

# Re-evaluating the Privileges or Immunities Clause

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Four years ago, in *Saenz v. Roe*,<sup>1</sup> the United States Supreme Court relied on the Fourteenth Amendment's Privileges or Immunities Clause<sup>2</sup> to invalidate a California state law limiting welfare benefits for newly arrived residents to the amount payable in the state of the individual's prior residence.<sup>3</sup> That the Court relied upon the Privileges or Immunities Clause at all was something of a surprise; that clause had been rendered virtually a dead letter—"sapped . . . of any meaning," as Justice Clarence Thomas put it<sup>4</sup>—a century and a quarter earlier in the *Slaughter-House Cases*.<sup>5</sup> Even more of a surprise was that this revival of a long-dead constitutional provision came from the pen of Justice John Paul Stevens, widely regarded as one of the more vocal proponents of a "living constitution,"<sup>6</sup> rather than Justice Thomas, whose trademark on the Court has been to revive the original understanding of long overlooked or misinterpreted clauses of the Constitution.<sup>7</sup>

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1 526 U.S. 489 (1999).

2 U.S. CONST. amend. XIV, § 1.

3 CAL. WELF. & INST. CODE § 11450.03 (West 2001).

4 *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

5 83 U.S. (16 Wall.) 36 (1872).

6 See, e.g., Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUB. L. REV. 229 (1987). See also John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277 (1986). But see Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 836 (1997) (contending that Justice Stevens has abandoned the "living constitution" model pushed by Justice Brennan and "replaced it with a looser model of originalism . . . to combat the increasingly strict originalism espoused most forcefully by Justice Thomas").

7 See, e.g., *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2481 (2002) (Thomas, J., concurring); *Printz v. United States*, 521 U.S. 898, 938–39 (1997) (Thomas, J., concurring); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852–53 (1995) (Thomas, J., concurring); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); *United States v. Lopez*, 514 U.S. 549, 601 (1995) (Thomas, J., concurring).

More surprising still, perhaps, was that Justice Thomas was in dissent.<sup>8</sup> The Privileges or Immunities Clause is one of three or four constitutional provisions that arguably were designed to codify the natural rights views of many of our nation's leading founders,<sup>9</sup> and Justice Thomas is undoubtedly the most solid devotee of the founders' natural rights philosophy to sit on the Court<sup>10</sup> since New Deal-era Justice George Sutherland.<sup>11</sup> Indeed, some of the most vigorous questioning during the initial phase of Justice Thomas's confirmation hearing involved speeches the Justice had made while chairman of the Equal Employment Opportunity Commission, praising the natural rights principles of the founding fathers.<sup>12</sup> Yet rather than embracing Justice Stevens's revival of the long-forgotten, natural rights-based clause, Justice Thomas excoriated the majority for "attribut[ing] a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified."<sup>13</sup>

Why was Justice Thomas in dissent? And why did Justice Stevens apparently don the robes of originalism and breathe new life into a long-forgotten provision of the Constitution rather than simply rely on assertedly fundamental notions of fairness, emanating from various penumbras of the Bill of Rights,<sup>14</sup> as the Court had been doing for a generation?<sup>15</sup> The latter question is, I think, pretty easy to answer.

<sup>8</sup> *Saenz*, 526 U.S. at 521 (Thomas, J., dissenting).

<sup>9</sup> See, e.g., Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 146 (2003); Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 416–25 (1995). Other provisions arguably codifying natural rights principles include the Ninth Amendment and the Republican Guarantee Clause. See, e.g., THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989); John C. Eastman, *The Declaration of Independence as Viewed From the States, in THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 96 (Scott Douglas Gerber ed., 2002).

<sup>10</sup> Justice Clarence Thomas was sworn into the Court on October 23, 1991.

<sup>11</sup> See, e.g., SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999); John C. Eastman, *Taking Justice Thomas Seriously*, 2 GREEN BAG 2D 425, 426 (1999) (reviewing SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999)); cf. John C. Eastman & Harry V. Jaffa, *Understanding Justice Sutherland as He Understood Himself*, 63 U. CHI. L. REV. 1347 (1996); HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994).

