

THREE KEYS TO THE ORIGINAL MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE

RANDY E. BARNETT*

Establishing the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause requires a wealth of evidence. But three key data points are crucial to identifying the core of its meaning. First, Supreme Court Justice Washington's explanation of the meaning of "privileges and immunities" in *Corfield v. Coryell*;¹ second, the rights protected by the Civil Rights Act of 1866; and third, Michigan Senator Jacob Howard's speech explaining the content of the Privileges or Immunities Clause when introducing the Fourteenth Amendment to the United States Senate in 1866. Any theory of the Privileges or Immunities Clause and its original meaning that cannot comfortably accommodate these three items is highly questionable.

I. *CORFIELD V. CORYELL*

We begin with data point number one. The Privileges and Immunities Clause of Article IV, Section 2, provides, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."² This clause protected the rights of citizens of one state when traveling in another state. Although it was generally taken by courts to bar discrimination against out-of-staters, antislavery activists insisted that it guaranteed to every American citizen the

* Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center; Director, Georgetown Center for the Constitution. This Essay is based on remarks delivered at the Federalist Society National Student Symposium at the Arizona State University, Sandra Day O'Connor College of Law, on March 15, 2019. I am grateful to Evan Bernick, with whom I am coauthoring a series of articles and a book on the original meaning of the Fourteenth Amendment. Permission to distribute for classroom use is hereby granted.

1. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

2. U.S. CONST. art. IV, § 2, cl. 1.

protection of a set of fundamental rights when traveling in another state.³

For example, the imprisonment of free black sailors from Northern states by Southern authorities while in Southern ports became a cause célèbre in the North.⁴ Antislavery activists protested this denial of privileges and immunities under Article IV, Section 2, despite the Southerners' assertion that they were treating out-of-state blacks in the same manner as they treated their own free blacks and hence were not discriminating against them.⁵ For the Northerners, the issue was not how a state treated its own citizens, but whether a fundamental right of all citizens was being denied to an out-of-state citizen.⁶

What were the fundamental rights to which all citizens were entitled under the Privileges and Immunities Clause of Article IV? In 1823, Supreme Court Justice Bushrod Washington, George Washington's nephew, was called upon as a Circuit Judge to address the scope of the rights protected by Article IV, Section 2.⁷ He began by identifying the "fundamental" privileges and immunities protected by the clause. He explained:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; *the enjoyment of life and liberty,*

3. See, e.g., Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 104–07 (2011).

4. See, e.g., David R. Upham, *The Meanings of the "Privileges and Immunities of Citizen" on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117, 1133 (2016); see also, e.g., Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1848*, 1 J. SOUTHERN HIST. 3, 21 (1935) ("The enforcement of the Negro seaman acts was a grievance against which northerners . . . protested." (footnote omitted)).

5. See Upham, *supra* note 4, at 1141–48.

6. See Hamburger, *supra* note 3, at 105.

7. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

*with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.*⁸

For Justice Washington, “privileges and immunities” are rights that (1) “are, in their nature, fundamental”; (2) “belong, of right, to the citizens of all free governments”; and (3) can be found in the positive law in the states, which included common law rights.⁹ Justice Washington then proceeded to list some examples, such as the rights to travel, to claim the writ of habeas corpus, to maintain lawsuits, and others.¹⁰

In the highlighted passage of Justice Washington’s description of these privileges and immunities, he included nearly verbatim the canonical formulation of natural rights penned by George Mason for the Virginia Declaration of Rights, which was replicated in four state constitutions. In his May 27, 1776, committee draft, Mason wrote:

T[hat] all men are born equally free and independent, and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are, *the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*¹¹

Mason’s description of “natural rights” are the same words used by Justice Washington in *Corfield*.¹²

It was upon similar language in Article I of the Massachusetts Constitution that the Supreme Judicial Court of Massachusetts based its 1783 ruling that slavery was unconstitutional

8. *Id.* at 551–52 (emphasis added).

9. *Id.* at 551.

10. *Id.* at 552.

11. George Mason, Committee Draft of the Virginia Declaration of Rights and edited by the Virginia Convention (May 27, 1776) (emphasis added), <https://consourse.org/document/committee-draft-of-the-virginia-declaration-of-rights-and-edited-by-the-virginia-convention-1776-5-27/20130122081535/> [<https://perma.cc/4E74-LZH2>]. I discuss the evolution of Mason’s draft and its influence on the Declaration of Independence, written by Thomas Jefferson just a couple weeks later, and on the constitutions of other states in RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 32–40, 66–69 (2016).

