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## The Privileges and Immunities of Non-Citizens

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# THE PRIVILEGES AND IMMUNITIES OF NON-CITIZENS

R. GEORGE WRIGHT\*

## ABSTRACT

However paradoxically, in some practically important contexts, non-citizens of all sorts can rightly claim what amount to privileges and immunities of citizens. This follows from a careful and entirely plausible understanding of the inherently relational, inescapably social, and essentially reciprocal nature of at least some typical privileges and immunities.

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## I. INTRODUCTION

This Article contends that the relationship between constitutional privileges and immunities and citizenship is more nuanced, and much more interesting, than usually recognized. Crucially, allowing some non-citizens to invoke the privileges and immunities of citizens often makes sense. The intuitive sense that non-citizens cannot logically claim the privileges or immunities of citizens rests on a misunderstanding of the nature of rights and rights-holders. Practice and logic combine to vindicate what would seem to be a paradoxical claim. In some practically important contexts, non-citizens of all sorts can rightly claim what amounts to privileges and immunities of citizens.

Let us begin with the relevant constitutional texts. Article IV reads, in part, that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>1</sup> The Fourteenth Amendment, in turn, declares that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”<sup>2</sup> As a matter of strict logic, neither

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<sup>1</sup> U.S. CONST. art. IV, § 2.

<sup>2</sup> *Id.* amend. XIV, § 1. This provision is followed immediately by references to “persons” in the contexts of due process and equal protection. *Id.* (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

passage implies that only citizens hold privileges<sup>3</sup> or immunities.<sup>4</sup> Persons who are not citizens could indeed hold privileges or immunities, but those privileges or immunities might not be enforceable—under particular circumstances or at all—on a federal constitutional privileges and immunities theory.<sup>5</sup> Both clauses thus are compatible with the idea that some or all non-citizens possess a range of significant privileges and immunities that are enforceable pursuant to federal or state statutes, under the common law, or perhaps pursuant to some other constitutional provision.<sup>6</sup>

In any event, this Article will not explore the possibility that non-citizens may have privileges and immunities enforceable by means apart from Article IV or the Privileges or Immunities Clause of the Fourteenth Amendment. The focus, however paradoxical, will be on the appeal by non-citizens to the privileges and immunities of citizens under either Article IV or the Fourteenth Amendment's Privileges or Immunities Clause. This Article, however, takes no issue with the sensible view that privileges and immunities are, for all constitutional purposes and in all cases, directly and universally somehow linked with citizens and citizenship.

Properly recognizing the privileges and immunities of actual citizens will, in some contexts, and to one degree or another, require what amounts to recognizing related privileges and immunities of persons who are not citizens. The standard assumption

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<sup>3</sup> The Article IV use of privileges and immunities, in the conjunctive, and the Fourteenth Amendment use, in contrast, of the disjunctive “or” seem to follow the purposive logic in each case. It would defeat the purpose of Article IV to allow states to grant privileges but not immunities, or immunities but not privileges, assuming some difference between privileges and immunities. Hence the conjunctive “and.” The Fourteenth Amendment, in contrast, addresses a possible denial, rather than a grant or recognition. While we would not want a state to deny both privileges and immunities, we would also not want a state to deny a privilege while recognizing an immunity or vice versa, again assuming that privileges and immunities are not identical in all contexts. This Article will in any event utilize whichever expression seems most appropriate in context.

<sup>4</sup> See *supra* text accompanying notes 1–2. Of course, at least as a first cut, the natural reading is to limit privileges and immunities to citizens. See, e.g., Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1149 (2000) [hereinafter Curtis, *Historical Linguistics*].

<sup>5</sup> See Derek Shaffer, *Answering Justice Thomas in Saenz: Granting the Privileges or Immunities Clause Full Citizenship Within the Fourteenth Amendment*, 52 STAN. L. REV. 709, 741 (2000).

<sup>6</sup> Thus, at least technically, one or more privileges or immunities of non-citizens might be thought to be enforceable under, say, the Ninth Amendment, the Fifth or Fourteenth Amendment Due Process Clause, the Fourteenth Amendment Equal Protection Clause, or even the Commerce Clause. See, e.g., *In re Griffiths*, 413 U.S. 717, 719–20 (1973) (“[A] lawfully admitted resident alien is a ‘person’ within the meaning of the Fourteenth Amendment’s directive that a State must not ‘deny to any person within its jurisdiction the equal protection of the laws.’” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))).

that Privileges and Immunities Clause protection,<sup>7</sup> unlike due process or equal protection,<sup>8</sup> realistically extends only to citizens thus turns out to be false.

This outcome is a matter of what one might call, with unnecessary pretentiousness, a mistaken social ontology of rights and rights-holders. Less pretentiously, the idea is that what we think of as individual constitutional rights, or even as rights held by some discrete group, are in reality not exhausted, or fully accounted for, at the level of the individual or the discrete group in question.

Instead, the constitutional right, privilege, or immunity at issue is often to some degree inherently shared in a way that transcends, and cannot be reduced to, a focus on any individual rights-holder. To fully understand such rights, we must think of them in terms of inherent relationalism, conjointness, inseparability, reciprocity, intertwinability, and inextricability, and not everyone who shares a right need fall into the same legal classification as everyone else who shares that right.

Thus, in some cases, what we think of as a privilege or immunity of citizen A must inherently extend, to one degree or another, to non-citizen B, if citizen A's privilege or immunity is to be properly understood, acknowledged, and meaningfully respected. The logic, scope, and limits of what one might call the inherent relationalism of privileges and immunities is traced below. As it turns out, the clearest and most important contexts involve attempts to pursue some sort of employment relationship.

## II. SOME POSSIBLE MEANINGS OF THE ARTICLE IV AND FOURTEENTH AMENDMENT DISCUSSIONS OF PRIVILEGES AND IMMUNITIES

Thinking of privileges and immunities as, in some contexts, inherently relational suggests that recognizing what amount to privileges or immunities of some non-citizens may be necessary to give appropriate scope and meaning to the privileges or immunities of some citizens. To be of much interest, however, this approach must at least be compatible with one or more sensible readings of either the Article IV or the Fourteenth Amendment approach to privileges or immunities.

For purposes of establishing the legitimacy of the idea of an inherent relationalism of privileges and immunities, it is actually helpful that the scope and meaning of Article IV and the Fourteenth Amendment have long been murky and contested.<sup>9</sup> At a minimum, it is plausible that at least some sensible reading of one or both of these constitutional texts is compatible with an inherent relationalism of privileges and immunities that can sometimes encompass both citizens and some non-citizens.

Thus, scholars have argued, for example, that “[p]rivileges’ and ‘immunities’ had been used to refer to natural and common law rights since the days of Blackstone—if the Framers did not want to constitutionalize those rights, it is difficult to understand

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<sup>7</sup> See, e.g., Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 339–40 (2005); Shaffer, *supra* note 5, at 741 (“The Privileges or Immunities Clause, following the definition of citizenship contained in Section 1 of the Fourteenth Amendment, by its terms applies only to U.S. citizens.”).

<sup>8</sup> See, e.g., Epstein, *supra* note 7, at 340. More broadly, see AKHIL REED AMAR, *THE BILL OF RIGHTS* 169–71 (1998) (noting that the Bill of Rights was intended primarily for the benefit of citizens, as distinct from resident aliens or non-citizens, even though some Bill of Rights protections may well extend, on whatever theory, to non-citizens).

