RECONSTRUCTING RECONSTRUCTION-ERA RIGHTS

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It is conventional wisdom that the Reconstruction generation distinguished between civil rights, with respect to which the Fourteenth Amendment would require equality, and political and social rights, which would be excluded from coverage. This Article challenges that wisdom. It demonstrates that social rights were not a concept relevant to the coverage of Article IV's Privileges and Immunities Clause, the precursor to the Fourteenth Amendment's Privileges or Immunities Clause. Antebellum legal and political sources used the term "social rights" in a variety of ways, but none tracked the purported Reconstruction-era trichotomy of civil, political, and social rights; most uses of the term connected social rights to civil rights, which Article IV (and therefore the Fourteenth Amendment) reached.

The harder question is whether the Fourteenth Amendment reaches "public" rights and privileges as opposed to "private" rights. A close examination of antebellum jurisprudence suggests that public rights were excluded from the scope of Article IV because they were privileges of "special" citizenship but not "general" citizenship common to the citizens "in the several states." Public privileges are likely included under the Fourteenth Amendment, however, which guarantees the privileges and immunities of citizens "of the United States" within particular states, including the privilege of all U.S. citizens to the public privileges of their own states to which they contribute through general taxation. If this framing is correct, then both the interracial marriage and school desegregation cases are easier to sustain on originalist grounds than prior studies have suggested.

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INTRODUCTION

It is conventional wisdom that the framers of the Fourteenth Amendment, and the public that ratified it, divided rights into three categories: civil rights, with respect to which the Amendment guaranteed equality, and social and political rights, which were excluded from coverage. Jack Balkin, for example, has written that the Reconstruction generation "divided the rights of citizens into three parts—civil, political, and social—and held that equal citizenship meant equality of civil rights."[1] According to this "tripartite theory of citizenship,"[2] most members of the Reconstruction Congresses and the public of the time "did not consider blacks to be full social equals with whites, and so they

[1] Jack M. Balkin, Constitutional Redemption: Political Faith in an Unjust World 139 (2011) [hereinafter Balkin, Constitutional Redemption]; see also Jack M. Balkin, Living Originalism 222–23 (2011) [hereinafter Balkin, Living Originalism] (articulating the tripartite distinction).

[2] Balkin, Constitutional Redemption, supra note 1, at 139 (emphasis omitted).

believed that states should still be able to restrict interracial marriage and perhaps even segregate some public facilities."[3]

Michael Klarman agrees: "Most northern whites supported only *civil* rights for blacks, such as freedom of contract, property ownership, and court access—rights guaranteed in the 1866 Civil Rights Act, for which the Fourteenth Amendment was designed to provide a secure constitutional foundation."[4] But "[m]any northern whites, including some Republicans, still resisted black *political* rights, such as voting or jury service, and *social* rights, such as interracial marriage or school integration."[5] Similarly, Bruce Ackerman states: "For Reconstruction Republicans, only three spheres of life were worth distinguishing: the political sphere, which involved voting and the like; the civil sphere, which involved the legal protection of life and liberty, including rights of property and contract; and the social sphere, which involved everything else"; and "[w]ithin this traditional trichotomy, the Reconstruction Amendments protected political and civil rights but not social rights."[6]

Michael McConnell, in his famous article defending *Brown v. Board of Education* on originalist grounds, writes that this "tripartite division of rights . . . between civil rights, political rights, and social rights" was "universally accepted at the time," and that "this tripartite division of rights forms the essential framework for interpreting the Amendment as it was originally understood."[7] For this proposition, McConnell relies on the legislative debates in Congress over what would become the Civil Rights Act of 1875.[8] This trichotomy is so engrained in the modern literature that nearly every study of the Fourteenth Amendment assumes it to have been widely accepted by the Reconstruction generation.[9]

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[3] Id. at 146; see also Balkin, Living Originalism, supra note 1, at 227 (arguing that members of Congress who debated what would become the Civil Rights Act of 1875 "accepted the basic distinction" between civil, political, and social rights and argued "over whether access to public education was a civil or a social right").

[4] Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 19 (2004).

[5] Id.

[6] Bruce Ackerman, We the People: The Civil Rights Revolution 130 (2014).

[7] Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1016, 1025 (1995) (discussing Brown v. Board of Education, 347 U.S. 483 (1954)).

[8] Id. at 1016–29.

[9] For other examples, see Michael B. Rappaport, Originalism and the Colorblind Constitution, 89 Notre Dame L. Rev. 71, 130 n.241 (2013) ("Another possible reason why marriage would not be covered by the Fourteenth Amendment is that it was regarded as a

This Article challenges that assumption. It takes a methodological approach different from most other studies of the Fourteenth Amendment. Most modern-day originalist (and non-originalist) scholars of the Fourteenth Amendment plumb the depths of the legislative debates in the Thirty-ninth Congress (or subsequent Congresses).[10] This Article, in contrast, presumes that the meaning of the Fourteenth Amendment can be determined from legal history because each of the central terms of the Fourteenth Amendment's first section—due process of law, the protection of the laws, and the privileges and immunities of citizenship—

social right rather than a civil right."); Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1120 (1997) ("Distinctions among civil, political, and social rights functioned more as a framework for debate than a conceptual scheme of any legal precision . . . . Social rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in the 'amalgamation' of the races."); David A. Strauss, Can Originalism Be Saved?, 92 B.U. L. Rev. 1161, 1169 (2012) (describing it as a "familiar and important point[]" that "the Reconstruction Congress distinguished among civil, political, and social rights: the Fourteenth Amendment, as that Congress conceived it, protected civil rights but not political rights (quintessentially the right to vote) or social rights (of which the clearest example was the right to marry a person of another race)"); Ronald Turner, The Problematics of the *Brown*-Is-Originalist Project, 23 J.L. & Pol'y 591, 599 (2015) (noting "the three separate and distinct categories of rights recognized in the Reconstruction era: civil rights, political rights, and social rights," and that "at the time of the adoption of the Fourteenth Amendment social rights (including the right to attend a desegregated school and to marry a person of another race) were deemed to be outside the protective scope of the amendment, a fact which calls into question the notion and conclusion that *Brown* is consistent with originalism"); Mark Tushnet, Civil Rights and Social Rights: The Future of the Reconstruction Amendments, 25 Loy. L.A. L. Rev. 1207, 1207 (1992) ("The Constitution's revision after the Civil War reflected distinctions that the Reconstruction's legal culture drew among different kinds of rights. That culture operated comfortably with distinctions among civil rights, political rights and social rights."). Richard Primus has called into question the logic of these categories but observes that "[a]ccording to prominent modern scholars in both history and law," understanding the "typology by which political and legal actors classified rights as 'civil,' 'political,' or 'social'" is "essential for understanding the constitutional legacy of Reconstruction." Richard A. Primus, The American Language of Rights 128 (1999); William M. Wiecek, Liberty under Law: The Supreme Court in American Life 94 (1988) (distinguishing between the three categories and describing social rights as including "equal access to public accommodations and education").

[10] See, e.g., Balkin, Constitutional Redemption, supra note 1, at 146 (arguing that the trichotomy emerged "out of political necessity" in the Reconstruction Congresses); David E. Bernstein, Philip Sober Controlling Philip Drunk: *Buchanan v. Warley* in Historical Perspective, 51 Vand. L. Rev. 797, 823 (1998) (noting the distinction between social and civil rights "was arguably consistent with the intent of the Framers of the Fourteenth Amendment"); see also supra notes 4–7 and accompanying text (discussing work by Klarman and McConnell on the legislative debates in the 1870s).

is written in legal language.[11] What is more, the principal authors of the Amendment suggested that the language of the Amendment would be interpreted in accordance with its legal history.[12] The legal meaning is also consistent with the public meaning.[13]

Although some scholars argue that the Privileges or Immunities Clause of the Fourteenth Amendment[14] was principally intended to incorporate the Bill of Rights against the states,[15] many originalist scholars now agree that the Clause was intended to constitutionalize the Civil Rights Act of 1866 and that the rights covered by the Clause are at a minimum coterminous with the "privileges *and* immunities" guaranteed in Article IV, § 2.[16] Known today as the Comity Clause, that Section

[11] Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment 15–63 (2020). For example, due process of law derives from the Magna Carta in 1215. Id. at 17. The protection of the laws also dates back at least to the Magna Carta and is elaborated upon by William Blackstone. Id. at 40–42. And privileges and immunities clauses can be traced back to the Articles of Confederation and even earlier to international treaties. Id. at 49–52.

[12] When Representative Andrew Jackson Rogers of New Jersey asked Representative John Bingham of Ohio, the principal author of § 1 of the Fourteenth Amendment, what he understood by the phrase "due process of law," Bingham responded: "I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866). When Senator Jacob Howard of Michigan presented the proposed Amendment to the Senate, he observed that the Senators "may gather some intimation of what probably will be the opinion of the judiciary" on the meaning of the Privileges or Immunities Clause "by referring to a case adjudged many years ago." Id. at 2765 (citing Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823)). Many of the Constitution's provisions are written in legal language. John O. McGinnis & Michael B. Rappaport, The Constitution and the Language of the Law, 59 Wm. & Mary L. Rev. 1321, 1330 (2018). See generally John O. McGinnis, Michael B. Rappaport, Ilya Shapiro, Kevin Walsh & Ilan Wurman, The Legal Turn in Originalism: A Discussion (San Diego Legal Studies, Paper No. 18-350, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3201200 [https://perma.cc/J3EU-398N (discussing and debating the trends towards the use of legal methods to interpret the Constitution)].

It is also likely that the Founding-era public was aware that legal terms would be construed legally. Ilan Wurman, The Legal U-Turn, *in* The Legal Turn in Originalism: A Discussion, supra, at 15.

[13] Though a full defense of this particular claim will have to await a future paper. See Ilan Wurman, Reversing Incorporation (unpublished manuscript) (on file with author).

[14] U.S. Const. amend. XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

[15] See, e.g., Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 163–80 (1998); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 1–10 (1986); Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship 65, 91–108 (2014).

[16] See, e.g., John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1414–20 (1992) (arguing that many in Congress "thought that the privileges or

provided, "The Citizens of each State shall be entitled to all Privileges and Immunities of the Citizens in the several States."[17] Its meaning was that whatever "privileges and immunities" a state granted its own citizens, it had to accord such privileges and immunities to citizens from other states traveling through or residing in the state.[18] As I have recently argued, and as others have argued before me, the Privileges *or* Immunities Clause of the Fourteenth Amendment, providing that no state shall "abridge" the "privileges or immunities of citizens of the United States," at a minimum does for *intra*state discrimination what the Privileges *and* Immunities Clause of Article IV did for *inter*state discrimination.[19]

If that is correct, then the "privileges or immunities of citizens of the United States" refers at a minimum to the set of privileges and immunities to which Article IV referred.[20] What I aim to show is that the set of rights guaranteed by Article IV included all "civil rights" and excluded "political rights" such as voting, holding office, and sitting on juries. Civil rights are those rights individuals had in the state of nature but which the laws of society modify and regulate;[21] the category also encompasses

immunities of citizens consisted of rights defined by state positive law"); McConnell, supra note 7, at 999–1000 ("The better view is that the Privileges or Immunities Clause of the Fourteenth Amendment protected citizens against denials *by their own states* of the same set of rights that the Privileges and Immunities Clause of Article IV protected against infringement by *other states*, and possibly, in addition, other rights of United States citizenship."); Steven G. Calabresi & Andrea Matthews, Originalism and *Loving v. Virginia*, 2012 BYU L. Rev. 1393, 1410 ("At a bare minimum then, the Fourteenth Amendment's Privileges or Immunities Clause included the enumerated rights in the Civil Rights Act such as the right to make or enforce contracts."); Christopher R. Green, Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause 52–60, 66–67 (2015); Wurman, supra note 11, at 101–02.

[17] U.S. Const. art. IV, § 2, cl. 1.

[18] See, e.g., Lemmon v. People, 20 N.Y. 562, 626–27 (1860) (asserting that the Clause "was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens"). See generally Lash, supra note 15, at 20–26 (tracing the history of the Privileges and Immunities Clause to the Articles of Confederation and visitation treaties between nations); Wurman, supra note 11, at 49–56 (arguing that the historical legal meaning of the Privileges and Immunities Clause required comity).

[19] U.S. Const. art. IV, § 2, cl. 1; id. amend. XIV, § 1, cl. 1; see sources cited supra note 16.

[20] This Article takes this position as a given and does not put forward any new evidence in support of it; it summarizes the argument in Section I.A *infra*.

[21] See, e.g., Jud Campbell, Fundamental Rights at the American Founding 8–9 (forthcoming) (on file with author) (explaining that many revolutionary-era Americans believed that "[a]t the formation of a political society . . . natural rights became 'civil' rights"); see also infra Section I.B (discussing the distinction between "political rights" and "civil rights").

other rights like due process and the protection of the laws that are fundamental to the social compact and to securing natural rights.[22] Political rights relate to the support and management of government and do not exist in the absence of political society. Civil rights belong to all "citizens," but not all citizens have political rights.[23]

So far, so conventional. The present contested point is that "social rights," whatever those are, had nothing to do with the scope of the privileges and immunities protected by Article IV. No use of that term in antebellum sources tracked the meaning of the term within the conventional understanding of the Reconstruction-era trichotomy. In each of the antebellum uses, social rights either included civil rights or were otherwise intimately connected with them.

If that is correct, then education and marriage are indisputably civil rights. Neither depends on political society. Certainly, each can be pursued and obtained through contract, and contract was the quintessential civil right guaranteed by Article IV (and the Civil Rights Act of 1866).[24] In one high-profile antebellum case involving the education of nonresident Black girls, it was assumed that Article IV reached at least private education.[25] And in another case from 1855 involving a marriage contract with a nonresident, neither the United States Supreme Court nor the Louisiana Supreme Court decided the case on the ground that marriage was not covered by Article IV which, if it had been

[22] These are rights that Jud Campbell has labeled "fundamental positive rights." See Campbell, supra note 21, at 16–17. As Campbell explains, Founding-era Americans understood "the importance of fundamental positive rights in securing natural rights"; "[t]o declare 'natural rights,' on this view, meant enumerating the customary common-law rules that safeguarded life, liberty, and property." Id. at 17. More generally, the best description of "privileges and/or immunities" that I have found comes from Eric Claeys. He writes, "[P]rivileges and immunities associated with citizenship referred to civil laws established to secure important moral rights considered crucial to the political community." 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, 785 (2008). "In these contexts, privileges and immunities relate to both natural and civil law. They are creations of positive law, but with the purpose of carrying the natural law into effect." Id.; see also 1 William Blackstone, Commentaries *125 (1765) (explaining that the "rights" and "liberties" of Englishmen are either "private immunities," namely the "*residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience," and "those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals").

[23] See infra notes 73–74 and accompanying text.

[24] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (guaranteeing equal right "to make and enforce contracts").

[25] Crandall v. State, 10 Conn. 339, 343 (1834); see infra Section I.D.

true, would have been the easiest way to resolve the case. Neither the courts nor the parties even questioned that the Clause reached marriage laws.[26]

The more complicated question is the status of "public rights," or "public privileges," in the sense of the classic private rights/public rights divide.[27] Private rights are those we have in the state of nature, as modified by the laws of civil society—that is, civil rights. Public rights, in contrast, are rights held by the public at large or are entitlements private individuals can claim from the government.[28] No study has examined the status of public rights under Article IV and the implications for the Privileges or Immunities Clause.[29] Yet the status of public rights and

[26] Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1855); Connor's Widow v. Adm'rs & Heirs of Connor, 10 La. Ann. 440, 449 (1855); see infra Section I.D.

[27] Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 565–68 (2007) (distinguishing between "public rights" held by the public as a whole, such as title to public lands and stewardship of the public treasury, public waters, and public roads; "private rights," namely the rights to personal security, liberty, and property; and "privileges" or "entitlements" that "had no counterpart in the Lockean state of nature" and were created by the State "to carry out public ends"); Ann Woolhandler, Public Rights, Private Rights, and Statutory Retroactivity, 94 Geo. L.J. 1015, 1020–21 (2006) (defining public rights to be "claims that were owned by the government—the sovereign people as a whole—rather than in persons' individual capacities," and including statutory rights in addition to the proprietary interests of the government within that term).

I am using the terms "public right" and "public privilege" interchangeably to refer to those rights that are not "private rights" within Professor Nelson's taxonomy. Public rights is arguably the broader term, subsuming both those rights actually held by the public (such as rights of way), as well as public privileges. In my view, statutory rights are not public rights, although they are considered so today under modern administrative law doctrine. All private rights are natural rights modified and regulated by the laws of civil society. It should not make a difference whether the source of that regulation is common law or statutory law.

[28] The classic examples of public rights are rights of way, such as public roads and waterways; public privileges like welfare benefits, public employment, and public land grants; and, in the antebellum period, corporate privileges. See Woolhandler, supra note 27, at 1021 (public lands); Nelson, supra note 27, at 566 (same); Stephen F. Williams, Liberty and Property: The Problem of Government Benefits, 12 J. Legal Stud. 3, 3–4 (1983) (distinguishing traditional liberty and property from government "benefits" including public employment and "government transfers or social insurance"). For corporate privileges, see infra Section II.C.

[29] Robert Natelson argues that "privileges" in Article IV were distinct from "rights" and referred only to state-bestowed rights. This would include privileges such as trial by jury, but also "public privileges" in the sense I am using the term here, such as welfare benefits and university tuition discounts. Robert G. Natelson, The Original Meaning of the Privileges and Immunities Clause, 43 Ga. L. Rev. 1117, 1189 (2009). This Article disagrees with Natelson's view that there is a distinction between privileges and rights for purposes of the Clause, because all natural rights are modified, explained, and protected by the laws of civil society

privileges must be addressed to provide a definitive originalist answer to the question of whether *Brown v. Board of Education* is correct because public education is a public privilege and not a private right.

Public rights differ from both traditional civil rights and political rights. Although some public rights, like welfare benefits or corporate privileges, do not exist in the state of nature, they have analogs in the state of nature: they involve the kinds of rights that already existed or were obtainable in the state of nature or in a private market. Additionally, many public privileges take the form of private rights in that they are supported through general taxation, which involves property rights, and because they are generally distributed and provided for private rather than public purposes.[30] These public rights therefore have similarities to civil rights despite that, like political rights, they depend on political society.

The distinction between private rights and public rights is, or at least historically was, important in many areas of law involving the separation of powers. For example, sovereign immunity tended to bar claims against the government when a private party alleged that the government had wrongfully withheld a public privilege, such as a land grant or welfare benefits.[31] Hence, non-Article III courts could adjudicate such matters because Congress's greater power to refuse consent to suit includes the lesser power to consent to an executive branch adjudication.[32] The distinction historically explained why the Due Process Clause did not

and are thus "privileges" even in the sense that Natelson uses the term. See also Claeys, supra note 22, at 785 (discussing Claeys's definition of privileges and immunities). And "immunities" would include any natural rights left untouched by civil law, at least if Blackstone's definition is any guide. Id. at 789–90. There *is* a difference, however, between such privileges, which are effectively private rights, and "public privileges" such as welfare benefits and in-state tuition. As to the latter, this Article shows, contra Natelson, that public privileges would *not* be covered by Article IV.

[30] See infra Section III.A for a more in-depth discussion.

[31] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (observing that the doctrine permitting certain cases to be adjudicated in legislative courts "may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued").