12. *Corfield*, 6 F. Cas. at 551–52.

in that state:¹³ “All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”¹⁴

If, therefore, the Privileges or Immunities Clause of the Fourteenth Amendment provided federal protection to the same set of fundamental rights to which the Privileges and Immunities Clause of Article IV refers, then these privileges or immunities include, inter alia, the natural right to “the enjoyment of life and liberty, with the [natural] right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”¹⁵

II. THE CIVIL RIGHTS ACT OF 1866

Data point number two: On April 9, 1866, Congress passed the Civil Rights Act of 1866, officially styled as an act “to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.”¹⁶ Commonly known as the Civil Rights Act of 1866, the act was passed pursuant to Congress’s enumerated power to enforce the Thirteenth Amendment’s ban on involuntary servitude.¹⁷ It began by declaring “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States”¹⁸ It then proceeded to guarantee that all such persons:

shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties,

13. The case itself is preserved in the archival materials of various Massachusetts figures. For a description of this case and its historical record, see generally John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the “Quock Walker Case,”* 5 AM. J. LEGAL HIST. 118 (1961).

14. MASS. CONST., art. I, annulled by MASS. CONST., art. CVI.

15. *Corfield*, 6 F. Cas. at 551–52.

16. Ch. 31, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982 (2012)).

17. *The Civil Rights Cases*, 109 U.S. 3, 22 (1883) (“Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted undertook to wipe out these burdens and disabilities, the necessary incidents of slavery . . .”).

18. Civil Rights Act of 1866, ch. 31, § 1.

*and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.*¹⁹

After its passage, President Andrew Johnson vetoed the bill as beyond the power of Congress to enact under the Thirteenth Amendment.²⁰

Congress responded by overriding the veto with a supermajority vote,²¹ but some members were concerned about whether such a measure really was within congressional power.²² Others had a different concern. What would happen to this statutory guarantee once the Democrats from the Southern states resumed their seats in Congress? Democrats were loudly proclaiming that it was their intent to repeal the bill as soon as they got the chance.²³ Who could say if they might one day have the votes to do so? In addition, what would the courts say about Congress trying to reverse, by a mere statute, the Supreme Court's decision in *Dred Scott v. Sandford*²⁴ denying the descendants of African slaves could ever be citizens of the United States?²⁵

For all of these reasons, many in Congress supported a parallel effort to adopt a constitutional amendment to make the freedmen United States citizens and to protect the fundamental rights of all United States citizens from being abridged by state

19. *Id.* (emphasis added).

20. CONG. GLOBE, 39th Cong., 1st Sess. 1679–81 (1866) (veto message of President Johnson).

21. Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 10 (2012).

22. See, e.g., MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 80 (1986) (describing how Representative John Bingham argued that Congress lacked the power to pass the 1866 Civil Rights Act before the ratification of the Fourteenth Amendment); see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 361 n.131 (2006).

23. Barnett, *supra* note 21, at 10–11.

24. 60 U.S. (19 How.) 393 (1857).

25. *Id.* at 404 (“We think [African slaves] are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”).

governments, as Southern states were commonly violating the rights of both freed blacks and white Republicans.²⁶ Which fundamental rights were protected? At least the rights listed in the Civil Rights Act, including the rights “to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property”²⁷—rights that correspond to the description of natural rights by Justice Washington in *Corfield*.

If it was the Privileges or Immunities Clause of the Fourteenth Amendment that protected these rights, then these rights are among “the privileges or immunities of citizens of the United States.”²⁸

III. SENATOR JACOB HOWARD’S SPEECH TO SENATE

This leads us to data point number three: Senator Jacob Howard’s speech to the Senate explaining the meaning of the Privileges or Immunities Clause during the debate over the Fourteenth Amendment. Six weeks after passing the Civil Rights Act, on May 23, 1866, Michigan Senator Jacob Howard introduced the Fourteenth Amendment in the Senate as its designated sponsor.²⁹ On that day, he delivered a comprehensive and widely reported address in which he explained the meaning of the amendment.

