

“Privileges and/or Immunities” in State Constitutions Before the Fourteenth Amendment

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September 14, 2018

INTRODUCTION

When Congress and the States constitutionalized “privileges or immunities” in the Fourteenth Amendment it was only the second time framers of the U.S. Constitution had placed together the first and third of words of that phrase.¹ But Americans had actually constitutionalized that language (sometimes with an “or” in the middle, sometimes with an “and,” sometimes just with a comma, and sometimes in a different order) more than *two dozen* times before. While scholars continue to disagree on the meaning of the Fourteenth Amendment’s reference to “privileges or immunities of citizens of the United States,” the history of these precursor constitutional phrases lies largely untold. This Article addresses that silence, reporting on how Americans used the grand conjunction of these two words in their constitutions before the Reconstruction Congress placed them in Section One of the Fourteenth Amendment.

This is not to say that others have not examined the phrase “privileges and/or immunities” in pre-Fourteenth Amendment documents. Many have reviewed its use in

¹ The first had been when the Constitutional Convention adopted the same language in Article IV, save an “and” instead of an “or” in the middle.

the all-important Article IV, Section 2,² in treaties,³ in the Articles of Confederation,⁴ in colonial charters,⁵ and in secondary sources.⁶ These investigations have taught us that the terminology had a long historical acceptance and, unlike to our modern ears, would not have sounded odd to U.S. citizens of the 1860s.

But aside from its inclusion in Article IV, Section 2, and the long-defunct Articles, this scholarship predominately has not examined the *constitutional* use of these two words.⁷ Yet, in understanding how the phrase “privileges or immunities” registered with the framers and ratifiers of the Fourteenth Amendment, it would be very useful to know of the repeated use of those words in other American constitutions. That is, the state constitutions that those Congressmen and state legislators were familiar with from their own states. This does not mean that the Reconstruction Congress was primarily influenced by state constitutional law in its crafting of the Fourteenth Amendment’s Privileges or Immunities Clause— Article IV, Section 2 was exceedingly more

² See, e.g., Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 Ga. L. Rev. 1117 (2009); Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 San Diego L. Rev. 809, 831-57 (1997).

³ See, e.g., Richard L. Aynes, *The Second Founding: Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. Pa. J. Const. L. 1295, 1298 n.13 (2009); Kurt Lash, *Privileges and Immunities*, 98 Geo. L.J. 1241, 1286-87 (2009); Arnold T. Guminski, *The Rights, Privileges, and Immunities of the American People: A Disjunctive Theory of Selective Incorporation of the Bill of Rights*, 7 Whittier L. Rev. 765, 789-90 (1985).

⁴ See, e.g., Thomas H. Burrell, *Privileges and Immunities and the Journey From the Articles of Confederation of the United States Constitution: Courts on National Citizenship and Antidiscrimination*, 35 Whittier L. Rev. 199, 215-25 (2014); Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1120-22 (1988).

⁵ See, e.g., Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 Campbell L. Rev. 7, 94-100 (2011); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1094-96 (2000).

⁶ See, e.g., Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship Under Article IV*, 45 Loy. U. Chi. L.J. 1, 24-26 (2013); Eric R. Claeys, *Blackstone’s Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 San Diego L. Rev. 777, 789-93 (2008).

⁷ There are a handful of exceptions, including CHRISTOPHER GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE* 33-34 (2015).

influential – or that examining state constitutions provides the “key” in “unlocking” the True Original Meaning of the Clause. But there is something lacking in the literature on the Fourteenth Amendment when we do not have a comprehensive tally of the constitutional forebears of one of its central mandates.

This Article puts in one place every time the two words “privilege(s)” and “immunity(ies),” were used in close conjunction in a state constitution before the framing of the Fourteenth Amendment. It also examines the words in isolation, discussing where state constitutions used “privilege(s)” but not “immunity(ies),” and vice-a-versa. The end result is an appreciation that Americans before the Fourteenth Amendment used the conjunction in a variety of contexts, but primarily in three areas: (1) the rights of corporate bodies, (2) bans on class-based state action, and (3) the protection of fundamental liberties. If a constitution’s framers wanted to do one of these three things they knew how to draft the document accordingly.

How this experience influenced the actual framers, and ratifiers, of the Fourteenth Amendment, I leave to others. I also leave the question of what these words mean in conjunction with “of citizens of the United States.” I do this primarily because those questions are far too large a project for this Article’s scope. But I also do that because, for obvious reasons, none of these state constitutional provisions tied “privileges or immunities” to “of citizens of the United States.” In other words, how the Fourteenth Amendment linked the concept to “privileges and/or immunities” to United States citizenship is not what this Article is about. But what “privileges and/or immunities” in

the constitutional context meant to people of Reconstruction America can help the separate study of what those interests were when it came to national citizenship.

After our tour of the pre-Fourteenth Amendment state constitutions I come to two conclusions.

First, most broadly, our exploration finds that “privileges” and “immunities” were just two of a number of other words that broadly referred to interests of the people. Others were “rights,” “estates,” and “franchises,” to name a few. They words were used in constitutions in a variety of combinations – the whole of which I non-pejoratively refer to as a “word salad.” “Privileges and/or immunities” was nothing special or mystical. This conclusion is not new. It reaffirms what other scholars have concluded, but with additional – this time *constitutional* – evidence. The real work of the Privileges or Immunities Clause was not, funnily enough, “privileges or immunities.” That phrase basically meant “rights.” What made the clause special was “of citizens of the United States.”

Second, I conclude that even though other words in the word salad would have done the job, the use of “privileges or immunities” nevertheless can give us a clue on what the clause protects, in a way that it would not if the framers had simply used “rights” instead. Given the variety of ways the language was used in state constitutions, “privileges or immunities” is well within the comfort zone of supporting both an equality based interpretation of the Privileges or Immunities Clause, and a fundamental rights interpretation. Americans had been protecting both equality and fundamental liberties for decades through similar language, and it is not a contradiction to conclude

that the Fourteenth Amendment’s “privileges or immunities” language protects each value.

Our historical journey begins in Part I with a brief review of how “privileges and/or immunities” was used before 1776. Then, in Part II, we examine the many times the language appeared in state constitutions, breaking it up into the three categories discussed above, and a few other miscellaneous examples. In Part III we go the extra mile in our tour of ante-Amendment state constitutions, with the use of “privileges” without its companion. For good measure, we also do the same with “immunities,” discovering that it was a much less popular term than its sibling. Part IV tries to make sense of this survey in light of the Fourteenth Amendment’s text itself.

I. “PRIVILEGES AND/OR IMMUNITIES” BEFORE THE AMERICAN REVOLUTION.

The phrase “privileges and/or immunities” has a long pre-American Revolution history. And, as with many words and phrases “Context mattered greatly; the words took on very different meanings depending on the purpose of the writing.”⁸ The words “privileges” and “immunities” were separately used in numerous legal documents alongside each other, and alongside words such as “rights,” “liberties,” “estates,” and others.⁹ And while these various words were used in many different combinations, not much of an emphasis should be made on the exact words used – they were a diverse

⁸ Jay, *supra* note 6, at 22.