<sup>12</sup> See, e.g., *First Session on the Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the House Comm. on the Judiciary*, 102d Cong. 2–5 (1993) [hereinafter *Hearings*] (first round of questioning by Sen. Joseph R. Biden); *Hearings*, at 236–243 (questioning by Sen. Howell Heflin); *Hearings*, at 313–15 (questioning by Sen. Alan K. Simpson). See also *Hearings*, at 59–62 (opening statement of Sen. Alan K. Simpson) (describing that some of Justice Thomas's opponents had tried to portray him as "a promoter of wild, dramatic, and unchecked theories of natural law that will cause the U.S. Constitution to come undone").

<sup>13</sup> *Saenz*, 526 U.S. at 521.

<sup>14</sup> U.S. CONST. amends. I–X.

<sup>15</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 129 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 472 (1972) (Burger, C.J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Existing Equal Protection jurisprudence treats non-suspect classifications, such as that between recent and long-established residents, very deferentially, subject to minimal rational basis review by the courts.<sup>16</sup> There is clearly a rational basis for a state law designed not to provide an incentive for indigents to come to the state merely to partake of welfare benefits more generous than were available elsewhere in the country.<sup>17</sup> On the other hand, under its existing “fundamental rights” jurisprudence, whether derived from the Equal Protection<sup>18</sup> or Due Process<sup>19</sup> Clauses of the Fourteenth Amendment, or more ephemerally from the Ninth Amendment,<sup>20</sup> the Court had never gone so far as to hold that individuals have a “fundamental right” to particular levels of welfare benefits.<sup>21</sup> Such a holding would have opened up a Pandora’s box that apparently gave pause even to Justice Stevens.<sup>22</sup>

The former question is much more difficult, but in the end much more important. Justice Thomas did not bemoan the revival of the Privileges or Immunities Clause; indeed, he welcomed it. Noting his belief that “the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence,” he invited a re-examination of the Clause, stating that he “would be open to reevaluating its meaning in an appropriate case.”<sup>23</sup> But his difficulty with Justice Stevens’s majority opinion was that it “fail[ed] to address [the Clause’s] historical underpinnings or its place in

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*But see* *Burnham v. Superior Court of California*, 495 U.S. 604, 627 n.5 (1990) (plurality opinion) (“The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon the society’s greedy adherence to its traditions can only be described as imperious.”).

<sup>16</sup> See *Califano v. Boles*, 443 U.S. 282, 296 (1979); *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). See also *Ambach v. Norwick*, 441 U.S. 68, 80 (1979); *Foley v. Connelie*, 435 U.S. 291, 296 (1978); cf. *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

<sup>17</sup> Cf. *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (upholding provision of Maryland’s Federal Aid to Families With Dependent Children program establishing a maximum benefit level regardless of family size, noting that the regulation “provides an incentive to seek gainful employment”).

<sup>18</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>19</sup> See, e.g., *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>20</sup> U.S. CONST. amend. IX. See also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>21</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972).

<sup>22</sup> See *Saenz v. Roe*, 526 U.S. 489, 515 (1999) (Rehnquist, C.J., dissenting) (noting that recent cases analyzing classifications of new and old residents applied a rational basis test under the Equal Protection Clause, not heightened scrutiny of a right to travel under the Privileges or Immunities Clause).

<sup>23</sup> *Id.* at 527–28.

our constitutional jurisprudence.”<sup>24</sup> Instead, he claimed that any proper reevaluation should “consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.”<sup>25</sup> No wonder he and Justice Stevens were on opposite sides in *Saenz*!

