive convergence of both due process and equal protection, but not the text of either clause.

The *Romer* Court did not place the case in an obvious line of political structure cases. Instead, it appeared to strike down the law with a version of rational basis scrutiny, holding that the law's "inevitable inference"[219] was that it served no legitimate purpose. The case was made difficult by its half-truthful rhetoric of rational basis. Why could *Romer* not call for close and exacting examination, since government classifications were in play? Why did the Court cast *Romer* as a simple equal protection case and strike down the statute on rationality grounds?

An answer may be found in the more recent *Morales* decision, with its similar consequences for political structure and its desperate search for constitutional text.[220] In *Morales*, the Court struck down a Chicago municipal ordinance because it allowed police officers to issue dispersal orders to suspected gang members. The opinion, like *Romer*, did not mention the crescendo of structural cases, such as *Hunter*, even though the Court's language speaks in terms of notice and enforcement discretion. Justice Stevens, writing for a plurality, noted that the Court's conclusion about the unconstitutionally wide discretion exercised by the police made it "unnecessary to reach the question whether the . . . ordinance is invalid as a deprivation of substantive due process."[221] Justice Stevens' problem was the same as Justice Washington's: both were caught between two doctrines.

Putting to one side Justice Stevens' argument that the "freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment,"[222] Chicago's vague statute arguably did not violate substantive liberty because loitering is not a fun-

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[217] *Id.*
[218] *Id.* at 1276.
[219] *Romer*, 517 U.S. at 634.
[220] Chicago v. Morales, 527 U.S. 41 (1999).
[221] *Id.* at 66.
[222] *Id.* at 52.

damental right, and apparent gang members are not a suspect class. Like *Romer*, the *Morales* Court had to have some politically structural underpinning, although, as in his *Romer* opinion, Justice Stevens did not breathe a word of it.

Justice Scalia zeroed in on this, accusing Justice Stevens of protesting too much. For Justice Scalia, Justice Stevens had, in effect, created a fundamental right to loiter, "placing the burden of proof upon the defendant to establish that loitering is *not* a 'fundamental liberty.'"[223] The dissent's rhetoric successfully lured six justices into deciding whether loitering is a fundamental right, when the debate should have been about structure. By way of comparison, it should be underlined that Justice Breyer, in unabashedly applying the Court's fundamental rights doctrine, abandoned a contractualist tone. For Justice Breyer, loitering inhered in a "free state of nature."[224] Had the Court considered the Privileges or Immunities Clause, the plurality's opinion—in rejecting Justice Breyer's use of the Due Process Clause—could have had more textual basis, not less. Invalidating the ordinance under the Privileges or Immunities Clause could have made the plurality opinion clause bound.

To show just how the plurality's decision could have been clause bound is also to show how my aspirations for the clause's *Morales* application is somewhat different from Professor Tribe's recent account of the case. Professor Tribe's account suggests that protections against the standardless discretion of the ordinance are bound up in "the essence of what it means to be a self-governing person . . . ."[225] His interpretation internalizes the structural resonance of the privileges clause but, in effect, he makes them personal rights.

The insistence upon reconceptualizing almost all personal rights as structural privileges of political and civil architecture requires abandonment of the project of textually grounding a different sort of guarantee than those protected by substantive due process doctrine. This argument frames all relations between the state and the individual as somehow self-governmental and, as a result, confirms the fears of Justice Miller and the northern Democrats of the 39th Congress, as well as those of Justice Frankfurter. In trying to open for business a doctrinal half-way house, wherein rights are somehow both structural and personal, Tribe backslides into an argument not for privileges or immunities but for what he terms "structural due process."[226] The problem is that the structural aims of privileges are textually separate from due process, and their distance

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[223] *Id.* at 86 (Scalia, J., dissenting).

[224] *Id.* at 68 (Breyer, J., concurring in part and concurring in the judgment).

[225] Tribe, *supra* note 4, at 191.

[226] In fact, Tribe's ambition here is much like that in his older piece. *See* Tribe, *supra* note 26 (attempting to frame fundamental rights such as those articulated in *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965), as grounded in notions of personal self-government).

was an attempt, I suggest, to avoid the third strand of more autonomy-oriented due process that Tribe suggests. This strand invokes merely another litany of personal rights grounded in a shapelessly wide concept of self-government, a concept with no more ready doctrinal boundaries than fundamental rights.