⁹ See, e.g., 2 THE HISTORY AND SURVEY OF THE CITIES OF LONDON AND WESTMINSTER, BOROUGH OF SOUTHWARK, AND PARTS ADJACENT 434 (1753) (Charter of the East-India Company) (“ . . . and do still enjoy divers Liberties, Privileges and Immunities, by Virtue of Letters Patents and Charters . . .”); THE RIGHTS AND IMMUNITIES OF THE ISLAND OF GUERNSEY 9 (1771) (quoting Charter of Queen Elizabeth I) (“ . . . been in possession of very many rights, jurisdictions, privileges, immunities, liberties and franchises, freely, quietly, and without any infringement . . .”).

word salad, where all the words were generally aiming at roughly the same thing.¹⁰ The use of words like these meant the drafter was trying to protect a variety of what I will call “interests.” And, as all lawyers know, one way to protect a wide array of interests is to use a wide array of words. This conclusion – that it did not matter much exactly what words were used to describe the interests being protected – will have implications when we discuss state constitutions and the Fourteenth Amendment itself.¹¹

Numerous other scholars have looked deep into the pre-Revolutionary history of “privileges and immunities,” so this will be a very brief sketch.¹² When the words “privileges” and “immunities” were used before 1776, it was not just in the context of the fundamental rights of British subjects. Instead, the phrase – along with the attendant “rights,” “franchises,” etc. – was often used in grants of power to specific bodies or individuals. A corporate charter was a very common place to put this language, wherein the grantor – at that time the Crown – could grant the corporate body all “privileges and immunities” due to it.¹³

¹⁰ Jay, *supra* note 666, at 33 (“Although the terminology employed in these charters varied somewhat, there was no apparent difference in meaning among them.”)

¹¹ See, *infra*, Part IV.

¹² See *supra*, notes 5-6.

¹³ See, e.g., 23 BRITISH AND FOREIGN STATE PAPERS 1844-1845 1366 (1859) (Charter of the Hudson’s Bay Company) (“and that they shall have, hold, retain, and enjoy the grants, liberties, privileges, jurisdictions and immunities, only hereafter in these presents granted and expressed, and no other.”); 4 THE STATUTES AT LARGE, FROM THE TENTH YEAR OF THE REIGN OF KING WILLIAMS THE THIRD TO THE END OF THE REIGN OF QUEEN ANNE 468 (1786) (incorporating the South Sea Company in 1710, stating “. . . to give and grant unto the said Company, to be erected, as aforesaid, such further and other Powers, Privileges, Immunities, Exemptions, and Advantages, as she or they in her or their Wisdom shall think fit and convenient . . .”); *id.* 307 (establishing, in 1707, a Court of Exchequer for Scotland, and stating “. . . the Barons of the Court of Exchequer in Scotland . . . shall be entitled to, and have an enjoy such and the same Privileges and Immunities, as the Members of the College of Justice have and enjoy . . .”); X A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 433 (ed. T.B. Howell, 1816) (quoting the Statute of Monopolies, 21 James, chap. 3, to state

But, the phrase was also used to describe what can best be called “the rights of Englishmen.” The English had various legal protections they enjoyed as subjects of the realm, most prominently those in Magna Carta, but also those in the English Bill of Rights of 1689 and similar documents. In describing these, William Blackstone summarized the rights they protected by stating:

The rights themselves thus defined by these several statutes, consist in a number of private *immunities*; which will appear, from what has been premised, to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil *privileges*, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.¹⁴

Thus, the “privileges and immunities” of Englishmen were the rights they enjoyed as English subjects. There were immunities that English subjects had not been asked to relinquish to society, and there were privileges that society has given to them in exchange for immunities that they *had* given up.¹⁵ It was in this sense that the Crown granted to the various American colonies in colonial charters the “rights,” “privileges,” “immunities,” etc., enjoyed by Englishmen back home.¹⁶

“. . . the same charters, corporations, companies, fellowships and societies, and their liberties, privileges, powers and immunities shall be and continue of like force and effect . . .”).

¹⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES 123 (emphasis added).

¹⁵ Blackstone was here, of course, channeling John Locke’s social contract theory on what individuals receive and exchange upon entering into civil society. See David Jenkins, *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, 56 MCGILL L.J. 543, 577-78 (2011) (describing the influence of Locke on Blackstone).

¹⁶ See, e.g., WILLIAM THOMAS RUSSELL, MARYLAND: THE LAND OF SANCTUARY 520 (1907) (Charter of Maryland) (“. . . with all and singular such, and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and royal rights, and temporal franchises whatsoever . . .”); 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1848 (Francis Newton Thorpe ed., 1909) (hereinafter “FEDERAL AND STATE CONSTITUTIONS”) (Charter of Massachusetts Bay) (“. . . and all Jurisdiction, Rights, Royalties, Liberties, Freedomes, Immunities, Priviledges,

The threat of losing these interests was a major reason that the American colonists declared their independence from their mother country. And at the time they did, they used this same terminology in protecting these “rights of Englishmen” in their new nation.

II. “PRIVILEGES AND/OR IMMUNITIES” IN STATE CONSTITUTIONS BEFORE THE FOURTEENTH AMENDMENT.

Before Americans had even declared their independence, they began drafting state constitutions. The first was New Hampshire’s in January 1776.¹⁷ By the mid-1780s eleven states, plus Vermont, had adopted their own constitutions.¹⁸ And the language they used often liberally borrowed from their English constitutional heritage. Thus, American drafters of state constitutions¹⁹ placed the words “privilege(s)” within another word or two of “immunity(ies)” on at least 27 occasions before the Reconstruction Congress recommended the Fourteenth Amendment to the states.²⁰ The

Franchises, Preheminences, and Comodities whatsoever . . .”). *See also* 7 FEDERAL AND STATE CONSTITUTIONS 3788 (First Charter of Virginia) (“which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions”).

¹⁷ Andrew T. Bodoh, *The Road to “Due Process”: Evolving Constitutional Language From 1776 to 1789*, 40 T. JEFFERSON L. REV. 103, 121 (2018).

¹⁸ That is, all of the original thirteen states other than Connecticut and Rhode Island. *Id.* at 121 n.112.

¹⁹ These numbers only include state constitutional language that became a state constitutional provision. When including failed constitutions – such as draft constitutions that a convention adopted but the electors of a state failed to ratify – the number very well could be higher.

²⁰ The full list is as follows: Delaware Const. of 1792, art. VIII § 9; Delaware Const. of 1831, art. VII § 8; Georgia Const. of 1865, art. V § 8; Indiana Const. 1851, art. I § 23; Iowa Const. of 1857, art. I § 6; *id.*, art. VIII § 12; Kansas Const. of 1859, Bill of Rights § 2; Kentucky Const. of 1850, art. VIII § 21; Maryland Const. of 1776, amend. 64 § 2 (adopted 1836); Massachusetts Const. of 1780, Part the First, art. XII; *id.*, Part the Second, ch. V, § 1, art. 1; *id.*, amend. II (1822); New Hampshire Const. of 1784, art. I § XV; New Hampshire Const. of 1792, art. I § XV; New Jersey Const. of 1776, art. XIX; Ohio Const. of 1851, art. I § 2; Oregon Const. of 1857, art. I § 20; Pennsylvania Const. of 1776, § 45; Pennsylvania Const. of 1790, art. VII § 3; Pennsylvania Const. of 1838, art. VII § 3; South Carolina Const. of 1790, art. VIII § 2; South Carolina Const. of 1861, art. VIII § 2; South Carolina Const. of 1865, art. IX § 9; Tennessee Const. of 1834, art. XI § 7; Vermont Const. of 1777, ch. II § XLI; Vermont Const. of 1786, ch. II § XXXVIII; Vermont Const. of 1793, ch.

following categorizes these various instances in four broad groups: (1) The rights of corporate bodies, (2) bans on class-based state action, (3) protections of fundamental liberties, and (4) others. It introduces the various clauses chronologically.