[32] Id. at 67–68 (explaining this line of cases); Nelson, supra note 27, at 582–85 (similar); William Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1540–47 (2020) (similar); see also Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855) (holding that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," but that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper").

apply to the withdrawal of welfare benefits.[33] And scholars have argued that Congress could delegate more freely in the context of public rights because the government had wide discretion as to how to administer its resources.[34]

This Article concludes that the legal materials from the antebellum period support the proposition that public rights and privileges were excluded from Article IV because a state could reserve such rights for its own citizens. To this day, for example, a state does not have to extend the benefits of in-state tuition to out-of-state residents.[35] The crucial question is *why* they were excluded. If they were excluded because "public privileges" are not "rights" in the sense of being "privileges and immunities of citizens," then they are excluded from both Article IV and the Fourteenth Amendment. If, however, the right of a state's *own* citizens to access public privileges of a certain type—at least those financed through taxation or other common resources, that are widely distributed and available, and that are for private rather than public use—is a "privilege or immunity" of all United States citizens within their particular states, the Fourteenth Amendment may reach such rights even if Article IV does not.[36]

[33] The distinction held until *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), which rejected the public/private distinction as applied to welfare benefits and due process. See also Charles A. Reich, The New Property, 73 Yale L.J. 733, 778–79 (1964) (arguing that public welfare and privileges should be treated on par with traditional property).

[34] See, e.g., Ann Woolhandler, Public Rights and Taxation: A Brief Response to Professor Parrillo 3–4 (Jan. 11, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4003530 [https://perma.cc/RJQ9-RHJL].

[35] Vlandis v. Kline, 412 U.S. 441, 442 (1973) (noting that many states require "nonresidents of the State who are enrolled in the state university system to pay tuition and other fees at higher rates than residents of the State who are so enrolled," although not addressing the constitutionality of that practice).

[36] In a new book, Randy Barnett and Evan Bernick argue that public privileges *and* political rights like voting can become part of the "privileges or immunities" of U.S. citizens if as a matter of present-day social facts we understand such privileges to be fundamental. Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 22 (2021). As this Article will show, that is incorrect. The criterion for inclusion under Article IV was not that a right was "fundamental," but rather that it was a civil right, all of which are fundamental. Civil rights, which are pre-political natural rights as modified by the rules of civil society, are categorically different than political rights and public rights. Although in modern discourse the term "civil rights" is casually understood to include political rights, that was not the *meaning* ascribed to that term or to the term "privileges or immunities" of citizens by those in the antebellum period. Moreover, Barnett and Bernick argue that under their reading, the reach of the Privileges or Immunities Clause can expand to include new

The implications for originalism and the school desegregation and interracial marriage cases are obvious. Michael McConnell's classic study of the legislative debates surrounding the Civil Rights Act of 1875 assumes that the question is whether integrated public education is a social right or a civil right and argues that the answer to this question is to be found in the post-enactment debates in the early 1870s.[37] The claim here, in contrast, is that the answer to whether the Fourteenth Amendment reaches public education is to be found in *pre-enactment*, antebellum jurisprudence, which distinguished civil rights and political rights on the one hand, and private rights and public privileges on the other. Separate may or may not be equal, but at a minimum the Fourteenth Amendment *applies* to public education. This approach also improves upon McConnell's argument that even if public education were not a civil right in 1868, it was certainly a civil right by 1954.[38] Resorting to 1954 does not supply a complete answer, however, because the question is whether a public privilege could *ever* be considered within the scope of the privileges and immunities of citizenship.

This approach differs from other defenses of *Brown* as well. Steven Calabresi and Michael Perl argue that the Privileges or Immunities Clause protected only "fundamental" rights, defined as rights guaranteed by at least three-quarters of the states, and that public education was such a right in both 1868 and 1954.[39] That approach faces several difficulties, including the validity of that criterion for determining fundamental rights, as well as the lower-order question whether public education in fact met that criterion (whether in 1868 or 1954).[40] The approach presented here,

rights that we deem fundamental, but it can never contract to eliminate protection for pre-political, natural civil rights like property rights or gun rights. Id. at 25. But if the criterion is what is "fundamental" by today's lights, why could the reach of the Clause not contract as well as expand?

[37] McConnell, supra note 7, at 953–54.

[38] Id. at 1103–04. Barnett and Bernick similarly defend *Brown* on the ground that public education could become fundamental over time as a matter of contemporary social understanding and, if so, it becomes covered by the Fourteenth Amendment. Barnett & Bernick, supra note 36, at 30.

[39] Steven G. Calabresi & Michael W. Perl, Originalism and *Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429, 434–35, 437 (describing Article IV, and thus the Privileges or Immunities Clause, as guaranteeing all "fundamental" rights, and arguing that public education was such a right).

[40] As noted previously, Calabresi and Perl argue the right was fundamental because it was recognized in at least three-quarters of the states' constitutions. See id. But as McConnell writes, "[t]here was considerable force to the claim that public school systems in the South,

in contrast, assumes that all civil rights (but not political rights) are "fundamental" in the sense of being covered by Article IV and the Fourteenth Amendment; the question then becomes whether public privileges were understood to be in this category when offered by a state, regardless of how many other states offered such privileges.[41]

Under this approach, there is even less question that the Privileges or Immunities Clause reaches marriage. The right to marry is not a public privilege and is not a political right. It is a civil right. It is therefore covered by the Fourteenth Amendment.[42] And the legal methodology adopted here also challenges the claims of non-originalist scholars that the Fourteenth Amendment could not compel the result in *Loving v.*

which were the focus of attention in the debates, were too informal and rudimentary to support the notion that there was an established, legally enforceable right to attend public school." McConnell, supra note 7, at 1039. McConnell argues that "[n]o comprehensive public school systems existed at all in the Southern states before the War, and progress after the War was fitful." Id. "Public schools in the Southern states served only a fraction of the school-age population." Id. Indeed, Calabresi and Perl themselves observe that several of the state constitutional provisions required the legislature to establish common schools "as soon as practicable" or "as soon as conveniently may be." Calabresi & Perl, supra note 39, at 451 & n.100, 453 n.111, 454 nn.120 & 122, 455 n.125, 457 n.130 (quoting Del. Const. of 1831, art. VII, § 11; then quoting Miss. Const. of 1868, art. VIII, § 1; then quoting Pa. Const. of 1838, art. VII, § 1; then quoting S.C. Const. of 1868, art. X, § 3; then quoting W. Va. Const. of 1861, art. X, § 2; and then quoting Conn. Const. of 1818, art. VIII, § 2). These provisions are not particularly strong evidence of a fundamental right.

[41] The defense of *Brown* presented here also does not depend on defining "equality" at a high level of generality, as earlier defenses have. Balkin, Living Originalism, supra note 1, at 230–31 (arguing that the civil rights revolution "was so successful in altering understandings of equality that the tripartite theory seems strange to us today," and that modern views of "equal citizenship and equality before the law" obviously require school desegregation and the invalidation of anti-miscegenation laws). Nor does it depend on interpreting the "protection of the laws" broadly, for the original meaning of that phrase was quite narrow, likely referring only to judicial remedies and protection against private violence. See, e.g., Christopher R. Green, The Original Sense of the (Equal) Protection Clause: Pre-Enactment History, 19 Geo. Mason U. C.R. L.J. 1, 44–45 (2008) (arguing that "equal protection of the laws" has such a narrow meaning); Christopher R. Green, The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application, 19 Geo. Mason U. C.R. L.J. 219, 220–21 (2009) (showing that this narrow meaning was the prominent understanding of the Equal Protection Clause post-enactment).

[42] This argument, too, is in contrast to prior scholarship. See Calabresi & Matthews, supra note 16, at 1419 (arguing that the question is whether the right to marry is a fundamental right, and answering that "[t]he right to marry would surely have been thought to be a fundamental and longstanding common law right in 1868").

Virginia[43] or *Brown v. Board*,[44] or that the Amendment was irreducibly ambiguous as to which rights it applied.[45]

This methodological approach should also therefore encourage a rethinking of Reconstruction rights discourse more generally. Numerous scholars have shown the illogic of the trichotomy.[46] Richard Primus, for example, has explained that one could argue social rights applied only to private actions, like private schools, but that many argued schooling altogether, whether private or public, was a social right.[47] Cass Sunstein and William Wiecek adopt the view that public education is a social right.[48] W.R. Brock, on the other hand, argues education is a political right.[49] The approach here has the potential to dissolve at least some of the controversy and contestation because civil rights, political rights, and public privileges are amenable to more concrete definition.

This Article proceeds as follows. Part I summarizes the connection between Article IV and the Privileges or Immunities Clause and the evidence for the proposition that the Clause reached all civil but not political rights. It then examines four prominent antebellum uses of the term "social rights," none of which tracked the purported Reconstruction-era trichotomy. It concludes with an examination of two marriage and education cases that suggest marriage and education were civil rights, although these cases are hardly dispositive of the question.

[43] 388 U.S. 1, 12 (1967) (invalidating anti-miscegenation laws).

[44] Michael J. Klarman, *Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1883 (1995) (arguing that *Brown* is inconsistent with originalism); Eric J. Segall, Originalism as Faith 52–53 (2018) (arguing that *Loving* is inconsistent with originalism); David A. Strauss, The Living Constitution 12–13 (2010) (arguing that *Brown* is not only inconsistent with originalism but that the *Brown* Court stated that the original understanding of the Fourteenth Amendment would not support the *Brown* decision).

[45] Mark Tushnet, The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston, 74 J. Am. Hist. 884, 888 (1987) ("The domains of civil, political, and social rights were thus not sharply set off from each other. Equality was a fuzzy concept, and its supporters often simply ignored their disagreements over the concept's application to particular problems.").

[46] See, e.g., id. at 889–90; see also Richard A. Primus, The American Language of Rights 156 (1999) (arguing that "many rights were not clearly fixed in one category or another" of the trichotomy).

[47] Primus, supra note 46, at 155.

[48] Cass R. Sunstein, The Partial Constitution 42 (1993); Wiecek, supra note 9, at 94.

[49] W.R. Brock, An American Crisis: Congress and Reconstruction, 1865–1867, at 19 (1963).

Part II analyzes antebellum jurisprudence surrounding public privileges, specifically the natural resources or common property of a state, the poor relief laws, and corporate privileges. It concludes that such privileges were excluded from Article IV because they were privileges of "special" rather than "general" citizenship and because under principles of comity a state could reserve such rights for its own citizens.

Part III makes the argument that such public privileges, although excluded from Article IV, are likely included within the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. It then investigates the use of the term "social rights" in the Reconstruction Congresses and concludes that with few exceptions, the members of these Congresses adhered to the classic distinctions between civil and political rights on the one hand, and private rights and public rights and privileges on the other. To be sure, it may be that the Reconstruction generation confronted a problem that rarely arose in the antebellum period: the question of compelling association in common carriers and common schools.[50] (This argument would not apply to prohibitions on interracial marriage.[51]) To the extent that this generation did identify a new category of "associational" rights in common institutions, the public rights/private rights distinction still helps clarify the analysis because it reveals that the Fourteenth Amendment at least requires equality with respect to such public privileges. It is, therefore, a merits question whether enforcing associational segregation in fact abridged the privileges and immunities of Black citizens. Part IV concludes.

I. ANTEBELLUM LAW

This Part briefly establishes the relevance of Article IV's Privileges and Immunities Clause and the distinction between civil and political rights to an inquiry into the meaning of the Fourteenth Amendment's Privileges or Immunities Clause. Section I.A explains the connection between the two Clauses. Section I.B endorses the conventional view that Article IV reached all civil rights but not political rights. Section I.C identifies four relatively prominent uses of the term "social rights" in the antebellum period, none of which tracked anything like the supposed Reconstruction-era trichotomy. Section I.D examines two antebellum

[50] This issue did arise occasionally. See Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849) (holding that segregated public schools did not violate any Massachusetts law).

[51] And in this sense, *Loving* was an easier case than *Brown*. See infra Part IV.

Article IV cases, one involving private education and the other marriage, which strongly suggest, although they do not conclusively demonstrate, that both education and marriage were understood to be civil rights or fundamental privileges of citizenship to which Article IV extended.

A. The Relevance of Article IV

Article IV guaranteed a travelling or sojourning citizen the same "privileges and immunities" as the state in which he or she was travelling or residing granted its own citizens.[52] A key debate in the antebellum era was whether free Black citizens of northern states were entitled to the privileges and immunities of the citizens in the southern states when traveling in the South, where Black persons were not citizens.[53] Some western states also sought to prevent the emigration of free Black individuals.[54] These states argued that free Black citizens of northern states were not citizens *of the United States* within the meaning of the Constitution and thus not entitled to any of the rights of "citizens" as described in the Constitution, including the rights Article IV secured.[55] The first sentence of the Fourteenth Amendment resolves this question, declaring all persons born or naturalized in the United States to be "citizens of the United States and of the State wherein they reside."[56]

But this did not solve the problem of discrimination among a state's *own* citizens. After abolition, the southern states established the notorious "Black Codes" that systematically denied civil rights to their own newly freed population, denying them the right to acquire real property or to keep arms, forbidding them from assembling or from testifying when white persons were parties to a lawsuit, and requiring them to enter into

[52] U.S. Const. art. IV, § 2, cl. 1("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."); see also, e.g., Lemmon v. People, 20 N.Y. 562, 626–27 (1860) (Wright, J., concurring) ("The provision was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens. A citizen of Virginia coming into New York was to be entitled to all the privileges and immunities accorded to the citizens of New York. He was not to be received or treated as an alien or enemy in the particular sovereignty."); id.at 608 (majority opinion) ("[T]he meaning is, that in a given State, every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess.").

[53] Wurman, supra note 11, at 77–79.

[54] Id. at 73–76.

[55] Id. at 74; see, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 416–17, 423 (1857).

[56] U.S. Const. amend. XIV, § 1, cl. 1.

certain kinds of employment contracts.[57] Hence the Thirty-ninth Congress enacted, over presidential veto, the Civil Rights Act of 1866.[58] That Act declared all persons born in the United States, including newly freed people, to be "citizens of the United States," and then provided that "such citizens, of every race and color . . . shall have the same right" to make and enforce contracts, to sue and be sued, and to acquire and possess property "as is enjoyed by white citizens."[59] The Act did not define any of these rights and did not require the states to provide any particular set of rights at all; it merely required that the states treat all citizens of the United States within their boundaries equally.

At a minimum, the Framers of the Fourteenth Amendment sought to provide a constitutional basis for the Civil Rights Act of 1866 and further to embed its requirements in the fundamental law lest future Democratic majorities undo the civil rights legislation of the Republican-led Congress.[60] Moreover, the Due Process and Equal Protection Clauses were insufficient to constitutionalize the Act because neither required equal civil rights: whatever rights one happens to have—however unequal those rights may be—due process guaranteed that the government will only take away such rights according to established laws and procedures, and the protection of the laws required the government to supply legal protection so one may enjoy and exercise those rights free of private violence and interference from others.[61]

[57] Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 198–207 (1988); Freedmen's Affairs, Laws in Relation to Freedmen, S. Exec. Doc. No. 39-6, at 170–230 (2d Sess. 1866). Black Codes had existed in various forms in the northern and western states, too, throughout the antebellum period. See Kate Masur, Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction 4, 16–18, 39–40 (2021).

[58] See Cong. Globe, 39th Cong., 1st Sess. 1857–60 (1866) (reporting bill and veto message).

[59] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981).

[60] Wurman, supra note 11, at 95–97.

[61] Although the point is contested, as I and others have argued, due process does not require equal rights, but merely provides that one's rights will not be taken away without established law and judicial procedures. Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1725 (2012); Wurman, supra note 11, at 165–35. The protection of the laws was the flip side of due process: it required legal protection against private interference with one's rights, principally protection from private violence and judicial remedies. For example, William Blackstone explained that the "*remedial* part of a law," or the "method of recovering and asserting those rights, when wrongfully withheld or invaded," is "what we mean properly, when we speak of the protection of the law." 1 William Blackstone, Commentaries 55–56 (1765). And Chief Justice John Marshall wrote, "The very essence of

That left the Privileges or Immunities Clause—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"—the text of which accomplished the central task.[62] The first thing to note is the parallel of the Fourteenth Amendment's first two sentences to the Civil Rights Act, which declared persons born in the United States to be citizens "of the United States," and that "such citizens [of the United States]" were entitled to equality in the provision of civil rights under state law.[63] Second, an equality reading would be consistent with prominent "privileges and immunities" provisions in antebellum law—in Article IV, the treaties of cession, naturalization statutes, and state constitutions—that were similarly anti-discrimination provisions, guaranteeing to one class of persons the same privileges and immunities (whatever those happened to be) enjoyed by some other class of persons.[64]

Third, Christopher Green has shown that the term "abridge" usually meant the granting of fewer rights to certain classes of persons,[65] and John Harrison has observed that the second section of the Fourteenth Amendment demonstrates that one can speak of "abridging" a right without having to define the content of that right.[66] Fourth, the Framers routinely described the "privileges or immunities of citizens of the United States" as the kind of rights that all free governments had to secure, including contract and property rights traditionally secured under state law.[67]

civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[62] U.S. Const. amend. XIV, § 1, cl. 2.

[63] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

[64] Wurman, supra note 11, at 48–56.

[65] Green, supra note 16, at 85.

[66] Harrison, supra note 16, at 1420–22. That section provides that a state that denies "or in any way abridge[s]" the right of a male citizen over twenty-one years of age to vote will have its representation in Congress proportionally reduced. U.S. Const. amend. XIV, § 2. Yet the states themselves still determine the *content* of the right to vote. A state could still decide whether to have elections every two years, or three years, or four years; establish voter registration deadlines; and the like. Moving from a two-year system to a four-year system of elections, or changing a registration deadline, would not "abridge" the right to vote. The right to vote is "abridged" only when a *lesser* set of voting rights is given to any male citizen twenty-one years of age and over.

[67] Indeed, Representative John Bingham, the principal author of the Fourteenth Amendment's first section, on multiple occasions defined the civil rights guaranteed by Article IV as the

B. The Civil-Political Dichotomy

The question then becomes to what kind of rights under state law does the phrase "privileges and immunities of citizens in the several states," and subsequently the phrase "privileges or immunities of citizens of the United States," refer. The conventional view is that, in the antebellum period, Article IV covered civil rights but not political rights. This Section rehearses some of the evidence for that conventional understanding, and then the next Section, for the first time, explores the meaning of "social rights" in antebellum rights discourse.

Most antebellum courts drew the line between civil and political rights. In 1797, the Maryland General Court "agreed" that Article IV does not extend to "the right of election, the right of holding offices, the right of being elected," but only to personal rights, like the right to acquire property.[68] In 1817, a Delaware court observed that "[t]he Constitution certainly meant to place, in every state, the citizens of all the states upon an equality as to their private rights, but not as to political rights."[69] The court continued:

> As long as he remains a citizen of another state, he cannot enjoy the right of suffrage nor be elected to a seat in the legislature; because these are privileges which can be exercised in one state only, and by those only who are bound by the same political compact and are obliged to support the government and to contribute with his purse and person to the exigencies of the state.[70]

In 1827, the Massachusetts Supreme Court held that the privileges conferred by Article IV on citizens are "qualified and not absolute, for [the citizens of other states] cannot enjoy the right of suffrage or of

privileges and immunities "of citizens of the United States." Cong. Globe, 35th Cong., 2d Sess. 984–85 (1859) (statement of Rep. Bingham); Cong. Globe, 39th Cong., 1st Sess. 158 (1866) (statement of Rep. Bingham); H.R. Rep. No. 41-22, at 1 (1871). Speaker of the House Schuyler Colfax explained, "We passed a bill on the ninth of April last, over the President's veto, known as the Civil Rights Bill, that specifically and directly declares what the rights of a citizen of the United States are—that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease, and sell property, and be subject to like punishments." The Cincinnati Com., Speeches of the Campaign of 1866, in the States of Ohio, Indiana, and Kentucky 14 (1866). And Senator Jacob Howard, when introducing the Amendment, said the privileges and immunities of U.S. citizens included the kinds of rights guaranteed under Article IV. Cong. Globe, 39th Cong., 1st Sess. 2765–66 (1866).