Howard began with the Privileges or Immunities Clause, which he described as “very important.”³⁰ By this clause, he said, citizens of the United States “are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their

26. See Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment’s Original Meaning*, 49 CONN. L. REV. 1069, 1084 (2017) (“[A]fter the Civil War, the Southern States were systematically denying civil rights to former slaves.”); see also Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 99–100 (2016) (discussing post-Civil War violence against and murders of Texan blacks and white Republicans that went largely unpunished).

27. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982 (2012)).

28. U.S. CONST. amend. XIV, § 1.

29. CONG. GLOBE, 39th Cong., 1st Sess. 2764–67 (1866) (statement of Sen. Howard). For a discussion of the significance of Howard’s speech, see Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 499–503 (2020).

30. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

enforcement whenever they go within the limits of the several States of the Union.”³¹ In other words, no state shall abridge the fundamental rights of a citizen of the United States. The question then becomes: What are these fundamental rights?

According to Howard, the privileges or immunities—or in his words the “fundamental guarantees”³²—of United States citizenship can be found in two textual sources in the Constitution. The first source was “the privileges and immunities spoken of in the second section of the fourth article of the Constitution,”³³ that is, the Privileges and Immunities Clause of Article IV. Howard noted that he was “not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guaranteed.”³⁴ Nevertheless, he said, “we may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington”³⁵—referring to our first data point: Justice Washington’s opinion in *Corfield v. Coryell*.

Howard then read “what that very learned and excellent judge says about these privileges and immunities of the citizens of each State in the several States”³⁶ including the language I highlighted above: “protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”³⁷ In his handwritten notes for his senate speech, Howard described all of these *Corfield* privileges and immunities as “these *fundamental civil rights* of citizens”³⁸

31. *Id.*

32. *Id.* at 2766.

33. *Id.* at 2765.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230)) (internal quotation marks omitted).

38. Handwritten Notes, Jacob Howard, Senator, U.S. Senate, Fourteenth Amendment’s Privileges or Immunities Clause 3 (1866) [hereinafter Handwritten Notes] (emphasis on second word added), <http://www.tifis.org/sources/Howard.pdf> [<http://perma.cc/V6HA-X2YK>]. On page “2” of his notes, Howard discussed *Corfield*. On page “3,” which presumably originally followed immediately after page “2,” he described them as “these *fundamental civil rights* of citizens, whatever may be their nature or extent.” At some point in advance of his

which connects this passage of his speech to the Civil Rights Act of 1866. But Howard was not yet finished.

He then located a second source of fundamental rights: “To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution”³⁹ After reading a list that included most of the rights listed in these amendments, Howard then summarized his understanding of these two textual sources of privileges or immunities.⁴⁰ “Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution”⁴¹

It is important that Howard did not indicate that these were two distinct categories of rights to be protected in different ways. For example, he did not privilege the enumerated rights in the first eight amendments at the expense of the *Corfield* rights. Rather, he described them all as “a mass of privileges, immunities, and rights” to which the text of the Constitution already refers.⁴² In addition, although he relied on the text of the Constitution for authority, he did not rely solely on the enumeration in the Constitution of certain rights. The fundamental rights to which the Privileges and Immunities Clause of Article IV refers are not themselves “enumerated” in the text.

Howard then explained that a constitutional amendment was necessary to protect all these rights because, at present, “[t]hey do not operate in the slightest degree as a restraint or prohibition upon State legislation.”⁴³ So “[t]he great object of the first section of this amendment is, therefore, to restrain the

speech, Howard inserted pages “2a” and “2b”—after page 2 and before page 3—which referred to the rights in the first eight amendments.

39. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Howard apparently added his reference to the rights in the first eight amendments as pages “2a” and “2b” of his notes. See Howard, Handwritten Notes, *supra* note 38.

40. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

41. *Id.*

42. *Id.* (emphasis added).

