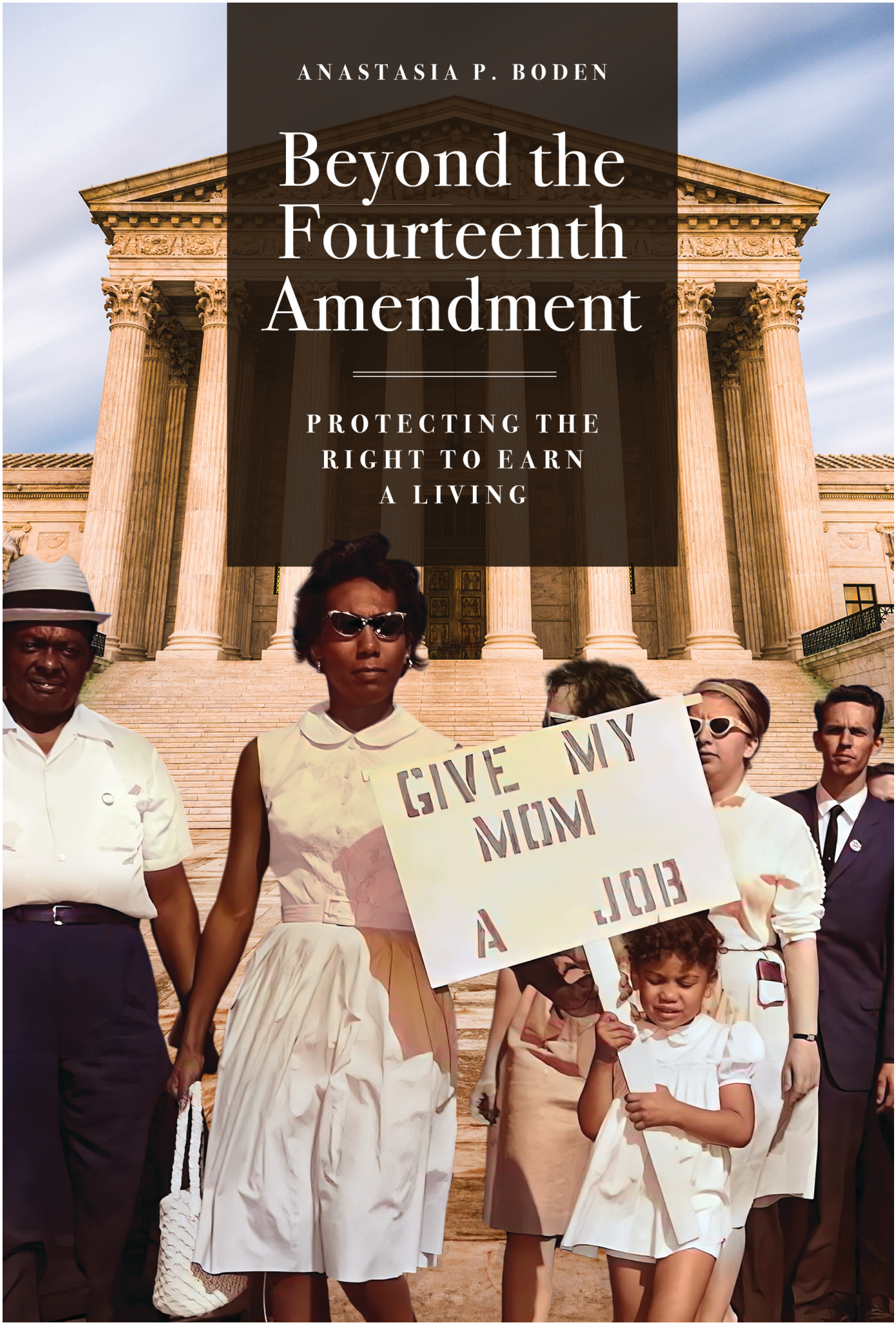
ANASTASIA P. BODEN

Beyond the Fourteenth Amendment

PROTECTING THE RIGHT TO EARN A LIVING



Protecting Economic Liberty under Both Article IV and the Fourteenth Amendment

By Skylar Croy and Daniel P. Lennington*

INTRODUCTION

James Madison wrote that a "just government" necessarily protects economic liberty.[1] Echoing this sentiment, Thomas Jefferson explained a few years later that "a wise and frugal government . . . shall not take from the mouth of labor the bread it has earned."[2] Their emphasis on economic liberty was well supported by the common law dating back centuries.[3] In 1614, for example, English courts held that people had a right to enter certain professions without first completing an apprenticeship,[4] and about a decade later, another English court invalidated an ordinance granting a monopoly to a

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1. James Madison, *Property* (1792), *in* JAMES MADISON: WRITINGS 515, 516 (1999).

2. Thomas Jefferson, President, First Inaugural Address (Mar. 4, 1801), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004.

3. Timothy Sandefur, *The Right to Earn a Living*, 6 CHAPMAN L. REV. 207, 209 (2003).

4. The Case of the Tailors, &c. of Ipswich, 77 Eng. Rep. 1218 (K.B. 1614); *see also* Allen v. Tooley, 80 Eng. Rep. 1055 (K.B. 1614).

chimney-repair company.[5] In one of these cases, the great jurist Sir Edward Coke explained that "no man could be prohibited from working in any lawful trade, for the law abhors idleness. . . ."[6] In the eighteenth century, Sir William Blackstone explained that the common law demanded that "every man might use what trade he pleased," and a statute in degradation of this principle was "general[ly] confined."[7] In America's first hundred years, court after court protected economic liberty.[8] Modern jurists and scholars, including the Goldwater Institute's Timothy Sandefur, have chronicled the historical record at length, and their work defies any notion that economic liberty is a newfound legal concept.[9]

Against this backdrop, the lack of significant and well recognized constitutional protection for economic liberty in modern jurisprudence is surprising. Section 1 of the Fourteenth Amendment contains two clauses often cited in discussions about economic liberty—the Privileges or Immunities Clause and the Due Process Clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." Under the Privileges or Immunities Clause, economic liberty as a constitutional right never had much of a chance. In 1873, just five years after adoption of the Fourteenth Amendment, the U.S. Supreme Court narrowly construed the Privileges or Immunities Clause in the *Slaughter-House* decision.[10] The Court held that the clause protects only rights that are "placed under the special care of the Federal government."[11] In a decision about two decades after *Slaughter-House*, the Court indicated that one such right could be the right to "carry on interstate commerce,"[12] but the

5. Les Brick-Layers & Tilers v. Les Plaisterers, 81 Eng. Rep. 871, 872 (K.B. 1624).

6. Tailors of Ipswich, 77 Eng. Rep. at 1219; *see also* Colgate v. Bacheler, 78 Eng. Rep. 1097, 1097 (K.B. 1602) (explaining a person "ought not to be abridged of his trade and living").

7. 1 William Blackstone, Commentaries *427–28.

8. Sandefur, *supra* note 3, at 225–27 (collecting decisions).

9. *See generally* Golden Glow Tanning Salon, Inc. v. Columbus, 52 F.4th 974, 982–84 (2022) (Ho, J., concurring); Porter v. State, 913 N.W.2d 842, 855–59 (Wis. 2018) (Rebecca Grassl Bradley & Kelly, J. J., dissenting); Sandefur, *supra* note 3.

10. Slaughter-House Cases, 83 U.S. 36 (1873).

11. *Id.* at 78.