[68] Campbell v. Morris, 3 H. & McH. 535, 553–54 (Md. 1797).

[69] Lavery v. Woodland, 2 Del. Cas. 299, 307 (Del. 1817).

[70] Id. at 307–08.

eligibility to office, without such term of residence as shall be prescribed by the constitution and laws of the state into which they shall remove."[71] In short, Article IV did not extend to "the exercise of political or municipal rights."[72] In 1847, the Missouri Supreme Court declared, "It would be strange indeed, that the moment a citizen of another State sets his foot on our soil, he is to be considered as entitled to all the political and municipal privileges enjoyed by our own citizens."[73]

The distinction between civil and political rights was so engrained in antebellum law that Attorney General Caleb Cushing, in an opinion interpreting an 1855 statute guaranteeing the Choctaw and Chickasaw tribe members "all the rights, privileges, and immunities" within each other's tribal jurisdictions,[74] observed that "the distinction between *citizen* and *elector* pervades our public law."[75] This distinction is important because it reveals that even nonvoters like women and children could be considered *citizens*, but voting was reserved for a special class of citizens known as *electors*, and therefore political rights were not rights of citizenship as such.[76]

[71] Abbott v. Bayley, 23 Mass. (6 Pick.) 89, 92 (1827).

[72] Id. at 92–93.

[73] Austin v. State, 10 Mo. 591, 594 (1847), *overruled in part by* State v. Jaques, 68 Mo. 260 (1878).

[74] Treaty with the Choctaws and Chickasaws, 11 Stat. 611, 612 (1855).

[75] Chickasaw Constitution, 8 Op. Att'ys Gen. 300, 302 (1857).

[76] In *Amy v. Smith*, the Court of Appeals of Kentucky addressed the then-explosive question of whether Black individuals could be citizens of the United States. 11 Ky. (1 Litt.) 326 (1822). The majority held that because persons of color did not enjoy the highest level of privileges and immunities like voting, they could not be considered citizens. Therefore Amy, a woman of color, could not claim the benefit of Article IV. Id. at 331, 334–35. Judge Benjamin Mills explained in dissent why this was wrong: "The mistake on this subject must arise from not attending to a sensible distinction between political and civil rights. The latter constitutes the citizen, while the former are not necessary ingredients." Id. at 342 (Mills, J., dissenting). Mills added that "[a] state may deny all her political rights to an individual, and yet he may be a citizen," and that "[t]he rights of office and suffrage are political purely, and are denied by some or all the states, to part of their population, who are still citizens." Id. He concluded that the government owes all citizens "liberty of person and of conscience, the right of acquiring and possessing property, of marriage and the social relations, of suit and defence, and security in person, estate and reputation." Id.; see also, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 583 (1857) (Curtis, J., dissenting) ("One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States.").

In sum, by the eve of the Civil War, the general understanding was that the "privileges and immunities" of citizens in the several states extended to civil rights generally, but not to political rights.[77] And the distinction between civil and political rights was widely shared in 1866, including by those who would draft the Fourteenth Amendment.[78]

The most prominent antebellum Article IV case, however, was *Corfield v. Coryell* in 1825, which, at first glance, does not seem to track the conventional civil-political dichotomy.[79] The issue in *Corfield* was whether a New Jersey law that permitted only its own citizens to collect oysters in New Jersey waters was valid under Article IV. Justice Washington, riding circuit, articulated his view as to the privileges and immunities to which Article IV extended:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments . . . .
>
> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness

[77] Kurt Lash collects many of the cases discussed above and summarizes that "almost every court to consider the issue adopted the same reading of Article IV," namely that it "secured to sojourning state citizens equal access to a limited set of state-conferred rights," but "[t]hese rights did not include political rights such as suffrage, and they excluded any liberty not granted by the state to its own citizens." Lash, supra note 15, at 25–26 (footnote omitted).

[78] See, e.g., Cong. Globe, 39th Cong., 1st Sess. 599 (1866) (statement of Sen. Lyman Trumbull) ("The [Civil Rights Act of 1866] is applicable exclusively to civil rights. It does not propose to regulate the political rights of individuals; it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights."); id. at 1117 (statement of Rep. James Wilson) (noting that civil rights do not include the "political right" of suffrage or jury service); id. at 2542 (statement of Rep. John Bingham) ("The [draft fourteenth] amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several states."); id. at 2766 (statement of Sen. Jacob Howard) (noting that the first section of the Fourteenth Amendment, which includes the Privileges or Immunities Clause, "does not give to either of these classes the right of voting").

[79] 6 F. Cas. 546, 549 (C.C.E.D. Pa. 1825). The case is often mistakenly reported to be from 1823. See Gerard N. Magiocca, Rediscovering *Corfield v. Coryell*, 95 Notre Dame L. Rev. 701, 701 n.2 (2019) (explaining that the case was officially from the 1823 Term, but that the opinion was not issued until 1825).

> and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.
>
> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental.[80]

Justice Washington's view is sometimes thought to distinguish between "fundamental" rights, which are protected and must be identified, and non-fundamental rights, which are excluded from coverage.[81] What Justice Washington seemed to be distinguishing in *Corfield*—and we shall come back to this point[82]—was fundamental, private rights, and what are called public rights and privileges. Justice Washington could not "accede to the proposition" that the Clause extends to "all the rights which belong exclusively to the citizens of any other particular state," nor that "in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens."[83] A "several fishery," Justice Washington argued, where not possessed by a particular individual, "belongs to all the citizens or subjects of the state," and "is the property of all," who "may be considered as tenants in common of this property."[84] It would be going "too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states," because in many cases that would create "the most serious public inconvenience and injury," particularly where exposing the resource "to too general use" may "exhaust[]" it.[85] As Part

[80] *Corfield*, 6 F. Cas. at 551–52 (paragraph breaks added).

[81] Barnett & Bernick, supra note 36, at 28–29; Lash, supra note 15, at 35; Calabresi & Perl, supra note 39, at 441–42; Calabresi & Matthews, supra note 16, at 1420.

[82] See infra Section II.A.

[83] *Corfield*, 6 F. Cas. at 552.

[84] Id.

[85] Id.

II will show, the common property of a state was understood to be a public right.[86]

This view is consistent with the understanding that the privileges and immunities of citizenship include all civil rights, though they may not have included public rights. As for political rights, it is true that Justice Washington added to the privileges and immunities he listed "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised."[87] This seems like a reference to political rights, but this addition is at least possibly consistent with the traditional civil-political divide because Justice Washington included the qualification "as regulated and established" by state law, which would have included residency requirements.[88] If Justice Washington meant to say that citizens of one state could vote in another without meeting any length-of-stay requirements, that was certainly not the conventional view.

C. Social Rights in Antebellum Discourse

The preceding Section examined some of the evidence for the conventional and correct view that Article IV extended to all civil rights but not political rights. Its analysis of *Corfield* also suggested that there may have been an exclusion for some kinds of public privileges like the common property of a state. What is abundantly clear from the sources is that "social rights" was not a relevant category. "Social rights"—in the sense that some in the 1870s would use the term—nowhere make an appearance in any of these cases.

There appears to have been four relatively prominent (and overlapping) uses of the term "social rights" in antebellum treatises, cases, or congressional speeches and documents prior to 1865: (1) social rights are coterminous with civil rights; (2) social rights are all the rights individuals have by virtue of the social compact; (3) social rights are the rights of society to regulate natural rights for the good of the whole; and (4) social rights refer to contractual relations such as between master (employer) and servant (employee) or husband and wife, or status relations such as between parent and child, as distinguished from "absolute," non-

[86] See infra Section II.A.

[87] *Corfield*, 6 F. Cas. at 552.

[88] Recall that the Massachusetts Supreme Court in 1827 similarly held that citizens of other states "cannot enjoy the right of suffrage or of eligibility to office, without such term of residence as shall be prescribed by the constitution and laws of the State into which they shall remove." Abbott v. Bayley, 23 Mass. (6 Pick.) 89, 92 (1827).

relational individual rights such as that of life, liberty of locomotion, and property. Under any definition, civil rights within the traditional civil-political dichotomy would be included within the meaning of social rights.

A first source that is useful to consult in examining antebellum law is Bouvier's law dictionary.[89] In the 1860 edition, civil and political rights are discussed under the general entry for "right"; social rights do not make an appearance. According to the dictionary, all natural rights are modified by "civil law."[90] "Political rights," the dictionary goes on to say, "consist in the power to participate, directly or indirectly, in the establishment or management of government," and include "the right of voting for public officers, and of being elected."[91] "Civil rights," in contrast, "are those which have no relation to the establishment, support, or management of the government," such as the "power of acquiring and enjoying property."[92] Everyone gets to enjoy "civil rights, which is not the case with political rights; for an alien, for example, has no political, although in the full enjoyment of his civil rights."[93] Bouvier's legal dictionary is a key indicator that the concept of social rights was not relevant to legal doctrine; Noah Webster's famous 1828 dictionary similarly makes no mention of social rights.[94]

[89] See, e.g., Matthew Ing, Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause, 45 Akron L. Rev. 719, 728 (2012) (describing the dictionary as widely used); Danné L. Johnson, What's Love Got to Do with It? Interest-Convergence as a Lens to View State Ratification of Post Emancipation Slave Marriages, 36 W. New Eng. L. Rev. 143, 158 (2014) (describing the dictionary as influential); Nick Harrell, Dictionary Research for Lawyers, 48 Colo. Law. 8, 10 (May 2019) (noting that most libraries will have this dictionary).

[90] 2 John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union 484 (10th ed. 1860) ("Rights might with propriety be also divided into natural and civil rights; but as all the rights which man has received from nature, have been modified and acquired anew from the civil law, it is more proper, when considering their object, to divide them into political and civil rights.").

[91] Id.

[92] Id.

[93] Id.

[94] Webster's antebellum dictionary observes that "rights are natural, civil, political, religious, personal, and public." 2 Noah Webster, An American Dictionary of the English Language 465 (1828). Under the definition "political," Webster suggests that "political rights" are those "that belong to a nation, or perhaps to a citizen as an individual of a nation," but "civil rights" are, for example, "local rights of a corporation." Id. at 299. Under this definition, political rights would include all natural and civil rights. Under the entry for "civil," however,

An early influential legal treatise was St. George Tucker's 1803 commentaries on Blackstone.[95] In his comments to Blackstone's chapter on the absolute rights of individuals, Tucker, who was a law professor at William & Mary and a jurist on the state courts of Virginia, argued that rights "admit of a fourfold division" into natural, social, civil, and political rights.[96] His taxonomy does not quite track the antebellum comity jurisprudence; for example, he defined political rights as those belonging to political officials, and civil rights under his taxonomy are political rights under Article IV jurisprudence.[97]

His definitions of natural and social rights are nevertheless instructive. Natural rights "appertain to every man . . . independent of any social institutions, or laws," and "[s]ocial rights comprehend whatever natural rights a man hath not abandoned by entering into society."[98] Among these social rights, Tucker included "all those privileges which are supposed to be tacitly stipulated for, by the very act of association," such as "the right of protection from injury" or "of redress for the same, by suit or action," as well as "[t]he right of holding lands" and "transmitting property."[99] Such social rights "depend upon the laws, customs, and usages," but "they have no relation to the nature, form, or administration of the government."[100] "Therefore," Tucker concluded, "in all civilized nations, all free persons, whether citizens or aliens . . . have their respective social

Webster suggests that "civil rights" are the "rights which a man enjoys as a citizen." 1 id. at 297. There are no mentions of "social rights" in Webster's dictionary. However, Webster defines "civil" generally as "[r]elating to the community, or to the policy and government of the citizens and subjects of a state," id.; and he defines "social" as "pertaining to society; relating to men living in society, or to the public as an aggregate body." 2 id. at 594. These definitions seem related and even coterminous.

[95] See, e.g., District of Columbia v. Heller, 554 U.S. 570, 594–95 (2008) (describing Tucker's edition as the "most important early American edition of Blackstone's commentaries"); Davison M. Douglas, Foreword: The Legacy of St. George Tucker, 47 Wm. & Mary L. Rev. 1111, 1111 (2006) ("St. George Tucker was one of the more influential jurists, legal scholars, and legal educators of late eighteenth- and early nineteenth-century America.").

[96] St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 145 (1803) [hereinafter Tucker, Blackstone's Commentaries].

[97] He defined political rights as the rights belonging to "magistrates, legislators, judges, or other public agents, characters, or functionaries" and defined "civil" rights in a "strict and confined sense" as appertaining to citizens of particular states, including the "right of electing, and being elected to, any public office or trust." Id.

[98] Id.

[99] Id.

[100] Id.

rights."[101] Only the enslaved "are excluded from social rights" because "[s]ociety deprives them of personal liberty, and abolishes their right to property; and, in some countries, even annihilates all their other natural rights."[102]

As noted, Tucker's taxonomy was by no means usual. It shows, however, that at least some jurists connected social rights with natural rights: social rights were our natural rights modified and regulated by the laws. That is what the Article IV cases referred to as "civil rights." Tucker's list includes the right of property and protection of the laws, which we would normally think of as civil rights, and both of which were guaranteed in the Civil Rights Act of 1866[103] and mentioned by Justice Washington.[104] Similar to Justice Washington's statement that Article IV reached rights that are "in their nature, fundamental; which belong, of right, to the citizens of all free governments,"[105] Tucker argued that "in all civilized nations, all free persons . . . have their respective social rights, according to the laws, customs, and usages of the country."[106]

Blackstone defined social rights differently. He subdivided the "rights of persons" into "absolute" rights, including the rights to life, liberty, and property; and "social and relative" rights, covering the relations between master and servant, husband and wife, and parent and child.[107] Although all of these relations were in some respect governed by the laws of

[101] Id.

[102] Id.

[103] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981) (requiring equality in the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property").

[104] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (explaining that Article IV extends to "[p]rotection by the government" and "the enjoyment of life and liberty, with the right to acquire and possess property of every kind").

[105] Id.

[106] Tucker, Blackstone's Commentaries, supra note 96, at 145. In another early source, Zephaniah Swift recognized that the terms "civil" and "social" rights referred to the same set of natural rights; he preferred the term "civil" rights in civil society because "social" rights could be enjoyed in the state of nature. 1 Zephaniah Swift, A System of the Laws of the State of Connecticut 16 (1795). In contrast, other early sources used "social" rights to refer to fundamental positive rights like due process and habeas corpus to distinguish them from natural rights. See Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246, 252 & n.14 (2017) (collecting sources). In either case, civil and social rights are connected to natural rights and their protection in civil society.

[107] 1 Blackstone, supra 61, at 119, 123, 410.

"status,"[108] they were also governed to a large degree by the law of contract. Blackstone wrote, "Our law considers marriage in no other light than as a civil contract."[109] When discussing menial servants, he noted that "[t]he contract between them and their masters [employers] arises upon the hiring."[110] And apprenticeships, which Blackstone also discussed in this chapter on the "social" or "relative" rights involving master and servants,[111] involve the right Justice Washington described "of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."[112] Article IV's precursor in the Articles of Confederation guaranteed this same right to "enjoy [in the different states] all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."[113] Whatever reasons Blackstone may have had to distinguish absolute individual rights and relational or social rights, both sets of rights constitute the "civil rights" guaranteed by Article IV and its precursor. Bouvier's law dictionary also subdivided *civil rights* into "absolute and relative" rights, suggesting that what Blackstone described as social rights were a subset of civil rights.[114]

Justice Story used the term "social rights" once in his *Commentaries on the Constitution of the United States*. In describing the old common law punishments of corruption of blood and forfeiture of estate, he writes: "The reason commonly assigned for these severe punishments" is that "[b]y committing treason the party has broken his original bond of allegiance, and forfeited his social rights. Among these social rights, that of transmitting property to others is deemed one of the chief and most

[108] Sir Henry Sumner Maine, Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas 172–74 (John Murray 1917) (1861); Kaiponanea T. Matsumura, Breaking Down Status, 98 Wash. U. L. Rev. 671, 674–75 (2021) (arguing that the law continues to respond to various status relationships); Katharina Isabel Schmidt, Henry Maine's "Modern Law": From Status to Contract and Back Again?, 65 Am. J. Compar. L. 145, 147 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956616 [https://perma.cc/MF9V-9LR6] (describing importance of Maine's work).

[109] 1 Blackstone, supra note 61, at 421.

[110] Id. at 413.

[111] Id. at 414, 415 (describing apprenticeships as usually being for purposes of learning a "trade" or an "art").

[112] Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825).

[113] Articles of Confederation of 1781, art. IV.

[114] Bouvier, supra note 90, at 484 (defining "relative" rights as "the right of allegiance" the people owe the government in exchange for "protection," and the reciprocal rights of "husband and wife, parent and child, guardian and ward, and master and servant").

valuable."[115] Here, social rights appear to be all the rights persons have merely by virtue of entering into civil society. That is, social rights are civil rights. Justice Story's example of inheriting and conveying property was also specifically mentioned in the Civil Rights Act of 1866.[116]

Turning to case law, in *Ogden v. Saunders*[117] Justice Johnson explained what he understood by the obligation of contract. He understood it to be what Blackstone described as a "relative or social" right.[118] Both the "moral law" and the "law of nature" respecting contracts are "modified and adapted to the exigencies of society by positive law."[119] Thus contracts ought to receive "a relative" interpretation, "for the rights of all must be held and enjoyed in subserviency to the good of the whole."[120] By this Justice Johnson meant that "the State decides how far the social exercise of the rights [the contracts] give us over each other can be justly asserted."[121] Although Justice Johnson does not use the exact phrase "social rights," it appears that he understood all contract rights to be "social"—that is, relative rights in which the state is allowed to regulate the relations of citizens to one another. Chief Justice Shaw of the high court in Massachusetts also appeared to use "social" and "personal" rights in the Blackstonian sense.[122]

In *State v. Simmons*, a 1794 decision of the Constitutional Court of Appeals of South Carolina,[123] the court appears to define social rights as civil rights, or all rights acquired by the social compact. The question was whether a white man could be convicted of accessory to murder by an enslaved man. Defendant's counsel argued that "slaves are to be considered as personal chattels, and not as persons having any civil or political rights attached to them, except as property belonging to others."[124] The court rejected the argument: "[T]he doctrine contended

[115] Joseph Story, Commentaries on the Constitution of the United States § 1295 (1833).

[116] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981). Story's passage was twice quoted in Congress in 1862. Cong. Globe, 37th Cong., 2d Sess. 450 (1862); Id. at 1051.

[117] 25 U.S. (12 Wheat.) 213, 215 (1827).

[118] 1 Blackstone, supra note 61, at 119–20.

[119] *Ogden*, 25 U.S. (12 Wheat.) at 282.

[120] Id.

[121] Id.

[122] Commonwealth v. Chapman, 54 Mass. 68, 71 (1847) (holding that the common law, "and the social and personal rights dependent upon them," remained in effect after the Revolution of 1776).

[123] 3 S.C.L. (1 Brev.) 6, 6 (1794).