To identify the privilege at stake in *Morales*, one need not reframe all talk of individual rights as repositories of personal "self-government."[227] The standardless discretion of any law enforcement officer annuls structural protections that guarantee responsive *ex ante* legislative and *ex post* judicial action. Yet, these guarantees flow not from a personal right to self-govern where you stand, but rather from a contractualist right to be told more concretely why you must move along. Acknowledging such a right makes the discretion both legislatively accountable and judicially enforceable.

Collapsing structural privileges, which relate directly to positive organizational features of government, with spheres of private autonomy precludes a determinate, independent content for the Privileges or Immunities Clause. This is not because determining participatory privileges is a process that would be much less politically contaminated than are current attempts to define the fundamental rights of due process. It is because making negative rights of personal autonomy "equally structural in character"[228] to the positive privileges of citizens' participation conflates two parallel systems of judicial review. These two systems of review issue from the separate normative trajectories of the Due Process Clause and the Privileges or Immunities Clause.

Keeping these modes of judicial review distinct would, for example, offer a response to Justice Scalia's dissent in *Romer v. Evans*.[229] Justice Scalia was troubled by the fact that a state can, consistent with the United States Constitution, outlaw certain behavior, such as the kind of sexual behavior implicated in *Bowers v. Hardwick*,[230] but cannot use that behavior as a predicate to remove a citizen from parts of the political or

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[227] Tribe, *supra* note 4, at 158.

[228] *See id.* at 162. Although Professor Tribe is right that the Ninth Amendment says only that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," U.S. CONST. amend. IX, and does not distinguish between those rights that relate to the Constitution's architecture and those that relate to individual freedom, the Fourteenth Amendment does make this sort of distinction. Professor Tribe's *Saenz* article understates the textual import of the Privileges or Immunities Clause. His piece seems to claim that it is only structural inference from various clauses that preserves the structural privileges of citizenship, while the text of the Privileges or Immunities Clause does, in fact, preserve such structural rights. The Ninth Amendment may not distinguish between the architectural privileges of a citizen and the personal rights of an individual, but the text and legislative history of the Privileges or Immunities Clause demonstrate that this clause is not neutral on that score.

[229] 517 U.S. 620, 636 (Scalia, J., dissenting).

[230] 478 U.S. 186 (1986).

civil process. For Scalia, the greater power includes the lesser;[231] if the state can criminalize an activity, it should be able to discriminate against those who engage in that activity, by amending its laws to preclude statutory protection for such behavior. Justice Scalia's attack on the *Romer* decision would be problematic if the Fourteenth Amendment allowed only one type of judicial review, based only on individual rights. If there is a second strand of judicial review, provided by the Privileges or Immunities Clause, that second type of review could protect the majoritarian, structural, and participatory rights of citizens whom the state's substantive laws and legislation may not protect. In other words, the apparent double standard that Justice Scalia perceived derives from a conflation of two alternative types of judicial review. The Court may, indeed, have had little to say about a state criminalizing certain behavior; but, that is because the framework of substantive rights of personal autonomy that underlay the decision in *Bowers* is different than the framework of structural rights of participatory citizenship at work in *Romer*.

Keeping separate the structural priorities of citizenship and the substantive rights of personhood would allow current commentators on the Privileges or Immunities Clause to resist a truce over intratextual inference.[232] Maintaining this separation disputes the claims of scholars that insist that protections for any unenumerated individual liberty must be pieced together from different amendments, just as unenumerated protections of states rights must be pieced together from various provisions in the service of state sovereignty.[233] This Article challenges the idea that a Court could wring out of the due process and equal protection doctrines an indigent's right to vote[234] only insofar as it could wring out of Second and Tenth Amendments a state officer's right not to run a background check at the federal government's every behest.[235]

For some recent commentators, the trade may seem a fair one, but only because these commentators collapse personal rights with rights directly related to civil and political structure. As a result, they can only vaguely call both sets of rights "facets"[236] of constitutional clauses and can find no explicit historical basis for structural privileges in the text. If one separates the class of extratextual, personal rights from the structural privileges of citizenship, those privileges are no longer just facets of constitutional text. An interpretive truce in order to justify intratextually inferred federalism principles trades something for nothing. Such a strategy would constitutionalize states' rights protections that are not present in