A. Rights of Corporate Bodies.

Searching for “privileges w/5 immunities” in a state courts database for the period before the Fourteenth Amendment will turn up a fair amount of cases on constitutional law. But the vast majority of those will concern Article IV, Section 2 of the U.S. Constitution, not the language of state constitutions. In fact, the dearth of caselaw on court decisions on state privileges or immunities clauses in this Article is largely due to the fact that it does not exist. Instead, a great many of the cases with those two words in conjunction from that time period will not concern constitutions, but corporate bodies.²¹ That is, lawsuits about the formation of societies, companies, and other

II § 41. The text of all of these provisions, other than the South Carolina, Confederate Constitution of 1861, can be found in the Thorpe volumes. *See generally* FEDERAL AND STATE CONSTITUTIONS, *supra* note 16. The South Carolina Constitution of 1861 can be found at http://www.carolana.com/SC/Documents/SC_Constitution_1861.pdf.

Incidentally, the Thorpe volumes, commissioned by Congress and published in 1909, contain constitutional documents for every state going back to colonial charters, territorial legislation, and even the 1835 constitution of the Republic of Texas. But they do not have any Confederate constitutions, perhaps evidence of the Civil War still being a part of living memory at that time.

²¹ *See, e.g., Opinion of the Justices*, 3 Mass. 568, 572 (1807) (“It was formerly the usage of the legislature to incorporate the inhabitants of particular places, not only by the name of districts, with all the powers, privileges and immunities of towns, except the right of chusing a representative, but also by the name of towns, with the same powers, privileges and immunities, and under the same exception.”); *Orleans Navigation Co. v. Mayor*, 2 Mart. (o.s.) 10, 28 (La. Sup. Ct. 1811) (“It will be shewn by Spanish laws, and by evidence of the usages which prevail in Spain, that the king often grants, by edicts, declarations, and even by royal letters, privileges and immunities, and transfers property to corporations, and individuals, even to provinces, and even the public in general”); *Inhabitants of Stockbridge v. Inhabitants of W. Stockbridge*, 12 Mass. 400, 401 (1815) (“[T]he inhabitants of West Stockbridge have exercised and enjoyed all the powers, privileges, and immunities of a town.”); *Trs. Of Phillips Acad. v. King*, 12 Mass. 546, 554 (1815) (describing a corporation as “vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common” (quoting “Kyd,” presumably STEWART KYD, 1 A TREATISE ON THE LAW OF CORPORATIONS 13 (London 1793)); *Trustees of*

bodies – especially municipal bodies – and their rights and powers vis-à-vis stockholders, officers, inhabitants, and other stakeholders. This is because in corporate charters, other corporate documents, and state legislation allowing the formation of those entities, it was very common to state the corporation had all the “privileges and/or immunities” of similar bodies.²² In other words, the phrase was a way of

Dartmouth College v. Woodward, 1 N.H. 111, 112 (1817) (“ . . . shall respectively forever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed, enjoyed and used by the trustees of Dartmouth College.” (quoting from charter for the college) (internal quotation marks omitted)); Freeholders of County of Essex v. Barber, 7 N.J.L. 64, 67 (1823) (“It provides that nothing in this act ‘shall affect the rights, powers, privileges and immunities given and granted by law to any city or town corporate, relative to the licensing of inns and taverns . . .’”); Humphrey v. Whitney, 20 Mass. 158, 165 (1825) (“[T]he rest of the inhabitants became a separate and distinct parish having the immunities and privileges of the first parish in that town . . .”); The Cayuga Bridge Co. v. Magee, 6 Wend. 85, 102 (N.Y. Ct. Cor. Errs. 1830) (“shall have, possess and enjoy all the rights, privileges and immunities which were granted to them by the original Act of Incorporation”); Boisdere & Goule v. Citizens’ Bank, 9 La. 506, 509 (1836) (“thereby became entitled to all the advantages, privileges and immunities conferred by the charter on stockholders”); James River & Kanawha Co. v. Anderson, 39 Va. 278, 305 (1841) (“The whole interest of the commonwealth in the works and property of the then James River Company, was transferred to the new company, together with all tolls, rents and other emoluments, rights, privileges and immunities, which were then enjoyed by the James River Company.”); Enfield Toll Bridge Co. v. Hartford N.H.R. Co., 17 Conn. 454, 462 (1846) (“The charters of both the Hartford and New-Haven and the Hartford and Springfield rail-roads expressly give to the respective companies ‘all powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of the acts.’”); Grubb v. Mahoning Navigation Co., 14 Pa. 302, 304 (1850) (“ . . . by which name the said subscribers shall enjoy all the immunities and privileges of a corporation . . .”); Lafayette & Indianapolis R.R. Co. v. Smith, 6 Ind. 200, 201 (1855) (“ . . . and the same rights, privileges, powers, and immunities are conferred upon and vested in this company . . .”); Gowen v. Penobscot R. Co., 44 Me. 140, 144 (1857) (“ . . . ‘that said corporation shall have all the powers, privileges and immunities, and be subject to all the duties and liabilities provided and prescribed respecting railroads’ . . .”); Boykin & Lang v. Shaffer, 13 La. Ann. 129, 135 (1858) (“ . . . the Lafourche and Terrebonne Navigation Company shall exercise and enjoy within said prescribed limits all the rights and privileges and immunities granted by its original act of incorporation . . .”).

²² See, e.g., Farmers’ & Mechanics’ Bank v. Greiner, 2 Serg. & Rawle 114, 116 (1815) (opinion of Yeates, J.) (“It cannot be denied that the Legislature possess the legitimate power of conferring special privileges and immunities, as well on corporate bodies as on individuals: but it is equally certain, that such particular exceptions from the general regulations of society, must plainly appear and be free from all ambiguity.”); Perry v. Prince, 1 Mo. 645, 650 (1826) (“While the law confers such privileges and immunities on bodies corporate, it imposes some restrictions, and if they avail themselves of the first they must submit to the latter.”); Parsonsfield v. Dalton, 5 Me. 217, 222 (1828) (“ . . . with all the powers, privileges, and immunities to which parishes in this Commonwealth are by law entitled.” (citations omitted)); Hartford & N.H.R. Co. v. Kennedy, 12 Conn. 499, 523 (1838) (“The company is vested with all powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of the act . . .”); Watervliet Turnpike Co. v. M’Kean, 6 Hill 617, 618 (N.Y. Sup. Ct. of Jud. 1844) (“The said Company shall have all the rights, privileges, powers and immunities granted, and be subject

extending to a corporate body the powers and protections of the law. This was a practice following from pre-1776 British usage, discussed above.

State constitutions often did the same thing as corporate charters. And most of the time state constitutions used the “privileges and/or immunities” language in a corporate context it was for religious organizations. This is not surprising given that for-profit corporations were still relatively rare in the age preceding general incorporation laws,²³ and where many organizations that we would today call “non-profits” were religious in nature.

The first use of “privileges and/or immunities” in a state constitution in a corporate context was in Pennsylvania in August 1776. Among the constitution’s many provisions it stated the following:

Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution: And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this state.²⁴

This language only applied to “religious societies or bodies of men” and only protected “privileges, immunities and estates” which existed under pre-Revolutionary

to all the regulations, restrictions, and liabilities imposed by title first, chapter eight, of the Revised Statutes . . .”); *Hannibal & S.J.R. v. Morton*, 20 Mo. 70, 72 (1854) (“By its charter, the company has ‘power to view, lay out and construct a railroad from St. Joseph to Palmyra, thence to Hannibal; and shall, in all things, be subjected to the same restrictions and entitled to all the privileges, rights and immunities which were granted to the Louisiana and Columbia railroad company . . .”).