[124] Id.

for, by the prisoners' counsel, is not well founded, but pregnant with dangerous consequences to society."[125] The opinion's author continued: "I do not agree with the proposition, that a negro slave is not contemplated by our law as a person entitled to social rights. Negroes are under the protection of the laws, and have personal rights . . . ."[126]

Most slavery cases in the later antebellum period emphatically declared that enslaved persons had no "civil or social rights," usually in the context of denying their capacity to contract for their freedom. In a particularly clear example from Alabama on the eve of the Civil War, the state's Supreme Court explained:

> The numerous decisions in which it has been held, that a promise made to a slave, or for his benefit, is not enforceable in any legal tribunal; that a slave cannot sue or be sued, except that he is clothed with the statutory right of instituting a suit for freedom; that he cannot acquire or own property; that he has no legal capacity to make a contract, not even that of marriage,—all proceed upon the fundamental idea, that our slaves have no civil or social rights, and are incapable of performing by their own volition, and as a matter of right, any civil act which can be made the lawful foundation of vesting new rights in themselves, or of divesting the existing rights, or determining in any respect the legal duties of others.[127]

Here it is not entirely clear how the term "social rights" is distinguished from "civil rights," but the examples are all rights mentioned in the Civil Rights Act of 1866.

In some cases, the term "social rights" appeared to refer to the rights of society to modify individual rights for the good of the whole,[128] or natural rights as modified by the laws of civil society.[129] In the 1859 case *Patten*

[125] Id. at 8.

[126] Id.

[127] Creswell's Ex'r v. Walker, 37 Ala. 229, 234–35 (1861). For similar examples, see, e.g., Bailey v. Poindexter's Ex'r, 55 Va. (14 Gratt.) 132, 197 (1858) (noting "our slaves have no civil or social rights"); Curry v. Curry, 30 Ga. 253, 260 (1860) (quoting *Bailey*, 55 Va. (14 Gratt.)).

[128] As Justice Washington himself said, the fundamental rights to which Article IV extends are "subject . . . to such restraints as the government may justly prescribe for the general good of the whole." Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825).

[129] See, e.g., Goddard v. President of Jacksonville, 15 Ill. 588, 590 (1854) ("Some of our natural rights we must and do surrender or modify in entering into the social state, and in like manner a part of both our natural and social rights in entering into the political state.").

v. Northern Central Railway,[130] the Supreme Court of Pennsylvania argued that "[i]nternal war brings the most intense social activity, and the greatest yielding of individual to social rights."[131] The court then observed, "No social want or social right is more obvious than that of avenues of intercourse"—exactly the rights of trade and commerce that are core civil rights.[132] The court added that the creation of "roads" is a social right to which the individual's right yields, though with just compensation.[133] One year earlier the same court had explained that "[t]he social right and power of government," including the "social right and power of preserving order," is "essentially inherent and inalienable, because man is naturally social, and there can be no society without government."[134]

Another example directly relates to the question of school desegregation. In 1850, the Supreme Judicial Court of Massachusetts concluded that it was constitutional under the state constitution to provide separate schools for Black children.[135] On the merits, Chief Justice Shaw concluded, separate schools were equal.[136] But he did not doubt that Black citizens were entitled to equality in "social rights":

> Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social, the question then arises, whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights.[137]

Once again it is not entirely clear what distinguishes social from civil rights, if anything, but it is instructive that the question in the case was

[130] 33 Pa. 426 (1859).
[131] Id. at 434.
[132] Id.
[133] Id. at 434–35.
[134] Mott v. Pa. R.R. Co., 30 Pa. 9, 35–36 (1858). In the trial of John Fries for his role in the Fries Rebellion, Justice Chase used social rights in a similar way. Instructing the defendant that he had no right to rebel against a government that supplied protection of the laws, he added, "If experience should prove that the constitution is defective, it provides a mode to change or amend it, without any danger to public order, or any injury to social rights." Case of Fries, 9 F. Cas. 924, 932 (C.C.D. Pa. 1800). Here social rights appear to refer to the rights of society to regulate for the public good.
[135] Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 198 (1849).
[136] Id. at 205.
[137] Id. at 206.

entirely on the merits of whether separate schools violated the social rights of Black citizens.

A search of congressional statements and documents prior to 1865 also uncovers instances in which the term "social rights" was used. It is often difficult to know exactly what the speaker meant by the term. But sometimes we can infer with more confidence. In his 1805 impeachment trial, Justice Chase stated, "I hold the position clear and safe, that all the rights of man can be derived only from the conventions of society, and may with propriety be called social rights."[138] In 1818, Representative James Pindall of Virginia, in a discussion over an expatriation bill, stated, "A man might by possibility be naturalized or receive all the social rights of a native citizen."[139] And in 1838 Senator Perry Smith of Connecticut said, "The people of the United States formed for themselves a Government, with such powers as to them seemed most likely to secure to them their social rights."[140] "[W]hen we speak of the rights of persons—the rights of people who are in a social state," said Senator Daniel Webster in an 1850 debate over slavery in the territories, "when we speak of their rights, I suppose we must mean their rights as they exist as social rights . . . ."[141] In all of these instances, the term social rights seems to refer to all rights guaranteed by the social compact.[142]

In several instances, the term was used coterminously with civil rights. In a debate over slavery, Representative John Heritage Bryan of North Carolina said that an enslaved person "labors under a total want of capacity to contract; and this Government cannot confer upon him that power, because that would be conferring upon him one of the most important social rights of freemen."[143] Here the right to contract—a core civil right—is referred to as a "social right." In another debate over the status of former slaves in 1864, Representative Samuel Cox of Ohio

[138] 14 Annals of Cong. 676 (1805) (emphasis omitted).
[139] 31 Annals of Cong. 1048 (1818).
[140] Cong. Globe, 25th Cong., 2d Sess. app. at 157 (1838).
[141] Cong. Globe, 31st Cong., 1st Sess. 1118 (1850).
[142] There are additional examples. In 1859, the clerk read the following argument from one Andrew H. Reeder:

> As to the inherent right of the people to provide in their primary meetings for the making of laws and frames of government, . . . the authorities are so abundant that days might be consumed in citations from standard works of learned, experienced, and able men . . . intended to define and illustrate the social rights of man, and the science of government, as well as to enlighten successive generations.

Cong. Globe, 34th Cong., 1st Sess. 1859 (1856).
[143] 4 Reg. Deb. 1081 (1828).

quoted a pamphlet as stating, "Since the whole human race is of one family, there should be, in a republic, no distinction in political or social rights on account of color, race, or nativity."[144] Here social rights again appear coterminous with civil rights.[145]

None of the above is to say there were no idiosyncratic uses of the term "social rights." In several instances it is difficult to determine the precise meaning of the term, as when some speakers or writers distinguished "individual" and "social" rights, perhaps taking up the Blackstonian distinction. And Senator Lyman Trumbull of Illinois, who was instrumental in Reconstruction, did appear as early as 1862 to distinguish "legal rights," namely civil and political rights, from "social rights," although he did not define what he meant by the term.[146] On the whole, however, the materials canvassed from legal and political sources suggest that, if anything, social rights included or were intimately connected with civil rights.

D. Education and Marriage

Scholars who have adopted the conventional trichotomy generally agree that education and marriage (or, at least, integrated education and interracial marriage) were social rights. If, however, education and marriage fell within the scope of Article IV, then that would be some evidence that the social rights distinction was not relevant to antebellum jurisprudence, or that education and marriage fell on the civil rights side of the divide. At a minimum, it would tend to show that whether

[144] Cong. Globe, 38th Cong., 1st Sess. 710 (1864).

[145] I discovered one use of the term "social rights" in the Blackstonian sense, distinguishing it from personal rights. Henry B. Stanton, Remarks of Henry B. Stanton, in the Representatives' Hall, on the 23rd and 24th of February, Before the Committee of the House of Representatives, of Massachusetts, to Whom Was Referred Sundry Memorials on the Subject of Slavery 28 (1837) ("[The slave's] labor is coerced from him, by laws passed by Congress:—No bargain is made, no wages given. His provender and covering are at the will of his owner. His domestic and social rights, are as entirely disregarded, in the eye of the law, as if Deity had never instituted the endearing relations of husband and wife, parent and child, brother and sister.").

[146] Senator Trumbull stated:

> I should be glad to see the free negroes of this country settled where they could assert all the rights and occupy the position of free men, without any domineering race; where they would not only have civil and political rights, legal rights, but where their social rights and privileges would be upon a level with all the community with whom they associated. But I do not think it best to introduce a proposition of that kind into this bill, and I trust it will not be done.

Cong. Globe, 37th Cong., 2d Sess. 1604 (1862).

segregation and anti-miscegenation laws are unconstitutional is a question on the merits of whether such laws produce "civil" inequality rather than "social" inequality.

There is at least one prominent antebellum Article IV case involving the private education of Black girls[147] and another involving marriage.[148] In neither case did anyone seem to think that education or marriage was somehow a "social right" excluded from the scope of the Clause. No one seemed to think such an argument was even available to make. These two data points are hardly dispositive, but they are nonetheless instructive.

The former case, *Crandall v. State*, dealt with a local law limiting education to residents or to white nonresidents.[149] Counsel for Prudence Crandall, who had been charged with educating a nonresident Black girl, argued that the "right of education is a *fundamental* right" and "is the main pillar of our free institutions."[150] Counsel for the State did not deny any of this, and instead focused on Justice Washington's statement in *Corfield* that such fundamental rights are subject "to such restraints as the government may justly prescribe for the general good of the whole."[151] "So we may say with equal propriety, and equal force, in this case," counsel argued, "that the 'privileges and immunities' of education shall be subject to such restraints as the government may justly prescribe, for the general good of the whole."[152] Chief Justice Daggett of the Connecticut Supreme Court of Errors agreed that "education is a 'fundamental privilege,' for this is the basis of all free government."[153]

Although we shall revisit this point in Section II.B, both sides seem to have agreed that the State did not have to allow nonresident girls to be educated in its *public* schools. Counsel for Connecticut argued that, if Crandall's argument were correct, the State's pauper laws would all be invalid. The State would not be able to "warn[] out"—that is, refuse public assistance to, and possibly remove—paupers.[154] It would not be able to require security of employers employing nonresidents or landlords

[147] Crandall v. State, 10 Conn. 339, 340 (1834).

[148] Conner v. Elliott, 59 U.S. (18 How.) 591, 591–92 (1855).

[149] William M. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760–1848, at 163 (1977).

[150] *Crandall*, 10 Conn. at 350–51.

[151] Id. at 365 (quoting Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825)).

[152] Id.

[153] Id. at 343. He later repeated that "education is a fundamental privilege." Id. at 347.

[154] Id. at 362. This system of warning out is described in more detail in Section II.B *infra*.

renting to nonresidents.[155] Crandall's counsel initially responded that perhaps the pauper laws *are* unconstitutional.[156] He then landed on a more sensible proposition: "[t]he legislature" cannot "be forced to burden the public treasury with the support of a foreign citizen; for the whole matter of settlement and of supporting paupers of any description, is of mere municipal regulation; but it can go no further."[157] This seems to acknowledge that public, though not private, education was excluded from the scope of Article IV.

In *Conner v. Elliott*,[158] a native-born citizen of Louisiana married her husband, a Mississippi resident, in Mississippi, and they both resided in Mississippi. After the husband died, the widow sought to acquire the property her husband had obtained in Louisiana. Under Louisiana law, such property would belong to the widow if the marriage contract had been entered into in Louisiana or the marriage had been performed (i.e., the couple had resided) in Louisiana. The state supreme court had denied the plaintiff the property because, although she was a native of Louisiana, her marriage was contracted into and carried out in Mississippi. The plaintiff argued this violated Article IV: if a Louisiana widow could acquire such property, then so should a non-Louisiana resident be able to acquire her late husband's property in the State.[159]

The United States Supreme Court sensibly rejected the argument. Article IV required only that Louisiana accord nonresidents *residing in* Louisiana the same rights it accorded its own residents. The widow was not residing in Louisiana. Justice Curtis, writing for the Court, did not decide the case in quite those terms. He argued that the privilege of acquiring the property of a deceased marriage partner was not a privilege of "citizenship" because it did not depend on one's citizenship within the State; it depended instead on where the marriage contract was entered into or performed.[160] This case is not nearly as helpful as *Crandall*, but it is nevertheless suggestive. Marriage was referred to as a contract, which is a civil right. And if marriage laws were categorically excluded from coverage, that would have been the easiest way to decide the case.

[155] *Crandall*, 10 Conn. at 362–63.
[156] Id. at 353.
[157] Id.
[158] 59 U.S. (18 How.) 591 (1855).
[159] Id. at 591–93.
[160] Id. at 593–94.

The decision of the Supreme Court of Louisiana is even more instructive. It recited the terms of Article IV and then held the statutes did not "conflict with the Constitution of the United States" because "[t]hey say, to all who chose to marry in this State, be they citizens of this State or of other States, your marriage in this State shall superinduce, of right, a partnership or community of acquets or gains."[161] Thus there is no "unconstitutional discrimination between our own citizens and citizens of other States of the Union."[162] This passage suggests that marriage and its incidents come within the scope of the Clause. The state supreme court merely recognized, correctly, that the law did not treat citizens of other states unequally; the right of "acquets" would redound to the benefit of either a citizen or a noncitizen residing in Louisiana. It appears that no one even thought to make the argument that marriage was not covered by the Clause.[163]

* * *

This Part has established the following. If the Privileges or Immunities Clause of the Fourteenth Amendment does for intrastate discrimination what Article IV did for interstate discrimination, then it requires equality

[161] Connor's Widow v. Adm'rs & Heirs of Connor, 10 La. Ann. 440, 449 (La. 1855).

[162] Id.

[163] In *Amy v. Smith*, Judge Mills in his dissent included "marriage and the social relations" as civil rights. 11 Ky. 326, 342 (1822) (Mills, J., dissenting).

The Supreme Judicial Court of Massachusetts in *Abbot v. Bayley*, 23 Mass. 89 (1827) also presumed that marriage and divorce laws fall within the meaning of the Clause, although the case's reasoning is not straightforward. The question was whether a woman from New Hampshire and who married in New Hampshire and who was driven away by the abandonment of her husband in New Hampshire, and came to reside in Massachusetts, could sue in the Massachusetts courts as a "feme sole." Id. at 89–91. The court noted that if the plaintiff had been a citizen of Massachusetts, and her husband had abandoned her, she would have had that privilege. Id. at 92. "Does then the union of the states, or the provision in the constitution referred to, make a difference?" the court asked. Id.

> The privileges and immunities secured to the people of each state in every other state, can be applied only in case of removal from one state into another. By such removal they become citizens of the adopted state without naturalization, and have a right to sue and be sued as citizens.

Id. Although the court's reasoning and discussion are a bit confusing, the court effectively held that its marriage and divorce laws can be applied to foreigners residing in the state, as had occurred in an earlier case where a British woman fled from her British husband and came to Massachusetts and was allowed to maintain her own legal actions. Id. at 93 (discussing Gregory v. Paul, 15 Mass. 31 (1818)). It is not entirely clear that Article IV was relevant to the court's holding, but it is nevertheless suggestive that "marriage and divorce" laws were treated the same as "the administration of justice," "the regulation of property and estates," and "the protection of the persons of those who live under their jurisdiction" in the Article IV discussion. Id.

with respect to the same "privileges and immunities" covered by the latter Clause. In antebellum law, the Clause reached civil but not political rights. Social rights were not a relevant concept and, if anything, social rights included civil rights or were otherwise intimately connected to them. Finally, marriage and at least private education were assumed to have been included within the scope of Article IV by at least two prominent antebellum cases.

II. PUBLIC RIGHTS AND COMITY

"[T]he distinction between citizen and elector pervades our public law," wrote U.S. Attorney General Caleb Cushing in 1857.[164] So did the distinction between private rights and public rights.[165] Although there is some disagreement over the scope of public rights in the antebellum era,[166] as a general matter, private rights are the kinds of rights individuals have in the state of nature without any dependence on government.[167] Private rights, that is, are just civil rights. Public rights, on the other hand, belong to the public at large, such as public roads and waterways; or are entitlements ("public privileges") given by the government by virtue of the government's grace or largesse. Welfare benefits, land grants, and corporate charters were classic examples of public privileges.[168] Once a public privilege vested in an individual—once title to a land grant vested in the grantee, once a welfare transfer payment arrived in one's bank account, or once a corporate charter was granted—these usually became private rights. Thus, after such privileges had become vested rights, they could not be taken away without due process of law, just as with any other

[164] Chickasaw Constitution, 8 Op. Att'ys Gen. 300, 302 (1857) (emphasis omitted).

[165] See supra notes 27–29 and accompanying text.

[166] Compare Nelson, supra note 27, at 565–67 (noting that "public rights" include title to public lands and stewardship of the public treasury, public waters, and public roads, and that "privileges" had "no counterpart in the Lockean state of nature" and were created by the State "to carry out public ends"), with Woolhandler, supra note 27, at 1020–21 (including statutory rights within the category of public rights); see also, e.g., Oil States Energy Servs., LLC v. Greene's Energy Grp., 138 S. Ct. 1365, 1373–74 (2018) (holding that once a patent has been granted it is still a public right); id. at 1384 (Gorsuch, J., dissenting) (contending that once a patent is granted it cannot be taken away without due process of law).

[167] As noted previously, private rights include what we might describe as "fundamental positive rights," those rights like due process, habeas corpus, and protection of the laws, which exist for the purpose of securing natural rights. See Campbell, supra note 21, at 16–17.

[168] See Nelson, supra note 27, at 566; Woolhandler, supra note 27, at 1028–29.

private right.[169] But there was no right to such privileges in the first place. They could be granted or denied at the discretion of the sovereign, and sovereign immunity ordinarily prevented judicial review of denials.[170] As noted previously, public rights are like political rights in the narrow sense that most such rights do not exist in the state of nature.[171] But they do not have to do with the support or management of government, and many public privileges operate like private rights in that they are funded through taxation (which involves property), are generally distributed, and are used for private rather than public purposes.[172]

This Part aims to establish that public rights were outside the scope of Article IV (whether some such rights are included within the scope of the Fourteenth Amendment's Privileges or Immunities Clause is addressed in Section III.A). Although the Supreme Court did not directly address the question of public rights and comity in the antebellum period,[173] it did decide a case in 1876 involving natural resources.[174] No case addressed the comity implications of the poor laws. And, finally, cases involving corporations offer instructive but not definitive language on the Clause's scope. Much of the argument of this Part therefore relies on reasonable inferences from the limited materials.

[169] See, e.g., Nelson, supra note 27, at 577–78 (noting that "as long as only public rights were at stake and no private individual had yet acquired any vested right to the [public] land, judicial power in the constitutional sense was not necessary" and that "[o]nce private individuals could claim vested rights in the land . . . the executive branch's authority to act conclusively ran out"). Prior to general incorporation statutes, the legislature often reserved the right to revoke or alter corporate charters. See, e.g., McLaren v. Pennington, 2 N.Y. Ch. Ann. 577, 580 (N.Y. 1828) (holding such a reservation clause valid).

[170] See Nelson, supra note 27, at 584; Woolhandler, supra note 27, at 1028–29; Williams, supra note 28, at 4.

[171] See supra notes 27–30 and accompanying text.

[172] See supra note 30 and accompanying text.

[173] In 1855, the Court disclaimed answering the question as it related to natural resources. Smith v. Maryland (*The Volant*), 59 U.S. (18 How.) 71, 75 (1855) ("Whether this liberty belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed in common by all citizens of the United States . . . are matters wholly without the scope of this case, and upon which we give no opinion.").

[174] McCready v. Virginia, 94 U.S. 391, 394 (1876).