12. Crutcher v. Kentucky, 141 U.S. 47, 57 (1891) ("To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution. . . .").

concept of "interstate commerce" then was much more limited than it has become, and the Court's jurisprudence on the Privileges or Immunities Clause has not kept pace.[13] Now, courts across the country routinely—and typically, without much thought—hold that "the right to earn a living in a lawful occupation of one's choice" is not protected by the clause.[14] In fact, scholars have characterized the clause as "contribut[ing] next to nothing to contemporary law."[15] Ouch. As the Fifth Circuit recently noted, the Due Process Clause was once used "aggressive[ly]" to "review . . . state regulation of business"; however, since the Progressive Era of the early 20th century, courts have generally upheld restrictions on economic liberty for merely having a rational basis,[16] as if economic liberty does not implicate fundamental rights like the right to earn a living.[17]

While the Privileges or Immunity Clause has been narrowly construed, the U.S. Supreme Court has never imposed such a cramped construction on the Privileges and Immunities Clause of Article IV, Section 2, which reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States." In this article, to avoid confusion, the Privileges or Immunities Clause is referred to as the "Fourteenth Amendment Clause" and the Privileges and Immunities Clause as the "Article IV Clause." Usually, similar language is given a similar construction,[18] but these two clauses, despite textual similarities, are treated quite differently.[19]

As currently construed, the Article IV Clause protects some aspects of economic liberty to a much greater degree than the Due Process Clause, making the Article IV Clause

13. Although it is not the focus of this article, one way to protect economic liberty might be to rely on the ever-expanding definition of "interstate commerce," which is now understood to cover just about everything even related to commerce. *See generally* Wickard v. Filburn, 317 U.S. 111 (1942).

14. Newell-Davis v. Phillips, No. 22–30166, 2023 WL 1880000, at *2, 6 (5th Cir. Feb. 10, 2023), *cert. denied*, 144 S. Ct. 98.

15. Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter & Spirit 41 (2021).

16. St. Joseph Abbey v. Castille, 712 F.3d 215, 221–27 (5th Cir. 2013); *see also* David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 Yale L.J. Forum 287 (2016).

17. *But see infra* Part I (explaining the right to earn a living has been considered a fundamental right in other contexts).

18. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012).

19. *Slaughter-House*, 83 U.S. at 73–79; *see also* United States v. Cruikshank, 92 U.S. (2 Otto) 542, 549 (1875).

unique. For example, in *Supreme Court of Virginia v. Friedman*, the U.S. Supreme Court stated that "the practice of law, like other occupations[,] . . . is sufficiently basic to the national economy to be deemed a privilege protected by the [c]lause."[20] In another decision, the Court explained that "the pursuit of a common calling is one of the most fundamental . . . privileges" safeguarded by the clause.[21] Problematically though, under current jurisprudence, even if a right is among those protected by the clause, the clause is irrelevant unless a state is treating its own residents better than nonresidents.[22] In other words, the Article IV Clause is relegated to preventing discrimination by states; it is not a robust protection of right in all circumstances. So, while its jurisprudence supports economic liberty, the Article IV Clause can be applied only in relatively narrow circumstances. In contrast, the rights protected by the Fourteenth Amendment Clause, while fewer, can be protected even in the absence of discrimination.

Relying on the Article IV Clause, this article proposes a litigation strategy that could be employed to persuade the U.S. Supreme Court that the Fourteenth Amendment Clause protects economic liberty. This strategy suggests working within existing doctrinal frameworks by first bringing more economic liberty cases under the Article IV Clause. Cases that involve the rights to engage in interstate commerce and travel may be ideal because these rights touch on national issues, thereby roughly fitting within the doctrinal framework laid out in *Slaughter-House* for the Fourteenth Amendment Clause.[23] After building on existing Article IV Clause jurisprudence, step 2 is to highlight textual similarities, historical sources, and precedential reasons that the Fourteenth Amendment Clause and the Article IV Clause should be construed to protect largely the same set of rights. The overlap between the rights protected by these clauses should be much more than it presently is. Under this strategy, bringing a step-2 case under the Fourteenth Amendment Clause nearly identical to a previously successful step-1 case under the Article IV Clause would force any court (and eventually the U.S. Supreme Court) to confront this fundamental question: How can a "privilege" or "immunity" clearly protected

20. Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 66 (1988).

21. United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of the City of Camden, 465 U.S. 208, 219 (1984).

22. *E.g.*, Toomer v. Witsell, 334 U.S. 385, 395–96 (1948).

23. *Slaughter-House*, 83 U.S. at 79–80.

by Article IV *not* also be a "privilege" or "immunity" protected under the Fourteenth Amendment?

Overall, the goal of this litigation strategy is to move the Supreme Court gradually toward recognizing the similarities between the two clauses, rather than calling for an immediate rejection of *Slaughter-House*, which the Court appears unwilling to do. Indeed, in 2023, the Court denied a petition for certiorari explicitly asking it to overrule *Slaughter-House*.[24] That denial does not bode well for any nonincrementalist approach, and so, this article proposes an incremental one.

I. AN OVERVIEW OF THE ARTICLE IV CLAUSE

In 1978, the U.S. Supreme Court recognized that the Article IV Clause "has been overshadowed" by the Fourteenth Amendment Clause, which contains "similar language."[25] The Article IV Clause, the Court said, "is not one the contours of which have been precisely shaped by the process and war of constant litigation and judicial interpretation. . . ."[26] In contrast, the Fourteenth Amendment Clause has been studied extensively, perhaps because scholars recognize its potential to resolve many perceived problems.[27] The Court questioned the relationship between the two clauses, noting their "relationship, if any," was "less than clear."[28]

Since then, scholars have dedicated significant time to documenting the original understanding of the Article IV Clause and its relation to the Fourteenth Amendment Clause.[29] The Article IV Clause, like most of Article IV, deals with interstate relations.[30] It is like a provision in the Articles of Confederation, which read:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to

24. *Newell-Davis*, 144 S. Ct. 98.

25. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 379 (1978).

26. *Id.*

27. *Id.* at 379–80; *see also* BARNETT & BERNICK, *supra* 15, at 41.

28. *Baldwin*, 436 U.S. at 380.

29. *E.g.*, BARNETT & BERNICK, *supra* note 15, at 54–60.

30. *Baldwin*, 436 U.S. at 379.

> all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.[31]

Notably, this provision explicitly protected "all the privileges of trade and commerce." The absence of such language in the Article IV Clause should not be understood as indicating it does not protect economic liberty. As an 1821 decision explained, "There was . . . objection" to the provision; specifically, it "employ[ed] the most comprehensive words" after "privileges and immunities," which potentially "weakened the force of those terms" through enumeration.[32]

The Article IV Clause was not discussed much at the Constitutional Convention, likely because it was so similar to the provision in the Articles of Confederation;[33] however, at the convention, James Wilson, a natural law scholar, summarized the provision in the Articles of Consideration as "making the Citizens of one State Citizens of all."[34]A reference in *The Federalist* confirms that the clause, like the provision, was meant to promote comity[35] and specifically "the equal treatment of citizens."[36] Given this history, the U.S. Supreme Court has described the clause as merely a shorter version of the provision,[37] although scholars have noted a few key differences of little relevance for the purpose of

31. Articles of Confederation of 1781, art. IV, ¶ 1.

32. Douglass v. Stephens, 1 Del. Ch. 465, 469 (1821).

33. David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 Case W. Res. L. Rev. 794, 840 (1987).

34. *Madison Debates* (Aug. 13, 1787), Avalon Project, https://avalon.law.yale.edu/18th_century/debates_813.asp#1.