We are, of course, not without materials with which to begin the reevaluation project invited by Justice Thomas. If the *Slaughter-House Cases* are to be overruled as flatly inconsistent with the original understanding of the Privileges or Immunities Clause, we have an opposing contemporaneous opinion to consider—the dissenting opinion by Justice Stephen Field in *Slaughter-House* itself.<sup>26</sup> At issue in the *Slaughter-House Cases* was a Louisiana law that essentially granted a monopoly over all butchering in the City of New Orleans to a politically well-connected butcher company.<sup>27</sup> The law was challenged as a violation of the Privileges or Immunities Clause of the Fourteenth Amendment, and for the first time since that Amendment’s enactment, the Court had to decide just what rights were protected by that clause.<sup>28</sup>

The phrase, “privileges or immunities,” is of course drawn from the nearly identical “privileges and immunities” Clause in Article IV of the Constitution.<sup>29</sup> The general understanding at the time of the adoption of the Fourteenth Amendment, as at the time of the ratification of the Constitution itself, was that the phrase, “privileges or immunities,” was meant to protect the fundamental natural rights that every legitimate government was bound to respect, including the freedom of contract—specifically, the common law right to earn a living at a lawful occupation, free from unreasonable governmental interference.<sup>30</sup> This right was central to the Jeffersonian tradition of individual liberty and lay at the core of the “pursuit of happiness” about which Jefferson wrote so eloquently in the Declaration of Independence.<sup>31</sup> Jefferson was here

<sup>24</sup> *Id.* at 527.

<sup>25</sup> *Id.* at 528.

<sup>26</sup> 83 U.S. (16 Wall.) 36, 83–111 (1872) (Field, J., dissenting).

<sup>27</sup> *Id.* at 59–60. Other butchers remained free to continue their own butchering activities, but they had to do so in the monopoly’s own slaughterhouse and pay for the privilege. *Id.*

<sup>28</sup> *Id.* at 66–67.

<sup>29</sup> U.S. CONST. art. IV, § 2, cl. 1. Contrary to the position taken by some scholars, I do not subscribe to the view that the difference between the “Privileges and Immunities” clause of Article IV and the “Privileges or Immunities” clause of the Fourteenth Amendment has any interpretive significance. The latter formulation is simply the result of the different grammatical sentence structure in which the clause appears.

<sup>30</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing the freedom “to contract [and] to engage in any of the common occupations of life” as among “those *privileges* long recognized . . . as essential to the orderly *pursuit of happiness* by free men”) (emphasis added).

<sup>31</sup> See, e.g., *W. Colo. Power Co. v. Pub. Utilities Comm’n*, 411 P.2d 785, 804 (Colo. 1966) (Frantz, J., dissenting) (“Freedom of contract’ . . . is also safeguarded by the constitutions of the states, and, by a constitutional guaranty of pursuit of happiness.”); Gen. Elec.

following John Locke, who argued that “every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.”<sup>32</sup> The government had no right to interfere with that liberty except to protect the public safety, via necessary health and safety regulations.

Jefferson was not alone in following this Lockean natural rights notion. One of the most influential of the early State constitutional enactments was the Virginia Declaration of Rights,<sup>33</sup> drafted by George Mason and adopted by the Virginia Constitutional Convention on June 12, 1776. Section 1 of the Virginia Declaration of Rights provided:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, *with the means of acquiring and possessing property*, and pursuing and obtaining happiness and safety.<sup>34</sup>

The Massachusetts Declaration of Rights, adopted in 1780, similarly recognized that the right of “acquiring” property as a means of seeking happiness was one of the “unalienable” rights with which all human beings are born: “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.”<sup>35</sup> New Hampshire included a similar provision in a Declaration of Rights when it replaced its original, pre-Declaration constitution with new constitutions in 1784 and 1792: “All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—*acquiring, possessing and protecting property*—and in a word, of seeking and obtaining happiness.”<sup>36</sup>

All of the above provisions, and others like them, laid the natural rights foundation that I contend was ultimately codified in the constitutional language of privileges and immunities,<sup>37</sup> and

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Co. v. Am. Buyers Coop., Inc., 316 S.W.2d 354, 361 (Ky. Ct. App. 1958) (“[F]reedom of contract’ . . . is safeguarded by the constitutional guaranty of ‘pursuit of happiness’ . . .”). See also Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 90–92 (1998).

32 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305–06 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

33 VA. CONST. of 1776, Bill of Rights.

34 *Id.* § 1 (emphasis added).