<sup>9</sup> See *infra* notes 10–15 and accompanying text.

why they chose such language.”<sup>10</sup> On this view, well before either clause was enacted, “[t]he words *rights*, *liberties*, *privileges*, and *immunities*, seem to have been used interchangeably.”<sup>11</sup>

In contrast, an equally prominent argument is that “[a]s originally understood, the Privileges and Immunities Clause<sup>12</sup> did not protect a right to travel, or any other natural right.”<sup>13</sup> Rather, this argument posits that the role of the Privileges and Immunities Clause “was to guarantee to an American visiting another state equal access to those privileges and immunities that the host state granted its own citizens as an incident of citizenship.”<sup>14</sup> Such privileges and immunities were, on this view, considered legally alterable.<sup>15</sup>

The most influential early construal of the Article IV Privileges and Immunities Clause is doubtless that of Justice Bushrod Washington in *Corfield v. Coryell*.<sup>16</sup> Justice Washington opted for a natural law-based interpretation, referring specifically to “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of several states which compose this Union . . . .”<sup>17</sup> As to what comprises those privileges and immunities, Justice Washington declined to provide anything like an exhaustive list.<sup>18</sup> Many such privileges and immunities are left unmentioned in *Corfield*.<sup>19</sup> At the most general level, however, such privileges and immunities of citizens encompass “[p]rotection 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 . . . .”<sup>20</sup>

The focus of Article IV, though, is on the privileges and immunities of a citizen of some other state who has now ventured into a different state and has suffered therein

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<sup>10</sup> Evan Bernick, *Yes, the Fourteenth Amendment Protects Unenumerated Rights: A Response to Kurt Lash*, HUFFINGTON POST (July 13, 2015), [www.huffingtonpost.com/evan-bernick/yes-the-fourteenth](http://www.huffingtonpost.com/evan-bernick/yes-the-fourteenth). Bernick is referring to Fourteenth Amendment, perhaps as distinct from Article IV, privileges and immunities, but Blackstone’s assessment would equally apply to either future clause. *Id.*

<sup>11</sup> MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 64–65 (1986) (emphasis in the original) (citing several usages pre-dating the Constitution in general); see AMAR, *supra* note 8, at 166–67 (“The plain meanings of [the words ‘right,’ ‘freedom,’ ‘privilege,’ and ‘immunity’] are roughly synonymous . . . .” (citing also to CURTIS, *supra*)); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 J. CONST. L. 1295, 1298 (2009) (quoting CURTIS, *supra*, specifically in the nineteenth century context).

<sup>12</sup> Referring to U.S. CONST. art. IV, § 2.

<sup>13</sup> Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1192 (2009).

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* at 1192–93.

<sup>16</sup> *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823).

<sup>17</sup> *Id.* at 551.

<sup>18</sup> *See id.* at 551–52.

<sup>19</sup> *See id.* at 551.

<sup>20</sup> *Id.* at 551–52.

some alleged privileges and immunities violation.<sup>21</sup> Thus read, the clause is more of a non-discrimination provision than a guarantee of substantive rights of in-state and out-of-state citizens who are temporarily within the state.<sup>22</sup> Justice Joseph Story's treatise, from roughly the time of the decision in *Corfield*, concurs in this essentially non-discrimination focus.<sup>23</sup> Several decades later, in the well-known *Myra Bradwell* case,<sup>24</sup> the Supreme Court observed that the Article IV Privileges and Immunities Clause "has no application to a citizen of the state whose laws are complained of."<sup>25</sup>

More recently, the Court has held that privileges and immunities for purposes of Article IV do not encompass every respect in which out-of-staters and in-staters might be treated differently.<sup>26</sup> In *United Building & Construction Trades Council v. Camden*,<sup>27</sup> the Court limited Article IV Privileges and Immunities to interests deemed "sufficiently 'fundamental' to the promotion of interstate harmony"<sup>28</sup> or else to "the vitality of the Nation as a single entity . . ."<sup>29</sup> Therefore, the Court's focus was more on fundamental Commerce Clause goals<sup>30</sup> than on fundamental rights or interests more generally.<sup>31</sup>

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<sup>21</sup> *See id.*

<sup>22</sup> *See id.*; Epstein, *supra* note 7, at 343; *see also* David R. Upham, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1486 (2005).

<sup>23</sup> Justice Story observes:

if the citizens of each state were to be deemed aliens to each other, they could not take, or hold real estate, or other privileges except as other aliens. The intention of this clause was to confer on them [i.e., presumably citizens of another state], if one may so say, a general citizenship; and to communicate all the privileges and immunities, which citizens of the same state would be entitled to under the like circumstances.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 947, 674 (Carolina Academic Press 1987) (1833).

<sup>24</sup> *Bradwell v. State*, 83 U.S. 130, 138–39 (1873) (disposing of the claim of Myra Bradwell to practice law on the grounds that as a married woman, she would lack independent legal personhood and the capacity to be bound by relevant express and implied contracts).

<sup>25</sup> *Id.* at 138; *see* *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 217 (1984). The *Bradwell* case was crucially decided under the Fourteenth Amendment Privileges or Immunities Clause, the theory being that engaging in the practice of law does not fall within the scope of those privileges or immunities one holds as a citizen of the United States in general, as opposed to those one holds as a citizen of some particular state. *Bradwell*, 83 U.S. at 138–39 (relying on the contemporaneous Fourteenth Amendment Privileges or Immunities-focused *Slaughter-House Cases*, 83 U.S. 36 (1873)).

<sup>26</sup> *Camden*, 465 U.S. at 218.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* The court also cited to a prior case in which it used the verbiage "maintenance or well-being of the Union" to limit Article IV Privileges and Immunities. *Id.* at 221 (citing *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978)).

<sup>30</sup> *See id.* at 218–22.

<sup>31</sup> One might conceivably think of a privilege against self-incrimination or an immunity against multiple prosecutions for the same offense as privileges or immunities for Article IV

The *Camden* Court offered no exhaustive inventory of the sorts of interests that might fall within the scope of Article IV Privileges and Immunities.<sup>32</sup> The Court elsewhere has held, at a distinctly specific level, that “the right to practice law is protected” as an Article IV Privilege and Immunity.<sup>33</sup> More broadly, the Court in *Camden* recognized the “interest in employment on public works contracts” as a protectable Article IV Privilege and Immunity.<sup>34</sup> And clearly more broadly yet, the *Camden* Court also explicitly endorsed “the pursuit of a common calling [as] one of the most fundamental of those privileges protected by the Clause”<sup>35</sup> and as a “basic and essential activity.”<sup>36</sup> At this point, the Court had not yet made the slightest inquiry into whatever might or might not have been distinctive in this regard as a matter of New Jersey state law.<sup>37</sup>

Of course, recognition of a privilege or immunity of citizenship does not by itself determine the outcome of the case if opposing state interests are involved.<sup>38</sup> Our primary concern herein, though, is not with the circumstances under which recognized privileges and immunities should prevail over opposing interests and values; rather, our concern is with the extent to which privileges or immunities of citizens imply, in practice, what substantively amount to privileges or immunities of non-citizens.

The meaning of a privilege or immunity of citizens remains contestable if we turn to case law and other interpretations of the Fourteenth Amendment. The range of reasonable interpretations of privileges or immunities, particularly in the Fourteenth Amendment context, is extensive.<sup>39</sup> To begin, one might adopt Judge Robert Bork’s “ink blot” theory<sup>40</sup> or Professor Philip Kurland’s “blank check” theory.<sup>41</sup> One might instead read the Fourteenth Amendment’s Privileges or Immunities Clause as, like that

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non-discrimination purposes without thinking exclusively of interstate harmony, or of national unity. The *Camden* Court does offer an arguably slightly broader test for a protectable privilege or immunity under Article IV when it refers to interests “sufficiently basic to the livelihood of the Nation.” *Id.* at 221 (quoting *Baldwin*, 436 U.S. at 388).

<sup>32</sup> *Id.*

<sup>33</sup> Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 283 (1985).

<sup>34</sup> *Camden*, 465 U.S. at 218.

<sup>35</sup> *Id.* at 219.

<sup>36</sup> *Id.*; see also *id.* (referring to “the broader opportunity to pursue a common calling.”).

<sup>37</sup> See *id.* The Court must have presumed that New Jersey public policy, in this respect, corresponded to a similar policy of other states or else to the only policy that would be consistent with the federal interest in national unity and comity. See *id.*

<sup>38</sup> The test in such cases requires the state to show a “substantial reason” for discriminating against out-of-staters, as well as a “close relationship” between the scope of the discrimination and the scope of the substantial state interest. *Id.* at 222. Perhaps a bit more demanding formulated, out-of-staters must be shown to be “a peculiar source” of the public policy harm to be remedied. *Id.* (quoting *Toomer v. Witsell*, 334 U.S. 385, 398 (1948)).

<sup>39</sup> See *infra* notes 40–46 and accompanying text.

<sup>40</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1997).