35. The Federalist No. 80 (Alexander Hamilton) (calling the clause "the basis of the Union").

36. Barnett & Bernick, *supra* note 15, at 56.

37. Austin v. New Hampshire, 420 U.S. 656, 660–61 (1975).

this article (e.g., the Article IV Clause has been called more "egalitarian" because "[i]t removed the exclusion of 'paupers' and 'vagabonds'").[38]

The Article IV Clause, on its face, and given its history and purpose, could be read to effectively prohibit all discrimination by a state in favor of its own residents; however, in an early decision, *Corfield v. Coryell*, a Justice riding circuit construed the clause to protect only some "fundamental" rights.[39] New Jersey prohibited nonresidents from "taking oysters" within its waters, which the court concluded was not a right protected by the clause because "[t]he oyster beds . . . might be totally exhausted and destroyed if the [state] legislature could not so regulate the use of them. . . ."[40] The court, however, provided an expansive, nonexclusive list of rights protected by the clause:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; 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. . . .[41]

Other decisions similarly use broad language in describing rights protected by the clause, while acknowledging it does not require absolute equal treatment—no one seriously thinks that a state could not prohibit nonresidents from voting in state elections, for example.[42]

Corfield has been exceedingly influential; it has been described as a "landmark opinion" by two scholars.[43] Another scholar went so far as to say, hyperbolically, that "every

38. Barnett & Bernick, *supra* note 15, at 55.

39. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Penn. 1823).

40. *Id.* at 552.

41. *Id.* at 551–52.

42. *See, e.g.*, *Douglass*, 1 Del. Ch. at 468–69; Murray v. McCarty, 16 Va. (2 Munf.) 393, 396–98 (1811) (Cabell, J., seriatim).

43. Barnett & Bernick, *supra* note 15, at 44.

court paid homage to its fundamental rights interpretation of the clause."[44] Notably, *Corfield* is hardly ever cited for its specific conclusion about taking oysters; instead, it is generally cited for the broad list of rights the court concluded were protected by the clause.

Consistent with *Corfield*, to this day, Article IV Clause jurisprudence requires a "two-step" analysis: (1) determine if a right is within the purview of the clause (a lot of rights are); and then (2) determine whether the state is discriminating in favor of its own residents, and if it is, whether the degree of differing treatment is justifiable—that is, whether it promotes "a substantial state interest."[45] Step 2 has been described as "at least as demanding as intermediate scrutiny," a test developed to deal with sex discrimination.[46]

Notably, not everyone has agreed that the Article IV Clause is about discrimination.[47] A particularly important figure in the mid-nineteenth century had a different understanding of the Article IV Clause. Representative John Bingham, who would later become the primary drafter of the Fourteenth Amendment Clause, gave a speech in 1859 opposing Oregon's admission to the Union—he was primarily concerned about racist provisions within the proposed state constitution.[48] These provisions applied to the detriment of not just nonresidents but also Black residents.[49] Representative Bingham argued that these provisions violated the Article IV Clause, which he said should be read as follows: "The citizens of each State shall be entitled to all privileges and immunities of citizens [of the United States] in the several States." This understanding of the clause is particularly relevant to this article, as Representative Bingham would go on to use the phrase "privileges or immunities of citizens of the United States" in drafting the Fourteenth Amendment Clause.[50] In his words,

44. Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 12 (1967).

45. *Friedman*, 487 U.S. at 64–65; *see also Toomer*, 334 U.S. at 396.

46. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 454 (1982).

47. *See generally* Antieau, *supra* note 44.

48. John Bingham, *Speech Opposing the Admission of Oregon* (1859), *in* 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 152, 152 (Kurt T. Lash ed., 2021).

49. *Id.*

50. *See infra* Part II.

> The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of the citizens in the several States." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is "the privileges and immunities of citizens of the United States in the several States" that it guaranties.[51]

Consistent with *Corfield*, Representative Bingham also described the rights protected using broad language, referencing "natural rights" four times.[52] He described "natural rights" as "those rights common to all men, and to protect which, not to confer, all good governments are instituted. . . ."[53] He then explained, "I cannot . . . consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights. . . ."[54] He explicitly referenced the "the right . . . to work and enjoy the product of . . . toil" as "the rock on which the Constitution rests."[55]

Representative Bingham did not persuade his colleagues, and Oregon became a state, with its discriminatory constitution unchanged.[56] His speech, however, supports the argument that he (as the primary drafter of the Fourteenth Amendment Clause) wanted natural rights protected—he did not view the "privileges and immunities" of United States citizenship narrowly at all. To him, the Article IV Clause protected the natural rights of all citizens—it was not about state discrimination against nonresidents.

Representative Bingham was not alone in this view, although it was not a widely held position during the nation's early years.[57] Moreover, this expansive view of "privileges

51. Bingham, *supra* note 48, at 153.

52. *Id.* at 154–56.

53. *Id.* at 156.

54. *Id.*

55. *Id.*

56. *Id.* at 156 n.*.

57. BARNETT & BERNICK, *supra* note 15, at 57. *Contra* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 636 (1994) (claiming "while *Corfield* had up to that time been generally understood to protect the rights

and immunities" became more prominent around the time that the Fourteenth Amendment Clause came into existence.[58]

Notably, in the infamous *Dred Scott v. Sandford* decision, the U.S. Supreme Court endorsed this reading, decrying that if Black people could be citizens of the United States, then they would have substantive constitutional rights under the Article IV Clause, including the right to sue in federal court.[59] In the Court's view, the phrase "citizens in the several states" meant "people of the United States" in the several states, and Black people were not among "this people."[60] The Court expressly decided that a citizen of one state may "not be entitled to the rights and privileges of a citizen in any other State" because the Article IV Clause protects only a "citizen of the United States."[61] The Court reached an abhorrent outcome based on consequentialist reasoning; however, as one scholar stated, "[I]sn't it beyond dubiety" that even the *Dred Scott* Court thought "the privileges and immunities" protected by the clause were not about discriminatory treatment?[62] In other words, if the Article IV Clause did not protect fundamental rights, then why was the Court concerned about whether Black people could make use of it? Obviously, the *Dred Scott* Court was concerned about the power of the clause and its ability to confer rights on Black people.

In 1868, the U.S. Supreme Court, in *Paul v. Virginia*, indicated that the Article IV Clause does not protect all citizens' substantive fundamental rights but rather those rights recognized by the state in question (although it did not address *Dred Scott*).[63] Despite some scholarly criticism,[64] the validity of this portion of *Paul* has not been seriously questioned by the Court; accordingly, as already explained, while many rights are within the Article IV Clause's purview, discriminatory treatment is necessary for a successful claim.

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of national citizens, . . . [the U.S. Supreme Court in *Slaughter-House*] made it appear that it had protected rights of state citizens").

58. *See infra* Part II.

59. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–07 (1857), *superseded by* U.S. Const. amend. XIV, § 1.

60. *Id.* at 404, 406.

61. *Id.* at 405.

62. Antieau, *supra* note 44, at 12.

63. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868), *overruled on other grounds*, United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).