35 MASS. CONST. of 1780, pt. I, art. I (emphasis added).

36 N.H. CONST. of 1784, pt. I, art. II (emphasis added). See also N.H. CONST. of 1792, pt. I, art. II.

37 U.S. CONST. art. IV, § 2, cl. 1.

even in the constitutional guaranty of a republican form of government.<sup>38</sup> Because human beings are created equally free and independent, they have—inherent in their nature and endowed by their Creator—the fundamental, inalienable right to protect that free and independent nature, or, in other words, the right to life and to liberty, and the right to acquire property in things that are the fruit of their own free and independent labor and to otherwise pursue their own individual happiness.<sup>39</sup> These are the rights—that is to say, the “privileges” and “immunities”—that every legitimate government is bound to recognize and without which the government cannot rightly be said to be “republican” in form.<sup>40</sup> Indeed, in the Jeffersonian formulation, the sole purpose of government is to protect these unalienable rights.<sup>41</sup>

In other words, the provisions of Article IV (and later of the Fourteenth Amendment) guaranteeing the “privileges and immunities” of citizenship and a “republican” form of government simply cannot be understood apart from the natural law principles of the Declaration from which they were drawn. Although the courts have either explicitly or effectively treated these provisions as nonjusticiable,<sup>42</sup> they are clearly commands of the positive law, and not just some vague, philosopher’s ideal of higher justice, such as is recognized in the Ninth Amendment of the United States Constitution<sup>43</sup> and parallel state constitutional provisions.<sup>44</sup>

38 *Id.* § 4.

39 See *supra* notes 34–36 and accompanying text.

40 At first blush, the guaranty of a “republican” form of government might be thought merely to protect the form of governmental institutions—governing bodies consisting of representatives chosen by the people. See, e.g., *Duncan v. McCall*, 139 U.S. 449, 461 (1891). But the guaranty must have a substantive component as well; a government chosen by only a favored class (such as whites in the ante-bellum South), or which did not have protections for the rights of the minority, is not “republican” in form. As Abraham Lincoln famously described, legitimate republican government must be “of the people, by the people, for the people.” Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (emphasis added), reprinted in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953).

41 See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure [the unalienable Rights with which all men are endowed by their Creator], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”).

42 See, e.g., *City of Rome v. United States*, 446 U.S. 156, 183 n.17 (1980) (“We do not reach the merits of the appellants’ argument that the Act violates the Guaranty Clause, art. IV, § 4, since that issue is not justiciable.”); *Baker v. Carr*, 369 U.S. 186, 208–10 (1962); *Luther v. Borden*, 48 U.S. (How.) 1, 42 (1849) (holding that a dispute over the Rhode Island elections and the status of the resulting state government vis-à-vis the Guaranty Clause of art. IV, § 4, was not a political question for Congress or a justiciable issue for the Court to decide).

43 U.S. CONST. amend. IX.

44 For a criticism of the idea that unenumerated natural rights, such as those recognized by the Ninth Amendment, are unenforceable, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 44 (1990). See also *The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 100th Cong., 1st Sess. 249 (1989):

I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says “Congress shall make no” and then there is an ink blot and you cannot read the rest of it and that

While history has not been kind to this interpretation of either constitutional clause, the historical development of the Republican Guaranty Clause<sup>45</sup> and the notion of fundamental rights codified in the Privileges and Immunities Clause demonstrates, or at least strongly suggests, that these specific textual provisions of the Constitution were themselves designed to codify the principles of the Declaration and make them enforceable as positive law. A review of that history is therefore in order.<sup>46</sup>

In 1783, after years of wrangling over the disposition of the western lands, Virginia ceded to the United States her claims to all land northwest of the Ohio River, a tract of land that would eventually become the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin.<sup>47</sup> The terms of the Virginia Act of Cession, which were scrupulously followed by Congress in the years to come, included this provision: "that the states so formed, shall be distinct *republican* states, and admitted members of the federal union; having the *same rights* of sovereignty, freedom and independence, as the other states."<sup>48</sup> The two ideas codified in this Act of Cession are extremely important in the historical development of the United States as one nation composed of free and equal states, rather than a nation composed of original states and a collection of colonial territories. The first would find its way into the United States Constitution of 1787, as the Republican Guaranty Clause of Article IV, Section 4.<sup>49</sup> The second would come to be known as the Equal Footing Doctrine,<sup>50</sup> pursuant to which every new state would be admitted to the Union on an "equal footing" with the original states.<sup>51</sup>