A. The Common Property of a State

In the antebellum era, natural resources, including fisheries, were public rights.[175] The leading case on whether such rights were included within the scope of Article IV was *Corfield v. Coryell*. Recall that Justice Washington held that the Clause extended to "fundamental" rights "which belong, of right, to the citizens of all free governments."[176] He then listed numerous civil rights as examples. Recall, however, that Justice Washington could not

> accede to the proposition . . . that . . . the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.[177]

A "several fishery," where not possessed by a particular individual, "belongs to all the citizens or subjects of the state" and "is the property of all" who "may be considered as tenants in common of this property."[178] It would be going "too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of cotenancy in the common property of the state, to the citizens of all the other states," because in many cases that would create "the most serious public inconvenience and injury," particularly where exposing the resource "to

[175] See, e.g., *The Volant*, 59 U.S. (18 How.) at 74–75 ("But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery." (citations omitted)); Adams v. Pease, 2 Conn. 481, 483 (1818) (opinion of Swift, C.J.) ("By the common law, in the sea, in navigable rivers, and navigable arms of the sea, the right of fishing is common to all. . . . Above the ebbing and flowing of the tide, the fishery belongs exclusively to the adjoining proprietors; and the public have a right or easement in such rivers, as common highways, for passing and repassing with vessels, boats, or any watercraft."); Dunham v. Lamphere, 69 Mass. 268, 271 (1855) ("By the common law of England, now too well known to require any considerable citation of authorities, the right of fishing on the shores of the sea, and in all creeks and coves, is common to all the subjects of the realm . . . .").

[176] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825).

[177] Id. at 552.

[178] Id.

too general use" may "exhaust[]" the resource.[179] "The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state," Justice Washington added, "but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe."[180]

From this discussion it is possible to conclude that public rights such as the common property of a state might be excluded from the scope of Article IV for three reasons. First, such privileges belong "exclusively" to citizens of a particular state and are not the kind of rights citizens enjoy everywhere; they are unique to the environment and context of each state. This reason supplies a possible textual basis for excluding these privileges from the scope of Article IV because they are not privileges "of citizens in the several states." The common property of a state—its fisheries, oyster beds, and other natural resources—are privileges exclusively of the citizens of the states in which such resources are located. They are therefore privileges of citizenship, but not privileges common everywhere.

Second, these rights are the *property* of the citizens of the state and therefore power over that property, unlike other civil rights, cannot be exercised by everyone. This reason suggests, however, that the right of a state's *own* citizens to access the "common property" on equal terms with other citizens may very well be a fundamental right common to the citizens of all free governments. Third, a state can reserve this common property for its citizens to avoid depletion. This final reason supplies a rationale for exclusion rooted in comity: a state is welcome to share its natural resources with citizens of other states, but it does not have to do so because otherwise those resources might be exhausted.

There do not appear to be other antebellum cases that independently addressed the "common property" or natural resources of a state in relation to Article IV. Other cases cited *Corfield* and affirmed that decision without analysis.[181] In 1855, the Supreme Court refused to address the question. In *The Volant*, the Court upheld a Maryland law that prohibited the dredging of oysters using a particular method against a

[179] Id.

[180] Id.

[181] See, e.g., Bennett v. Boggs, 3 F. Cas. 221, 226 (C.C.D.N.J. 1830); State v. Medbury, 3 R.I. 138, 142–43 (1855).

Commerce Clause challenge.[182] The Court observed that the rights to use the natural resources and fisheries are "public rights"[183] and that the State "may forbid all such acts as would render the public right less valuable, or destroy it altogether" because it has a "duty to preserve unimpaired those public uses for which the soil is held."[184] The Court refused, however, to address "whether this public use may be restricted by the State to its own citizens, or a part of them."[185]

In 1876, the Supreme Court finally did give its opinion.[186] *McCready v. Virginia* involved the question "whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege."[187] The Court's answer is worth quoting at length:

> [W]e think we may safely hold that the citizens of one State are not invested by [Article IV] of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege.
>
> And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free governments,' but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

[182] Smith v. Maryland (*The Volant*), 59 U.S. 71, 74–75 (1855).
[183] Id. at 75.
[184] Id.
[185] Id.
[186] McCready v. Virginia, 94 U.S. 391, 394 (1876).
[187] Id.

> . . . [I]f the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone.[188]

This opinion lends support to the argument that public rights largely depend on the circumstances of a particular state. The use of common property is therefore a privilege of citizenship, but of "special" rather than "general" citizenship. It appertains only to the citizens of that state.

B. Public Welfare

Another classic public right is welfare.[189] In the antebellum period, there were no Article IV cases in which a citizen of one state made a claim upon another state for support of its poor laws. The reason is likely that no one questioned that a citizen of another state was not entitled to such privileges. In the eighteenth and nineteenth centuries, the operation of the public welfare laws centered on identifying the "legal settlement" of a pauper.[190] The definition of legal settlement varied from state to state, but generally was the location where the individual "had worked for the same

[188] Id. at 395–96 (first paragraph break added).

[189] See Williams, supra note 28, at 3–4 (distinguishing traditional liberty and property from government "benefits" including public employment and "government transfers or social insurance").

[190] Kristin O'Brassill-Kulfan, Vagrants and Vagabonds: Poverty and Mobility in the Early American Republic 62 (2019) ("In most states, generally from the 1780s into the early twentieth century, an individual was only eligible to receive public aid in their place of legal settlement."); Ruth Wallis Herndon, Unwelcome Americans: Living on the Margin in Early New England 2 (2001) ("Officials . . . carefully distinguish[ed] between those legally entitled to poor relief and those not legally entitled and [sent] away the latter. Settlement laws in every colony provided that all those needing poor relief would receive it—but *only* in their towns of legal settlement."); Gerald L. Neuman, The Lost Century of American Immigration Law (1776–1875), 93 Colum. L. Rev. 1833, 1846 (1993) ("In neither the eighteenth century nor the nineteenth century did American law concede the right of the poor to geographic mobility. At the time of Independence, the states took with them the heritage of the English poor laws, which made the relief of the poor the responsibility of the local community where they were legally 'settled.'").

employer for a given length of time, owned land or paid poor tax, served an indenture, or rented a home for a given length of time."[191]

This Section examines first the laws and practices respecting paupers and public welfare, and second the legal materials that might shed light on the constitutional question. Overall, the antebellum approaches to the poor laws suggest that these public privileges did not fall within the scope of Article IV for the same reason that common property did not: such privileges were of local or municipal citizenship, not common to citizens in the several states; and, because they depended on public resources, they were subject to depletion if not reserved to local citizens who contributed those resources.

1. The Antebellum Systems of Poor Relief

There were generally four approaches to handling indigent transients in the antebellum period, which varied from state to state and over time. The first approach, which was common in the late eighteenth century and persisted into the nineteenth, was pauper removal.[192] To prevent paupers from becoming public charges, a local jurisdiction could physically remove a pauper to his or her last "legal settlement"—whether in another town in the same state or in another state. The historian Kristin O'Brassill-Kulfan has examined this practice in detail.[193] "Forced transportation of the transient poor, generally referred to as pauper removal, was a ubiquitous and legally sanctioned method by which state and local

[191] O'Brassill-Kulfan, supra note 190, at 62. In Rhode Island in the eighteenth century, writes Herndon, "there were four principal ways to acquire an official settlement . . . : by being born there; by serving out an apprenticeship or other servitude to a master who lived there; by purchasing a freehold; or (for women) by marrying a man who belonged there." Herndon, supra note 190, at 5. In Pennsylvania after 1803, one could gain legal settlement,

> by holding public office for one year, paying public poor taxes for two years, leasing a residence valued at over ten pounds for at least one year, serving at least a one-year term as an unmarried, childless indentured servant, or being a woman married to a man or widowed by a man with a legal settlement.

O'Brassill-Kulfan, supra note 190, at 16. In Delaware and Maryland, one could gain legal settlement by "a year's residence, property ownership, payment of poor taxes, or services as an indentured servant." Id. In New York after 1801, legal settlement could be obtained "by holding public office for one year, renting and occupying a residence valued at a minimum of thirty dollars for two years, paying public poor tax for two years, or being an indentured servant in a New York district for at least two years." Id.

[192] For the origins of these laws in English and colonial legislation, see Stefan A. Riesenfeld, The Formative Era of American Public Assistance Law, 43 Calif. L. Rev. 175, 183–232 (1955).

[193] O'Brassill-Kulfan, supra note 190, at 58–61.

authorities exerted control over the movement of the poor," she writes, "and limited fiscal liability for the care of the poor individuals and families who had no claim on their district through residency or the payment of poor taxes."[194]

The "early manifestations" of these removal laws in the eighteenth century "allowed town officials to escort indigent transients outside the boundaries of their jurisdiction in order to prevent them from becoming 'chargeable' to the town for poor relief."[195] The 1817 manual for the Philadelphia Guardian of the Poor described its mission thus: "[T]he great object of this incorporation is to provide for the support and relief of such Poor persons as have a legal settlement within its limits."[196] The object is also to provide for the poor who "may be found therein, having such settlement elsewhere," but these individuals "are to be relieved by the guardians until they can be removed by the agent, to their place of settlement."[197] Although most often the removal process appears to have operated within a state among local jurisdictions, removal from one state to another was not uncommon.[198]

In a case involving an inhabitant of another state, the Connecticut Supreme Court of Errors held that "[w]ithout some one of these qualifications" for obtaining legal settlement in Connecticut, a transient person "or inhabitant of another state, was always liable to be removed, notwithstanding any length of time he may have been suffered to continue in any town."[199] And in 1821, the New York Supreme Court ordered the removal of certain paupers to Massachusetts.[200] The paupers had resided in New York for a year, but the court held that "[i]t could not have been intended to adopt paupers coming from the other states, and allow them a settlement here, merely on a year's residence."[201]

[194] Id. at 58.

[195] Id. at 59.

[196] A Manual for the Guardians of the Poor of the City of Philadelphia, the District of Southwark, and Township of the Northern Liberties (Philadelphia, 1817) 1, *quoted in* O'Brassill-Kulfan, supra note 190, at 64.

[197] Id., *quoted in* O'Brassill-Kulfan, supra note 190, at 64–65.

[198] O'Brassill-Kulfan explores the records of individuals who were removed from Philadelphia to New Jersey and New York, from Ohio to Pennsylvania, and from New York to Pennsylvania. O'Brassill-Kulfan, supra note 190, at 66–67. Many "warned out" or removed from Rhode Island came from Massachusetts or Connecticut. Herndon, supra note190, at 3.

[199] Town of Danbury v. Town of New-Haven, 5 Conn. 584, 587 (1825).

[200] Overseers of Chatham v. Overseers of Middlefield, 19 Johns. 56, 57 (N.Y. Sup. Ct. 1821) (per curiam).

[201] Id.

The overall objective of removal was "long-term immunity from any obligation to pay for the relief of indigent transients."[202] The historian Ruth Wallis Herndon explains that in New England, "each local government administered 'poor relief' to its own inhabitants," and "[w]hatever the form of poor relief, its funding originated with local taxpayers."[203] Herndon observes that "[m]ore often than not, the cause of the treasury's exhaustion was the high cost of poor relief."[204] Thus "a culling out of those not entitled to town support, so as to limit the expense to taxpayers," was the "first step" in administering poor relief.[205]

A second approach was to "warn out" paupers whose legal settlements were elsewhere, a practice more common in New England.[206] This process instructed the paupers that they were not eligible for relief under the poor laws; those warned could stay but could be legally removed at some point in the future. O'Brassill-Kulfan explains that in Boston, for example, the warning system "was primarily a bureaucratic effort to absolve the city of responsibility to care for nonresident indigent transients and did not often result in actual removal."[207] The aim was "to protect the limited available funds of public relief."[208] One study shows that of those "warned out" in Boston in 1791, twenty-eight were from Philadelphia, nineteen from New York City, four from Carolina, three from Maryland, three from New Hampshire, three from Albany, and two from Hartford.[209]

A third approach, also relatively common in New England, was for a town that expended public resources in support of a pauper to seek reimbursement from another town within the same state, if the latter town

[202] O'Brassill-Kulfan, supra note 190, at 61.

[203] Herndon, supra note 190, at 1.

[204] Id.

[205] Id. at 6; see also O'Brassill-Kulfan, supra note 190, at 18–19 (noting how the high cost of poor relief motivated local governments to expel nontaxpaying transients).

[206] Allan Kulikoff, The Progress of Inequality in Revolutionary Boston, 28 Wm. & Mary Q. 375, 399 (1971) ("Almost all newcomers to Boston were 'warned out,' officially informed that the town would not care for them if they ever needed charity."); O'Brassill-Kulfan, supra note 190, at 7. Warning out did, however, often result in removal, particularly in colonial times. Herndon, supra note 190, at 2. In these systems, however, usually a transient had to be warned out before he or she could be removed. Herndon writes that "[t]he system of warning out . . . had its own peculiar language and conventions, which varied from colony to colony. Studies of the Vermont and Massachusetts records, for example, suggest that actual removals of transients occurred much less frequently there than in Rhode Island." Id. at 10.

[207] O'Brassill-Kulfan, supra note 190, at 59.

[208] Id. at 7.

[209] Kulikoff, supra note 206, at 401.

was the pauper's legal settlement, or from the county or state itself if the pauper had no legal residence within the state.[210] For example, in *Inhabitants of Brunswick v. Inhabitants of Litchfield*,[211] the question was where the pauper had her "legal settlement" because if it was in the defendant town, then the town that supported her was entitled to reimbursement.[212] Although less relevant to interstate relations, these cases suggest once again that public benefits were reserved to local citizens.

Finally, some states toward the middle of the nineteenth century began affording poor relief to all persons, whether from other states or not. Due to the increased migration and the simple fact that many paupers did not have a legal settlement at all, New York ultimately amended its laws in 1824 to provide for indigent transients as well as the local poor.[213] New York, however, still made it a crime to bring in a pauper from another state with the intent to make the pauper chargeable to a town within New York. In one case where superintendents of the poor of one New York town sued overseers of the poor in Pennsylvania, the New York Supreme Court upheld the judgment against the defendants.[214] "We had abandoned the practice which at one time prevailed, of sending paupers who had gained no settlement here, to the state where they had a legal settlement," the court explained.[215] "[A]nd as the legislature had determined to provide in future for all the poor within our limits, they intended that other states, so far as we are concerned, should do the same."[216] Even when New York provided for all paupers within its territory, no matter their place of legal settlement, the State still made it illegal to bring a pauper from another state into New York.

[210] Neuman, supra note 190, at 1848 (noting that in Massachusetts, a "town was responsible for relief of any poor person found within it, subject to rights of reimbursement from the town where the individual had his legal settlement, or from the Commonwealth if the individual had no legal settlement in any Massachusetts town"). There were numerous such cases for reimbursement. See, e.g., Portland v. Bangor, 42 Me. 403, 410 (1856); Town of St. Johnsbury v. Town of Waterford, 15 Vt. 692, 699–700 (1843).

[211] 2 Me. 28, 28 (1822).

[212] Id. at 32.

[213] O'Brassill-Kulfan, supra note 190, at 71–75; Neuman, supra note 190, at 1853.

[214] Winfield v. Mapes, 4 Denio 571, 572–73 (N.Y. Sup. Ct. 1847).

[215] Id. at 573.

[216] Id.

2. The Constitutional Question

Although no case appears to have been brought under Article IV, the question of pauper removal arose in the congressional debate of 1820–1821 over whether Missouri's new constitution could prohibit the entry of free Black citizens of other states, or whether such a prohibition would violate Article IV.[217] When Missouri submitted its proposed constitution to Congress, it contained a provision requiring the state legislature to "pass such laws as may be necessary . . . [t]o prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever."[218] The southern representatives argued that if pauper removal laws were constitutional, then so was a prohibition on the entry of free Black citizens from other states. Representative Alexander Smyth of Virginia asked, "Has not every county and parish a right to exclude paupers and vagrants? May not every city and town exclude persons having infectious diseases, although they are citizens?"[219] And Representative William Archer, also of Virginia, compared the exclusion of free Black citizens to the exclusion of paupers and criminals.[220]

Representative Joseph Hemphill of Pennsylvania responded to this claim by first suggesting that "perhaps" paupers "form an exception," as "they were expressly excepted in the old Articles of Confederation" and "their usefulness to their country is spent."[221] He added, however, that paupers "fall helpless on the benevolence of the society to which they belong; they have no property to go to, neither have they any election as to the place of their residence; they are as a debt on their own State, and no other State is bound to discharge it."[222] This reasoning sounds in public rights: one state cannot be required to expend public resources on the poor of other states. Representative James Strong of New York made the point more clearly: "I have never understood that a State, town, or city, could

[217] This episode is discussed in Wurman, supra note 11, at 73–77; Wiecek, supra note 149, at 122–25.

[218] Wiecek, supra note 149, at 122–23 (quoting Mo. Const. of 1820, art. III, § 26, *in* 4 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 2154 (Francis Newton Thorpe ed., 1909)).

[219] 37 Annals of Cong. 557 (1820); see also id. at 558 (pointing to a D.C. law that permitted the exclusion of "vagrants and paupers" as evidence that states "possess the right of exclusion").

[220] 37 Annals of Cong. 583 (1820).

[221] 37 Annals of Cong. 601 (1820).

[222] Id.

prevent the admission of a pauper as such. In many of the States, and I do not know but in all of them, a pauper may be removed if likely to become a public charge."[223]

A handful of Tennessee cases sound in comity and address the issue of public welfare. In *Hawkins v. Pearce*,[224] the question was whether a nonresident could claim a homestead exemption enacted for the benefit of Tennessee's poorer classes. The court said no, reasoning that nonresidents "who may be casually or transiently in the State" do not "come within the policy and provisions of those laws."[225] The court went on to say that "the poor families" that were "intended to be protected and provided for" by the system of poor laws "are those only which are resident in the State."[226] "[B]ut for the aid and protection which these laws confer upon poor families," the court observed, "many of them might be reduced to such extreme destitution and want, as to make it necessary to subsist them at the public charge, a consideration that can only apply to persons residing in the State."[227] The court was therefore "satisfied that these poor laws apply only to the poor of our own State."[228]

In *Lisenbee v. Holt*,[229] the question was whether a nonresident could take advantage of a law that exempted poor individuals from giving a security for costs when filing a lawsuit. The court held that this law *did* apply to nonresidents as a matter of statutory construction.[230] The constitutional question whether such a law could exclude nonresidents under Article IV was therefore not presented. In distinguishing *Hawkins*, the court noted that the statutes there specifically applied only to residents of Tennessee. It went on to say that "independent of this fact, a sound policy would so limit" the operation of such statutes to residents because their object was to prevent the "destitution" of debtors and having them "become a charge to the community."[231] "These reasons and objects," the court reasoned, "could not be made properly to apply in the case of citizens of other states, who might be indebted to ours," because "[w]e

[223] 37 Annals of Cong. 566 (1820) (emphasis added).
[224] 30 Tenn. 44 (1850).
[225] Id. at 45.
[226] Id. at 46.
[227] Id.
[228] Id.
[229] 33 Tenn. 42 (1853).
[230] Id. at 50.
[231] Id. at 50–51.

are under no obligation to make provision for them" and "[t]hey must look to their own governments for protection."[232]

Although not dispositive, it bears mention that the U.S. Supreme Court, in a notorious slavery case, noted in dicta that a state obviously could prevent paupers from coming in and residing in the state. "We entertain no doubt whatsoever," wrote Justice Story in *Prigg v. Pennsylvania*, "that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers."[233] Two years earlier in an extradition case,[234] Justice Baldwin had written that "[n]o state can be compelled to admit, retain, or support foreign paupers, or those from another state," who "may be removed or sent where they came" because poverty "is a misfortune not to be mitigated or relieved by the compulsory contributions of those among whom they throw themselves."[235]

What seems clear from these materials is that no one questioned that these exclusionary practices were consistent with Article IV, as no challenge was ever brought, and the Supreme Court approved of the practices in dicta. Simply put, as O'Brassill-Kulfan concludes, "[p]ossessing legal settlement usually entitled one to receive poor relief in that location, as a privilege of *municipal* citizenship."[236] It was not, however, a privilege of citizens in the several states. The existence of poor relief laws, unlike the existence of basic civil rights, depends on the choices and circumstances of a particular polity. Access to such relief is therefore enjoyed as a privilege of "citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality."[237]

Some further light might be shed, finally, by the change in language from Article IV of the Articles of Confederation to Article IV of the Constitution. The Articles had provided that the "free inhabitants of each" state "shall be entitled to all privileges and immunities of free citizens in the several States," but "excepted" from that provision "paupers,

[232] Id. at 51.
[233] 41 U.S. 539, 625 (1842).
[234] Holmes v. Jennison, 39 U.S. 540 (1840).
[235] Id. at 616 (Baldwin, J., concurring).
[236] O'Brassill-Kulfan, supra note 190, at 16 (emphasis added).
[237] McCready v. Virginia, 94 U.S. 391, 395–96 (1876).

vagabonds and fugitives from justice."[238] The simplest explanation for this exclusion is the widespread removal practices, which meant that paupers were not entitled to *any* privileges of citizenship, even basic civil rights, where they were not legally settled. This language, however, was taken out of the new Constitution, which provides only that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[239] And yet the pauper laws remained largely unchanged, permitting the exclusion of nonresidents. One explanation is that public privileges were not privileges of "citizens in the several states" and therefore would have been excluded from coverage anyway. To the extent a pauper *could* maintain him or herself through the exercise of basic civil and economic rights, exclusion was not necessary.