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[231] *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (citing *Bowers*, 517 U.S. at 620).
[232] *See* Tribe, *supra* note 4, at 158.
[233] *See id.*
[234] *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).
[235] *See* Printz v. U.S., 521 U.S. 898, 917–18 (1997).
[236] Tribe, *supra* note 4, at 168.

any constitutional clause, in order to gain recognition for privileges of citizenship that are already smack in the middle of one. While the more personal rights of autonomy may need to be constitutionally derived in much the same way as principles of federalism, the distinct privileges or immunities of citizenship—as they might have been applied in *Morales* or *Romer*—do not need to strike a deal. An interpretive pact that concedes the legitimacy of intratextualism in the service of state sovereignty speaks not only, as Professor Tribe suggests, to the long, strange trip it's been[237] for the Court's modern interpretivist stance, but also seems bent on asking whether an interpretive friend of the devil could now be a friend of mine.[238]

The Court's recent structural forays in *Saenz* and *Zobel* garnered easy majorities, as the Court unearthed the text and history of the Privileges or Immunities Clause, reframing earlier precedent around this stronger textual basis.

Last Term, in *Saenz v. Roe*,[239] the Court invalidated a durational residency requirement in California's welfare statute. As in *Romer*, the Supreme Court's analytical method was different from the lower court's. Unlike in *Romer*, the *Saenz* Court's choice of doctrine earned votes rather than losing them. The district court struck down the durational residency requirement on the grounds that it violated the Equal Protection Clause.[240] The court concluded that the statute, combined with California's higher cost of living, penalized the decision of new residents to migrate to the state.[241] The district court concluded that California had failed to justify the discriminatory classification, and the Court of Appeals affirmed on the same grounds.[242] This structural rendition of equal protection was somewhat expected: the case looked almost precisely like *Shapiro v. Thompson*.[243] The lower courts adopted that earlier case's method without much fanfare. In *Shapiro*, the Court had struck down a state law preventing new citizens from receiving benefits from the state in which they had settled for less than one year.[244] Because the statute in *Saenz* only *limited* welfare benefits, its discrimination might have appeared less suspect than that in *Shapiro* and *Shapiro*, with its waffling between fundamental rights and suspect classification analysis, had turned out to be a close case. It had been set for reargument and then narrowly decided six-to-three. *Saenz*, on the other hand, was decided in one shot, in a seven-to-

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[237] *Cf.* ROBERT HUNTER & JERRY GARCIA, *Truckin,' on* AMERICAN BEAUTY (Warner Bros. 1970).

[238] *Cf.* JERRY GARCIA, *Friend of the Devil is a Friend of Mine, on* AMERICAN BEAUTY (Warner Bros. 1970).

[239] 526 U.S. 489 (1999).

[240] *See* Roe v. Anderson, 966 F. Supp. 977, 984–85 (E.D. Cal. 1997).

[241] *See id.*

[242] *See* Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998).

[243] 394 U.S. 618 (1969).

[244] *See id.* at 621.

two vote by a Court much less willing to entertain the idea of intermediate scrutiny for wealth- and education-based classification.

The *Saenz* Court's choice of doctrine compensated for this historical fact, allowing it to resolve the case with relative ease. The *Saenz* Court did not choose the route of equal protection, as the *Shapiro* Court had;[245] the *Saenz* Court chose to analyze the case under the Privilege or Immunities Clause, which allowed it to reconceptualize a right formerly secured by equal protection as a privilege of national citizenship.[246]

The Court similarly reconceptualized the residency requirement at issue in *Zobel v. Williams*.[247] In *Zobel*, the Alaska legislature had decided to divvy up its newly found oil wealth according to length of residency in the state. The legislature's rationale, which was to reward those residents who had borne Alaska's hardships the longest, was held unconstitutional.[248] The Court feigned rational basis scrutiny, stating that Alaska had "shown no valid state interests which are rationally served by the distinction it makes between citizens . . . ."[249] In a separate concurrence, Justice O'Connor expressed disappointment with the Court's pretense, pointing to what seemed to be a clear rational basis in the seniority scheme.[250] She relied, instead, on the Privileges and Immunities Clause of Article IV, holding that the law indirectly penalized the "right to travel" to, and settle in, Alaska.[251]

Professor Tribe frames these cases as instances of the Court making structural inferences. One might describe the Court as using rational basis review and privilege or immunity analysis in *Zobel*, or fundamental rights and equal protection in *Saenz*, to demonstrate that the Court worked "through structural inference rather than relying solely on explicit text."[252] If that were the case, both opinions would have needed to derive structural rights from multiple clauses, failing to locate them in the text of one clause alone.