<sup>41</sup> Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, WASH. U. L.Q. 405, 408 (1972) (noting that the Fourteenth Amendment Privileges or Immunities Clause “was a blank check drawn on an account without funds”).

of Article IV, promoting equality of rights, whatever they may be, rather than protecting particular substantive rights.<sup>42</sup> Or one might view Fourteenth Amendment “privileges or immunities as participatory privileges of citizenship, rather than personal rights of individual liberty . . .”<sup>43</sup>

More substantively, the Fourteenth Amendment Privileges or Immunities Clause has also been read as “an attempt to resolve a national dispute about the Comity Clause rights of free blacks.”<sup>44</sup> In contrast, others have argued more broadly that “the authors of the Clause largely believed that it would provide greater security to the privileges guaranteed in Article IV.”<sup>45</sup> Alternatively, others assert that “those who advanced the cause of the Privileges or Immunities Clause understood it to require the States to respect certain fundamental rights.”<sup>46</sup>

The latter fundamental rights interpretation of the Fourteenth Amendment Privileges or Immunities Clause was, importantly, endorsed by Justice Clarence Thomas prior to his ascension to the Supreme Court.<sup>47</sup> At the time of a 1988 symposium, Thomas associated the Clause with certain natural and “fundamental rights of the American regime—those of life, liberty, and property.”<sup>48</sup> Others argue, relatedly, that “[p]rivileges’ and ‘immunities’ had been used to refer to natural and common law rights since the days of Blackstone . . .”<sup>49</sup>

Thus, Professor Michael Kent Curtis has argued that “the Fourteenth Amendment’s Privileges or Immunities Clause was designed to make the Constitution what its preamble promised—a guarantee of liberty.”<sup>50</sup> The liberties in question, according to Professor Curtis, include those specified in the Bill of Rights;<sup>51</sup> the

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<sup>42</sup> See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387–88 (1992). For a similar reading of the Article IV clause, see *supra* note 22 and accompanying text.

<sup>43</sup> Daniel J. Levin, *Reading the Privileges or Immunities Clause: Textual Irony, Analytic Revisionism, and an Interpretive Truce*, 35 HARV. C.R.–C.L. L. REV. 569, 570 (2000).

<sup>44</sup> Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 61–62 (2011).

<sup>45</sup> David R. Upham, *The Meanings of the “Privileges and Immunities of Citizens” on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117, 1118 (2016).

<sup>46</sup> D. Scott Broyles, *Doubting Thomas: Justice Clarence Thomas’s Effort to Resurrect the Privileges or Immunities Clause*, 46 IND. L. REV. 341, 342 (2013).

<sup>47</sup> See Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989).

<sup>48</sup> *Id.* at 68. This view links “fundamentality” to matters of life, liberty, and property, however either grievous or minimal the restriction thereof. Among the resulting interpretive questions would be what this approach to privileges and immunities adds to the simultaneously adopted, and textually adjacent, explicit focus on deprivations of life, liberty, and property. See U.S. CONST. amend. XIV, § 1.

<sup>49</sup> Bernick, *supra* note 10.

<sup>50</sup> Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 2 (1996).

<sup>51</sup> Curtis, *Historical Linguistics*, *supra* note 4, at 1146.



privileges enshrined in Article IV, Section 2;<sup>52</sup> the writ of habeas corpus;<sup>53</sup> immunity from ex post facto legislation;<sup>54</sup> equal protection of the laws;<sup>55</sup> the right to travel;<sup>56</sup> a criminal conviction standard of proof beyond a reasonable doubt;<sup>57</sup> and other unspecified privileges.<sup>58</sup>

Finally, Professor John Hart Ely has emphasized not merely the breadth but also the open-endedness of the scope of binding protection<sup>59</sup> of the Fourteenth Amendment Privileges or Immunities Clause.<sup>60</sup> When adding this sense of open-endedness to the various fundamental right,<sup>61</sup> natural right,<sup>62</sup> common law right,<sup>63</sup> and generally broad and expansivist<sup>64</sup> interpretations noted above, a generally broad and encompassing view of Fourteenth Amendment Privileges or Immunities is within the contemporary mainstream at least as to the substance of privileges and immunities (if not as to who can bear such privileges and immunities).

Of course, the constitutional case history for many years, if not still today, suggested otherwise. The classic *Slaughter-House* cases<sup>65</sup> famously sought to limit the scope as well as the significance of the Fourteenth Amendment Privileges or Immunities Clause.<sup>66</sup> Justice Miller's majority opinion distinguished between citizenship of a particular state and United States citizenship.<sup>67</sup> Only the latter, which did not include rights to pursue a gainful occupation,<sup>68</sup> were addressed and additionally protected by the Fourteenth Amendment.<sup>69</sup>

According to Justice Miller, among the privileges and immunities of citizens of a particular state are "protection by the government, with the right to acquire and possess

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* How this would affect the enforceability, or the stringency, of equal protection rights in various contexts raises intriguing and complex issues.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 23–24 (1980).

<sup>60</sup> See *id.* at 28.

<sup>61</sup> See *supra* notes 46–48 and accompanying text.

<sup>62</sup> See *supra* notes 48–49 and accompanying text.

<sup>63</sup> See *id.*

<sup>64</sup> See *supra* notes 50–58 and accompanying text.

<sup>65</sup> *Slaughter-House Cases*, 83 U.S. 36 (1873).

<sup>66</sup> See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 43 (1975) (explicating the policy logic of Justice Miller's majority opinion).

<sup>67</sup> *Slaughter-House*, 83 U.S. at 74.

<sup>68</sup> *Id.* at 80.

<sup>69</sup> *Id.* at 74.

property of every kind, and to pursue and obtain happiness and safety . . . .”<sup>70</sup> In contrast, the privileges and immunities accruing to a citizen of the United States itself included, among other rights, the right to come to the government to press any claim,<sup>71</sup> to transact any business with the government,<sup>72</sup> to share in its offices<sup>73</sup> and its administration,<sup>74</sup> to access seaports,<sup>75</sup> to seek protection on the high seas<sup>76</sup> and under foreign governments,<sup>77</sup> and to use the navigable waters of the United States.<sup>78</sup>

The right to come to the seat of government to assert one’s claim would also seem, as the Court evidently recognizes, to imply something like a “right to peaceably assemble and petition for redress of grievances . . . .”<sup>79</sup> The Court also acknowledges a federal citizenship-based privilege of habeas corpus.<sup>80</sup> Relatedly, though explicitly focused on a citizen’s rights against state governments, a federal citizen is to have access to “courts of justice in the several States”<sup>81</sup> along with the right to change one’s state citizenship.<sup>82</sup>

Oddly, the *Slaughter-House* majority concluded this inventory of the protected privileges and immunities of federal citizens by referring to the rights protected, whether of citizens or of persons, under the Thirteenth Amendment,<sup>83</sup> the Fifteenth Amendment,<sup>84</sup> and the remainder of the Fourteenth Amendment, including the Due Process and Equal Protection Clauses.<sup>85</sup> The majority did not address whether Fourteenth Amendment Privileges or Immunities protection of one’s pre-established rights under the Thirteenth, Fourteenth, and Fifteenth Amendments serves any practical purpose.<sup>86</sup>

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<sup>70</sup> *Id.* at 76.

<sup>71</sup> *Id.* at 79.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Presumably, these and other privileges could have analogues under Article IV, at least where states choose to recognize a privilege to, say, participate in government business.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 80.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See id.* Of course, the need for Fourteenth Amendment protection, as against state law, of pre-existing federal privileges and immunities seems dubious given the trumping role of the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2. For the sense in which Article IV Privileges and Immunities protection may at least in some cases be redundant given the Equal Protection

Whatever one thinks of the *Slaughter-House* majority opinion, its primary focus seemingly is not on any distinction between federal citizens and non-citizens, or on federal citizens and any class of aliens. Rather, the emphasis seems to be on what the majority perceives as either validating or invalidating the idea of a substantial shift in how the privileges and immunities of state citizens are to be protected.<sup>87</sup> The majority's idea seems to be that substantively protecting such rights—as opposed to merely not discriminating against out-of-staters—should continue to be left to state law as opposed to federal constitutional law.<sup>88</sup> Thus, the focus of the *Slaughter-House* majority is really more on limiting federal authority relative to the states,<sup>89</sup> not to a focus on who is entitled to particular state-level or federal-level privileges or immunities.

In any event, the basic logic of the *Slaughter-House* majority was eventually challenged in the case of *Saenz v. Roe*.<sup>90</sup> *Saenz* involved limitations on welfare benefits for, among others, persons who had recently migrated to California and could now claim to be resident-citizens of California.<sup>91</sup> The majority in *Saenz* concluded that such cases of the broader right to travel<sup>92</sup> were governed not only by the Article IV Privileges and Immunities Clause, but also by the Fourteenth Amendment's Privileges or Immunities Clause.<sup>93</sup> The *Saenz* majority thus recognized some manifestations of a right to travel as a substantive privilege or immunity, binding on the states in virtue of the Fourteenth Amendment's protection of privileges or immunities.<sup>94</sup>

In his dissenting opinion in *Saenz*,<sup>95</sup> Justice Thomas looked to history in an attempt to determine the proper meaning and role of privileges and immunities of citizens.<sup>96</sup> On Justice Thomas's view, the colonists and Framers understood "privileges" and "immunities" in general "to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons."<sup>97</sup> On such a view, the

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Clause test for implied fundamental rights, see *infra* note 190. We hereby set aside questions of the comparative stringency of protection under alternative clauses.