43. *Id.*

power of the States and compel them at all times to respect these great fundamental guarantees.”⁴⁴

In a speech delivered three years later, Howard offered this summary of the Privileges or Immunities Clause:

The occasion of introducing the first section of the fourteenth article of amendment into that amendment grew out of the fact that there was nothing in the whole Constitution to *secure absolutely* the citizens of the United States in the various States against an infringement of *their rights and privileges under the second section of the fourth article of the old Constitution*. That section declares that—“The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.”⁴⁵

On this occasion, Howard did not feel the need to make special reference to the first eight amendments presumably because, along with *Corfield* rights, these too were among the privileges and immunities of United States citizens to which, he believed, Article IV, Section 2 referred. Chief Justice Taney had made the same assumption in *Dred Scott* when he wrote that Southern states would never have agreed that free blacks could be citizens of the United States, because that would entail that Article IV, Section 2 “would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”⁴⁶

CONCLUSION

We can summarize the original meaning of the Privileges or Immunities Clause that is derived from these three key data points in a single run on sentence:

No state shall make or enforce any law which shall abridge
(1) those privileges and immunities (a) which are, in their nature, fundamental; (b) which belong, of right, to the citi-

44. *Id.* at 2766.

45. CONG. GLOBE, 40th Cong., 3d Sess., 1003 (1869) (emphases added) (quoting U.S. CONST. art. IV, § 2, cl. 1).

46. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

zens of all free governments; and (c) 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,

(2) such as the protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, and

(3) the right to make and enforce contracts, to sue, be parties, give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property as well as

(4) the personal guarantees contained in the first eight amendments.

The idea that Congress and the federal courts can protect this “mass of privileges, immunities, and rights”⁴⁷ from abridgment by state governments may seem like a radical proposition. And there is no doubt that the Fourteenth Amendment did alter the nature of our federalism by design. But it is not nearly as radical as it sounds.

Recall that Justice Washington added that “the enjoyment of life and liberty” and “the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety” was “subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”⁴⁸ In other words, states have the just power to regulate the exercise of these rights—which is called the police power—provided that such regulations are actually adopted to serve an end to which legislators are competent—such as the protection of the health and safety of the public.

As Justice Bradley explained in his dissenting opinion in the *Slaughter-House Cases*,⁴⁹ “The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted,”⁵⁰ but still, “there are certain fundamental rights which this right of regulation cannot infringe.”⁵¹ He then made the following distinction: “It may

47. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

48. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

49. 83 U.S. (16 Wall.) 36 (1873).

50. *Id.* at 114 (Bradley, J., dissenting).

51. *Id.*

prescribe the manner of their exercise, but it cannot subvert the rights themselves.”⁵² Prescribing “the manner of their exercise” is regulation; subversion is violation and abridgment.

Under this approach, identifying the rights, privileges, or immunities of citizens is of less significance than identifying the proper basis for regulating them and ensuring a fit between a proper end and the means adopted to achieve it. After the adoption of the Fourteenth Amendment, this was accomplished by the development of a theory of the police power of states.⁵³ Evan Bernick and I discuss this theory elsewhere in great detail.⁵⁴ But the bottom line of our analysis is that regulations are proper if they rationally relate to an end within the competence of state legislatures.

Astute readers will recognize this test as “rational basis scrutiny,” and it is what rationality review was until the New Deal Court. As the Court said in *United States v. Carolene Products*:⁵⁵

no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.⁵⁶

This type of rationality review is not the *conceivable* basis scrutiny that was adopted by the Warren Court in *Williamson v. Lee Optical of Oklahoma, Inc.*,⁵⁷ which only requires judges to imagine why a legislature “might” have restricted liberty.⁵⁸

52. *Id.*

53. See Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

54. See *id.*

55. 304 U.S. 144 (1938).

56. *Id.* at 144 (emphases added); see also *id.* at 153 (“Where the existence of a *rational basis* for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.” (emphasis added) (citation omitted)).

57. 348 U.S. 483 (1955).

58. See, e.g., *id.* at 487 (“The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses.”); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309 (1993) (“The question before us is whether there is any conceivable ra-

Rather the traditional rationality review articulated by the Court in *Carolene Products* was the approach employed by the three-judge lower court panel in *Lee Optical of Oklahoma, Inc. v. Williamson*,⁵⁹ which the Supreme Court reversed.⁶⁰

The careful analysis conducted by that panel demonstrated that, if there is the will to restore the original meaning of the Privileges or Immunities Clause's protection of fundamental rights, there is also a feasible way.

tional basis justifying this distinction for purposes of the Due Process Clause of the Fifth Amendment.”).

59. 120 F. Supp. 128 (W.D. Okla. 1954), *rev'd*, 348 U.S. 483 (1955).

60. *Id.*; see Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845 (2012).