²³ “Before the Civil War in the United States, the corporate charter generally was perceived as a privilege granted only by a special act of the legislature for purposes deemed to be in the public interest.” David McBride, *General Corporation Laws: History and Economics*, 74 L. & CONTEMPORARY PROBLEMS 1, 2-3 (2011).

²⁴ 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3091 (Pennsylvania Const. of 1776, § 45).

laws (the state constitution having been adopted a mere two months after the Declaration of Independence²⁵). It therefore was primarily a protection of religious freedom for churches, perhaps following from the tradition of religious freedom in Pennsylvania dating back to William Penn himself.²⁶

The protection of churches could have been done via various terminologies, of course. A simple protection of “rights” that churches enjoyed up to the constitution’s adoption might have sufficed. Indeed, the state’s concurrently adopted Declaration of Rights had clear protections of freedom of religion.²⁷ But instead the framers referenced “privileges, immunities” and even “estates.” And, while greatly redrafting other parts of the constitution in the conventions of 1790 and 1838, Pennsylvania kept a version of this language, in substance, in new constitutions.²⁸

Inspired by Pennsylvania’s protection of the corporate rights of religious entities, Vermont followed suit the next year with nearly identical language.²⁹ It then kept this language in follow-up constitutions of 1786 and 1793.³⁰ Delaware protected the “rights, privileges, immunities, and estates of religious societies” in 1792.³¹ South Carolina used similar phrasing, but also expanded it to other corporate entities. In its new constitution

²⁵ *Id.* at 3081 n.a.

²⁶ *Id.* at 3077 (Charter of Privileges Granted by William Penn, Esq. to the Inhabitants of Pennsylvania and Territories, 1701) (declaring religious freedom for all monotheists).

²⁷ *Id.* at 3082 (Pennsylvania Const. of 1776, Dec. of Rights § II) (“That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding.”).

²⁸ *Id.* at 3099 (Pennsylvania Const. of 1790, art. VII § 3) (“The rights, privileges, immunities, and estates of religious societies and corporate bodies shall remain as if the constitution of this State had not been altered or amended.”); *id.* at 3112 (Pennsylvania Const. of 1838, art. VII § 3) (same).

²⁹ 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3748 (Vermont Const. of 1777, ch. II § XLI).

³⁰ *Id.* at 3760 (Vermont Const. of 1786, ch. II § XXXVIII); *id.* at 3771 (Vermont Const. of 1793, ch. II § 41).

³¹ 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 579 (Delaware Const. of 1792, art. VIII § 9).

of 1790 it read: “The rights, privileges, immunities, and estates of both civil and religious societies, and corporate bodies, shall remain as if the constitution of this State had not been altered or amended.”³² Notice how not only are “civil” societies protected, but “corporate bodies” too. In doing this, South Carolinians were protecting not just religious freedom but freedom of civil society, including commercial civil society, more generally.

But “privileges and/or immunities” were not just used for constitutional protection of religious corporate bodies or corporate bodies in general, but in one instance specific corporate bodies that the drafters, for whatever reason, wanted to secure. Thus, the 1780 Massachusetts Constitution included this ultra-specific protection of a certain school:

the president and fellows of Harvard College, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise, and enjoy all the powers, authorities, rights, liberties, privileges, immunities, and franchises which they now have, or are entitled to have, hold, use, exercise, and enjoy . . .³³

Talk about Harvard grade inflation. Here not only are the school’s “privileges” and “immunities” protected, but all kinds of other interests, and the school’s elders not only can “have, hold, use, exercise, and enjoy” those interests, but “have” those “which they now have.” A kind of “having” squared. This is something a twenty-first century legal

³² 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3264 (South Carolina Const. of 1790, art. VIII § 2).

³³ 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1906 (Massachusetts Const. of 1780, part the second, ch. V § 1 art. 1).

writing instructor would advise to simplify, but to John Adams and his fellow drafters of this constitution it was a way to secure the rights of that august institution.³⁴

Further, Massachusetts later amended its constitution to give the state the power to create more corporate bodies: “The general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution as the general court shall deem necessary or expedient for the regulation and government thereof.”³⁵ This language is a lot like the language a general incorporation statute might bestow on duly-created private corporations. It gives the state legislature the ability to create municipalities whose members, in turn, have certain “powers, privileges, and immunities.”

Although not found in that many states, these corporate entity provisions demonstrate an American tradition of constitutionally *protecting* corporate entities with language often used to *empower* corporate entities – privileges and immunities, among other words. Constitutional drafters of this time knew perfectly well about using words like “rights” or “inalienable,” yet when it came time to protect artificial entities the language of entities was likely to be used. And that language frequently used “privileges and/or immunities.”

³⁴ See LAWRENCE FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 10 (2011) (discussing Adam’s roll in drafting the document).

³⁵ 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1911 (Massachusetts Const. of 1780, art. of amend. II).

This is not to say that *only* corporate entities were protected with the words “privileges and/or immunities.” They were employed in other contexts too, including the protection of individuals.

B. Bans on Class-Based Discrimination.

When you read the Privileges or Immunities Clause of the Fourteenth Amendment you unmistakably get the sense that these particular “privileges” and “immunities” are a *good* thing.³⁶ States cannot abridge these, and Congress can even protect them through appropriate legislation.³⁷ But not all privileges and immunities are “good.” Some are downright forbidden. That is, when they are parceled out to some citizens but not to others. Thus, in 1834 Tennessee adopted a new constitution with this new language in it: “The legislature shall have no power to . . . pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community . . .”³⁸

This provision did not forbid the Tennessee legislature from extending “rights, privileges, immunities, or exemptions” at all, but made it an all-or-nothing matter. Give a “privilege” to only one person or group? That is not allowed. That would be favoring one individual or class of people over another.

In one sense Tennessee’s provision was the mirror image of Article IV, Section 2’s command that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” That takes a neutral stance on whether

³⁶ “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .” U.S. CONST., am. XIV, sec. 1.

³⁷ U.S. CONST., am. XIV, sec. 5.

³⁸ 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3439 (Tennessee Const. of 1834, art. XI § 7).

privileges and immunities, whatever they are, are “good” (or are otherwise constitutionally protected), but simply mandates that they be extended to citizens from other states. Tennessee’s clause turned that around to prohibit the legislature from granting privileges or immunities unless they are extended to everyone. In this mirror-image way Tennessee’s predecessor was Article IV, Section 2. But it was not the only predecessor.

Far back on the eve of the Declaration of Independence, New Jersey adopted a constitution with this language:

all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.³⁹

Here, privileges and immunities are good, not bad (people get to “fully and freely enjoy” them), but just as in Tennessee they must be enjoyed equally, at least among Protestants. This language in New Jersey is a bit curious as it is the only anti-class privileges and/or immunities provision in a state constitution before Tennessee’s. But it also predates both Article IV, Section 2 and even the Articles of Confederation. For whatever reason the idea of using these two words to prevent class legislation did not catch on at the time.

But it did catch on later. In 1851 Indiana adopted a constitution with language that would become a model for many other constitutional attempts to forbid

³⁹ 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2597-98 (New Jersey Const. of 1776, § XIX).

discrimination.⁴⁰ Perhaps inspired by Tennessee's provision, it stated "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."⁴¹ The impetus for Indiana's clause was the corruption of the economically turbulent 1840s. The state had been rocked by railroads and banks enriching themselves via public contracts, and then going broke, with the state taxpayer left holding the bag.⁴² To prevent future similar sweetheart deals, the framers of the new constitution only made those deals permissible if they were made available to everyone.