<sup>87</sup> See *Slaughter-House*, 83 U.S. at 74.

<sup>88</sup> See, e.g., BICKEL, *supra* note 66, at 43.

<sup>89</sup> See generally *Slaughter-House*, 83 U.S. 36. Note the Court's continuing concern for analogous federal versus state power relationships in some of the later Commerce Clause cases, including, for example, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); and *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200 (1922) (finding that major league baseball is not within the scope of congressional interstate Commerce Clause regulatory power).

<sup>90</sup> *Saenz v. Roe*, 526 U.S. 489 (1999).

<sup>91</sup> *Id.* at 493–94.

<sup>92</sup> *Id.* at 502.

<sup>93</sup> *Id.* at 502–03.

<sup>94</sup> See *id.* at 502–04.

<sup>95</sup> *Id.* at 521–28 (Thomas, J., dissenting). Justice Thomas's dissenting opinion was joined by Chief Justice Rehnquist. *Id.* at 521.

<sup>96</sup> *Id.* at 522.

<sup>97</sup> *Id.* at 524.

rights constitutionally protected as genuine “privileges” and “immunities” were apparently substantive.<sup>98</sup> The Constitution did not merely offer guarantees against discrimination or inequality of treatment with regard to the otherwise state-recognized right in question.<sup>99</sup> A crucial limitation, though, seems to be that privileges and immunities must be somehow fundamental in their character rather than secondary or derivative in their character or importance.<sup>100</sup>

Of particular interest for our purposes is Justice Thomas’s understanding of colonial history where, at least at some early stage,<sup>101</sup> the fundamental rights classified as privileges and immunities were to be enjoyed not just by English citizens, but “more broadly, by all persons.”<sup>102</sup> This logic suggests that privileges and immunities might more accurately be thought of as natural or human rights, held by all persons, whether the person in question is a citizen or not.<sup>103</sup>

More explicitly, if a right of any sort counts as genuinely fundamental, it is difficult to see why the right-holders in question would be indifferent as to whether the particular right is respected as a substantive right or not as long as everyone’s right is equally respected or else equally denied in a non-discriminatory way. It is also difficult to see why right-holders would be satisfied with a situation in which the right in question is subject to complete and utter violation by state-level governments as long as the federal government does not also violate the right.

Rather than press such matters, though, let us conclude this Section with a sense of Justice Thomas’s more fully elaborated thoughts on the proper role of the Fourteenth Amendment Privileges or Immunities Clause. The later case of *McDonald v. City of Chicago*<sup>104</sup> addressed whether the Second Amendment’s individual right to keep and bear arms<sup>105</sup> is also binding as against state-level governments.<sup>106</sup> The *McDonald* plurality, not including Justice Thomas, acknowledged the controversial nature of the narrow construction in the *Slaughter-House* cases of the Fourteenth Amendment’s Privileges or Immunities Clause<sup>107</sup> as well as the later privileges or immunities revival and revisionism of *Saenz*.<sup>108</sup> But the plurality explicitly declined to

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<sup>98</sup> See Harrison, *supra* note 42.

<sup>99</sup> *Saenz*, 526 U.S. at 524 (Thomas, J., dissenting).

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* For further discussion, see Tim A. Lemper, *The Promise and Perils of “Privileges or Immunities”*: *Saenz v. Roe*, 119 *S. Ct.* 1518 (1999), 23 *HARV. J.L. & PUB. POL’Y* 295, 320–21 (1999) (noting some possible alternative futures for the logic of the *Saenz* case); Douglas G. Smith, *A Return to First Principles? Saenz v. Roe and the Privileges or Immunities Clause*, 2000 *UTAH L. REV.* 305, 305 (2001).

<sup>104</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>105</sup> As adjudicated in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>106</sup> *McDonald*, 561 U.S. at 758–59 (plurality opinion).

<sup>107</sup> *Id.* at 756–57.

<sup>108</sup> *Id.*

revisit the privileges or immunities doctrine<sup>109</sup> and instead addressed the question before the Court as a matter of Fourteenth Amendment due process.<sup>110</sup>

Justice Thomas, however, issued an opinion concurring in part and concurring in the judgment.<sup>111</sup> On his view, the right to keep and bear arms was not most appropriately protected against state interference through the literally procedural rights-focused Due Process Clause.<sup>112</sup> Instead, Justice Thomas forthrightly declared that “the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”<sup>113</sup> This approach was grounded in part on Justice Thomas’s view that there is a greater overlap between state and federal privileges and immunities than the *Slaughter-House* cases recognized.<sup>114</sup> The idea that at least some rights recognized under Article IV are also encompassed within the Fourteenth Amendment Privileges or Immunities Clause is, in any event, at this point a defensible, mainstream approach to understanding the scope of privileges and immunities in general.

### III. PRIVILEGES AND IMMUNITIES AND SOME ASSERTED RIGHTS OF ALIENS

Aliens present within the United States, whether documented or undocumented, count as “persons” for purposes of the Fourteenth Amendment Due Process and Equal Protection Clauses.<sup>115</sup> As the Court in *Plyler v. Doe*<sup>116</sup> recognized, “[a]liens, even aliens whose presence in the country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”<sup>117</sup>

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<sup>109</sup> *Id.* at 758.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 805 (Thomas, J., concurring in part and concurring in the judgment).

<sup>112</sup> *Id.* at 806.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 855 (Thomas, J., concurring in part and concurring in the judgment) (“I reject *Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship.”).

<sup>115</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 212–15 (1982) (providing equal protection to undocumented children seeking equal access rights to Texas public schools); *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) (finding in an alien state public employment case that “[i]t is established, of course, that an alien is entitled to the shelter of the equal protection clause.”) (citing, among other cases, *Graham v. Richardson*, 403 U.S. 365, 371 (1971)). In the context of pursuing, within reasonable constraints, a gainful occupation, trade, or employment, see the classic alienage equal protection case of *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *Yick Wo* was, in turn, cited for the broad principle that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.” *Truax v. Raich*, 239 U.S. 33, 41 (1915) (citing, among other cases, *Yick Wo*, 118 U.S. 356).

<sup>116</sup> *Plyler*, 457 U.S. 202.

<sup>117</sup> *Id.* at 210 (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo*, 118 U.S. at 369). For a discussion of education as a national-level privilege or immunity of citizens, see Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286 (2003).

More broadly, “[a]liens may . . . be said to enjoy certain incidents of ‘equal citizenship’ in our society by virtue of their possession of an important range of fundamental rights, notwithstanding their lack of status-citizenship.”<sup>118</sup> Of course, falling as a class within the scope or coverage of a constitutional right by itself tells us little about the real strength of the right or about the scope of one’s opportunities to exercise that right.<sup>119</sup>

A right of aliens to keep and bear arms under the Second Amendment, as binding on the states,<sup>120</sup> is far from clearly settled.<sup>121</sup> The Second Amendment, after all, refers to “the people”<sup>122</sup> as the literal bearer of the right in question.<sup>123</sup> Therefore, the question of whether aliens fall within the scope of the Second Amendment’s coverage would seem to hinge on whether aliens are not merely people, but also within the scope of “the people” for Second Amendment purposes.

One position suggests that, at least in some contexts, “[t]he words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing.”<sup>124</sup> Some Justices have challenged this formulation, however,<sup>125</sup> as well as the idea that “the people” must have the same meaning in each of its various constitutional references.<sup>126</sup> At least in the Fourth Amendment and some other contexts, the Court has concluded that “the people” refers to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country

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<sup>118</sup> Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285 (2002).

<sup>119</sup> For the distinction between the coverage and the degree of protection of a right, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–74 (2004).

<sup>120</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 758–59 (2010) (plurality opinion).

<sup>121</sup> See Justine Farris, *The Right of Non-Citizens to Bear Arms: Understanding “The People” of the Second Amendment*, 50 IND. L. REV. 943 (2017); Maria Stracqualursi, *Undocumented Immigrants Caught in the Crossfire: Resolving the Circuit Split on “The People” and the Applicable Level of Scrutiny for Second Amendment Challenges*, 57 B.C. L. REV. 1447 (2016).