The *Shapiro* Court may have been "quite obviously driven by its concern for the plight of the poor,"[253] but the *Saenz* Court spoke in terms of structural entitlement, rather than classifications. The Court framed *Zobel* structurally, as well, and did not split on the question of whether

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[245] *See* Saenz v. Roe, 526 U.S. 489, 499–504 (1999).

[246] *See* Tribe, *supra* note 4, at 143 (describing the Court's decision as being easier because interstate travel is now viewed as more related to "institutional building blocks of government").

[247] 457 U.S. 55 (1982).

[248] *See id.* at 65.

[249] *Id.*

[250] *Id.* at 72 (O'Connor, J., concurring) ("Even a generalized desire to reward citizens for past endurance, particularly in a State where years of hardship only recently have produced prosperity, is not innately improper.").

[251] *See id.* at 73 ("[T]he plan denies non-Alaskans settling in the State the same privileges afforded longer term residents.").

[252] Tribe, *supra* note 4, at 156.

[253] *Id.* at 116.

Alaskan citizens with less seniority formed a suspect class or whether receiving per capita payment from Alaska's coffers was a fundamental right. If it had followed the structural lead of these cases, the *Morales* Court would not have been strong armed into deciding whether suspected gang members were a protected class or whether loitering was a fundamental right. For that matter, the *Romer* Court should not have had to decide whether gay men and women were a protected class or whether Colorado's Amendment Two[254] deprived this class of a fundamental right.

Commentators have found, in these cases, a second track for fundamental rights of natural law (chalking up interstate travel as a personal right to start the list). As an analytical matter, this approach replaces one interpretive failure with another. Past treatment of the Privileges or Immunities Clause was historically and analytically unfaithful to its original meaning. Courts and scholars had limited the privileges or immunities of citizenship to a modest list of personal rights and set them apart from conventional rights of a political, civil, or structural character. Merely lengthening that obscure list of privileges does not correct the clause's trajectory; framing interstate travel as a personal right will not reinvigorate other rights previously unnoticed by the Supreme Court. The trenches of the fundamental rights battlefield are too well defined for that. Justice Breyer's lonely concurrence in *Morales* is a reminder of just how hard it is to garner votes for any new fundamental right.

Conclusion

In three parts, this Article outlines textual, analytical, and jurisprudential considerations, all of which suggest that the Privileges or Immunities Clause may constitutionally preserve civic republicanism and participatory virtues. The clause secures structural rights in ways that the Equal Protection Clause and the Due Process Clause cannot. Mining the legislative history and the early interpretations of the Privileges or Immunities Clause provides an original, textual basis for structural privileges. These privileges do not include personal rights that constrain the content of state and federal law; rather, these structural privileges define the acceptable modes of the laws' enactment. The Privileges or Immunities Clause also lends historical credence to a potential interpretive renaissance, providing a textual basis for participatory, representation-reinforcing rights that have lain dormant since their more political appearances in the Warren Court. Analytically, the Privileges or Immunities Clause, as a limited trove of structural privileges, helps to unify doctrinally a variety of Warren Court decisions. The clause also suggests consens-building interpretations for recent decisions such as *Romer* and *Morales*. Jurisprudentially, the clause allows a reframing of these partici-

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[254] *See* COLO. CONST. art II, § 30b.

patory privileges as privileges that protect more than classificatory equal protection doctrine, which is too confining, and less than a set of personal liberties, which is too controlling of state substantive law.

Rediscovering the textual grounding, in the Privileges or Immunities Clause, of these structural privileges of citizenship allows us to reunite political access doctrine with its rich historical and theoretical lineage in early precedent and Fourteenth Amendment ratification speeches. Understanding the clause's genealogy helps clarify the structural entitlements of citizenship. Arguments about citizenship's structural elements will no doubt continue, in much the same way that arguments over the definition of a fundamental right do. At least those of us arguing about structural rights would then be disagreeing about precisely the right thing, as we better manage the ironies of the text, the changing analytics, and the deal-making jurisprudence of the Privileges or Immunities Clause.