Today we might call this kind of provision an "equal protection clause." And, indeed, Indiana's courts, and the courts of other states with similar clauses, have often characterized them that way and used federal equal protection caselaw in interpreting them.⁴³ But, as those same courts have sought to point out at different times, their origins of protecting against the excesses of big business and big government belie a different emphasis.⁴⁴ It is not so much that the state has to treat everyone the same, but that it cannot dole out special favors to persons and classes.

⁴⁰ I should note that although New Jersey's 1844 Constitution has been, understandably, credited as containing a clause like Indiana's, and thus predating it, *see, e.g.*, Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L.P.P. 983, 1077 (2013), the clause in question was actually not added to that constitution until 1875, after the adoption of the Fourteenth Amendment. *In re Pet. of S. Lakewood Water Co.*, 294 A.2d 13, 17-18 (N.J. 1972).

⁴¹ 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1075 (Indiana Const. of 1851, art. I § 23).

⁴² *See Collins v. Day*, 644 N.E.2d 72, 76-77 (Ind. 1994) (discussing history of failed public projects and state debt); Michael John DeBoer, *Equality as a Fundamental Value in the Indiana Constitution*, 38 VAL. U.L. REV. 489, 541-43 (2004) (describing motivations of drafters of the provision).

⁴³ *See, e.g., Collins*, 644 N.E.2d at 74-75 (discussing how Indiana courts have historically vacillated between applying federal equal protection caselaw to its privileges or immunities clause and marking out the state clause as distinct); *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 83 P.3d 419, 425-28 (Wa. 2004) (holding that although the state court had considered the state clause very similar to the Equal Protection Clause of the Fourteenth Amendment in the past, it required independent analysis and consideration).

⁴⁴ *See, e.g., Collins*, 644 N.E.2d at 76-77; *Grant Cty. Fire Prot. Dist. No. 5*, 83 P.3d at 426.

At the same time Indiana adopted its clause, Ohio took on a slightly different, and seemingly not as sweeping, variety. It stated that “no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.”⁴⁵ This simply banned privileges or immunities that are “special” and that cannot be revoked by the state legislature. Thus, legislation awarding a privilege or immunity to a specific person or class would be fine as long as the legislature could undo that act one day. This is quite a bit less restrictive than the Indiana model, which forbids privileges or immunities that are not made available to everyone, whether or not they can be later repealed.

Despite its stricter terms – or maybe because of them – Indiana’s language inspired a couple other states in the years before the Fourteenth Amendment. Iowa’s 1857 constitution took the language verbatim, and added a little more for good measure, stating “All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens.”⁴⁶ Oregon adopted very similar language, generalizing “General Assembly” to “no law” the same year: “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”⁴⁷

⁴⁵ 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2913 (Ohio Const. of 1851, art. I § 2).

⁴⁶ 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1137 (Iowa Const. of 1857, art. I § 6).

⁴⁷ 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2999 (Oregon Const. of 1857, art. I § 21).

No more states adopted privileges and/or immunities language in a constitution to address class-based discrimination before the crafting of the Fourteenth Amendment. But, it is interesting to note that many other states did so later in the nineteenth century, and into the early twentieth century as well.⁴⁸ Thus, by the time the Fourteenth Amendment was adopted, if not shortly thereafter, an ascendant form of denying special favors was through the privileges or immunities nomenclature, on the Indiana model.

C. Protections of Fundamental Liberties.

One of the most common types of clause in early state constitutions was variations on Article 39 of Magna Carta, the first half of the charter's "Golden Passage." The original Article 39 stated "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute

⁴⁸ See, e.g., 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 308 (Arkansas Const. of 1868, art. 2 § 18) ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."); 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 414 (California Const. of 1879, art. 1 § 7(b)) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."); 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3371 (South Dakota Const. of 1889, art. 6 § 18) ("No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2856 (North Dakota Const. of 1889, art. I § 20) ("No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."); 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3974 (Washington Const. of 1889, art. I § 12) ("No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."); New Mexico Const. art. IV § 26 (adopted in 1911) ("The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."); Arizona Const. art. 2 § 13 (adopted in 1911) ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.").

him, except by the lawful judgment of his peers and by the law of the land.”⁴⁹ States took various approaches in incorporating this famous language into their declarations of rights. Virginia, for example, simply stated “that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.”⁵⁰ Here, the constitution simply named “liberty” as protected, without the long enumeration of troublesome things that constitute losing one’s liberty, such as arrest, imprisonment, etc.

But other states hewed more closely to Article 39’s format. Thus, Massachusetts in 1780 proclaimed “And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.”⁵¹ This forbids all kinds of things from happening to “subjects,” including the deprivation of “immunities or privileges.” New Hampshire then adopted this language in its 1784 Constitution, and readopted it in its (present) 1792 version.⁵² These are now known as law of the land clauses, functionally identical to due process clauses in other state constitutions.

How much should we make of the fact that Massachusetts included “immunities” and “privileges” in its Golden Passage clause, but Virginia used “rights?” Earlier we discussed how seventeenth and eighteenth century declinations of interests

⁴⁹ A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 388 (1968).

⁵⁰ 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3813 (Virginia Const. of 1776, Dec. of Rights § 8).

⁵¹ 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1889 (Massachusetts Const. of 1780. Part the First, art. XII).

⁵² 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2467 (New Hampshire Const. of 1784, Part First, art. XV); *id.* at 2473 (New Hampshire Const. of 1784, Part First, art. XV).

used words like these rather indiscriminately.⁵³ Surely there must be something to the fact that different words are used in these different clauses? Well, maybe, or maybe not. We shall revisit this conundrum later in discussing the Fourteenth Amendment.

D. Other Uses of “Privileges and/or Immunities.”

There are a couple of other times state constitutions used a variant of the phrase “privileges and/or immunities” before the Fourteenth Amendment. I mention them here for a full accounting of the phrase’s state constitutional history.

First, Kentucky’s 1850 Constitution gave an extremely specific power for pardons of those guilty of participating in duels. It said:

The governor shall have power, after five years from the time of the offence, to pardon all persons who shall have in anyway either participated in a duel, as principals, seconds, or otherwise, and to restore him or them to all the rights, privileges, and immunities to which he or they were entitled before such participation.⁵⁴

The Constitution otherwise gave the governor standard pardon powers, save for treason which was given to the legislature.⁵⁵ And that language did not reference rights, privileges, or immunities, or any other interests. But for whatever reason, “duel

⁵³ To give another example of an overinclusive listing of possible interests, see this language from a 1691 act of New York’s colonial legislature: “To have, hold, exercise, occupy, possess and enjoy all their and every of their former rights, customs, prerogatives, privileges, pre-eminences, practices, immunities, liberties, franchises, royalties and usages whatsoever, in as full and ample manner as if none of the changes, alterations, disturbances, want of other forms in the law, or the non-feasance of any rights, privileges or customs of any corporation aforesaid had ever happened or been neglected, anything herein contained or in any other law to the contrary in any wise notwithstanding . . .” *People v. Lingston*, 8 Barb. 253, 292 (N.Y. Sup. Ct. 1850) (quoting the unnamed act).

⁵⁴ 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1309 (Kentucky Const. of 1850, art. VIII § 21).

⁵⁵ *Id.* at 1298 (Kentucky Const. of 1850, art. III § 10) (“He shall have power to remit fines and forfeitures, grant reprieves and pardons, except in cases of impeachment. In cases of treason, he shall have power to grant reprieves until the end of the next session of the General Assembly, in which the power of pardoning shall be vested; but he shall have no power to remit the fees of the Clerk, Sheriff, or Commonwealth’s Attorney, in penal or criminal cases.”).

pardons” could not be made until five years had passed. And, perhaps to counter that unusual time limitation, the drafters made clear that the pardons restored “rights, privileges, and immunities.”