<sup>122</sup> U.S. Const. amend. II.

<sup>123</sup> *Id.*

<sup>124</sup> This oddly redundant statement is drawn from the notorious *Dred Scott* case. *Scott v. Sandford*, 60 U.S. 393, 404 (1857).

<sup>125</sup> See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–67 (1990) (plurality opinion).

<sup>126</sup> For a discussion of possible meanings of “the people” in the First, Second, Fourth, Ninth, and Tenth Amendments, see *id.* (defining “the people” as generally “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”). For a recognition that “the people” does not have precisely the same meaning in all constitutional contexts, see *United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015) (emphasizing, however, a similarity of the term’s meaning across the Bill of Rights).

to be considered part of that community.”<sup>127</sup> In comparison, the Privileges or Immunities Clause certainly has no explicit broad exclusion of non-citizens.<sup>128</sup>

The problem with any such formulation is that “community” may vary in its scope and meaning at least as much as the idea of a “people.” Communities can be “thick” or “intensive” as well as “thin” or less restrictively conceived.<sup>129</sup> Specifying that the “community” exists at the national level rules out some possible meanings of the idea of community, but still leaves us with too broad a range of possible interpretations to meaningfully constrain the idea of “the people” in any constitutional context.<sup>130</sup> Importantly, the relationship between various sorts of alienages and the idea of a national or political community is of little assistance in determining the relationships between classes of alienage and membership in a national “people.”

Thus, if a court chooses to emphasize a particular undocumented alien’s sustained, extensive, multi-faceted ties to the United States, the conclusion that such a person should count as within the scope of “the people,” though not also as a citizen, for Second Amendment purposes will seem reasonable.<sup>131</sup> At least for the present, most courts have categorically judged undocumented aliens, regardless of their established connections or circumstances, as outside the scope of the national political community and therefore not of “the people” for purposes of the Second Amendment right to keep and bear arms.<sup>132</sup>

The Second Amendment’s text seems to direct us to inherently contestable questions as to whether particular aliens or classes of aliens should count, at least for Second Amendment purposes, as members of the national or political community. This approach may be unavoidable on a textualist theory of the Constitution.<sup>133</sup> Other theories, though, may recognize or expand the rights of aliens to keep and bear arms depending on the strength of the right in question.<sup>134</sup> Thus, a presumed natural right to

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<sup>127</sup> *Verdugo-Urquidez*, 494 U.S. at 265.

<sup>128</sup> See U.S. CONST. amend. XIV, § 1.

<sup>129</sup> Perhaps the most conceptually sophisticated account of the ambiguities of “community” is that of ANDREW MASON, *COMMUNITY, SOLIDARITY AND BELONGING* 4 (2000). Classically, see FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* (Jose Harris, ed., Jose Harris & Margaret Hollis trans., 2001) (1887). See also WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (David Miller & Alan Ryan eds., 1995), along with the evolving understandings of “the community” in Western and Central Europe.

<sup>130</sup> See generally *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1078–79 (2013) [hereinafter *Meaning(s) of “The People”*].

<sup>131</sup> See *Meza-Rodriguez*, 798 F.3d at 670–72.

<sup>132</sup> See *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012); *United States v. Portillo-Munoz*, 643 F.3d 437, 440, 442 (5th Cir. 2011); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam) (affirming a conviction on the basis of the logic of *Portillo-Munoz*, 643 F.3d 437). For discussion of the cases in this area, see Farris, *supra* note 121, at 950–56; Stracqualursi, *supra* note 121, at 1461–65; *Meaning(s) of “The People”*, *supra* note 130, at 1078–79.

<sup>133</sup> See Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 95–96 (2004).

<sup>134</sup> See *id.* at 107–08.

self-preservation, or taking measures for the bare physical protection of self and others, would seem to apply to all classes of aliens no less than to citizens.<sup>135</sup>

Whether any citizen's right to keep and bear arms could somehow practically require some relational right of one or more aliens, perhaps as a matter of effective common or collective defense, we may set aside as speculative. At a minimum, the meaningfulness of one person's right to self-protection may well depend upon recognizing something like an analogous right in other persons. Security may in some respects be inherently collective.

Beyond the context of the Second Amendment, a possibly more controversial argument, for example, is in favor of a right of at least some aliens to vote in federal or in state and local elections. After all, one's citizenship or alienage status may tell us little about, say, the duration of an adult's United States residence, one's status as a person who is relevantly informed or uninformed, or the extent to which one's life is likely to be affected by an electoral outcome. The focus of a number of relevant constitutional cases is on preventing qualified citizens from being denied the right to vote rather than on confining the franchise to citizens only.<sup>136</sup> And to the extent that voting in state elections is a matter of either equal protection or substantive due process,<sup>137</sup> the protected class on such a theory is generally assumed to be persons rather than citizens.<sup>138</sup> Presumably, constitutional-level debates over the voting rights of aliens will focus mainly on questions of equal protection of laws rather than on anyone's privileges or immunities.<sup>139</sup> We may set aside voting rights contexts as, at least for the historical moment, not sufficiently implicating any shared, joint, or relational quality of the rights at stake.

Of much greater immediate interest are the cases in which local governments arguably seek, on one ground or another, to restrict the processes by which aliens and others may pursue or obtain an otherwise licit gainful occupation or trade.<sup>140</sup> These employment cases best illustrate our main thesis and for that reason warrant separate consideration.

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<sup>135</sup> For discussion of a presumed natural right of self-preservation, see *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1165–66 (10th Cir. 2012). The most fundamental classic discussion of the moral and motivational status of self-preservation is probably that of THOMAS HOBBES, *LEVIATHAN* chs. 13–14 (Richard Tuck ed., 1991) (1668).

<sup>136</sup> See David M. Howard, *Potential Citizens' Rights: The Case for Permanent Resident Voting*, 95 TEX. L. REV. 1393, 1414 (2017).

<sup>137</sup> See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 354–60 (1972) (focusing on residency requirements for voting in a local election and discussing the legitimacy of a state interest in having knowledgeable voters); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969) (focusing on residency requirements for voting in a local election and applying equal protection strict scrutiny).

<sup>138</sup> U.S. CONST. amend. XIV, § 1.

<sup>139</sup> See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 285–93 (2000).

<sup>140</sup> See, e.g., *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 107 (2d Cir. 2017); *Valle del Sol Inc. v. Whiting*, 709 F.3d 808, 814 (9th Cir. 2013); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 940 (9th Cir. 2011).



#### IV. ALIEN EMPLOYMENT TRAFFIC RESTRICTION AS DIRECTLY IMPACTING THE PRIVILEGES AND IMMUNITIES OF CITIZENS

In some respects, state law restrictions on the employment opportunities of aliens specifically are entirely familiar.<sup>141</sup> In general, courts tend to uphold reasonable restrictions on alien employment against equal protection challenges if the position in question involves either discretionary law enforcement or perhaps what one might call “socializing other persons to good citizenship.”<sup>142</sup> However, this Article focuses elsewhere. In particular, this Article considers instead the recent challenges to local ordinances adversely affecting the ability of day laborers and their potential employers, or the agents of the latter, to arrange for such employment.<sup>143</sup> Such ordinances have been attacked primarily as limitations on freedom of speech and on commercial speech in particular.<sup>144</sup>

A point of debate is whether free speech law, as relating to commercial speech or not, is really the essence of these day labor employment cases. But even if the courts insist on treating these cases exclusively as First Amendment cases,<sup>145</sup> an alternative focus on the practically crucial matter of obtaining gainful employment and pursuing an occupation or trade as a constitutionally protected<sup>146</sup> privilege or immunity can offer important insights. Ultimately, the key point is that the privileges or immunities

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<sup>141</sup> See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 69 (1979) (permitting exclusion of aliens as public school teachers under the equal protection clause); *Foley v. Connelie*, 435 U.S. 291, 292 (1978) (permitting exclusion of aliens from employment as state police officers under an equal protection challenge); *In re Griffiths*, 413 U.S. 717, 717–18 (1973) (preventing aliens from being excluded from bar membership under the Equal Protection Clause); *Sugarman v. Dougall*, 413 U.S. 634, 635 (1973) (finding exemptions for the New York State Civil Service that prevent aliens from employment in some principal positions, elected positions, and positions filled by either the governor or the legislature).