64. Antieau, *supra* note 44.

Even still, the U.S. Supreme Court has a long history of declaring various statutes that burden the right to earn a living unenforceable under the Article IV Clause. In 1871—just a few years after the Fourteenth Amendment was adopted—the U.S. Supreme Court held unenforceable a state law that required nonresidents to pay more for a license to trade in foreign goods.[65] As the Court stated in this seminal decision, "[T]he clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation. . . ."[66]

In 1948, in *Toomer v. Witsell*, the U.S. Supreme Court held unconstitutional a state law that required nonresidents to pay more for a commercial fishing license.[67] The Court focused on the step 2 analysis (whether the degree of discriminatory treatment was justifiable), considering step 1 well settled by existing precedent: "In line with . . . [the Article IV Clause's] purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State."[68] The Court did not address *Corfield*, but its holding indicates that the *Corfield* court's specific conclusion about taking oysters was incorrect.

In 1952, the U.S. Supreme Court held invalid a scheme in the Alaska Territory that required nonresidents to pay more for a commercial fishing license even though it was not a state.[69] Technically, the decision was not about the Article IV Clause but rather a federal statute; however, the Court "presumed" that Congress would not have authorized a territory to treat nonresidents worse, discussing *Toomer* at length.[70]

In 1978, the U.S. Supreme Court held unconstitutional a statute that required residents to be given preferential hiring treatment for positions in the oil and gas industry.[71] In this decision, the Court used some of its clearest language about the right to earn a living:

65. Ward v. Maryland, 79 U.S. 418 (1871).

66. *Id.* at 430.

67. *Toomer*, 334 U.S. at 395.

68. *Id.* at 396.

69. Mullaney v. Anderson, 342 U.S. 415 (1952).

70. *Id.* at 417–20.

71. Hicklin v. Orbeck, 437 U.S. 518 (1978).

"Appellants' appeal to the protection of the [c]lause is strongly supported by this Court's decisions holding violative of the [c]lause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State."[72]

In 1984, the U.S. Supreme Court reversed a judgment of a state supreme court because the state court had reasoned that the Article IV Clause was inapplicable to a municipal ordinance requiring 40 percent of "the employees of contractors and subcontractors working on city construction projects be" residents of the municipality.[73] The municipality, the City of Camden, New Jersey, is located right on the border of Philadelphia, Pennsylvania, which made the state court's reasoning that the "ordinance discriminates on the basis of municipal, not state, residency," seem absurd; the U.S. Supreme Court strongly condemned any distinction between state and municipal law for the purpose of deciding Article IV Clause claims.[74] The Court said that "[m]any, if not most," of its precedents on the Article IV Clause have dealt with "the pursuit of a common calling," which the Court characterized as a "basic and essential activity."[75] "Public employment," the Court held, was merely "a subspecies of the broader opportunity to pursue a common calling."[76]

In the last two decades, several lower courts have recognized the importance of the Article IV Clause in protecting economic liberty, including the right to earn a living. For example, in 2002, the District of Massachusetts enjoined an ordinance that required 50 percent of construction work hours on public works projects to be performed by city residents, noting that "[i]t is the purpose of the [Article IV] Clause to protect . . . the rights of citizens to pursue a common calling. . . ."[77]

72. *Id.* at 524.

73. *United Bldg.*, 465 U.S. at 210.

74. *Id.* at 210, 215–16.

75. *Id.* at 219.

76. *Id.*

77. Utility Contractors Ass'n of New England, Inc. v. City of Worcester, 236 F. Supp. 2d 113, 117 (D. Mass. 2002).

In 2003, Connecticut residents challenged a "[n]onresident Lobster Law" in New York, which affected their "lawful pursuit of livelihood—commercial lobstering."[78] The Second Circuit agreed with their claim that the law violated the Article IV Clause.[79]

More recently, in *Brusznicki v. Prince George's County*, a 2022 decision, the Fourth Circuit considered a Maryland statute that directed counties "to offer defaulted properties to a select class of people (comprising largely those living and holding government positions there) before listing the properties for regular public auction."[80] Three plaintiffs "in the business of purchasing tax-lien certificates" and who were not in that class sued, claiming the statute violated the Article IV Clause.[81] They argued the statute violated their "fundamental rights to own property and pursue a chosen profession"—the Fourth Circuit agreed.[82] In its words, "Plaintiffs wish to purchase property largely for commercial ends," which fell within "the right to a common calling" as "broadly" conceptualized in Article IV Clause jurisprudence.[83]

In summary, while much may be unclear about the Article IV Clause, one thing is clear: at step 1, the clause protects economic liberty, including the right to earn a living.[84]

These decisions often emphasize that economic liberty is critical to the national economy, which is in turn critical to national unity. In *Supreme Court of New Hampshire v. Piper*, a 1985 decision, the U.S. Supreme Court said that an attorney has a "fundamental right" to "practice law" that is protected by the Article IV Clause.[85] It emphasized the role that attorneys play in the "national economy," noting that "activities of lawyers play an important part in commercial intercourse."[86] Three years later, in *Friedman*, the Court summarized its decision in *Piper* as applicable to "other occupations," so long as they are "sufficiently basic to the national economy to be deemed a privilege protected by the

78. Connecticut ex rel. Blumenthal v. Crotty, 346 F.3d 84, 89, 96 (2d Cir. 2003).

79. *Id.* at 88.

80. Brusznicki v. Prince George's County, 42 F.4th 413, 416 (4th Cir. 2022).

81. *Id.* at 416–17.

82. *Id.* at 417.

83. *Id.* at 421–22.

84. Bogen, *supra* note 33, at 831, 856.

85. Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 281 (1985).

86. *Id.* (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 788 (1975)).

[c]lause."[87] References to the national economy permeate Article IV Clause jurisprudence and, as discussed below, echo the language of *Slaughter-House*.[88]

II. AN OVERVIEW OF THE FOURTEENTH AMENDMENT CLAUSE

The Fourteenth Amendment Clause was added as a part of the Reconstruction Amendments after the Civil War and was based on the Article IV Clause. The drafting history demonstrates that the framers of the Fourteenth Amendment believed that the phrase "Privileges and Immunities of citizens in the several States," which appears in the Article IV Clause, was not measurably different from "privileges or immunities of citizens of the United States," the phrase used in the Fourteenth Amendment Clause.

After the Civil War, the federal government tried to protect former slaves from oppressive state action.[89] Congress enacted the Civil Rights Act of 1866, which promised Black citizens "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens," among other things such as the right to make and enforce contracts free of racial discrimination.[90] Southern states had passed laws, so-called Black Codes, restraining Black people from earning a living (among other things), and according to one scholar, Congress's "primary concern" in passing the Act was to protect the "economic rights . . . [of] new black citizens."[91] Another scholar said that the Act "enshrined free labor values as part of the definition of American citizenship."[92]

Opponents of the Civil Rights Act argued that Congress lacked the authority to enact it, which sparked discussions about the need for a constitutional amendment.[93]

87. *Friedman*, 487 U.S. at 66.

88. *See also Hicklin*, 437 U.S. at 531–32.

89. McDonald v. City of Chicago, 561 U.S. 742, 771–75 (2010).

90. 14 Stat. 27, § 1 (1866), *codified as amended*, 42 U.S.C. § 1981.

91. Sandefur, *supra* 3, at 227–28; *see also* Eric Foner, The Second Founding 48 (2019) (explaining Black people were prohibited from entering "certain occupations"); Eric Foner, Free Soil, Free Labor, Free Men xxxv (1995) (calling the Civil Rights Act a partial "response to . . . Black Codes that severely limited the liberty of former slaves").

92. Foner, Free Soil, *supra* 91, at xxxv.

93. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 234–38 (2023) (Thomas, J., concurring).