Second, the state of Georgia’s immediate post-Civil War constitution declared that:

All rights, privileges and immunities which may have vested in, or accrued to any person or persons, in his, her, or their own right, or in any fiduciary capacity, under and in virtue of any act of the General Assembly, or any judgment, decree, or order, or other proceeding of any Court of competent jurisdiction in this State, since the first day of January, A. D. eighteen hundred and sixty-one, shall be held inviolate by all Courts before-which they may be brought in question, unless attacked for fraud.⁵⁶

This, of course, was protecting any legal arrangements and obligations that had arisen since the state succeeded from the Union. It was not an attempt to directly protect slavery, as the constitution did separately recognize that slavery was no longer legal.⁵⁷ But it certainly could have been read to protect expectations that slaveholders had, or that anyone doing business with institutions supporting slavery, including the Confederacy and the State of Georgia, had. Why the provision referenced “rights, privileges and immunities” and not other interests we can only speculate about. But, perhaps importantly for the purposes of reading the Fourteenth Amendment, this provision is evidence that, as of 1865, the use of that phrase was a standard locution used to protect the full panoply of legal interests.

⁵⁶ 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 821-22 (Georgia Const. of 1865, art V § 8).

⁵⁷ Although it did try to leave open the door for compensation for former slaveholders. *See id.* at 811 (Georgia Const. of 1865, art. I § 20).

III. “PRIVILEGES” OR “IMMUNITIES,” BUT NOT TOGETHER.

We have seen how “privileges and/or immunities” was frequently used in pre-Fourteenth Amendment America as a term sometimes referring to “rights,” and sometimes referring to whatever interests (if any) a person has in addition to “rights.” But, generally, wherever the phrase was used not much distinction was placed on “privileges” or on “immunities,” with the two essentially each playing the same purpose. As one state court opined, in construing Article IV, Section 2, “Privilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege.”⁵⁸

But under the surface there seemed to have been a difference in meaning for some people. Blackstone hinted at this in the language quoted earlier, where he states that “immunities” are natural rights that have not been given up to government, while “privileges” are benefits that people receive in exchange for entering into society – that is, what people get as part of a “Lockean bargain” of sorts.

But Blackstone’s view was not the only one. In 1847 the Pennsylvania Supreme Court gave a slightly different, but related take. In *Knight v. Abert*⁵⁹ the court briefly described the common law interest an owner of cattle has in allowing his cattle to brows on a neighbor’s unenclosed land. It said that

such browsing is excusable as a trespass, [but] it is [not a] matter of right. *It is an immunity, not a privilege; or, at most, a license revocable at the will of the tenant, who may turn his neighbour’s cattle away from his grounds*

⁵⁸ *Campbell v. Morris*, 3 H. & McH 535, 553 (Md. 1797).

⁵⁹ 6 Pa. 472, 472 (1847).

at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law . . .⁶⁰

From this we get a sense that, essentially, if you exercise a “privilege” you’re not doing anything wrong. If you exercise an “immunity,” however, you may have done something wrong, but no one can punish you for it. This corresponds with Blackstone’s notion, as “immunity” is something that the cattle’s owner has not given up to society, but “privilege” would be something that society would give to him. Thus, if you were presented with a choice on which to use, and if you couldn’t get both, you would probably pick privilege, not immunity.

It is perhaps for that reason that, prior to the Fourteenth Amendment, when state constitutions used either one term or the other they overwhelmingly went with “privilege.” Although not as popular as the word “right” in state constitutions, “privilege(s)” was commonly used to describe interests of the people. “Immunities” was used at times as well, but only on a handful of occasions when uncoupled from its sibling. When Americans wrote their constitutions they loved recognizing “rights” and “privileges,” but not so much “immunities” (unless, as we have seen, those immunities were accompanied by privileges).

The following details how “privilege(s)” was often used on its own, and then ends with the handful of “immunities.” It is not a complete enumeration, but a representative sampling.

⁶⁰ *Id.*

A. The Use of “Privilege(s)” in State Constitutions.

Before the Fourteenth Amendment, state constitutions used “privilege(s),” without being paired with “immunities” in a wide-variety of contexts. These ran from pure natural rights and procedural rights to anti-discrimination protections to special privileges for certain persons. There is no one meaning of “privilege” across all of these contexts. The word was used many times to mean different things.

Perhaps the most common use of privilege was in habeas corpus clauses. With just a few exceptions, most states had some variant on the U.S. Constitution’s Suspension Clause guaranteeing that “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”⁶¹ Almost all post-dated the Constitution’s framing in 1787, and are probably copies of it as the wording is almost always fairly identical.⁶² But Massachusetts had its own distinctive wording, where it also labeled the interest a “privilege” (actually, a “privilege and benefit”).⁶³

Privilege was also used to describe many things that could easily have been described as rights, including natural rights. Two states, Alabama and New Jersey, refer

⁶¹ U.S. Const. art. I, Sec. 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

⁶² See, e.g., 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 98 (Alabama Const. of 1819, art. I § 17) (“... the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.”); *id.* at 391 (California Const. of 1849, art. I § 5) (“The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require its suspension.”).

⁶³ “The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.” 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1910 (Mass. Const., ch. VI, art. VII.).

to the “privilege” of worshiping God.⁶⁴ Texas protected the “privilege” of speech.⁶⁵

Several states also protected procedural interests that the U.S. Constitution often refers to as rights, such as the “privilege” of counsel,⁶⁶ the “privilege” to plead one’s own cause,⁶⁷ and the “privilege” of an impartial trial or trial by jury.⁶⁸ But most common in this area is the “privilege” of voting. A great number of states referred to the “privilege of free suffrage” or the “privilege” of serving as an elector.⁶⁹

In line with the anti-class discrimination provisions discussed above, many states banned or severely limited public or hereditary “emoluments” and “privileges.” For example, Connecticut’s 1818 constitution stated “no man, or set of men are entitled to exclusive public emoluments or privileges from the community.”⁷⁰ Similar provisions

⁶⁴ 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 98 (Alabama Const. of 1819, art. I § 3); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2597 (New Jersey Const. of 1776, § XVIII).

⁶⁵ 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3548 (Texas Const. of 1845, art. I § 5).

⁶⁶ 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 810 (Georgia Const. of 1865, art. I § 8); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2597 (New Jersey Const. of 1776, § XVI).

⁶⁷ 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 785 (Georgia Const. of 1777, art. LVIII)

⁶⁸ 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1310 (Kentucky Const. of 1850, art. X § 3); 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2474 (New Hampshire Const. of 1792, Part First, art. XXI).

⁶⁹ *See, e.g.*, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 109 (Alabama Const. of 1819, art. VI § 5); *id.* at 404 (California Const. of 1849, art. XI § 18); *id.* at 544 (Connecticut Const. of 1818, art. VI § 6); 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 674 (Florida Const. of 1838, art. VI § 13); *id.* at 1139 (Iowa Const. of 1857, art. II § 5); 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1307 (Kentucky Const. of 1850, art. VIII § 4); *id.* at 1441 (Louisiana Const. of 1864, tit. VII art. 95); *id.* at 1654 (Maine Const. of 1819, art. IV, Part Second § 3); *id.* at 1725 (Maryland Const. of 1850, art. III § 33); *id.* at 1896 (Massachusetts Const. of 1780, Part the Second, ch. I § II, art. II); 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1997 (Minnesota Const. of 1857, art. IV § 15); *id.* at 2061 (Mississippi Const. of 1832, art. VII § 4); *id.* at 2404 (Nevada Const. of 1864, art. II § 1); *id.* at 2479 (New Hampshire Const. of 1792, Part Second § 31); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2924 (Ohio Const. of 1851, art. V § 4); 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3226 (Rhode Island Const. of 1842, art. II § 4); *id.* at 3560 (Texas Const. of 1845, art. VII § 4); 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3850 (Virginia Const. of 1850, Sch. § 4).