<sup>142</sup> See, e.g., *Ambach*, 441 U.S. 68; *Foley*, 435 U.S. 291.

<sup>143</sup> See, e.g., *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 104.

<sup>144</sup> See *Ambach*, 441 U.S. 68; *Foley*, 435 U.S. 291; *In re Griffiths*, 413 U.S. 717; *Sugarman*, 413 U.S. 634.

<sup>145</sup> See, e.g., *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 112.

<sup>146</sup> The actual strength of protection afforded Article IV Privileges and Immunities is a bit under-theorized. There seems to be a hybrid scrutiny test combining a mid-level weight of a government interest with, apparently, something akin to strict scrutiny narrow tailoring. Thus, in the Article IV context, the Court required merely a “substantial” government interest and a “close” degree of tailoring between the substantial interest and the actual impact of the regulation. *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 222 (1984). Those adversely affected by the government regulation must also constitute “a peculiar source of the evil” sought to be remedied by the regulation. *Id.*

In the Fourteenth Amendment Privileges or Immunities context, the Court has, at least in a travel or residency-change context, suggested the applicability of a strict scrutiny test of any substantial impingement. Thus, in *Saenz v. Roe*, 526 U.S. 489, 504 (1999), the Court endorsed “[n]either mere rationality nor some intermediate standard of review . . . . The appropriate standard may be more categorical . . . but it is surely no less strict [than the strict scrutiny standard applied in the durational residency case of *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled by* *Edelman v. Jordan*, 415 U.S. 651 (1974)].”

of citizens extends, inherently, on its own relationalist logic to encompass at least some documented and undocumented aliens.

*Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay* presents a typical scenario among recent day labor employment restriction cases.<sup>147</sup> After recognizing the plaintiff's standing in the case,<sup>148</sup> the court immediately addressed the free speech merits<sup>149</sup> of the ordinance in question, ultimately finding the ordinance failed to meet the tailoring requirements imposed on content-based regulations of commercial speech.<sup>150</sup> The regulation purportedly was adopted "to protect residents from the dangers of obstruction, distraction, and delays of traffic caused by the solicitation of employment by pedestrians."<sup>151</sup> The impetus for the regulation seemingly was public reaction to "daily gatherings of usually 20–30, but sometimes 50, day laborers soliciting employment along a four-block stretch of Oyster Bay's Forest Avenue . . ."<sup>152</sup> Some local residents referred merely to traffic problems,<sup>153</sup> but "others premised their objections on their views as to the laborers' immigration status[es]."<sup>154</sup>

The text of the ordinance in question declared:

It shall be unlawful for any person standing within or adjacent to any public right-of-way within the Town of Oyster Bay to stop or attempt to stop any motor vehicle utilizing said right-of-way for the purpose of soliciting employment of any kind from the occupants of said motor vehicle.<sup>155</sup>

Presumably, the intent of the regulation was to include vehicle drivers or occupants who function merely as agents, or other intermediaries who may lack the authority to actually offer any employment.<sup>156</sup>

More curiously, the ordinance by its terms seemed to encompass initiative-taking only by prospective employees or, presumably, prospective independent contractors.<sup>157</sup> The ordinance did not appear to envision a situation in which occupants of a vehicle take the initiative of stopping at some customary or standard location and

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<sup>147</sup> See *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d 104 (2d Cir. 2017).

<sup>148</sup> *Id.* at 111.

<sup>149</sup> *Id.* at 112.

<sup>150</sup> *Id.* (citing the standard commercial speech regulation case of *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)). We here set aside the possibility of content-neutral restrictions on commercial speech, whether the test in any such case might vary from that of *Central Hudson* or not.

<sup>151</sup> *Id.* at 107–08 (citation omitted).

<sup>152</sup> *Id.* at 108.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*; see *Valle del Sol Inc. v. Whiting*, 709 F.3d 808, 815 (9th Cir. 2013) (referring to the number of "illegal immigrants" involved).

<sup>155</sup> *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 107 (citation omitted).

<sup>156</sup> See *id.*

<sup>157</sup> See *id.*

opening the door to initiate an encounter with gathered pedestrians.<sup>158</sup> In typical cases, though, either the vehicle occupant or the waiting pedestrian could just as easily initiate any encounter.<sup>159</sup> Only the latter variant, however, would seem to be within the scope of the ordinance.

The ordinance went on to “exempt[] the solicitation of a wide variety of ‘[s]ervice related activities such as taxicabs, limousine services, public transportation vehicles, towing operations, ambulance service and similar uses.’”<sup>160</sup> But how often do day laborers stop any of these vehicles precisely to solicit employment from their occupants? In any event, an explicit exemption exists that covers all such vehicles.<sup>161</sup>

On the free speech merits, the Second Circuit Court of Appeals noted that the ordinance has a conduct, or non-speech, element consisting of the pedestrian’s stopping or attempting to stop a vehicle.<sup>162</sup> The court then further assumed a speech element to the ordinance as well;<sup>163</sup> speech by the prospective day laborer that was irrelevant to a purpose of soliciting employment would be permissible under the ordinance.<sup>164</sup> On the other hand, speech that essentially proposed a commercial transaction, presumably including speech soliciting day labor employment, was normally considered to be commercial speech.<sup>165</sup> The court thus applied a standard intermediate scrutiny test for regulations of commercial speech from the *Central Hudson* case.<sup>166</sup>

Ultimately, the Second Circuit Court of Appeals took advantage of the indeterminacy of “tailoring” inquiries<sup>167</sup> to conclude that the ordinance’s potential speech impact was insufficiently tailored to its purposes.<sup>168</sup> The court colorfully observed, among other considerations, that the ordinance would apply to “children selling lemonade at the end of a neighbor’s driveway . . . , the veteran holding a sign

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<sup>158</sup> *See id.*

<sup>159</sup> *See id.* at 108.

<sup>160</sup> *Id.* at 107 (citation omitted). Let us note in particular that typically, one does not stop an ambulance in order to pursue gainful employment opportunities with the ambulance crew.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 112.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*; *see* text accompanying *supra* note 155.

<sup>165</sup> *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 112. The court also referred to the speech regulation as content-based, which might suggest the application of strict scrutiny. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). But the court quickly declared that the standard mid-level test for (content-based) regulations of commercial speech was the applicable free speech test. *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 112.

<sup>166</sup> *See* the four-part intermediate scrutiny test laid out in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>167</sup> For discussion of the manipulability of most sorts of “tailoring” inquiries, *see* R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction that Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081 (2016).

<sup>168</sup> *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 115–17.

on a sidewalk stating ‘will work for food,’ and students standing on the side of a road advertising a school carwash.”<sup>169</sup>

The court also rejected defendant-Town of Oyster Bay’s argument that the tailoring requirement under *Central Hudson* need not be met.<sup>170</sup> The court rejected the argument on the grounds that typical day laborer speech would be constitutionally unprotected, as such speech would ultimately aim at a transaction that would likely violate “immigration, tax, and labor laws . . . .”<sup>171</sup> On the court’s view, though, the ordinance also “could be applied to prohibit speech proposing no illegal transaction.”<sup>172</sup>

Overall, analyzing day labor regulations as free speech cases or, for that matter, as equal protection cases should not face any objection. Certainly, the recurring references to immigrant status<sup>173</sup> suggest at least the possibility of the latter analysis.

Courts’ analytical focus on free speech in day laborer traffic regulation cases is not, however, beyond critique. After all, the commercial transactions regulated in *Oyster Bay* and elsewhere need not actually involve any contemporaneous speech of any sort. The ordinance refers to stopping or attempting to stop a vehicle.<sup>174</sup> The stop must also be for a particular purpose: obtaining employment.<sup>175</sup> But neither having a purpose nor stopping a vehicle with any such purpose requires speech. The vehicle’s stopping may consummate the transaction, at least as far as the local traffic regulation is concerned. The involved parties do not need to exchange any words, at least at the relevant time, or make any visual signals. The interaction does not require contemporaneous speech of any sort, symbolic or otherwise. The parties certainly can discuss terms and conditions of any employment later when outside the geographical bounds of the ordinance.