More importantly for present purposes, the two doctrines expressed in the Virginia Act of Cession shed a great deal of light on the role the Declaration of Independence and its principles were intended to play in the expansion of the American regime to new territories in the West.<sup>52</sup> The constitutional guaranty of a republican form of government, it was soon to be argued by those opposed to slavery, required Congress to deny admission to states that per-

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is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

*Id.*; Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 94 (1995).

<sup>45</sup> U. S. CONST. art. IV, § 4.

<sup>46</sup> For a more comprehensive discussion of the argument presented here, see Eastman, *supra* note 9, at 96–117.

<sup>47</sup> Virginia Act of Cession, in 26 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 115–16 (Gaillard Hunt ed., 1928) [hereinafter Virginia Act of Cession].

<sup>48</sup> *Id.* at 114 (emphasis added).

<sup>49</sup> U.S. CONST. art IV, § 4.

<sup>50</sup> Pollard v. Hagan, 44 U.S. (3 How.) 212, 228–29 (1845).

<sup>51</sup> *Id.* at 229. See also United States v. Alaska, 521 U.S. 1, 6 (1997).

<sup>52</sup> Virginia Act of Cession, *supra* note 47, at 114; THE DECLARATION OF INDEPENDENCE (U.S. 1776).

mitted slavery, while those in favor of slavery argued that the Equal Footing Doctrine guaranteed to each new state the same constitutional protections of slavery as the original states enjoyed.<sup>53</sup> The actions taken by Congress with respect to the Northwest Territory clearly demonstrate that the former argument was more consistent with the thinking of the founders, but the latter argument would eventually prevail, placing the nation on the tragic road that culminated in the Civil War.

The Supreme Court has noted that the "distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves."<sup>54</sup> In other words, in an extended territory, republican government is the *means* by which the Declaration's *principle* of consent by the governed is implemented. And because the principle of consent is mandated by the self-evidence of the proposition that all men are created equal, the constitutional guaranty of a republican form of government is analytically incompatible with the existence of slavery. As James Madison, himself a slave-owner, wrote on the eve of the federal constitutional convention of 1787, "where slavery exists, the Republican Theory becomes still more fallacious."<sup>55</sup>

This conclusion, logically compelled by the nature of the matter, was given effect in the Northwest Ordinance, the ordinance adopted by the Continental Congress on July 13, 1787, "for the Government of the Territory of the United States north-west of the river Ohio" or, in other words, for the territory that had been ceded to the United States by Virginia in 1783.<sup>56</sup> Article VI of that Ordinance provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted . . . ."<sup>57</sup>

The preamble to the Ordinance makes clear that the prohibition on slavery was not adopted simply because, as some historians would later argue, the soil and climate of the region would not support a slave economy. On the contrary, the preamble demonstrates that the anti-slavery provision was mandated by the *principles* upon which the nation and existing states had been founded, namely, the principles of the Declaration of Independence:

53 U.S. CONST. art. I, § 9, cl. 1; *Pollard*, 44 U.S. at 228-29.

54 *Duncan v. McCall*, 139 U.S. 449, 461 (1891).

55 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 144 (W.W. Norton & Co., 1987) (1840).

56 An Act to Provide for the Government of the Territory Northwest of the river Ohio, ch. 8, 1 Stat. 50, 51 n.a (July 13, 1787) (re-enacted Aug. 7, 1789).

57 *Id.* at 51-53 n.a.