Discussions about a constitutional amendment were ongoing even before the Civil Rights Act was enacted in April 1866, given concerns about the Act's validity. In February of that year, a few representatives, including Representative Bingham, argued in favor of a proposed constitutional amendment allowing Congress "to secure to the citizens of each State all privileges and immunities of citizens in the several States"—language taken directly from the Article IV Clause.[94] The proposed amendment was "intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States."[95] One representative emphasized that it would empower Congress "to give to all citizens the inalienable rights of life and liberty. . . ."[96] In speaking, Representative Bingham equated the language used in the Article IV Clause with the language that would eventually be used in the Fourteenth Amendment Clause: "[The proposed amendment] secures to the citizens of each of the States all the privileges and immunities of citizens of the several States. . . . It is to secure to the citizen of each State all the privileges and immunities of citizens of the United States in the several States."[97] Effectively, "citizens in the Several States" meant, in his view, "citizens of the United States"—a view he had expressed years earlier in opposing Oregon's admission to the Union. This proposal failed to garner sufficient votes. Notably, just a few years after the Fourteenth Amendment was ratified, Representative Bingham said that the "rights, privileges, and immunities" of United States citizenship include "the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow-men, and to be secure in the enjoyment of the fruits of your toil."[98] Similarly, post ratification, a senator remarked:

94. *US House, Debate Continued, "Privileges and Immunities" Amendment, Speeches of John Bingham and Giles Hotchkiss, Vote to Postpone Consideration* (1866), *in* 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 48, at 108, 109.

95. *Id.* at 109.

96. *Id.*

97. *Id.* at 117.

98. *US House, Speech of John Bingham on the Meaning of the Privileges or Immunities Clause of Section One of the Fourteenth Amendment* (1871), in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 48, at 620, 629.

"Has not every person a right to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself . . . ?"[99]

In May 1866, when the House of Representatives debated the language that would ultimately become the Fourteenth Amendment, Representative Bingham argued that the purpose of the Fourteenth Amendment Clause was to remediate violations of the Article IV Clause: "No State ever had the right, under the forms of law or otherwise, to . . . abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without a remedy."[100] The assumption underlying this argument is that the rights protected by the Article IV Clause are largely the same—if not exactly the same—as those protected under the Fourteenth Amendment Clause.

During the Senate debate, that same month, one senator explained that when the Constitution was initially drafted, there was no such thing as a citizen of the United States—although he acknowledged that phrase appeared in parts of the Constitution as originally drafted.[101] To him, the point of the Article IV Clause "was to constitute *ipso facto* the citizens of each of the original States citizens of the United States."[102] In discussing what these rights of United States citizenship under the Article IV Clause might be, he quoted the long list of rights from *Corfield*.[103] In his view, the primary if not sole reason for passing the Fourteenth Amendment Clause was to ensure that the federal government could effectively safeguard the rights he thought were already protected by the Article IV Clause (and, to the extent not clearly expressed in Article IV Clause jurisprudence, to incorporate the Bill of Rights against the states).[104] This speech has been called a particularly "direct[]" statement about the clause's original understanding because it was "widely disseminated."[105]

99. 2 CONG. REC. app. 363 (1874).

100. *US House, Proposed Fourteenth Amendment, Debate and Passage* (1866), in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 48, at 170, 178.

101. *US Senate, Proposed Fourteenth Amendment, Speech of Jacob Howard Introducing the Amendment*, in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 48, at 186, 186–87.

102. *Id.* at 186.

103. *Id.*

104. *Id.* at 187–88.

105. BARNETT & BERNICK, *supra* note 15, at 140.

A Massachusetts legislative committee during the ratification debate similarly understood the Fourteenth Amendment Clause as analogous to—if not functionally the same as—the Article IV Clause.[106] The committee noted, "[W]e are not aware that there has been any decision, or that there is any agreement among legal authorities as to what constitutes citizenship of a State, apart from citizenship in the United States."[107] The committee declared most of Section 1 of the Fourteenth Amendment "at best, mere surplusage."[108] The committee was concerned that Section 1 could be understood to imply that already existing rights actually did not exist.[109]

A similar concern was raised in a Maryland legislative committee report, which quoted the Article IV Clause and noted that a "citizen of a State" is a "citizen of the United States."[110] Interestingly, both those in favor of and in opposition to the Fourteenth Amendment appeared to agree that the Article IV Clause protected a very similar set of rights. One Maryland resident in opposition even declared, "[U]nder the Constitution, independent of this supposed amendment, the provisions as to the rights of citizens are the same as those of the amendment."[111]

Newspapers at the time also described the rights of "citizen[s] of the United States" using the broad language that had been previously used in reference to the Article IV Clause. In one article, the author argued, "[The people] demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction—*full and complete protection* in the enjoyment of life, liberty, property, the pursuit of happiness, the right to speak and write his sentiments, regardless of localities; to keep and bear arms in his own defence . . ." (emphasis added).[112] Later in the same article, the

106. *Massachusetts, Legislative Committee on Federal Relations, Majority and Minority Reports on the Proposed Fourteenth Amendment* (1867), in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 48, 383, 384.

107. *Id.* at 385.

108. *Id.*

109. *Id.*

110. *Maryland, Legislature's Joint Committee Report, Rejection of the Fourteenth Amendment*, in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 48, at 393, 395.

111. *Reverdy Johnson, "A Further Consideration of the Dangerous Conditions of the County,"* in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 48 at 403, 403.

112. *"Madison," Essays on the Fourteenth Amendment, Nos. I, II, and V, New York Times* (1866), in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 48, at 297, 297.

author said that the long list of rights from *Corfield* are "the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere."[113] Another newspaper article from the same author said that the purpose of the Fourteenth Amendment Clause was merely to let the federal government enforce the Article IV Clause.[114]

Accordingly, a review of the historical record confirms that the Fourteenth Amendment Clause was not originally understood to protect a different—and narrower—set of rights than the Article IV Clause. In the primary sources, the references to the Article IV Clause and specifically *Corfield* are simply too many to ignore—not to mention, several of the references to the Article IV Clause discuss a much broader understanding of that clause than recognized in modern jurisprudence. In fact, Justice Clarence Thomas has stated that "*Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment[.] Members frequently, if not as a matter of course, appealed to *Corfield*, arguing that the Amendment was necessary to guarantee the fundamental rights . . . identified in . . . [the] opinion."[115] Additionally, "it appears that no member of Congress refuted the notion that . . . [the] analysis in *Corfield* undergirded the meaning of the" Fourteenth Amendment Clause.[116] The history of the Civil Rights Act and its relation to the Fourteenth Amendment Clause also confirms that the clause was at least in part about safeguarding economic liberty. Scholars generally agree that the Fourteenth Amendment Clause's original understanding "guarantee[d] and constitutionalize[d]" the rights safeguarded by the Act.[117]

Despite the historical record, the two clauses are currently interpreted very differently because of the decision in *Slaughter-House*. Shortly after the Fourteenth Amendment was ratified, *Slaughter-House* commenced in the District Court for Louisiana.[118] Louisiana enacted a law in 1869 that gave one private company—the Crescent City Livestock Landing & Slaughterhouse Company—a monopoly to slaughter animals in the New Orleans

113. *Id.* at 298–99.

114. *Id.* at 299.

115. Saenz v. Roe, 526 U.S. 489, 526 (1999) (Thomas, J., dissenting).

116. *Id.*

117. Sandefur, *supra* note 3, at 228 (quoting BERNARD H. SEIGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 50 (1980)); *see also* BARNETT & BERNICK, *supra* note 15, at 144.

118. Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649 (C.C.D. La. 1870), *rev'd*, *Slaughter-House*, 83 U.S. 36.

vicinity.[119] The law stated, "[A]ll . . . [livestock] shall be landed at the stock-landings and slaughtered at the slaughterhouses of the company, and nowhere else."[120] The law literally referred to this right as an "exclusive privilege."[121] An association of butchers sued, arguing the law violated the Fourteenth Amendment Clause by "creating a monopoly . . . conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community" and "depriv[ing] a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families. . . ."[122]

The district court ruled in favor of the association, concluding, "[I]t would be difficult to conceive of a more flagrant case of violation of the fundamental rights of labor than the one before us."[123] As it articulated, "[T]he citizen has chosen a lawful and useful employment. He has been brought up to it, and educated in it. He has invested property in it. He is willing to comply with all police regulations, properly such, in the exercise of it."[124] Under such circumstances, the butchers had a constitutional right to practice their chosen profession, in the court's view.[125]

The U.S. Supreme Court reversed in a 5–4 decision.[126] The Court spent little time addressing the historical record, but it did try to distinguish the text of the Article IV Clause from the text of the Fourteenth Amendment Clause[127] (albeit while misquoting the Article IV Clause).[128] As it reasoned, the Article IV Clause "embrace[s] . . . civil rights[s] for

119. *See Slaughter-House*, 83 U.S. at 59.

120. *Id.*

121. *Id.*

122. *Id.* at 60.

123. *Live-Stock Dealers' & Butchers' Ass'n*, 15 F. Cas. at 653.

124. *Id.* at 654.

125. *Id.*

126. *Slaughter-House*, 83 U.S. 36.

127. *Id.* at 75–79.

128. Notably, the U.S. Supreme Court in *Slaughter-House* misquoted the Article IV Clause as follows: "The citizens of each State shall be entitled to all the privileges and immunities of citizens *of* the several States." *Id.* at 75 (emphasis added). The actual language of the clause does not say "of the several States" but rather "in the several States." U.S. CONST. art. IV, § 2. Even left-leaning scholars, who may not like an expansive view of economic liberty, have acknowledged that the misquotation is significant because it totally avoids the expansive reading of the Article IV Clause that had been offered by

the establishment and protection of which organized governments is instituted"—that is, natural rights.[129] As explained above, that conclusion is correct: the Article IV Clause was designed to protect a large group of fundamental rights. Then, however, the Court took a very narrow view of the Fourteenth Amendment Clause, holding that the clause only protected rights that stem from the "National character" of the federal government.[130] The Court gave a few examples, including (1) the right to access seaports, "through which all operations of foreign commerce are conducted," (2) the right to "come to the seat of government" to transact business and assert claims, and (3) the right to demand "protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."[131]

Three strong dissents were authored in *Slaughter-House*. The lead dissent, joined by four Justices, explained that while a state "may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society," it could not ban anyone willing to follow these regulations from working in a common calling.[132] This distinction, between regulating and prohibiting, was also discussed in another dissent: "[T]he right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one which the legislature of a State cannot invade, whether restrained by its own constitution or not."[133] The third dissent, echoing the philosopher John Locke, explained, "[L]abor is property, and as such merits protection."[134]

Representative Bingham and others. James W. Fox, Jr., *Re-Readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 80 (2002). If Representative Bingham was right, and the Article IV Clause should be read as "citizens of the United States in the several States," the entire basis for the Court's textual distinction breaks down. Representative Bingham's reading would be wholly meritless if the Article IV Clause explicitly referred to "citizens of the several States." *See supra* Part I.

129. *Slaughter-House*, 83 U.S. at 76.

130. *Id.* at 79.

131. *Id.*

132. *Id.* at 110 (Fields, J., dissenting).

133. *Id.* at 113–14 (Bradley, J., dissenting).

134. *Compare id.* at 127 (Swayne, J., dissenting), *with* JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 27 (1689) ("The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. . . . For this *Labour* being the unquestionable Property of the Labourer, no man but he can have a right to what that is once joyned to. . . .").

Notably, the dissenters refused to recognize the validity of *Slaughter-House*, with one writing just a few years later that "[t]he right to follow any of the common occupations of life is an inalienable right."[135] As the Justice continued, "to deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but . . . to the express words of the [C]onstitution."[136] Another wrote that the Fourteenth Amendment Clause "recognized, if it did not create, a National citizenship . . . and declared that their privileges and immunities, which embrace fundamental rights belonging to citizens of all free governments, should not be abridged by the State."[137]

The dissents were even relied upon in the lower courts, perhaps most famously in *In re Parrott*, a decision from the District of California in 1880.[138] The decision dealt, in part, with the Burlingame Treaty between the United States and China, which provided for "the free immigration and emigration of citizens and subjects" of both nations for "purposes of curiosity, or trade, or as permanent residents."[139] The next article of the treaty declared that citizens of both nations "shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."[140] California claimed, as a matter of police powers, that it could prohibit corporations from hiring Chinese people, regardless of the treaty.[141] The court disagreed.[142] To construe the treaty, it looked first to *Corfield* and then to other Article IV Clause decisions.[143] It then quoted both the majority and dissents in *Slaughter-House*.[144] As the court explained, "Some of these extracts are from the dissenting opinions, but not upon points where there is any disagreement. There is no difference of

135. Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

136. *Id.*

137. Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 140 (1873) (Field, J., concurring).

138. *In re* Parrott, 1 F. 481 (C.C.D. Cal. 1880).

139. *Id.* at 485.

140. *Id.* at 504.

141. *Id.* at 484.

142. *Id.* at 504.

143. *Id.*

144. *Id.* at 505–06.

opinion as to the significance of the terms 'privileges and immunities.'"[145] "Indeed," the court continued, "it seems quite impossible that any definition of these terms could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence."[146]

Evidently, the decision in *Slaughter-House* has been controversial since the day it was rendered. A prominent law professor, Richard A. Epstein, has said that "[i]n the eyes of virtually all historians, there is little doubt that *Slaughter-House* is wrong."[147]

In 2010, the U.S. Supreme Court recognized that *Slaughter-House* was likely decided incorrectly, quoting the work of another law professor who said that "virtually no serious scholar—left, right, and center—thinks . . . [*Slaughter-House*] is a plausible reading."[148] In the 2010 decision, the Court was asked to incorporate the Second Amendment's right to keep and bear arms against the states via the Fourteenth Amendment Clause.[149] A plurality of the Court declined, claiming that while many scholars agreed *Slaughter-House* was wrong, less agreement existed on whether the right to keep and bear arms was a privilege or immunity; instead, the Court relied on the Due Process Clause of the Fourteenth Amendment for incorporation, negating a need to revisit *Slaughter-House*.[150] (As an aside, a few primary sources explicitly indicate that the right to keep and bear arms is protected by the Fourteenth Amendment Clause.)[151]

145. *Id.* at 506.

146. *Id.*

147. Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 1096, 1098 (2005).

148. *McDonald*, 561 U.S. at 756 (quoting Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001)).

149. *Id.* at 758.

150. *Id.* (plurality opinion); *see also id.* at 805–06 (Thomas, J., concurring in part & concurring in the judgment) (explaining the Court should have relied upon the Fourteenth Amendment Clause).

151. *E.g.*, *Madison*, *supra* note 112, at 297, 299 (explaining each of "the people" demands the right "to keep and bear arms in his own defence" and then referring to this right as a "privilege" safeguarded by the Article IV Clause, which would become better protected by the Fourteenth Amendment Clause); see *also* JOHN TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849), *in* 1 THE RECONSTRUCTION AMENDMENTS, *supra* note 48, at 237, 251 (referring to the right to keep and bear arms as "another of the immunities of a citizen of the United States, which is guaranteed by the supreme organic law of the land" and arguing "[t]he colored citizen, under our constitution, has now as full and perfect a right to keep and bear arms as any other").