That seems to have been the thrust of the argument of Prudence Crandall's counsel. Recall that counsel for Connecticut argued that the laws could prohibit even the private education of Black girls from other states and, if it were otherwise, that would lead to the invalidation of the State's pauper laws.[240] Crandall's counsel responded first by pointing out that Connecticut's pauper laws were enacted before the adoption of the Constitution and they might very well be unconstitutional under Article IV.[241] But then he argued that

> [t]he legislature may declare, that such an one shall not gain a legal settlement; nor can it be forced to burden the public treasury with the support of a foreign citizen; for the whole matter of settlement and of supporting paupers of any description, is of mere municipal regulation; but it can go no further.[242]

This statement is no authority of its own force. It is merely the argument of Crandall's counsel. But it is the best articulation of the law in the antebellum period in light of the various sources and practices discussed above. Anyone, even paupers, can come into any state, so long as they do not seek or require public maintenance. A state cannot "be forced to burden the public treasury with the support of a foreign citizen."[243] But

[238] Articles of Confederation of 1781 art. IV.

[239] U.S. Const. art. IV, § 2.

[240] Crandall v. State, 10 Conn. 339, 362–63 (1834); see supra note 150 and accompanying text.

[241] *Crandall*, 10 Conn. at 353.

[242] Id.

[243] See id.

every other right, privilege, and immunity must be extended to all citizens coming in from other states. If they do become a burden, they can perhaps still be removed to their legal settlement. But unless and until they offend against the pauper laws, they have every right to come and settle in any other state.

C. Corporate Privileges

In the antebellum era, corporate charters and privileges were public rights. With few general incorporation laws until later in the nineteenth century, the power to grant a corporate charter was entirely within the prerogative of the sovereign.[244] In the famous *Trustees of Dartmouth College v. Woodward* case, Chief Justice Marshall explained, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."[245] The Court later explained that a corporate "act contains the grant of certain privileges by the public, to a private corporation, and in a matter where the public interest is concerned."[246] The Massachusetts Supreme Court explained that owners of a corporate charter for the purpose of building public works occupy a "public privilege."[247]

Numerous scholars have concluded that corporate charters were public privileges within the private/public distinction.[248] Stephen Siegel has

[244] See, e.g., Bruce A. Campbell, Social Federalism: The Constitutional Position of Nonprofit Corporations in Nineteenth-Century America, 8 L. & Hist. Rev. 149, 153 (1990) ("[R]etention of the chartering power allowed the legislature discretionary authority to deny applications for charters for good reasons or ill.").

[245] 17 U.S. 518, 636 (1819). In an earlier case, the Court had noted that a corporation "is the mere creature of the act to which it owes its existence." Head & Amory v. Providence Ins., 6 U.S. 127, 167 (1804).

[246] Richmond, Fredericksburg, and Potomac RR. Co. v. Louisa RR. Co., 54 U.S. 71, 81 (1851) (emphasis added).

[247] Proprietors of Canal Bridge v. Gordon, 18 Mass. 296, 306 (1823).

[248] Gerald Berk, Corporate Power and Its Discontents, 53 Buff. L. Rev. 1419, 1420 (2006) ("[I]n antebellum America states issued corporate charters for public purposes with specific rights and obligations."); Morton J. Horowitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 72 (1992) (observing in the late nineteenth century "the erosion of the 'grant' or 'concession' theory of the corporation, which treated the act of incorporation as a special privilege conferred by the state for the pursuit of public purposes"); Craig J. Konnoth, Revoking Rights, 66 Hastings L.J. 1365, 1374 n.24 (2015) ("[A]lthough corporation charters slowly became treated as private property, in pre-nineteenth century thought, corporation charters were considered public privileges."); Martha T. McCluskey, The

explained, for example, that according to "pre-nineteenth century Liberal thought, corporations were clearly privileges."[249] By the early nineteenth century this view became more controversial as the number of corporations and general incorporation laws proliferated.[250] "Nonetheless," writes Siegel, "nineteenth century corporations still had many aspects which allowed for their continued conceptualization as privileges."[251] Thus "many jurists concluded that nineteenth century state-granted franchises merited differential treatment from ordinary contracts" because "[s]tate-granted franchises raised de facto the problems associated with traditional de jure privileges."[252]

Subsection II.C.1 examines a number of antebellum comity cases involving corporate charters. Subsection II.C.2 then examines "equal privileges or immunities" clauses in state constitutions, which were largely enacted in opposition to special, corporate privileges—that is, to this form of public rights.

1. Corporations under Article IV

Most comity cases relating to corporate charters involved corporations from State *A* seeking to exercise rights and powers in State *B* on the same terms that similar corporations in State *B* enjoyed. In some of these cases, the courts resolved the matter by holding that corporations were not citizens within the meaning of Article IV. But in others, the reasoning was along the public-private distinction. Because it was entirely up to State *B* whether and to what extent to charter corporations and grant them powers, it was entirely a matter of comity whether State *B* would allow corporations from State *A* to exercise rights and powers in the state.

For example, in one antebellum case involving the right of a state to treat foreign corporations differently from domestic corporations, the

Substantive Politics of Formal Corporate Power, 53 Buff. L. Rev. 1453, 1475–76 (2006) (noting the "structural politics of corporations as public privileges" and that "[t]hrough the mid-nineteenth century, U.S. law often treated the corporate charter as a public benefit"); William G. Roy, Socializing Capital: The Rise of the Large Industrial Corporation in America 41, 52 (1997) (noting that a corporation was "a form of privilege" and "[t]he state . . . defined what the corporation was and the particular rights, entitlements, and responsibilities" it had).

[249] Stephen A. Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence, 60 S. Cal. L. Rev. 1, 67 (1986).

[250] Id. at 67–68.

[251] Id. at 68.

[252] Id. at 74.

state supreme court held that corporate privileges are not "a right pertaining to the corporators merely as citizens."[253] The court went on to say, however, that even "if it did pertain to them as citizens of their own State, it would still be a peculiar privilege derived from their own State."[254] The former statement suggests that the public privileges appertaining to corporate charters are not privileges of citizenship at all; the latter that such privileges are privileges of citizenship but, unlike civil rights, such privileges are unique to each state and are not common to citizens of all the states.

In *Paul v. Virginia*,[255] the U.S. Supreme Court addressed the issue in much the same way. "Special privileges enjoyed by citizens in their own States are not secured in other States by" Article IV.[256] The Court then specifically addressed whether the Clause required that a corporation from State *A* must have the same privileges in State *B* as corporations in State *B* enjoy. It observed that if that were the constitutional requirement, then states "would be unable to limit the number of corporations doing business therein" because "[t]hey could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits."[257] "They could not repel an intruding corporation," the Court elaborated, "except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited," and that these corporations should be strictly regulated for the public good.[258]

This reasoning stems from the private-public distinction. Every person can enjoy civil rights, but public privileges are entirely within the discretion of the state. It would put the state in an impossible position if by granting public privileges to its own citizens it would open the floodgates to claims for such privileges from those in other states. The Court therefore concluded that a corporation cannot be a citizen within the meaning of Article IV: "The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the

[253] Commonwealth v. Milton, 51 Ky. 212, 225 (1851).
[254] Id.
[255] 75 U.S. 168 (1868).
[256] Id. at 180.
[257] Id. at 182.
[258] Id.

State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."[259]

The greater power to deny privileges altogether included the lesser power to grant them on whatever conditions the State wished. The Louisiana Supreme Court explained, "If this State has thought fit to recognize foreign charters of incorporation to the extent of permitting foreign corporations to transact business in their corporate name, through agents, within our limits, the Legislature had an undoubted right to attach what conditions it thought fit to the privilege."[260] "May [the Legislature] not, then, permit upon terms, what they might prohibit altogether?" asked one justice of the New Jersey Supreme Court.[261] In that case, the legislature imposed a tax upon insurance companies doing business in the State but incorporated in other states, which it did not impose on its own incorporated insurance companies.[262] Another justice observed,

> [i]n the very nature of things, the citizen referred to [in Article IV] is a natural person, a human being having rights essential to his character as a member of a free government, and not a mere artificial person, the creature of a special charter, having no rights but such as are thereby granted.[263]

"Having the power to give, the state has the power to withhold such sanction" to corporations.[264]

"The rights and privileges guaranteed to citizens in the Federal Constitution are inconsistent with the nature, properties and purposes of corporations," the Pennsylvania Supreme Court explained.[265] "If corporations created by State authority were held to be within the provision, their rights and powers would no longer be measured by the grants of their charters, but by the constitutional rights of an American freeman; they would overrun State lines . . . ."[266] In other words, the Clause protects privileges and immunities that are common to free citizens everywhere—that is, civil rights. Public privileges are not

[259] Id. at 177.
[260] State v. Lathrop, 10 La. Ann. 398, 402 (La. 1855).
[261] Tatem v. Wright, 23 N.J.L. 429, 441 (N.J. Sup. Ct. 1852) (opinion of Potts, J.).
[262] Id. at 444 (opinion of Elmer, J.).
[263] Id. at 446.
[264] Id.
[265] Wheeden v. Camden & A.R. Co., 1 Grant 420, 423 (Pa. 1856).
[266] Id.

common to the citizens in the several states; they are creatures entirely of state law.

None of these cases addresses the constitutionality of a state reserving the right to incorporate to its own citizens, although several states did so limit their incorporation statutes, further suggesting that corporate privileges, as public privileges, fell outside the scope of Article IV.[267] The cases we do have, however, suggest that perhaps these privileges are not "fundamental" or do not appertain to citizenship, and are therefore excluded from Article IV. Alternatively, because a state may have a legitimate interest in limiting the number of corporations—just as it has a legitimate interest in limiting the number of public charges or the number of citizens who use its natural resources—the right to corporate privileges can be legitimately reserved to in-state citizens.[268]

[267] It is not clear whether such limitations were ever litigated, but this practice is some indication that it was constitutional to limit incorporation to citizens or at least residents. See, e.g., Act of June 16, 1836, No. 194, 1836 Pa. Laws 476, 476 (referring to "any number of persons," specifically "citizens of this commonwealth"); Act of Mar. 2, 1849, 1849 N.J. Laws 300, 302 ("The business of every such company, shall be managed and conducted by the directors thereof . . . a majority of whom shall be residents of this state . . . ."); id. ("[O]ne of the directors shall be chosen president, who shall be a resident of this state . . . ."); Act of Dec. 22, 1847, 1847 Ga. Laws 219, 219 ("[An Act] to authorize all the free white citizens of the State of Georgia, and such others as they may associate with them, to prosecute the business of Manufacturing, with corporate powers and privileges."); Act of Feb. 9, 1850, ch. 179, 1850 Tenn. Pub. Acts 385, 385 ("The stock, property and concerns of such company shall be managed by not less than three nor more than nine trustees . . . a majority of whom shall be citizens of this state . . . ."); Tenn. Code tit. 9, ch. 2, art. II, § 1448 (1858) ("No such corporation can be established or continued without at least three stockholders, a majority of whom shall be citizens of this State, and owners of the greater part of the stock."); Act of Jan. 8, 1853, ch. 490, No. 11, 1852 Fla. Laws 62, 62–63 (requiring "any ten or more persons, of whom at least five shall be residents of the State of Florida"); Act of Feb. 29, 1868, ch. 23, 1868 Kan. Sess. Laws 190, 192 ("The charter of an intended corporation must be subscribed by five or more persons, three of whom, at least, must be citizens of this state, and must be acknowledged by them before an officer duly authorized to take acknowledgements of deeds.").

[268] A related example is public licensure, which may perhaps be treated as a public privilege. See John Harrison, Executive Discretion in Administering the Government's Rights and the Delegation Problem 23–29 (Sept. 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3686204 [https://perma.cc/L9PJ-CE3T] (arguing that licensing schemes can be understood to be public rights). In *Austin v. State*, the Supreme Court of Missouri upheld a two-year residency as a condition of obtaining a liquor license against an Article IV challenge. 10 Mo. 591, 593–94 (1847), *overruled in part by* State v. Jaques, 68 Mo. 260 (1878). Because the Act prohibited the selling of liquor except "by certain persons, having certain qualifications specified in the law, it then becomes a municipal privilege, which may be only exercised by those persons who have the qualifications . . . ." Id. at 594. Because

2. Under State Privileges or Immunities Clauses

In the Jacksonian era, several states enacted "equal privileges or immunities" clauses in their state constitutions. These clauses were overwhelmingly aimed at "special privileges," and particularly corporate charters and monopolies. That suggests that such privileges were excluded from Article IV because they were not common to citizens in the several states but, like common property, equal access to them among a state's own citizens was understood to be a fundamental right. These provisions might also suggest that corporate privileges effectively became similar to "private rights" in that they were widely available and tended to serve private rather than public purposes.

Anthony Sanders has helpfully collected these state constitutional provisions.[269] In 1834 Tennessee adopted a new constitution that included the following provision:

> 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 who may be able to bring himself within the provisions of such law . . . .[270]

Immediately following is the proviso: "Provided always, The legislature shall have power to grant such charters of corporation as they may deem expedient for the public good."[271] The language and structure of this clause suggest that charters of incorporation would otherwise have been included within the term "rights, privileges, immunities, or exemptions."[272] That is what the state supreme court concluded, observing that "it is evident the Legislature would have been denied the

Article IV did not reach "political privileges," the court held, "there is the same reason for extending the limitation to municipal privileges." Id. Whether or not one agrees that a state can convert private rights into public privileges in this manner, the court's reasoning in *Austin v. State* supports the conclusion that comity rights do not reach public privileges.

[269] Anthony B. Sanders, "Privileges and/or Immunities" in State Constitutions Before the Fourteenth Amendment 15–18 (Oct. 1, 2018) (unpublished manuscript) (on file with author).

[270] 6 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 3439 (Francis Newton Thorpe ed., 1909) [hereinafter Federal and State Constitutions] (quoting Tenn. Const. of 1834, art. XI, § 7).

[271] Id.

[272] Id.

power of granting charters of incorporation without the proviso."[273] Public privileges and immunities, in other words, are privileges and immunities of state citizenship.

Indiana's constitution of 1851 provided: "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."[274] There was some debate on this clause, and its sponsor stated that it "destroys the monopoly principle . . . ."[275] Another delegate to the constitutional convention explained that "the proposition is a plain one, that there shall be no exclusive monopolies—no privileges granted to one man which shall not, under the same circumstances, belong to all men."[276] Yet another observed of the proposal that "[i]f [the legislature] grant a privilege to a corporation, they shall grant the same privilege to all other persons who ask for the privilege."[277] Illustrating with some examples, one delegate explained that under this provision, anyone who had sufficient capital to start a branch of the state bank should be able to do so under the same conditions applicable to other branches.[278] And any public contracts to operate ferries shall be open to all to "apply under the same circumstances and on similar terms."[279] Under this clause, in other words, "privileges or immunities" included public privileges.[280]

Ohio's constitution, also of 1851, provided that "[n]o special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."[281] The motivation appears to have been to move away from special acts of incorporation to more general incorporation laws. One delegate explained, "I contend that . . . corporate privileges are, more or less, special privileges . . . the granting by a

[273] State v. Armstrong, 35 Tenn. 634, 643 (1856).

[274] 2 Federal and State Constitutions, supra note 270, at 1075 (quoting Ind. Const. of 1851, art. I, § 23).

[275] 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1393 (1850).

[276] Id. at 1394.

[277] Id. at 1397.

[278] Id. at 1393.

[279] Id. at 1394.

[280] For the previous citations to the reports of the debates, I am indebted to Edward M. Mansfield & Conner L. Wasson, Exploring the Original Meaning of Article I, Section 6 of the Iowa Constitution, 66 Drake L. Rev. 147, 184 (2018). These materials are also discussed in *Collins v. Day*, 644 N.E.2d 72, 76–77 (Ind. 1994) and in Michael John DeBoer, Equality as a Fundamental Value in the Indiana Constitution, 38 Val. U. L. Rev. 489, 541–43 (2004).

[281] 5 Federal and State Constitutions, supra note 270, at 2913 (quoting Ohio Const. of 1851, art. I, § 2).

legislature of 'corporate privileges' is an enlargement and extension of a man's natural rights . . . ."[282] Another stated, "it is more truly republican, to establish a general law, by which every association of individuals may be governed; for thereby you take away that corrupting influence always attendant upon the granting of special privileges by a Legislature . . . ."[283] These statements are consistent with the movement in the Jacksonian era toward general incorporation laws because special corporate acts were deemed "special privileges."[284]

Iowa's constitution of 1857 provided: "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."[285] There was little debate on this clause, whose object, according to its sponsor, was "to prevent the Legislature from granting exclusive privileges to any class of citizens."[286] Oregon's constitution of the same year provided: "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."[287] There were no recorded debates or antebellum cases interpreting the clause.[288] In short, although corporate privileges were

[282] Official Reports of the Debates and Proceedings of the Ohio State Convention 314 (1851) (statement of Mr. Norris).

[283] Id. at 317 (statement of Mr. Dorsey).

[284] Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 73 ("During the Jacksonian period, special charters were denounced for their encouragement of legislative bribery, political favoritism, and, above all, monopoly. As a result, the movement for 'free incorporation' laws that would break the connection between the act of incorporation and political favoritism and corruption triumphed between 1850 and 1870."); Berk, supra note 248, at 1420 ("In the 1830s, Jacksonians attacked the special corporate charter as 'class legislation,' which created privilege and corrupted the state's obligation to act in the public interest. Instead of doing away with the corporate instrument altogether, Jacksonians opened the charter to all through general incorporation laws.").

[285] 2 Federal and State Constitutions, supra note 270, at 1137 (quoting Iowa Const. of 1857, art. I, § 6).

[286] Mansfield & Wasson, supra note 280, at 155–56 (2018) (quoting 1 The Debates of the Constitutional Convention of the State of Iowa, Assembled at Iowa City, Monday, January 19, 1857, at 200–01).

[287] 5 Federal and State Constitutions, supra note 270, at 2999 (quoting Or. Const. of 1857, art. I, § 21).

[288] Mansfield & Wasson, supra note 280, at 186. At this point, it is worth noting that New Jersey also had a similar clause dating back to 1776:

> [A]ll 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

excluded from the scope of Article IV, they were universally covered by state equal privileges or immunities clauses. The implications shall be considered in the next section.