And for extending the *fundamental principles* of civil and religious liberty, which form the basis whereon these republics [i.e., the existing states], their laws and constitutions are erected; *to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory:* to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

*It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent . . .*<sup>58</sup>

In other words, the anti-slavery article, like the other of the Ordinance's six articles, was to be considered an "article of compact" that was unalterable unless by the common consent of the original states and the people and states in the new territory, because it was mandated by "the *fundamental principles* of civil and religious liberty" upon which the existing states were founded and which were to serve as the foundation of government in the new states as well.<sup>59</sup>

The language of the preamble also gives life to the later claim that the Equal Footing Doctrine guaranteed to new states the same right to permit slavery as existed in the original states.<sup>60</sup> The new states to be formed in the Northwest Territory were expressly guaranteed the right to enter the union on an "equal footing" with the original states, but the prohibition on slavery was to remain an unalterable principle, established as the basis for "all laws, constitutions, and governments" that would thereafter be formed in the territory.<sup>61</sup>

While the hyper-technical argument might be (and eventually was) advanced that the prohibition applied only to all territorial governments, as opposed to governments formed after admission to statehood, the word "constitutions" undermines that contention. Because the territories were governed by act of Congress until admission to statehood, they did not have separate constitutions;<sup>62</sup> thus, the word "constitutions" must necessarily have been intended to apply to the constitutions of state governments even after admission to the Union.

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<sup>58</sup> *Id.* at 51–52 n.a (first and second emphasis added).

<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> *Id.* at 51–53 n.a.

<sup>61</sup> *Id.* at 51–52 n.a.

<sup>62</sup> *Id.* at 51–53 n.a.

Moreover, when the eastern portion of the territory petitioned for statehood in 1802, Congress mandated in the Ohio Enabling Act both that the new state “shall be admitted into the Union, upon the same footing with the original states, in all respects whatever” and that the new state’s constitution and government “shall be republican, and not repugnant to the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the original states and the people and states of the territory northwest of the river Ohio.”<sup>63</sup>

The people of Ohio (and subsequently the people of each of the other Northwest Territory states) complied with that mandate by incorporating into Article VIII, Section 2 of their new constitution the requirement that “[t]here shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.”<sup>64</sup> This provision was necessary, according to the Ohio constitution, in order “[t]hat the general, great, and essential principles of liberty and free government may be recognized, and forever unalterably established.”<sup>65</sup> Section 1 of the same article contained the litany of principles drawn from the Declaration of Independence: the equality of all men; the doctrine of inalienable rights, including the rights to life, liberty, property, and the pursuit of happiness; the requirement of consent; and the right to alter or abolish governments when necessary to affect the legitimate ends of government.<sup>66</sup> Moreover, Section 1 expressly tied these principles to the idea of “republican” government:

That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, *acquiring, possessing, and protecting property*, and pursuing and obtaining happiness and safety; and every free *republican government* being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties and securing their independence; to effect these ends, they have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary.<sup>67</sup>

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63 An Act to Enable the People of the Eastern Division of the Territory Northwest of the River Ohio, to Form a Constitution and State Government, and for the Admission of Such State into the Union, on an Equal Footing with the Original States, and for Other Purposes, ch. 40, 2 Stat. 173–74 (Apr. 30, 1802). Congress imposed the same terms on each of the other states that were admitted to the Union from the Northwest Territory: Indiana in 1816, Illinois in 1818, and Michigan in 1837. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 51–53 n.a (July 13, 1787) (re-enacted Aug. 7, 1789).

64 OHIO CONST. of 1802, art. VIII, § 2.

65 *Id.* art. VIII.

66 *Id.* § 1.

67 *Id.* § 1 (emphasis added).

Equal footing, then, did not allow new states to avail themselves of the slavery *compromises* in the Constitution at the expense of the republican *principle*. Those compromises were to be cabined to the original states.