⁷⁰ 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 537 (Conn. Const. of 1818 art. I § 1).

prohibited hereditary titles and privileges, such as Ohio's statement that "No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this state."⁷¹

But "privilege" was often also used in contexts where the interest referred to was more of a, well, "privilege." By this I mean an interest that is not considered a natural right (such as free speech or freedom of religion) or even a bedrock procedural principle of government (such as the right to counsel or a jury trial). Beginning in the late 1830s and 1840s, many state constitutions referred to corporate privileges, especially banking privileges, with the intention of protecting against the abuse of those privileges.

Pennsylvania's 1838 Constitution, for example, stated that "No corporate body shall be hereafter created, renewed or extended, with banking or discounting privileges, without six months previous public notice of the intended application for the same in such manner as shall be prescribed by law."⁷² More neutrally, California's 1849 Constitution declared that "The term corporations as used in this article shall be construed to include all associations and joint-stock companies, having any of the powers or privileges of corporations not possessed by individuals or partnerships."⁷³

And, another repeated use of a very non-natural rights "privilege" in many constitutions was the "privilege" of legislators being immune from arrest when on legislative duty. A typical example is in Delaware's 1792 constitution: "They shall in all

⁷¹ 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2915 (Ohio Const. of 1851, art. I § 17).

⁷² *Id.* at 3107 (Pennsylvania Const. of 1838, art. I § 25).

⁷³ 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 396 (California Const. of 1849, art. IV § 33).

cases, except treason, felony, or breach of the peace, be Privileged from arrest during their attendance at the session of their respective houses . . .”⁷⁴

Many state constitutions used “rights” and “privileges” together, just as “privileges” “immunities” were used together. In fact, “right” and “privilege” were used together about as many times as “privileges” and “immunities” were. Sometimes this was in a “Golden Passage” provision,⁷⁵ but the pairing came up in many other contexts, including in oaths.⁷⁶ And, a few times, again often in Golden Passage provisions, instead of “rights and privileges” the pairing was “liberties and/or privileges.”⁷⁷

A close textualist reading of these clauses would lead one to believe that the drafters were trying to protect something other than “rights” or “liberties” with the word “privileges;” otherwise they would have just used the one word and not both. But, as we have seen, “privilege” *can*, and often does, mean a right – whether natural or procedural – in other clauses. And, again, the plethora of pairings of all of these various

⁷⁴ *Id.* at 571-72 (Delaware Const. of 1792, art. II § 11).

⁷⁵ 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1991 (Minnesota Const. of 1857, art. I § 2); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2647 (New York Const. of 1821, art. VII § 1).

⁷⁶ For instance, Vermont’s 1777 Constitution required officeholders to take this oath:

I _____ do solemnly swear, by the ever living God (or I do solemnly affirm in the presence of Almighty God), that as a member of this Assembly, I will not propose, or assent to any bill, vote or resolution, which shall appear to me injurious to the people; nor do or consent to any act or thing whatever, that shall have a tendency to lessen or abridge their *rights and privileges*, as declared in the Constitution of this State; but will in all things, conduct myself as a faithful, honest representative and guardian of the people, according to the best of my judgment and abilities.”

6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3743 (Vermont Const. of 1777, ch. II § 9) (emphasis added). Similar versions appeared in the state’s 1786 and 1792 constitutions. *Id.* at 3757, 3767 (Vermont Const. of 1786 ch. II § 12; Vermont Const. of 1793, ch. II § 12).

⁷⁷ *See, e.g.*, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 270 (Arkansas Const. of 1836, art. II § 10); 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1007 (Illinois Const. of 1848, art. XIII § 8); 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 3427 (Tennessee Const. of 1834, art. I § 8).

words – rights, privileges, immunities, franchises, etc. – demonstrate that there is not necessarily a difference between “rights” and “rights and privileges” or “liberties and privileges,” other than a sense that the drafters were being cautious in protecting as many interests as possible. Thus, the backdrop of the Fourteenth Amendment was that constitutional drafters were not extremely careful about which of these words they used, as long as they used some – that is, preferably more than one – of them.

B. The Use of “Immunities” in State Constitutions.

Without its friend to accompany it, “immunities” was an infrequent guest in state constitutions before the Fourteenth Amendment. Once it made an appearance in a remedies clause, in Maine.⁷⁸ Two states used the word to refer to immunities of local units of government, and a state university, respectively.⁷⁹ And four states used “immunities” in clauses supporting the promotion of arts and science. Massachusetts’ of 1780 was the first: “. . . it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth . . . to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce,

⁷⁸ Maine Const. art. I § 19 (“Every person, for an injury inflicted on the person or the person’s reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.”).

⁷⁹ 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1958 (Mich. Const. of 1850 art. X § 1) (“Each organized county shall be a body corporate, with such powers and immunities as shall be established by law”); *id.* at 2009-10 (Minn. Const. of 1857 art. VIII § 4) (“All the rights, immunities, franchises and endowments heretofore granted or conferred are hereby perpetuated unto the [University of Minnesota].”).

trades, manufactures, and a natural history of the country.”⁸⁰ New Hampshire, Indiana, and Arkansas followed in turn with similar admonitions.⁸¹

But that is it. Divorced from its usual companion, “immunities” was not on the minds of many constitution writers in the lead up to the Fourteenth Amendment.

IV. WHY “PRIVILEGES” AND “IMMUNITIES” DO NOT, BUT ALSO DO, REALLY MATTER.

What lessons do we have of how Americans used “privileges and/or immunities,” and “privileges” or (but not and) “immunities,” in state constitutions before the Fourteenth Amendment? We learn the fact that when constitutional drafters wanted to grant powers to units of government and corporate bodies, and protect the powers of those same bodies, they knew how to do that, and frequently used familiar “privileges and immunities” language to do so. We also learn that when drafters wanted to make government treat people equally – to not give special privileges or immunities to classes of people – they knew how to do that too. And, we learn that when drafters wanted to protect fundamental liberties and common law rights, invoking language going clear back to Magna Carta, they also knew how to do that. They frequently used “privileges” plus other words, and added “immunities” on a couple of occasions.

⁸⁰ 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1907 (Mass Const. of 1780, Part the Second, ch. V § II).

⁸¹ 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 283 (Arkansas Const. of 1836, art. VII § 1); 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1069 (Indiana Const. of 1816, art. IX § 1); 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 2467 (New Hampshire Const. of 1784, part II, Encouragement of Literature).

From these findings, and the other history presented above, we can make two conclusions related to the Fourteenth Amendment. First, that “privileges or immunities” is not magic. Second, that the Amendment’s phrase “privileges or immunities” allows for a fundamental rights *and* an equality interpretation.

A. “Privileges or Immunities” is Not an Incantation.

Our tour through over two dozen uses of “privileges” coupled with “immunities” in pre-Fourteenth Amendment state constitutions, plus many other clauses using one or the other of these words, demonstrate that “privileges” and/or “immunities” were not “magic words” or even terms of art. This is not a new conclusion, and others have demonstrated this as well.⁸² But it is a reaffirmation of that conclusion with considerable evidence from a mountain of *constitutional* sources that should further dispel claims to the contrary.⁸³ From reviewing the many constitutional mutations of phrases using these two words, but also “rights,” “estates,” “franchises,” “liberties,” and on and on, we learn that “privileges and immunities” were simply part of the same word salad that had been used since the days of the Virginia Colony’s First Charter.⁸⁴ Context did matter, but the context that mattered most were the words

⁸² See, e.g. Christopher R. Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL OF RIGHTS J. 93, 111 (2015) (“I agree with [Professor Kurt Lash] that the terms ‘privileges’ and ‘immunities’ were themselves not sharply distinguished from each other, or from terms like ‘rights’ or ‘advantages,’ in the context of the Privileges or Immunities Clause.”).