In 2023, the U.S. Supreme Court denied a petition for certiorari explicitly asking it to overrule *Slaughter-House*.[152] Ursula Newell-Davis, a social worker, wanted to engage in "respite care"—that is, "short-term relief to primary caregivers of special needs children."[153] In Louisiana, respite work is regulated, and an applicant "must undergo what's called a facility Need Review."[154] This process does not look at an applicant's qualifications but rather whether a provider is "needed" in light of the total amount of work in the community.[155] Louisiana did not even try to defend its regulation on public safety grounds, instead saying that the scheme was implemented to "eas[e] its regulatory burden."[156] Ms. Newell-Davis was rejected not based on her qualifications, but effectively because regulators did not want to have to supervise her business. She lost at the district court and the circuit court because of *Slaughter-House*. The U.S. Supreme Court's denial of her petition demonstrates it is extraordinarily skeptical of the Fourteenth Amendment Clause, perhaps because the clause could be misused as a judicial license to create all kinds of new constitutional rights.[157]

Today, the Fourteenth Amendment Clause is not understood to protect much, but it does protect the "right to travel."[158] As articulated by the U.S. Supreme Court in *Saenz v. Roe*, the Article IV Clause protects one "component" of this right: "[B]y virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits."[159] The specific examples mentioned by the *Saenz* Court are noteworthy: the Article IV Clause protects the right to travel for various legitimate purposes, including "obtain[ing] employment" and "engag[ing] in commercial . . . fishing."[160] Another component, "the right of a newly arrived citizen

152. *Newell-Davis*, 144 S. Ct. 98.

153. Petition for a Writ of Certiorari, at i, *Newell-Davis*, 144 S. Ct. 98, https://www.supremecourt.gov/DocketPDF/22/22-1208/268914/20230612153454500_Newell-Davis%20Brief_pdfa.pdf.

154. *Id.* at 3.

155. *Id.*

156. *Id.* at i.

157. *See* BARNETT & BERNICK, *supra* note 15, at 42.

158. *Saenz*, 526 U.S. 489 (majority opinion).

159. *Id.* at 501.

160. *Id.* at 502.

to the same privileges and immunities enjoyed by other citizens of the same State," is protected by the Fourteenth Amendment Clause.[161] As stated in *Slaughter-House*, "[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."[162] Notably, the *Saenz* Court quoted one of the dissents from *Slaughter-House* at length, seemingly because the Court felt that it could not rely only upon the majority opinion in *Slaughter-House*, given that opinion's reputation.[163] In sum, it is fair to say that *Saenz* at least loosened up *Slaughter-House*'s cramped reading, and may, in the future, provide fodder for further expanding rights recognized under the Fourteenth Amendment Clause.

III. A LITIGATION STRATEGY

Under *Slaughter-House*, economic liberty is not broadly protected by the Fourteenth Amendment Clause. As explained above, only narrow rights of a "national character" are protected, such as "the right of free access [to] seaports," the "right to use the navigable waters of the United States," and the right to "come to the seat of government . . . to transact any business. . . ."[164]

To be sure, these are narrow categories, but they are a starting point for a litigation strategy. Today, the U.S. Supreme Court appears to recognize that *Slaughter-House* was wrong, but also appears reluctant to overrule *Slaughter-House*. So, it seems litigants must work within the existing doctrinal frameworks and seek incremental changes that will eventually lead to greater protection for economic liberty. Incrementalism, rather than outright reversal, may be the preferred route for some current U.S. Supreme Court Justices, such as Chief Justice John Roberts.[165]

Notably, the *Slaughter-House* categories are similar in that they involve the right to travel, which, as already explained, is protected by both the Article IV Clause and the

161. *Id.* at 502.

162. *Id.* at 503 (quoting *Slaughter-House*, 16 U.S. at 80 (majority opinion)).

163. *Id.* at 503–04 (quoting *Slaughter-House*, 16 U.S. at 112–13 (Bradley, J., dissenting)).

164. *Slaughter-House*, 16 U.S. at 76 (majority opinion).

165. Tom Curry, *Robert's Rule: Conservative but Incremental*, NBC NEWS (June 25, 2007), https://www.nbcnews.com/id/wbna19415777.

Fourteenth Amendment Clause.[166] Additionally, the precedent for both clauses recognizes similar concerns. Whereas decisions on the Article IV Clause discuss the "national economy,"[167] decisions on the Fourteenth Amendment Clause discuss rights of a "national character."[168] And it is not too much of a stretch to argue that *Saenz* was chiefly a case about economic liberties, though couched in terms of the right to travel.

Based on these commonalities, this article proposes a two-step litigation strategy aimed at loosening *Slaughter-House* incrementally, with the eventual goal of engrafting the rights-describing language from Article IV Clause decisions into Fourteenth Amendment Clause decisions.

As step 1, public interest litigants should bring more Article IV Clause cases alleging violations of economic liberty. *Brusznicki*, overturning a state law mandating how certain commercial properties are sold (discussed above), is a good example. And the U.S. Supreme Court has already held that the right to earn a living is protected as a "privilege" or "immunity" under the Article IV Clause. As a strategic matter, working within this doctrinal framework may result in rights-describing language that is helpful in mounting future Fourteenth Amendment Clause cases. At worst, several bad protectionist statutes will fall.

For step 1, a great deal of attention should be paid to the type of economic liberty cases brought. The existing overlap between the two doctrinal frameworks largely centers on the right to travel. In *Saenz*, the U.S. Supreme Court explicitly recognized that some aspects of this right (such as traveling to obtain employment) are protected by the Article IV Clause and that other aspects (such as deciding to make a state in which one is located a residence) are protected by the Fourteenth Amendment Clause. Accordingly, the Court is more likely to expand this overlap if it can rely on Article IV Clause decisions with fact patterns involving a right to travel for economic purposes when construing the Fourteenth Amendment Clause. In summary, for step 1, this article recommends bringing not just more Article IV Clause cases, but Article IV Clause cases that could arguably fall under the umbrella of *Slaughter-House* and *Saenz*.

166. *McDonald*, 561 U.S. at 809 (Thomas, J., concurring in part & concurring in the judgment) ("[T]he Court has held that the Clause prevents state abridgment of only a handful of rights, such as the right to travel. . . .").

167. *Friedman*, 487 U.S. at 66.

168. *Slaughter-House*, 83 U.S. at 79.

Consider this concrete example: a Wisconsin statute provides that "[n]o guide license for hunting or trapping may be issued to or obtained by any person who is not a resident of this state."[169] Without a license, a person may not "engage or be employed for any compensation to guide, direct or assist any other person in hunting . . . or trapping. . . ."[170] The statute provides that a nonresident who violates this prohibition, "upon such conviction," must forfeit up to $100.[171]

The Wisconsin statute clearly impedes the right to earn a living and discriminates between residents and nonresidents. It makes an arbitrary distinction between a Michigander and a Wisconsinite who live just a few miles apart. The Michigander cannot "ply" his "trade," "practice" his "occupation," or "pursue a common calling within" Wisconsin, solely on the basis of his residency.[172] The statute is analogous to, though actually worse than, the commercial fishing license schemes that the U.S. Supreme Court has held invalid on a few occasions in that it is a total ban—not just a higher fee.[173] Because the statute is a total ban, the state cannot even argue that some degree of differential treatment is justified. Hunting guides also implicate tourism, travel, professional business transactions, navigable waters, and even seaports (all "national" concerns noted in *Slaughter-House* and *Saenz*). Other states have similar, albeit less egregious, prohibitions related to hunting and the right to earn a living. For example, in Michigan, a nonresident cannot act as a bear hunting guide.[174] Additionally, in West Virginia, a nonresident cannot train hunting dogs except during small game season.[175]

To further expand this litigation hypothetical: a public interest law firm could represent a waterfowl hunting guide from Michigan or Minnesota who wants to serve clients within Wisconsin but cannot because of this statute. This guide wishes to use navigable (or perhaps even interstate) waters to conduct his business. The guide could also

169. WIS. STAT. § 29.512(1).

170. *Id.*

171. § 29.512(2).