This conclusion is actually compelled not just by the theory of the Declaration, but by the explicit terms of both the Northwest Ordinance and the Constitution itself. The Northwest Ordinance's anti-slavery article, Article VI, contains a proviso clause, elided over above: "*Provided always*, that any person escaping into the same, from whom labour or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid."<sup>68</sup>

As the emphasized words make clear, the obligation to return fugitive slaves expressly extended only to slaves escaping from the "original states." Article I, Section 9 of the United States Constitution contains a similar limitation: "The Migration or Importation of such Persons as any of the States *now existing* shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . ."<sup>69</sup> Thus, the Northwest Ordinance was a large step toward full vindication of the Declaration's principles. Moreover, the fact that the anti-slavery provisions were deemed in that document to be required by the *principles* upon which the nation was founded and also mandated by the requirement of republican government mandated by the Virginia Act of Cession bolsters the contention that those principles were themselves codified as positive law in the United States Constitution's Republican Guaranty Clause.<sup>70</sup>

The drafters of the Privileges or Immunities Clause of the Fourteenth Amendment<sup>71</sup> likewise referred to the fundamental principles of the American founding when drafting the amendment,<sup>72</sup> and also to the important case of *Corfield v. Coryell*.<sup>73</sup> In that case, Justice Bushrod Washington, riding circuit, held that

68 An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 51–53 n.a (July 13, 1787) (re-enacted Aug. 7, 1789) (emphasis added).

69 U.S. CONST. art. I, § 9, cl. 1 (emphasis added). The Constitution's own "fugitive slave" clause is not textually limited to the original states, but the greater power to exclude slaves from new states altogether would render such a protection unnecessary. *Id.* art. IV, § 2, cl. 3.

70 *Id.* § 4.

71 Portions of this section are drawn from John C. Eastman and Timothy Sandefur, *Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?*, 6 NEXUS 121 (2001) (reprinted with permission).

72 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2764–65 (1866) (statement of Sen. Howard); CONG. GLOBE, 42d Cong., 1st Sess. app. 86 (1871) (statement of Rep. Bingham); CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman).

73 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

the rights secured by the parallel Privileges and Immunities Clause in Article IV of the Constitution included “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.”<sup>74</sup> The term “privileges and immunities” had long been used to describe these rights.<sup>75</sup>

The majority in the *Slaughter-House Cases* rejected this historical understanding of the clause and instead held that the clause merely protected a few rights of *national*, as opposed to *state*, citizenship, and therefore did not protect the old common law right to earn a living free from undue governmental burdens.<sup>76</sup> By its holding, the majority effectively defined the clause—which embodied the natural rights philosophy of the Declaration of Independence—into obscurity.

Justice Field, in a powerful (and correct) dissent, would have given the clause its due: “[By the first clause], [t]he fundamental rights, privileges, and immunities which belong to [citizens] as a free man and a free citizen, now belong to him as a citizen of the United States . . . . [The amendment] assumes that there are such privileges and immunities which belong of right to citizens as such . . . .”<sup>77</sup> Then, adopting Justice Washington’s definition of the parallel phrase in Article IV as his own, Justice Field elaborated on the definition: Privileges or Immunities are rights “which belong . . . to the citizens of all free governments,” which are, “in their nature, fundamental.”<sup>78</sup> In other words, for both Justice Washington with respect to the Article IV clause (applicable to the federal government), and Justice Field with respect to the Fourteenth Amendment clause (applicable to the states), the natural law principles of the Declaration of Independence had been brought down from the heavens and made into positive law, enforceable by the courts. Indeed, Justice Field wrote that the Fourteenth Amendment

was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the 14th Amendment every citizen of the United States should be able to plead his citizenship of the Republic as a pro-

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<sup>74</sup> *Id.* at 551–52.

<sup>75</sup> *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting) (explaining the history of the terms); 1 WILLIAM BLACKSTONE, COMMENTARIES \*125–29.

<sup>76</sup> 83 U.S. (16 Wall.) 36, 74 (1872).

<sup>77</sup> *Id.* at 95–96 (Field, J., dissenting).