III. RECONSTRUCTION

The previous two Parts demonstrated two central points: that "social rights" were not relevant to antebellum Article IV jurisprudence, and that "public rights" or "public privileges" were. This Part turns to Reconstruction. It begins, in Section III.A, by considering the text of the Privileges or Immunities Clause and asking whether public privileges might be included within its scope. Section III.B explores uses of the term "social rights" in the enacting Congress; it shows that the terms civil, political, and social rights were used in the Thirty-ninth Congress in a conventional manner. The exclusion of so-called "social rights" was introduced at this time by three members of Congress. One statement was made in passing, without discussion; another can be read consistently with the civil-political distinction; and the third was discussed and immediately questioned by those who knew better. Section III.C turns to the debate over what would become the Civil Rights Act of 1875, over the course of which several members of Congress sought to separate out "social rights" from the scope of the new Privileges or Immunities Clause. Even here, however, most of the discussion can be read consistently with the antebellum legal distinctions. The real debate was over whether access to common schools was a "privilege or immunity" of citizenship because it was a public privilege.

A. Public Rights and the Fourteenth Amendment

Part II demonstrated that public privileges did not fall within the scope of Article IV in the antebellum period for three overlapping reasons: First, public privileges depend on the circumstances and choices of a particular state and the state may in fact deny them altogether. In contrast, although regulations of natural rights varied from state to state, all states—and all free governments—did and had to guarantee these natural rights in some

> 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.

5 Federal and State Constitutions, supra note 270, at 2597–98 (quoting N.J. Const. of 1776, art. XIX).

form. Thus, public privileges were privileges and immunities of citizenship, as the Court suggested in *McCready v. Virginia*, but not common to citizens "in the several states."[289] Second, public rights, like natural resources and poor relief funds, are the common *property* of the state's citizens, and therefore access could not necessarily be shared in the same way that any person can exercise basic civil rights. Third, such common property was subject to resource exhaustion and could legitimately be reserved for those whose property it was and who pay into the public coffers.

Whether such public privileges are covered by the Fourteenth Amendment, which requires equality in the "privileges or immunities of citizens of the United States," is a difficult question. There are two reasons to think they might *not* be covered. The first is if public privileges, like political rights, are categorically excluded. Recall that political rights are excluded because they are not privileges and immunities of *citizenship*; not all citizens (like women and children) had political rights.[290] Perhaps public privileges are excluded for a slightly different reason: they are not "privileges and immunities" at all because they are not "rights" and are merely privileges within the public/private distinction.

The early sources relating to Article IV do not compel that conclusion. Although some public rights can never be shared—a corporate charter to operate a monopoly over the Charles River Bridge, or to operate a Bank of the United States—the kinds of public rights discussed above all operated like private rights. They belonged to all citizens because they were "common property." Some (like the poor laws) were financed through general taxation. And they all served private rather than public purposes, including corporate privileges after the dissemination of general incorporation statutes. That explains why such privileges were included within the scope of state equal privileges or immunities clauses, and why the Court in *McCready* described access to natural resources as a privilege and immunity of special citizenship. Some public privileges, in short, operate *like* private rights and are good candidates to be included within the privileges and immunities of citizenship.

The second reason poses a more difficult challenge. Even if public privileges are "privileges and immunities" of citizenship, they may not be

[289] 94 U.S. 391, 395–96 (1876); U.S. Const. art. IV, § 2, cl. 1.
[290] See supra notes 75–76 and accompanying text.

privileges and immunities "of citizens of the United States." That is, public privileges appertain to local or state citizenship but not to citizens of the United States everywhere. Recall that the overlap between Article IV and the Fourteenth Amendment is established by the historical record.[291] John Bingham, the principal author of Section 1 of the Fourteenth Amendment, routinely described the privileges and immunities guaranteed by Article IV as the privileges and immunities "of citizens of the United States."[292] These are the rights and privileges that *all* United States citizens have—the fundamental rights to contract, to acquire property, to free speech, and the like, subject to the states' respective positive law. If not all states had to guarantee public privileges like common schools or welfare benefits, then they cannot be privileges and immunities "of citizens of the United States" everywhere. Put another way, there is an overlap between Article IV and the Fourteenth Amendment, and if public privileges are excluded from the former, presumably they are excluded from the latter.

As Section III.C will show, however, most Republicans in the 1870s *did* think that the Privileges or Immunities Clause applied to public privileges.[293] Although a state did not have to provide public privileges at all, if it did choose to provide them, it had to do so equally. These members of Congress thought that it was a "civil right"—a private right—to enjoy public privileges financed through general taxation or the common resources of the state. Such privileges are unique to each state and can be excluded under Article IV, but the right of a state's own citizens to access whatever such privileges a state does offer is a fundamental right in all the states. The present inquiry is why they might have thought so. There are good arguments in support: Unlike the right to operate a monopoly over the Charles River Bridge or the Bank of the United States, access to commons existed in the state of nature. Additionally, the taxes that finance public rights come from the private property of individuals. And the use of these public privileges—the use of natural resources, claiming the benefit of the poor laws, and incorporating under a general incorporation statute—all serve private rather than public functions. They could be excluded from Article IV because the specific benefits were unique to each state, were the property of the state's own citizens, and could be reserved to avoid exhaustion.

[291] See supra Section I.A.
[292] See supra note 67.
[293] See infra Subsection III.C.2.

None of these limitations, however, apply to the Fourteenth Amendment, which prohibits discrimination among a state's own citizens.

Further, the cases on a state's "commons" strongly imply that the public resources and lands of the state are held in *common* for *all* of a state's citizens. And the state equal privileges or immunities clauses further suggest that antebellum Americans believed that if a state was going to grant public privileges to select citizens, it had to grant such privileges on equal terms to all citizens. More still, Justice Washington included "exemption from higher taxes or impositions than are paid by the other citizens of the state" as a "fundamental" right.[294] Presumably, this meant that the benefits and programs financed through taxation must also be equal, otherwise the taxation and impositions would not be equal. Few antebellum legal cases invalidated state or local taxes, but around the Civil War and through the nineteenth century, courts began enforcing a "public purpose" principle, invalidating such taxes that benefited private parties.[295] And in 1869, the National Convention of Colored Men of America adopted a resolution that complained of being denied natural rights; they included among their grievances that they "are taxed to support common schools while their children are denied the privilege of attending those in their respective wards."[296]

In sum, the right of a state's own citizens to access its commons and public resources, and certainly those financed through "compulsory contributions," can plausibly be defined as a "privilege or immunity" of citizens everywhere. The right would be excluded from Article IV because the specifics of that right would appertain only to a state's own citizens; but the right generally appertains to all citizens of the United States in their states and is therefore covered by the Fourteenth Amendment.

[294] Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825).

[295] Clyde E. Jacobs, Law Writers and the Courts 98–159 (1954); see also id. at 157–58 ("The judiciary obviously could not insist that every taxpayer receive equal benefits . . . . But the courts did require that the purposes for which taxes were levied and appropriations were made be such that there was a reasonable prospect that some direct benefit would or could accrue to the taxpayer as a member of the body politic.").

[296] Proceedings of the National Convention of the Colored Men of America 34 (1869), https://omeka.coloredconventions.org/items/show/452 [https://perma.cc/9SJM-QHZ8].

B. Social Rights: 1866–1868

Turning away from public privileges and back to social rights, it remains to be seen whence the tripartite distinction among civil, political, and social rights originated. Part I showed that social rights were not relevant to an Article IV analysis; this Part shows that the use of the terms "social rights" in the Thirty-ninth Congress was largely conventional.

The very first use of the term social rights in the Thirty-ninth Congress, on January 12, 1866, appeared in a debate over Black suffrage in the District of Columbia. Representative Zachariah Chandler of Michigan spoke to oppose granting suffrage to the Black citizens in the District. That some states at some points in time had allowed Black and female citizens to vote does not "disgrace" those who have been excluded from the vote.[297] "The right to vote," Chandler explained, "is a political and not a social right."[298] Here, Chandler appears to equate social rights with civil rights. The reason Congress can or should exclude Black citizens from voting is because it is a political right, and not a "social right"—that is, a right that every citizen has by virtue of the social compact.

On January 16, 1866, Representative George Julian of Indiana argued in favor of Black suffrage in the District. Responding to Chandler's argument, Julian argued that the right to vote was a natural right because "[t]he right of a man to a voice in the Government which deals with his liberty, his property, and his life is as natural, as inborn as any one of those enumerated by our fathers."[299] Julian argued that all natural rights were in fact social rights because the state of nature did not exist "save in the dreams of speculative writers."[300] Thus, he argued, one may call the right to vote a "natural *social* right."[301] Here, too, the term "social right" refers to all the rights persons have by the social compact. It is telling that Representative Julian wanted to describe the right to vote as a social right; presumably that is because social rights were the minimum persons could expect under the social compact. Representative George Boutwell of Massachusetts agreed with Julian, arguing that although the right to vote was not a natural right "like the right of locomotion" or "the right to breathe," it is a "natural social right."[302] "The natural social right,"

[297] Cong. Globe, 39th Cong., 1st Sess. 218 (1866).
[298] Id.
[299] Id. at 255.
[300] Id.
[301] Id. at 256.
[302] Id. at 287, 309.

Boutwell continued, "is the right of the family to speak in all matters which concern the welfare of the family as one family in the great society and family of man."[303] So far, so consistent.

Of particular interest is a discussion on February 3, 1866, over the provision of the Freedmen's Bureau bill that would have extended military protection in any jurisdiction where the ordinary course of judicial proceedings had been suspended, and where Black persons did not have the same "civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . ."[304] Representative Samuel Marshall of Illinois, in opposition, argued that he supposed "the right to sit upon juries is a civil right," and "the right to marry a white woman is a civil right which belongs to . . . white men . . . ."[305] Representative Samuel Moulton also of Illinois, in support of the law, denied that "it is a civil right for a white man to marry a black woman or for a black man to marry a white woman," because such were "matter[s] of taste, of contract, of arrangement between the parties."[306] He added that no person has a right to marry any other "particular" person, and then for good measure that no right was being denied anyway because the anti-miscegenation law "applies equally to the white man and the black man."[307] Sitting on a jury, further, was "not a civil right" because "you cannot enforce it by a civil writ."[308]

Representative Anthony Thornton of Illinois pushed the issue and asked whether "a marriage between a white man and a white woman is a civil right?"[309] The following exchange ensued:

> MR. MOULTON. It is not a civil right.
>
> MR. THORNTON. It is not?
>
> MR. MOULTON. No, sir, not in my opinion.

[303] Id. On January 22, Representative Edgar Cowan of Pennsylvania used the term differently. What good is the right of voting and holding office, he asked, "without social rights and social distinction?" Id. at 343. Here, he appears to use social rights and distinction to refer to social status generally, and not in any technical sense.

[304] Id. at 626, 632.

[305] Id. at 629.

[306] Id. at 632.

[307] Id.

[308] Id.

[309] Id.

> MR. THORNTON. Then what sort of a right is it?
>
> MR. MOULTON. Marriage is a contract between individuals competent to contract it.
>
> MR. THORNTON. Is it a political or a civil right?
>
> MR. MOULTON. It is a social right. I understand that a civil right is a right that a party is entitled to and that he can enforce by operation of law.
>
> MR. THORNTON. I would ask my colleague if marriages are not contracted in all the States of this Union by virtue of provisions of law?
>
> MR. MOULTON. I think, perhaps, they are to a greater or less extent.
>
> MR. THORNTON. Then is not a contract provided for by law a civil right?
>
> MR. MOULTON. It is not especially provided for by the law regulating it. The right to marry is a right which cannot be enforced. There are a great many things a man can do that are imperfect obligations which cannot be enforced by law, and hence are not civil rights contemplated by this bill.[310]

At this point, Representative Thornton read the civil rights language and maintained that "if the civil right of marriage was denied to a black man with a white woman," the government official denying the marriage license would be liable.[311] To which Representative Moulton repeated that "the right to marry is not strictly a right at all, because it rests in contract alone between the individuals, and no other person has a right to contract it."[312]

This discussion is instructive. Moulton describes marriage as an "imperfect obligation." This is the language natural law writers used to describe *moral* obligations that were not *legally* enforceable.[313] Justice Story wrote in his equity treatise that legal codes leave "many matters of natural justice wholly unprovided for" because of the "difficulty of framing any general rules to meet them, and from the doubtful nature of

[310] Id.
[311] Id.
[312] Id.
[313] I am indebted to Jud Campbell for alerting me to the possibility that this term was used by natural law writers.

the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness."[314] Emer de Vattel explained that obligations in natural law are either perfect or imperfect; the "perfect obligation is that which gives to the opposite party the right of compulsion; the imperfect gives him only a right to ask."[315] Other treatises offered similar definitions.[316]

If Moulton was using the term "imperfect obligation" in the same way as these treatise writers, then "social rights" was not something new, but rather a new term to describe a very old idea of legally unenforceable moral obligations. There would be nothing objectionable here in principle, only in Moulton's description of a marriage contract as an imperfect obligation. No one can "enforce by operation of law" the right to enter into a *specific* contract, but a marriage contract that has been entered into *can* be enforced by operation of law like any other contract—and in fact comes with a number of other enforceable legal obligations.[317] Thus Thomas Rutherforth described perfect and imperfect obligations in his natural law treatise, and a marriage contract had many perfect

[314] 1 Joseph Story, Commentaries on Equity Jurisprudence 2 (2d ed. 1839).

[315] Emer de Vattel, The Law of Nations; Or Principles of the Law of Nature, at lxii (Joseph Chitty ed., 1844) (1758) (emphases omitted).

[316] See, e.g., William Paley, The Principles of Moral and Political Philosophy 78–81 (3d ed. corrected 1786); Thomas Rutherforth, Institutes of Natural Law 27–34 (2d ed. 1779).

[317] Marriage is more than the contract to marry itself. Once entered into, the parties cannot contract around the various duties and obligations imposed by law. See Maynard v. Hill, 125 U.S. 190, 210–11 (1888) ("[W]hilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.").

obligations.[318] As Thornton himself recognized, marriage is no different than any other contract.[319]

Moulton was simply wrong on the merits, and his argument that marriage was an imperfect obligation was likely motivated by the need to win support. Moulton's deceptive innovation is to say that because choosing whom to marry involves an imperfect obligation between private persons, then when the state prohibits enforcement of a marriage contract that *has* been entered into, that, too, is an "imperfect" obligation or "social right" when in fact it involves what otherwise would be legally enforceable contractual matters and thus civil rights.

One well known discussion about the scope of civil rights occurred a few weeks later in relation to what would become the Civil Rights Act of 1866. The draft language provided that there was to be no discrimination "in civil rights or immunities" among citizens "on account of race, color, or previous condition of" servitude.[320] On March 1, 1866, the head of the judiciary committee, Representative James Wilson of Iowa, tried to assuage concerns that this would lead to complete social equality among the races. In defining the term "civil rights and immunities," he argued that they do not mean that "in all things civil, social, political, all citizens,

[318] Rutherforth, supra note 316, at 27–34 (describing perfect and imperfect obligations similarly to Vattel); id. at 303–50 (discussing marriage); id. at 330 ("[I]n this as in all other contracts, . . . the contract will become void, if either party deprives the other of what [s]uch contract has given him or her a perfect right to: where the agreement is broken on one [s]ide, the obligation cea[s]es on the other."); id. at 333 (describing prohibitions on adultery as a law of marriage that is a "perfect" obligation, whereas love and reverence for one another is an "imperfect" obligation). Paley also argues that adultery is "a civil injury; for which the imperfect [s]atisfaction that money can afford, may be recovered by the hu[s]band." Paley, supra note 316, at 259. The use of the word "imperfect" here is unfortunate, for Paley does not mean it is an imperfect obligation, but rather suggests that the victim could seek civil damages, and thus the injunction against adultery is a perfect obligation.

[319] Cong. Globe, 39th Cong., 1st Sess. 632 (1866). Or as James Fox has observed, also challenging the traditional trichotomy, "the right to contract was understood to include the right to the *marriage* contract," and moreover "the right to engage in a sphere of familial intimate relations may have had the greatest immediacy for former slaves: upon receiving freedom, former slaves overwhelmed Union army and administrative resources with demands to recognize marriages and to secure parental and other family rights." James W. Fox Jr., Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship, 13 Temp. Pol. & C.R. L. Rev. 455, 468 (2004); see also Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values 35 (1997) ("The formation of legally recognized marriage bonds signified treatment as a human being rather than as chattel—acceptance as people and as members of the political community.").

[320] Cong. Globe, 39th Cong., 1st Sess. 1117 (1866).

without distinction of race or color, shall be equal."[321] Suffrage, for example, would be excluded because that was a political right.[322] Nor do the words mean "that all citizens shall sit on the juries, or that their children shall attend the same schools," because "[t]hese are not civil rights or immunities."[323] Wilson then quoted Bouvier's law dictionary, which provided that "[c]ivil rights are those which have no relation to the establishment, support, or management of government."[324]

The reader will recall, however, that Bouvier's dictionary did not make any mention of social rights and distinguished civil rights from political rights, which *do* "consist in the power to participate, directly or indirectly, in the establishment or management of government," and include "the right of voting for public officers, and of being elected."[325] Arguably, Representative Wilson was merely restating the classic civil-political distinction. Voting is related to the "establishment" of government, holding office is related to the "management" of government, and serving on juries (and perhaps militia service) is related to the "support" of government. Under this definition, marriage and schools are certainly civil rights. It is possible that Wilson thought that access to common schools was not a civil right because it was merely a privilege, but he did not actually say that such schools would not be covered by the civil rights bill. He said only that the bill did not mean that white and Black children shall attend the *same* schools. This was a question on the merits—whether separate was in fact equal or discriminatory.[326]

A somewhat less instructive, but still suggestive, debate occurred over suffrage in the District of Columbia on December 12, 1866, and whether to strike the qualifier "male" from the right to vote.[327] Senator Gratz Brown of Missouri, who favored universal suffrage, argued that the "community is ripe for the declaration that all are created equal, and that

[321] Id.
[322] Id.
[323] Id.
[324] Id.
[325] Bouvier, supra note 90, at 484.
[326] At the end of the debate on that day, Representative George Shanklin of Kentucky notified his colleagues that he would move to amend the bill to add the proviso "[t]hat nothing in this act contained shall be so construed as to confer on any negro, mulatto, or Indian the right to vote at any election or to invest them with any other political or social rights not expressly named herein." Cong. Globe, 39th Cong., 1st Sess. 1120 (1866). It is unclear from this passage whether he is distinguishing civil, social, and political rights, or including all civil rights within social rights.
[327] Cong. Globe, 39th Cong., 2d Sess. 77–78 (1866).

there is no reason to exclude from any right, civil or political, on the ground of race or color."[328] Here, there is no mention of social rights, only the classic divide between civil and political.

Senator Garrett Davis of Kentucky, in opposition to the bill, argued that the radicals believe "that the negro must be the equal of the white man before the law, that he must have every legal right, every political and social privilege, everything to elevate his condition and destiny to that of the white man politically, civilly, and socially," and that "[i]f they are equal, they not only have the right to vote, but they have the right to be eligible to all offices; they not only have the right to civil protection and to enjoy all civil rights, but they are entitled also to all political and all social rights."[329] Davis thus did use the term "social rights," but it is unclear precisely to what the term referred, although he seemed to separate them for both political and civil rights.[330]

The last occurrence of the term "social rights" in Congress before the Fourteenth Amendment was ratified in July 1868[331] was by Senator Lyman Trumbull on June 5, 1868. In a debate over the readmission of certain states, Trumbull said that the judiciary committee wanted to make a condition of admission the same condition that was made for Arkansas, that there shall be no discrimination in the right to vote, but with the exception of the words "or any other rights."[332] Trumbull explained that there was no need for those words because "[t]he citizens of these States are protected in all their civil rights independent of this bill; and it might lead to a misconstruction or misapprehension as to what the words 'any

[328] Id.