⁸³ This includes, for example, Philip Hamburger’s argument that the use of “privileges or immunities” in the Fourteenth Amendment had a calculated meaning different from if the word “rights” had been used. Philip Hamburger, *Privileges or Immunities*, 105 NW. U.L.R. 61, 105-06 (2011) (discussing the same language in treaties).

⁸⁴ The language in that document, again, was “Liberties, Franchises, and Immunities.” 7 FEDERAL AND STATE CONSTITUTIONS 3788 (First Charter of Virginia).

surrounding the words drawn from the word salad, not so much the specific ingredients drawn from the salad themselves.

This is not to say that pre-Fourteenth Amendment courts and commentators never gave importance to the specific meaning of “privileges” and “immunities,” as discussed above.⁸⁵ But the infrequency of such an examination – and the narrowness of any difference in meaning when such an examination was undertaken – demonstrate that as a practical matter “privileges” and “immunities” were understood to mean the same thing. And, more importantly, their common combination with the rest of the word salad in countless constitutional and other legal documents demonstrate that they were *also* meant to mean the same thing with “rights,” “estates,” “franchises,” “liberties,” etc. Living in a legal world without the benefit (or, perhaps, the burden) of Hohfeld’s clarity on what some of these various legal terms mean,⁸⁶ constitutional writers of the late eighteenth and nineteenth centuries wanted to protect, broadly speaking, what just about everyone today would call “rights.” That includes everything from natural rights to legislatively created rights bestowed on corporations, to real “privileges” such as subsidies to banks and railroads. The phrase “privileges or immunities” was *one* way to protect those various interests, just as “rights, liberties, and franchises” or “___ and privileges” might have been used instead, and had been used in

⁸⁵ See *supra*, notes 59-60 and accompanying text.

⁸⁶ See William Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

several constitutions.⁸⁷ For whatever reason, shorthanding all of these “rights” into the “privileges or immunities” phraseology became more and more popular as a way – but not the only way – to protect the people’s various interests as Americans drafted more and more constitutions, especially in the three areas discussed above.

Where does this leave us in reading the Fourteenth Amendment itself? Section 1 of the Amendment states in full:

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

In *McDonald v. City of Chicago* Justice Thomas succinctly stated that “At the time of Reconstruction, the terms ‘privileges’ and ‘immunities’ had an established meaning as synonyms for ‘rights.’ The two words, standing alone or paired together, were used interchangeably with the words ‘rights,’ ‘liberties,’ and ‘freedoms,’ and had been since the time of Blackstone.”⁸⁸ He then went on to cite a number of authorities saying similar things to what is discussed above. This Article’s discussion of state constitutional use reaffirms his conclusion, although a bit more expansively than perhaps what Justice Thomas meant. “Privileges or immunities” meant “rights,” but this included interests going beyond just “natural rights.”

⁸⁷ See e.g., 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 16, at 1991 (Minnesota Const. of 1857, art. I § 2) (“No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.”).

⁸⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 813 (2010) (Thomas, J., dissenting).

Thus, if nothing else, this examination of state constitutional language makes something clear: there is nothing mysterious about the phrase “privileges or immunities” in the Fourteenth Amendment. It meant “rights” at the time the Amendment was written and adopted, and it meant “rights” in a very broad sense. Corporations had privileges or immunities even if they were creatures of statute and kept on a short leash. Whatever interests they were allowed to have, those were the corporations’ “privileges or immunities.” Further, when citizens were treated equally, they had equal “privileges or immunities,” whether those were natural rights, procedural rights, or items of legislative grace.

Any hyper-textualist examination of these words will lead in failure. The simple truth is constitutions at the time used “privileges or immunities” to mean “rights” or “liberties” or other synonyms, or at least near-synonyms. And this would have been true whether the Fourteenth Amendment said what it says, or said “rights and liberties,” “liberties and estates,” or any other combination of ingredients from this marvelous, poetic, and age-old – but *not* magical – word salad.

B. A Big Tent for a Big Amendment.

And yet, we have seen that “privileges or immunities” was frequently used in American constitutions in certain contexts more than others. Does this background count for *anything* in interpreting the phrase, other than to conclude that it means “rights”? Perhaps it is not “the key” to understanding its original public meaning, but is it at least a piece of the puzzle on how the clause should be applied?

Despite what I say about the word salad, above, I think the answer to these questions is “yes.” We have seen “privileges and/or immunities” was often used as a way to protect the rights of corporate bodies. It also was often used as a tool to make sure people or citizens were treated equally. And it was sometimes used – and “rights and privileges” was often used – as a way to protect fundamental liberties.

The use of “privileges or immunities” fits comfortably within *all* of these contexts. Reading that phrase in that Amendment tells the constitutionally literate reader of 1868 that it could be protecting corporate bodies, *and* equality, *and also* fundamental liberties. The same meaning could have been true if the word “rights” were simply used, but the phrasing makes for a more comfortable reading. Any doubt that “rights” might apply to one of these contexts does not exist if “privileges or immunities” is substituted, simply because those are the areas where that phrase had been used. In other words, the reading is more familiar. The meaning is not different, but the recognition that certain applications of the language would be correct is different. If “rights, privileges or immunities” were used then this recognition would still be present. The presence of “privileges or immunities,” not the absence of rights, draws the reader’s attention toward certain aspects of everything that the broad term “rights” could mean. The meaning does not change, but what is *comfortably* within that meaning is made clearer.

But, of course, this does not answer the question everyone cares about. Which is, what does “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” mean? Unfortunately for the reader, the

present exercise is not taking on that task. Much has been written on what “citizenship” meant in light of the Fourteenth Amendment, and what distinction, if any, there is between the “privileges or immunities” of state citizenship versus those of the United States variety. This historical survey is not the place to answer that larger question.

That being said, one thing we can surmise is that the use of “citizens” surely seems to rule out the clause’s application to corporate bodies. However, that only becomes true once we read “of citizens of the United States.” The words “privileges or immunities” on its own, again, very much could apply to corporate bodies in the constitutional context.

And, both an equality reading and a fundamental rights reading fit comfortably within the phrase “privileges or immunities” on its own, and also are protections that could apply to “citizens.” They are both comfortably within the “big tent” of the “privileges or immunities” and also of the meaning of “citizens.” I leave it to others— from Justice Miller to Justice Thomas to every professor in-between— to duke out how the rest of the clause’s language affects an equality reading versus a fundamental reading versus some other reading. But it does no offense to the words “privileges or immunities” if the clause does both.

CONCLUSION

With the light of dozens of similar *constitutional* provisions at our disposal, we can conclude that the key to discovering what the Privileges or Immunities Clause means is *not* the phrase “privileges or immunities.” It is “of citizens of the United

States.” But we can also conclude that that three word phrase does give us a hint, and that hint is that the clause can protect both equality and fundamental liberties.

I therefore conclude a bit like Socrates in a Platonic dialog. I have added very little to your knowledge on what the truth is about the central issue you likely care about. But, like Socrates, I hope to have broadened your horizons on what might, or might not, be the truth. Privileges or immunities meant many things to many different actors. It was a big tent of a phrase. And an examination of other constitutional uses of that phrase tells us there is no reason to think that that big tent is not present in the Fourteenth Amendment itself.