Otherwise put, in some cases covered by the ordinance, the driver of the vehicle and one or more pedestrians could briefly discuss the possibility of employment or one or more terms of such employment at the regulated location, bringing the transaction within the scope of commercial speech.<sup>176</sup> But they do not need to employ words or other symbols or symbolic acts while at the regulated site. Standing, as almost anyone might, at a particular corner under particular circumstances and

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<sup>169</sup> *Id.* at 116. This citation is not intended to endorse the claim that all of these hypothetical cases would actually fall within the scope of the ordinance in question. To offer to sell a glass of lemonade is not typically thought of as a solicitation for employment. For similar hypothetical events within the scope of a somewhat similar ordinance, see *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 (2011).

<sup>170</sup> *See Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 114.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *See* text accompanying *supra* notes 154, 171.

<sup>174</sup> *See* text accompanying *supra* note 155.

<sup>175</sup> Of course, in some contexts, physically standing in front of someone, or pushing someone, can convey an entirely clear specific message. We would nonetheless in many such cases hesitate to classify mere undifferentiated standing or pushing as a form of constitutional speech.

<sup>176</sup> *See, e.g., Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

entering the deliberately stopped vehicle may by itself contextually convey all that needs to be conveyed in the moment. This may be particularly true if the pedestrians recognize either the driver or the vehicle as familiar, repeat transactional players.

Thus, while commercial speech may, in some instances, take place while the participants remain within the logical scope of the ordinance, speech or symbolic conduct<sup>177</sup> are hardly of the essence of the regulated behavior. One might argue that standing on a corner, again as almost anyone might, while waiting for a vehicle counts, under the circumstances, as a form of constitutional speech or that specifically entering a stopped vehicle, given the circumstances, typically counts as symbolic speech. But this would require a relatively broad and controversial interpretation of what counts, for constitutional purposes, as symbolism.<sup>178</sup> For instance, we certainly do not normally think of the undifferentiated boarding of a bus as an environmental statement.

The courts nevertheless seem inclined to treat day laborer traffic ordinance cases as regulations of speech.<sup>179</sup> Such emphasis does not deserve any objection if it is not exclusive of other theories. One could sensibly argue, though, that such cases are often, if not typically, as much about obtaining employment by one means or another as about speech on any subject.<sup>180</sup> The aim, or “purpose” as the Oyster Bay ordinance has it,<sup>181</sup> of the regulated parties’ conduct is to obtain some form of gainful employment, at least for the day.<sup>182</sup> Regardless of how many of the regulated persons wish to contemporaneously speak, presumably all of them wish to pursue gainful employment. The pursuit of gainful employment takes place—under the ordinance if not also by definition—at least at the sites and circumstances within the scope of the ordinance.<sup>183</sup>

Crucially, the pursuit of gainful employment or of some occupation or trade is of constitutional privileges or immunities status on at least some reasonable views. Classically, but merely for example, Justice Washington paved the way for such

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<sup>177</sup> For classic symbolic speech or mixed speech and conduct cases, see *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 504 (1969) (wearing of black arm bands in Vietnam War-era protest); *United States v. O’Brien*, 391 U.S. 367, 369 (1968) (burning of draft card in public in Vietnam War-era protest).

<sup>178</sup> Currently, to be considered symbolic speech, the conduct must meet a two-part test. *Spence v. Washington*, 418 U.S. 405 (1974) (finding that in order for speech to qualify as symbolic, there must be “[a]n intent to convey a particularized message” and that “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”).

<sup>179</sup> See, e.g., *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017); *Valle del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944–45 (9th Cir. 2011).

<sup>180</sup> See *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 107.

<sup>181</sup> See *supra* note 155 and accompanying text.

<sup>182</sup> *Id.*

<sup>183</sup> See *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 107.

recognition in the Article IV Privileges and Immunities case of *Corfield v. Coryell*.<sup>184</sup> In *Corfield*, Justice Washington referred to the protected status, for Article IV purposes, of “the right to acquire and possess property of every kind,”<sup>185</sup> along with “the enjoyment of life and liberty,”<sup>186</sup> subject to an overriding public interest.<sup>187</sup>

As the case law accrued, the notion that “the pursuit of a common calling is one of the most fundamental of those privileges protected by the [Article IV Privileges and Immunities] Clause” became well-established.<sup>188</sup> According to the Supreme Court itself, the pursuit of a common calling, or employment, is among the most typically addressed privileges and immunities.<sup>189</sup> Thus, seeking employment, at least for Article IV contexts and purposes,<sup>190</sup> is reasonably seen as a “basic and essential activity.”<sup>191</sup>

Pursuit of employment, of a common calling, or of gainful employment certainly is more than speech in the regulated context and is the essence of the activity subject to the ordinance in *Oyster Bay* and in similar cases.<sup>192</sup> But under Article IV, no less than under the Fourteenth Amendment, how documented or undocumented aliens could benefit from constitutional privileges or immunities (those assumed to have been intended to benefit only citizens)<sup>193</sup> is far from clear.

In some Article IV contexts, the Court has treated the ideas of “citizens” and “residents” as essentially synonymous.<sup>194</sup> One can easily imagine an alien who qualifies in relevant respects as a “resident” of a particular state, whether or not the currently sought-after employment is within that state.<sup>195</sup> This limited categorical equivalence would seem to imply that even an alien can qualify, in crucial respects, as a “citizen.”<sup>196</sup> But as the case law does not seem to consider or endorse any such logic,<sup>197</sup> this Article shall set this notion aside.

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<sup>184</sup> *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823); see *supra* notes 16–20 and accompanying text.

<sup>185</sup> *Corfield*, 6 F. Cas. at 551.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 552.

<sup>188</sup> *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984).

<sup>189</sup> *Id.*

<sup>190</sup> Again, Article IV is typically interpreted not as establishing any substantive rights, but as in effect requiring something like equal protection of out-of-staters venturing into one’s own state, with respect to whatever privileges and immunities happen to be recognized for in-staters. See, e.g., *id.* at 216 (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)).

<sup>191</sup> *Id.* at 219.

<sup>192</sup> See, e.g., *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 107 (2d Cir. 2017).

<sup>193</sup> But see text accompanying *supra* notes 3–6.

<sup>194</sup> See, e.g., *Camden*, 465 U.S. at 216 (citing *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)).

<sup>195</sup> See *id.* at 233 (Blackmun, J., dissenting).

<sup>196</sup> See *id.*

<sup>197</sup> See *Camden*, 465 U.S. at 216–17 and the relevant authorities cited therein.

Instead, consider merely the mainstream understanding that under either Article IV or the Fourteenth Amendment, the pursuit of gainful employment by some sort of contractually negotiated process can count as a privilege or immunity of acknowledged citizens.<sup>198</sup> The crucial point, then, is that pursuing employment, a trade, a calling, or some occupation, whether temporarily or on a more sustained basis, is in its very essence an interpersonal activity.<sup>199</sup> The status of employee, in its essence, requires another person in the status of employer. The status of being employed thus inherently implies some sort of interpersonal relationship, in which both parties have some direct and immediate reciprocal, if also partly conflicting, interest.

Whether the person seeking or enjoying employment is an alien (documented or undocumented) does not affect the inherent relationalism of any sort of employment. And some aliens who seek, negotiate over, or enjoy employment, at one time or another, engage in that transaction or transactional relationship with one or more acknowledged citizens of the United States.<sup>200</sup>

In all such cases, the parties inherently and directly share the privilege or immunity of gainful employment status. A meaningful right or privilege to seek out and sustain a relationship with an employer requires some corresponding right of another party to negotiate over and offer employment if that party is so disposed. An employer could hardly pursue their own chosen calling, occupation, or trade without a corresponding privilege to negotiate with or take on necessary employees. For instance, an individual could hardly flourish in any service, construction, manufacturing, or certainly any number of high-tech enterprises without a right or privilege of negotiating with and hiring and maintaining employees.

Thus, as a matter of practice and logic, a denial of employment opportunities to an alien, on grounds of non-citizenship, may in a given case immediately, directly, and inescapably adversely affect the corresponding privilege of a citizen-status employer to hire the prospective employee in question, thereby correspondingly impairing the citizen-employer in their own gainful calling. To impair the livelihood-pursuit of the former is inevitably to impair the livelihood-pursuit of the latter to one degree or another. By very loose analogy, the status of the head of a coin as up or down is logically inseparable from the status of the tail of the coin.