172. *Hicklin*, 437 U.S. at 524.

173. *See supra* Part I.

174. MICH. WILD LIFE CONSERVATION ORDER, Ch. III, § 3.205(2) (prohibiting nonresidents from being bear hunting guides), https://www.michigan.gov/-/media/Project/Websites/dnr/Documents/Orders/Wildlife-Conservation-Order/ChapterIII.pdf?rev=f9475819704a47c58aa503f67bfe9a64.

175. W. VA. STAT. § 20-2-5(22).

allege that he would use Wisconsin marinas (ports) on navigable waterways. A quick Google search for "Minnesota waterfowl guides" reveals dozens of existing businesses, including some that operate already in multiple states.[176] Bringing such a case would likely result in Wisconsin's law being struck down under the Article IV Clause, but with a fact pattern that raises a plausible argument under the Fourteenth Amendment Clause—even within the cramped confines of *Slaughter-House*, which recognized the importance of navigable waters, and so on.

As another example, the Wisconsin state government employs at least hundreds, if not thousands, of "project position" employees—to be eligible, an applicant must reside within the state.[177] As described above, "public employment" is merely "a subspecies of the broader opportunity to pursue a common calling" under existing Article IV Clause precedent.[178] Accordingly, this residency requirement is also ripe for challenge (though it does not involve some of the facts described in the hypothetical case of the hunting guide).

Step 2 is to bring a nearly identical Fourteenth Amendment Clause case that is at least arguably within the existing *Slaughter-House* framework. For example, the waterfowl guide described above could bring such a claim solely under the Fourteenth Amendment Clause, even without bringing an Article IV Clause claim. The guide could rely on the rights-describing language from the precedent created at step 1. The guide's case would inherently involve a right of a "national character" because it would involve the right to travel, including to ports and on navigable waterways.

Bringing this type of case, in this sequence, would therefore present the difficult question for any court: Why does the waterfowl guide win under Article IV, but not under the Fourteenth Amendment? The answer is clear—the guide should win under both clauses, not only because the text and history of both clauses is similar, but even considering the "national character" limitations of *Slaughter-House*.[179]

176. *See, e.g.*, *Minnesota Waterfowl Hunting: Western & Metro Minnesota*, MAXXED OUT GUIDES, https://maxxedoutguides.com/minnesota-hunts/.

177. *See* WIS. STAT. § 230.27(1m)(a).

178. *United Bldg.*, 465 U.S. at 219; *see also* Nelson v. Geringer, 295 F.3d 1082, 1084, 1090 n.8 (10th Cir. 2002) (declaring invalid a requirement that a general officer in the Wyoming National Guard reside within the state, although not grounding its decision in the right to pursue a common calling).

179. Notably, in 1978, the U.S. Supreme Court held that the Article IV Clause does not protect a right to engage in recreational hunting; however, that decision is no bar to this litigation strategy. *Baldwin*,

This two-step litigation strategy is adaptable. Most—if not all—states have residency requirements for certain economic activity. Many cities and counties have similar requirements, which are also subject to liability under the Fourteenth Amendment Clause via 42 U.S.C. § 1983. As an example, Atlanta, Georgia, prohibits out-of-state residents from operating taxicabs.[180] As the ordinance states, applicants must "[b]e a resident, for at least one year immediately preceding the date of application, of the state."[181]Atlanta, for context, is home to the nation's busiest airport, serving tens of millions each year.[182] An Uber driver could not travel from Chattanooga or Birmingham during an especially busy season (for example, a World Series or Super Bowl) to help get people to the airport (which is basically a modern-day seaport as described in *Slaughter-House*).[183] More importantly, even if the driver were to move to Atlanta and declare it his or her home, he or she would have to wait a year, which directly implicates the right discussed in both *Slaughter-House* and *Saenz*: "[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."[184] Even if the driver is not a "*bona fide*" resident of Georgia, he or she should have an Article IV Clause claim. Stated differently, after the driver has moved, either he or she is a resident of Georgia, and need not wait a full year, or he or she is a resident of Tennessee/Alabama. Moreover, nothing would prevent a second out-of-state Uber driver from bringing a second lawsuit, under step 2, alleging only a claim under the Fourteenth Amendment Clause. Again, courts would be presented with the sticky question, why should the Uber driver win under one clause but not the other? Presenting this difficult question should incrementally move the Supreme Court to broaden and eventually abandon *Slaughter-House*.

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436 U.S. at 380. The decision was not about the right to earn a living—just recreational hunting. *See Blumenthal*, 346 F.3d at 96 ("Reliance on *Baldwin* is misplaced, however, as *Baldwin* involved a challenge to Montana's recreational elk hunting law. . . . The Supreme Court drew a clear line of demarcation between the fundamentally protected nature of a nonresident's pursuit of a livelihood and the minimally protected nature of a nonresident's recreational pursuit.").

180. Atlanta Code of Ordinances § 162–77(4).

181. *Id.*

182. Michelle Baran, *These Are the 20 Busiest Airports in the United States*, afar (Aug. 9, 2024), https://www.afar.com/magazine/busiest-airports-in-the-us.

183. Atlanta Code of Ordinances § 162–76; *see also Looking for Driving Jobs in Atlanta, GA?*, Uber, https://www.uber.com/us/en/e/drive/atlanta-ga-us/.

184. *Saenz*, 526 U.S. at 503 (quoting *Slaughter-House*, 16 U.S. at 80).

CONCLUSION

This litigation strategy is viable for several reasons. First, as a matter of originalism, the Fourteenth Amendment Clause's meaning should be tied to the Article IV Clause. The primary sources already discussed are by no means exhaustive, and the meaning of these clauses is often debated; however, one thing is clear: they were not understood to cover largely different sets of rights. Second, the U.S. Supreme Court in *Piper* and other Article IV Clause decisions employed broad language in describing the rights protected by the clause, including express references to the right to earn a living. These cases are consistent with *Corfield*. Third, *Slaughter-House* emphasized the "National character" of the federal government, even noting that rights protected by the Fourteenth Amendment Clause include a right to access seaports.[185] This reasoning is quite similar to the justification for protecting economic liberty under the Article IV Clause: as the Court noted in *Piper*, some occupations implicate the "national economy," and the point of the Article IV Clause was to make the nation unified for economic and other purposes.[186] Protecting the "national economy" is both a matter of national unity (an Article IV Clause concern) and a matter of relevance to the "character" of the federal government, which has substantial control over regulation of interstate commerce (a Fourteenth Amendment Clause concern). Incrementalism may very well be key to protecting economic liberty over the long term.

185. *Slaughter-House*, 83 U.S. at 76.

186. *Piper*, 470 U.S. at 281.