[329] Id. at 80–81.

[330] In January of 1868, Senator Davis again used the term. He claimed that "[t]he negro is naturally indolent and improvident," and that it must be "very unpleasant and repulsive to gentlemen who contend for the equality of the races, for negro suffrage, and for negro civil and social rights, to have such a statement as this made." Cong. Globe, 40th Cong., 2d Sess. 349 (1868). Here, it is again unclear whether social rights are distinct from civil rights; they may in fact be the same. Davis used the terms "civil, political, and social rights and privileges" subsequently, again without defining them. See id. app. at 284 (1868). On January 11, 1868, Representative Michael Kerr of Indiana, in a discussion over naturalization of foreign citizens, mentioned the "civil and political and social rights of citizens in this country" without defining the terms. Cong. Globe, 40th Cong., 2d Sess. 467 (1868).

[331] It was ratified by the final state on July 16 and proclaimed on July 28. See Douglas H. Bryant, Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment, 53 Ala. L. Rev. 555, 573–76 (2002).

[332] The record is not entirely clear on the language of the Arkansas bill, but the fundamental condition was regarding the right to vote. Cong. Globe, 40th Cong., 2d Sess. 2858, 2390, 2399 (1868).

other right' meant."[333] More specifically, those words "might be construed by some persons as applying possibly to social rights, or rights in schools, which the Senator from Missouri"—who drafted the Arkansas condition—"did not intend."[334] Here is the clearest statement that "social rights" and "rights in schools" are different from civil and political rights, although it is not at all clear that the right to schooling is included within Trumbull's social rights category.

Stepping back to assess the evidence, the debates over suffrage in the District of Columbia show largely conventional uses of the terms civil, political, and social rights. Senator Trumbull's statement certainly excludes "rights in schools" from civil rights, but it is also not (yet) clear what kind of rights those otherwise are, and his statement was made in passing and no one commented upon it. Although Representative Wilson, in the debate over the civil rights bill, appears to have excluded the right to go to the *same* schools from the definition of civil rights, his statement is arguably consistent with the antebellum civil-political dichotomy as evidenced by Bouvier's law dictionary. His point may have been that although the term civil rights might cover schools, separate schools could still be equal schools. The only extensive discussion occurred when Representative Moulton, in an attempt to defend the bill from racist detractors, argued that marriage was not a civil right because it was merely a "contract." He was immediately called out for the incoherence of this position.[335]

C. School Desegregation: 1872–1875

If there is any evidence for a trichotomy, it is to be found in the debates over what would become the Civil Rights Act of 1875, the initial draft of which would have required desegregating public schools. Michael McConnell has thoroughly examined these debates and it will suffice to highlight the most relevant parts. McConnell describes the numerous statements of Democrats opposed to the bill who argued that although education was a civil right, *integration* was a social right.[336] This was not a dispute over whether education and marriage were civil rights, but rather an argument about whether keeping the races separate in matters of family

[333] Id. at 2858.

[334] Id.

[335] In the course of research, no relevant uses of the terms "public rights" or "public privileges" or "paupers" were found in the records of the Thirty-ninth and Fortieth Congresses.

[336] See McConnell, supra note 7, at 1014–23.

and schooling was in fact an "abridgement" of civil rights or not. Other opponents did argue that schooling in general or public education in particular was not a "civil right," but their argument was not that it was a social right instead. Best understood, their argument was that public schooling is a public privilege not falling within the privileges and immunities of citizenship.

1. Social Rights as Integration

Most opponents of the draft civil rights bill between 1872–1874 did not contend that education and marriage were not civil rights. They argued that *intermixing* the races was a "social right" and that the bill would force association between the races. "After we have secured to the negros by previous bills the right of suffrage and all the civil rights which belong to any man," Senator Francis Blair argued, "it is now proposed to give them social rights, to impose upon the whites of the community the necessity of a close association in all matters with the negroes."[337] As McConnell writes, Representative Robert Vance of North Carolina conceded that "the right to be educated out of moneys raised by taxation" is a "civil right," but the right to go to the "same school with white children, mixing the colored children and the white children in the same schools" was a "social right instead of a civil right."[338] Many other opponents of integration did not use the term "social rights" at all and merely argued that the bill would create social equality or eliminate social distinctions.[339]

As for the argument that integration was a "social right," that does not establish a new category of rights. It is rather an argument on the merits of the question whether separate is in fact equal, whether separate schools are an "abridgment" of Black citizens' civil rights. Representative Aylett Buckner of Missouri understood this. He argued that public accommodations and public schools were everywhere provided to

[337] Cong. Globe, 42d Cong., 2d Sess. 3251 (1872).

[338] McConnell, supra note 7, at 1015 (quoting 2 Cong. Rec. 555 (1874)).

[339] For example, Senator Thomas Norwood of Georgia argued that the bill implies there is "no distinction between the two races," and asked:

> [W]hat distinction will then exist between the whites and blacks in a social point of view? If they are educated together, if they grow up together, if they are in familiar association all the days of their lives, and are allowed to marry, what other distinction can there be drawn of a social nature that the Senator from Massachusetts can point out?

Cong. Globe, 42d Cong., 2d Sess. 819 (1872). Senator Eli Saulsbury of Delaware argued the bill "seeks to place them upon an equality socially." Id. app. at 9.

persons of both races.[340] But, he said, the civil rights bill seeks to have the two races sit at the "same desk" and the "same seat."[341] "It is not civil rights but social rights that it seeks to enforce and protect," he said.[342] He then asked:

> Can it be pretended when the State provides teachers and schools for the education of the future negro statesman, ample and sufficient for that purpose, that it discriminates against him, because he is taught in a school separate from the whites, male or female?
>
> Will it be said that any "immunity or privilege" of the African citizen is abridged, or that he is denied "the equal protection of the laws," when he is required to ride in a railroad car set apart for his special accommodation?[343]

Simply put, these members were not inventing a new category of rights excluded from the Fourteenth Amendment. They did not dispute that all persons had the privileges and immunities of schooling and marriage and travel in public accommodations. The argument was that separating the races was not an *abridgement* of those privileges and immunities.

To be sure, some members did seem to think that compelled *association* in public accommodations or common schools was a new "right," which they deemed a "social right." But this was dubious on the merits, at least if antebellum law is to be our guide. As Representative Chester Darrall of Louisiana said, quoting Confederate General Beauregard,

> It would not be denied that in traveling and at places of public resort we often share these privileges in common with thieves, prostitutes, gamblers, and others who have worse sins to answer for than the accident of color; but no one ever supposed that we thereby assented to the social equality of these people with ourselves. I therefore say that participation in these public privileges involves no question of social equality.[344]

[340] 2 Cong. Rec. 428 (1874).
[341] Id.
[342] Id.
[343] Id.
[344] Id. app. at 479.

Or, as Senator Daniel Pratt of Indiana declared, the bill does not give Black Americans "any of your peculiar social rights and privileges."[345] He explained, "if you will travel in a public conveyance, you must be content to share your convenience with the Indian, negro, Turk, Italian, Swede, Norwegian, or any other foreigner who avails himself of the same facility, because it is public, and should therefore be open to all."[346] And "if you choose to set down at a public table in a public inn open to all comers who behave themselves, you must be content to sit beside or opposite to somebody whose skin or language, manners or religion, may shock your sensibilities."[347]

In other words, association with supposedly less desirable individuals was always part of the civil right of access to public accommodations and public schools.[348] Compelled association *in public* was nothing new. But even if it were new, as Representative Buckner acknowledged, the question would still be whether recognizing this new "social right" would lead to inequality in the civil right. This was a question on the merits of

[345] 2 Cong. Rec. 4082 (1874).

[346] Id.

[347] Id.

[348] Bouvier's law dictionary explained that duties of "common carriers" include the duty "[t]o carry passengers whenever they offer themselves and are ready to pay for their transportation. They have no more right to refuse a passenger, if they have sufficient room and accommodation, than an innkeeper has to refuse a guest." 1 Bouvier's Law Dictionary, supra note 90, at 250. Kent's Commentaries similarly explained that common carriers "are bound to do what is required of them . . . if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action." 2 James Kent, Commentaries on American Law 599 (William M. Lacy ed., 1889). And as Justice John Harlan explained in dissent in the *Civil Rights Cases*:

> The rights which Congress, by the act of 1875, endeavored to secure and protect are legal, not social rights. The right, for instance, of a colored citizen to use the accommodations of a public highway, upon the same terms as are permitted to white citizens, is no more a social right than his right, under the law, to use the public streets of a city or a town, or a turnpike road, or a public market, or a post office, or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed. Scarcely a day passes without our seeing in this court-room citizens of the white and black races sitting side by side, watching the progress of our business. It would never occur to any one that the presence of a colored citizen in a court-house, or court-room, was an invasion of the social rights of white persons who may frequent such places.

109 U.S. 3, 59–60 (1883) (Harlan, J., dissenting).

whether separate was in fact equal—and, as Charles Black famously instructed, that question was easy.[349]

No one in these debates contended that marriage was not a civil right. Even the Court in *Plessy v. Ferguson* acknowledged that it was.[350] The question of whether anti-miscegenation laws were constitutional was a question on the merits—whether they in fact abridged the civil rights of Black citizens because they perpetuated white supremacy and were designed to keep Black citizens in a subordinate caste. On this score, other scholars have noted that "both proponents and opponents" of the Fourteenth Amendment "generally (though not unanimously) declared, acknowledged, or conspicuously failed to deny, that the Amendment would invalidate" anti-miscegenation laws.[351] And, of course, if the "social right" was the right to associate with whomever one chooses, then the anti-miscegenation laws violated this social right.[352]

But we need not rely on the views of the Reconstruction-era Republicans. We can rely on the racist antebellum legislators and jurists themselves. The fact that a Black person could not marry a white person was the key indicator to them that Black persons could not be considered equal to white persons. As Representative William Archer of Virginia, in the 1820 debate over Missouri's admission to statehood, stated in relation to "the engagement of marriage": "How could persons be said to belong to the same class who were every where prohibited by law from the contraction of any relation of intimacy, and from association, on the basis of social equality?"[353] And in *Dred Scott v. Sandford*, Chief Justice Taney

[349] Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424–27 (1960) (arguing that the social meaning of segregation as "the putting of the Negro in a position of walled-off inferiority" is a matter of "common notoriety," the ignoring of which would be "self-induced blindness").

[350] 163 U.S. 537, 545 (1896) ("Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State."). The Court was of course correct and should have stopped at the end of the sentence's first clause.

[351] David R. Upham, Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause, 42 Hastings Const. L.Q. 213, 216 (2015); McConnell, supra note 7, at 1019–20. Additionally, as Michael McConnell has pointed out, the Democrats' very arguments proved that separate was unequal. The idea that integration would impose "social equality" and that the Amendment does not require equality in "social rights" was a concession that separate was unequal—that keeping one race in subordination to another was the whole point of the segregation laws. Id. at 1016.

[352] McConnell, supra note 7, at 1020.

[353] 37 Annals of Cong. 585 (1820).

used the anti-miscegenation laws as the prime evidence of "the degraded condition of this unhappy race."[354]

2. Public Education as Public Privilege

Putting aside social rights, it might still be the case that common schools are not covered by the Privileges or Immunities Clause at all because they are public privileges and not private rights. Senator Lyman Trumbull of Illinois, who introduced the idea that schooling may be a social right in a cryptic statement in June 1868,[355] took a different approach in 1872. The following conversation took place between Trumbull and Senator George Edmunds of Vermont and Senator Oliver Morton of Indiana in May of that year:

> Mr. EDMUNDS. How about the right to go to a public school?
>
> Mr. TRUMBULL. The right to go to school is not a civil right and never was.
>
> Mr. EDMUNDS. What kind of a right is it?
>
> Mr. TRUMBULL. It is not a right.
>
> Mr. EDMUNDS. What is it?
>
> Mr. TRUMBULL. It is a privilege that you may have to go to school.
>
> . . .
>
> Mr. MORTON. I ask the Senator if the right to go to school is not a civil right, what kind of a right is it, or is it any right at all?
>
> Mr. TRUMBULL. It is not any right at all. It is a matter to be regulated by the localities.[356]

[354] 60 U.S. (19 How.) 393, 409 (1857); see also id. at 413 ("The law of 1786, like the law of 1705, forbids the marriage of any white person with any negro, Indian, or mulatto, and inflicts a penalty of fifty pounds upon any one who shall join them in marriage; and declares all such marriages absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy. And this mark of degradation was renewed, and again impressed upon the race, in the careful and deliberate preparation of their revised code published in 1836.").

[355] See supra notes 331–34 and accompanying text.

[356] Cong. Globe, 42d Cong., 2d Sess. 3189–90 (1872). Trumbull, however, may have distinguished social rights generally from civil and political rights again in 1872, even if he

Trumbull went on to explain that schooling is not a right because it "depends upon what the law of the locality is."[357] The term "civil rights," he said, "applies to the rights pertaining to the citizen as such," but "[t]here may be no schools at all in the State of Indiana or the District of Columbia."[358] He thus argued that education was a "right growing out of a privilege created by legislation."[359]

Representative Roger Mills of Texas echoed, "Are these fundamental rights? Are they uniform everywhere?"[360] And counsel for segregated schools in California argued in an 1874 case that "[t]he whole system is a beneficent State institution—a grand state charity—and surely those who create the charity have the undoubted right to nominate the beneficiaries of it."[361] Senator George Vickers of Maryland distinguished personal rights that can be pursued at one's "own expense," from "privileges" sustained by taxpayer support.[362]

Senator Trumbull and his colleagues appeared to be arguing that public education is not a civil right but is instead a "privilege" in the sense of the public-private distinction. As noted previously, there were good reasons to think that public privileges did not fall within Article IV, but that all United States citizens had a right to enjoy public privileges financed through general taxation if their states chose to provide such privileges.

That is precisely what proponents of the bill argued. Senator Morton of Indiana explained in response to Trumbull that the bill required only that where there are "free schools kept at public expense," then "there shall be an equal right to participate in the benefit of those schools created by common taxation."[363] If anything, "where schools are maintained and supported by money collected by taxation upon everybody," then that is all the more justification for "an equal right to participate in those schools."[364] A few weeks earlier Senator George of Vermont admitted that a common school was a "creature of the law," but argued that that

thought education was not a "right" at all. Earlier in 1872 he had stated that the 1866 Civil Rights Act was "confined exclusively to civil rights and nothing else, no political and no social rights." Id. at 901.

[357] Id. at 3190.

[358] Id. at 3191.

[359] Id.

[360] 2 Cong. Rec. 385 (1874).

[361] Ward v. Flood, 48 Cal. 36, 40 (1874).

[362] Cong. Globe, 42d Cong., 2d Sess. app. at 42 (1872).

[363] Id. at 3191.

[364] Id.

"*when* the law sets up a common school," there must be equality.[365] And Senator John Sherman of Ohio added that because "[a]ll contribute to the taxes" for common schools, "all are entitled to equal privileges in the public schools."[366]

Senator Charles Sumner similarly argued that common schools must indeed be "common" to all because they are "sustained by taxation to which all contribute."[367] Senator Matthew Carpenter of Wisconsin stated that because schools are "supported by law and maintained by general taxation," they must be open to all.[368] As McConnell has written, even opponents recognized the force of this argument.[369] Representative Robert Vance of North Carolina argued, "the right to be educated out of moneys raised by taxation" is "[o]ne of the civil rights of the colored man."[370] This argument shows why public privileges should not be understood to be excluded from the Privileges or Immunities Clause. A key reason they were excluded from Article IV was precisely because it was the citizens of a particular state that contributed to the poor funds or the common schools. This reason does not apply to the Privileges or Immunities Clause, which requires equality among a state's own citizens, all of whom contribute taxes and which taxes must also, as Justice Washington stated, be equal.

* * *

Part III has demonstrated that the civil, political, and social rights trichotomy does not deserve the weight it has received. The trichotomy was unknown to the antebellum period and aside from one cryptic statement from Senator Trumbull in 1868, the only evidence from the drafting and ratification period is an 1866 statement from Representative Moulton, who argued that marriage was a social right and was immediately called out for the incoherence of this position.[371] This Part has also shown, however, that the trichotomy is not necessarily justified by the discussions in 1872–1875. The vast majority of the uses of the term "social rights" were in reference to the argument that marriage and education were civil rights, but the Amendment did not compel the

[365] Id. app. at 26 (emphasis added).
[366] Id. at 844.
[367] Id. at 384.
[368] Id. at 763.
[369] McConnell, supra note 7, at 1042–43.
[370] 2 Cong. Rec. 555 (1874).
[371] See supra notes 304–12 and accompanying text.

intermixing of the races. This was a question on the merits: Was keeping the races separate in matters of schooling and family an abridgment of these civil rights? Was it a discrimination? The real argument was over whether public schooling is covered by the Privileges or Immunities Clause because it is a public privilege. As numerous Senators and Representatives noted, all citizens contribute to the provision of public privileges through general taxation. Such rights can be reserved to a state's own citizens, but among those citizens there can be no discrimination.

CONCLUSION

There is little evidence supporting the weight scholars have given the conventional Reconstruction-era trichotomy among civil, political, and social rights. This trichotomy was nonexistent in antebellum law, and certainly nonexistent under Article IV, the direct precursor to the Privileges or Immunities Clause. The only statements ever made in support of the proposition that marriage or education was a social right were Representative Moulton's in 1866, the incoherence of which was immediately criticized, and Senator Trumbull's cryptic statement from 1868 in the context of readmitting seceded states. The distinctions instead centered on civil and political rights on the one hand, and private rights and public privileges on the other.

With this corrective, the application to school desegregation and anti-miscegenation laws is obvious. As noted, there was no doubt that the right to marry was a civil right; it is certainly not a political right nor a public privilege. The Privileges or Immunities Clause therefore applies to marriage. And, as Chief Justice Taney himself declared, the anti-miscegenation laws perpetuated inequality.[372] As for public education, that was a public privilege excluded from the scope of Article IV but within the scope of the Privileges or Immunities Clause. Whether separate but equal was in fact equal was a merits question, and an easy one at that.[373]

The approach of this Article is a more reliable guide to original meaning. In assessing whether the Fourteenth Amendment requires desegregating public school and invalidating the anti-miscegenation laws, one must answer two questions: whether marriage and public schools fall

[372] See supra note 354 and accompanying text.
[373] See supra notes 348–52 and accompanying text.

within the scope of the Amendment, and whether separating the races is or is not an abridgement. The legislative history and the original expected application are unreliable guides to the first question. Stray statements in the legislative history reveal that some perhaps thought that interracial marriage and integrated education fell within a new category of social rights. But these statements were cryptic or incoherent, the product of motivated reasoning, and few and far between.

The legal history of the term privileges and immunities of citizenship is a surer guide. That history demonstrates that the important division was between civil and political rights on the one hand and private rights and public privileges on the other. With these dichotomies in view, it becomes apparent that most of the legislative history and the specific statements and understandings of informed members of the public were in fact consistent with the legal history. In some instances, legal meaning and public understanding might diverge, and perhaps the public understanding should prevail.[374] That is not a dilemma scholars face here.

[374] Currie, supra note 12, at 132 (argument by Daniel Webster that the term "bankruptcy" should not be understood in its restricted legal sense, but in its "common and popular sense—in that sense in which the people may be supposed to have understood it when they ratified the Constitution").