Whether a restriction on hiring opportunities is more deeply felt by the prospective employer or by the prospective employee, or even by the citizen and the alien, cannot be determined in advance. The gravity of the practical effect on both will be a matter

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<sup>198</sup> See *supra* notes 179–97; see, e.g., *McBurney v. Young*, 569 U.S. 221, 227 (2013) (“[T]he Privileges and Immunities Clause protects the right of citizens to ‘ply their trade, practice their occupation, or pursue a common calling.’” (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978))); 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, 782 (2008) (noting that initially, “it was widely assumed that privileges and immunities covered positive law rights securing property and the right to practice a commercial trade.”); William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 216 (2002) (“Employment rights have been consistently linked to our understanding of ‘privileges or immunities.’”); see also Epstein, *supra* note 7, at 345 (“[T]he right to practice one’s occupation is . . . closely tied to entry into commerce, the pursuit of happiness, and the ownership of property . . .”).

<sup>199</sup> See Rich, *supra* note 198, at 216.

<sup>200</sup> See, e.g., *Camden*, 465 U.S. at 233 (Blackmun, J., dissenting).

of the relevant scarcities and other market conditions.<sup>201</sup> Nor can we say in advance, more generally, that a restriction on hiring opportunities will more “directly” or “immediately” affect one party or the other.

Of specific interest for this Article’s purposes is that in any case in which the prospective employee is either a documented or undocumented alien, the prospective employer may be a citizen of the state in question or of another state as well as a citizen of the United States.<sup>202</sup> For the purposes of considering the regulated employment transaction, we may for sheer simplicity think of an alien prospective employee and a citizen prospective employer. The alien may or may not have in-state residence or other substantial and sustained in-state ties. The citizen, in turn, may or may not have similar linkages.

The employer-citizen in such a case thus may be a resident of the state in question. In that instance, the most immediately and obviously relevant privileges or immunities would be those that accrue under the Fourteenth Amendment, which on some sensible views may well now encompass more than the limited range initially recognized in the *Slaughter-House* cases.<sup>203</sup> One might also read the Article IV Privileges and Immunities Clause as more than a limited, and perhaps redundant, version of an equal protection clause benefiting out-of-staters alone.<sup>204</sup>

If, on the other hand, the employer-citizen is a non-resident of the state in question, Article IV Privileges and Immunities, which clearly includes employment-related privileges, would certainly be available.<sup>205</sup> Presumably, Article IV’s Commerce Clause-like concern for employment, callings, occupations, and the practice of hiring for business projects, as in *Camden* itself, would apply fully.<sup>206</sup>

Consider, though, the position of the alien who seeks employment from the above employer. If the alien were instead a citizen of the United States but not of the relevant

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<sup>201</sup> Studies in this area effectively capture impacts of employment restrictions in hindsight, however. For an example of the impacts of employment restrictions on aliens and citizens, see Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHL.-KENT. L. REV. 291 (2003).

<sup>202</sup> Certainly, a reversal of these alienage and citizenship roles as between the prospective employer and prospective employee is possible as well. The alien, as entrepreneur, may be hiring citizens.

<sup>203</sup> Consider the possibilities suggested in *supra* notes 90–114 and accompanying text.

<sup>204</sup> Rights of out-of-staters under Article IV may or may not be protected as stringently under that Article as under the Equal Protection Clause. The Court, for example, applied some sort of hybridized strict and mid-level scrutiny in *Camden* under Article IV, but applied strict scrutiny in the right to travel equal protection case of *Shapiro v. Thompson*, 394 U.S. 618 (1969), *overruled by* *Edelman v. Jordan*, 415 U.S. 651 (1974). For the *Camden* case’s murkier language, see *supra* note 38. In general, if Article IV Privileges and Immunities count as implicitly constitutionally fundamental, they should evoke strict scrutiny under the Equal Protection Clause. For example, see the strict scrutiny applied in the voting rights equal protection case of *Dunn v. Blumstein*, 405 U.S. 330 (1972). We need not take any stand on these questions herein.

<sup>205</sup> See the discussion of *Camden*, *supra* notes 26–38 and accompanying text, as well as *McBurney v. Young*, 569 U.S. 221, 227 (2013).

<sup>206</sup> See *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984).



state, Article IV and Fourteenth Amendment privileges would both accrue.<sup>207</sup> If the alien were a citizen of the United States and of the state in question, then at a minimum, the Fourteenth Amendment Privileges or Immunities Clause would clearly attach.<sup>208</sup>

Alienage in this context thus does not erase the possibility of what in effect amounts to privileges or immunities protection for someone who lacks citizenship status. Whether an alien is deemed a resident of the state in question or not, the alien in these circumstances directly and inescapably partakes in and enjoys a privilege or immunity that is merely the other logically essential half of the inherently relational, reciprocal, and interpersonal transactional privilege held by the citizen with whom employment is sought. The transactional rights of prospective employers and employees thus are inherently shared and inseparable, even if the rights of the former are constitutional privileges and even if the latter persons are not themselves also citizens.

To deny, as through traffic regulations, realistic employment opportunities to aliens among other persons is inescapably to deny the essentially corresponding or reciprocal opportunities of prospective employers who qualify as citizens and who thus may invoke any relevant privileges or immunities. At first approximation, the proper judicial outcome in these cases is just what one would expect if the court has formally extended the relevant privilege or immunity to the alien in question.<sup>209</sup> This holds whether the actual employer is physically present on the municipally regulated scene or not.<sup>210</sup> One entirely reasonable way of accounting for these observations is by recognizing that documented or undocumented aliens effectively hold, under particular circumstances, what one might at a very minimum call “pragmatic” or “de facto” privileges or immunities.<sup>211</sup>

A complication arises in cases where the prospective or actual employer of the alien is not a natural person or a corporation. In such instances, an alien non-citizen can hardly be said to share or draw upon the citizen status of the purely corporate employer, as corporations are assumed, at least for our purposes, to be non-citizens,<sup>212</sup> and thus are incapable of holding privileges and immunities,<sup>213</sup> at least under Article

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<sup>207</sup> See even the highly restrictive analysis in the *Slaughter-House* cases, *supra* notes 65–89 and accompanying text.

<sup>208</sup> *See id.*

<sup>209</sup> *See Camden*, 465 U.S. at 218.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See, under Article IV, *Bank of the United States v. Deveaux*, 9 U.S. 61, 86 (1809), *overruled in part by Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. 497 (1844), and *Paul v. Virginia*, 75 U.S. 168, 178 (1869), *overruled in part by United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944) (“[I]n no case . . . has a corporation been considered a citizen within the meaning of [the Article IV Privileges and Immunities Clause].”). *See also* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 98 (2014); Stewart Jay, *The Curious Exclusion of Corporations from the Privileges and Immunities Clause of Article IV*, 44 HOFSTRA L. REV. 79, 79 (2015).

<sup>213</sup> *See supra* note 212.

IV.<sup>214</sup> Even in such cases, however, a member or agent of the corporation, as distinct from the corporation,<sup>215</sup> may still be able to assert a relevant privilege or immunity of citizens to the immediate logical benefit of any transacting alien.<sup>216</sup>

#### V. CONCLUSION

On the basis of the logic outlined above, thinking of documented and undocumented aliens, under specified circumstances, as effectively holding, however paradoxically, typical privileges and immunities of citizens is sensible. This follows from a careful, but entirely common sense, understanding of the inherently relational, inescapably social, and essentially reciprocal nature of at least some typical privileges and immunities. We might draw a very loose analogy to the fact that even if we choose to focus on the head of a coin, the very idea of the head of a coin depends upon that of a tail.

This is not to deny some obvious costs to aliens of any broad constitutional de-emphasis of equal protection and due process rights of persons in favor of an increased emphasis on the rights of citizens, which this Article does not endorse. Some leading scholars have feared such a shift in emphasis.<sup>217</sup> While these concerns are certainly justified, this Article has shown that in some practically crucial respects, such concerns are of reduced relevance or need not come into play at all. In some crucial contexts, non-citizens of all sorts may reasonably invoke what amount to privileges and immunities of citizens. As it turns out, the clearest and most practically significant of these contexts involves attempts to establish one sort of employer-employee relationship.

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<sup>214</sup> We here set aside the less historically litigated question of whether a corporation, of any sort, can itself claim any of the otherwise available privileges or immunities of citizens under the Fourteenth Amendment.

<sup>215</sup> See *Bank of Augusta v. Earle*, 38 U.S. 519, 542 (1839).

<sup>216</sup> See, e.g., *id.* (distinguishing the rights of the corporate artificial person from the rights of its natural person members, who may be citizens of states for Article IV purposes).

<sup>217</sup> For example, see the discussion of the concerns of Professors Laurence Tribe and John Hart Ely in *Bosniak*, *supra* note 118, at 1289.