<sup>78</sup> *Id.* at 97 (Field, J., dissenting).

tection against any similar invasion of his privileges and immunities.<sup>79</sup>

Justice Field's view of the Privileges or Immunities Clause is most assuredly *not* the view adopted by Justice Stevens's majority opinion in *Saenz*. Indeed, the view that one has a constitutional "right" to governmental benefits,<sup>80</sup> which is to say benefits paid from the tax revenues contributed by others, is fundamentally at odds with the natural rights principles that the Privileges or Immunities Clause was designed to protect. Instead, Justice Stevens's view is more in line with the views of the Progressives at the end of the nineteenth century, who viewed the Declaration of Independence and the natural law tradition with ultimate skepticism, if not outright hostility.<sup>81</sup>

As noted, Justice Field relied upon Justice Bushrod Washington's landmark ruling in *Corfield* to flush out the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>82</sup> But in *Corfield*, Justice Washington actually held that the right to travel to another state in order to fish for oysters in its lakes was *not* a privilege protected by the clause.<sup>83</sup> In other words, the right did not include a claim to someone else's property, but it did include, as Justice Field would later argue, the right to acquire your own property by pursuing lawful employment in a lawful manner.<sup>84</sup> Had Justice Stevens bothered to consider the actual meaning of the clause, he would have realized that newly-arrived citizens from other states no more have a natural right—a privilege and immunity—to the common fund of welfare benefits provided by the earnings of California's laborers than the plaintiff in

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<sup>79</sup> *Id.* at 105–06 (Field, J., dissenting). See also Kimberly C. Shankman and Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 11 (1998) (contending that the privileges or immunities clause "was intended essentially to constitutionalize the natural rights philosophy of the Declaration of Independence"). Of course, some contemporary positive law jurists, such as Chief Justice William H. Rehnquist, Justice Antonin Scalia, and former Judge Robert Bork, reject the claim that the natural rights principles of the Declaration are enforceable by the courts. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 705 (1976); BORK, *supra* note 44. However, in refusing to give the two privileges and immunities clauses their intended natural rights meaning, these jurists are actually rejecting the positive law mooring for natural rights intended by the framers of the clauses. For sources providing a more comprehensive treatment of this dispute, see John C. Eastman and Harry V. Jaffa, *supra* note 11, at 1355 n.23.

<sup>80</sup> See, e.g., Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31 (2003).

<sup>81</sup> For a more complete discussion of the Progressive Era's hostility to natural law, see Thomas G. West, *The Constitutionalism of the Founders Versus Modern Liberalism*, 6 NEXUS 75 (2001).

<sup>82</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

<sup>83</sup> *Id.* at 551–52.

<sup>84</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 109–11 (1872) (Field, J., dissenting).

*Corfield* had a natural right to the oyster beds held in common by the people of New Jersey.

Justice Stevens has opened the door for a renewed Privileges or Immunities Clause jurisprudence, however, and that door is likely to stay open. In what direction that open door leads remains to be seen. It could be a Justice Stevens direction, pointing the way to a new round of "rights" to entitlements of every sort, or it could be in Justice Field's and Justice Thomas's direction, towards understanding both the scope and the limits of a Privileges or Immunities Clause grounded in natural rights. Unless Justice Field's understanding can be recovered, the Supreme Court will be doomed to repeat in this century, via the Privileges or Immunities Clause, the errors of the post-New Deal substantive due process revolution of the last century.

Unfortunately, the prospects for recovering Justice Field's understanding are not particularly good. Many conservatives have what might be called a "Justice Brennan Problem." They are not willing to give any credence to a natural rights jurisprudence, even one grounded in the actual text of the Constitution such as the Privileges or Immunities Clause, lest it become the departure point for Justice Brennan's, or now Justice Stevens's, liberalism—a liberalism that purports to be grounded in natural rights but actually ignores the tenets of such rights.<sup>85</sup> In rejecting natural rights jurisprudence altogether, however, many conservatives have rejected the very tools that would allow them to make the kind of distinctions that Justice Field and Justice Washington made. If people would make the effort to understand Justice Field's judicial philosophy, perhaps the modern day juridical supporters of limited government would regain the jurisprudential high ground, and find in Justice Field a suitable source as they embark upon the inquiry invited by Justice Thomas in his dissenting opinion in *Saenz v. Roe*.

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<sup>85</sup> Judge Robert Bork, for example, praised the majority opinion in the *Slaughterhouse Cases* as "a narrow victory for judicial moderation." BORK, *supra* note 44, at 39.