

Corfield v. Coryell and the Privileges and Immunities of American Citizenship*

Justice Bushrod Washington's famous discussion in *Corfield v. Coryell*¹ of the meaning of the Privileges and Immunities Clause² is, as Charles Fairman remarked, "certainly one of the most famous pronouncements ever made in a circuit court."³ The fame of Washington's decision is well-deserved, for it was long considered *the* authoritative interpretation of the Privileges and Immunities Clause.⁴ His discussion of the clause was one of the first offered by a federal court. He was surely capable of undertaking such initiatory interpretation, as he was no doubt aware of the original understanding of the clause. He had studied law with James Wilson (whom he replaced on the Supreme Court in 1798) and had been a member of the Virginia ratifying convention, where he had voted with James Madison, John Marshall, and others in favor of the Constitution.⁵ In fact, his pronouncement in *Corfield* represents one of the few elaborate interpretations of the Privileges and Immunities Clause left by anyone who participated in the adoption of the Constitution.⁶

* This Note is largely an adaptation of chapters 2–7 from my unpublished dissertation: Exploring "That Unexplored Clause of the Constitution": The Meaning of the "Privileges and Immunities of Citizens" Before the Fourteenth Amendment (2002) (Unpublished Ph.D. dissertation, University of Dallas) (on file with author). I am especially grateful to my wife, Libby, for her patience and support while I was writing both this piece and the dissertation on which it is based. I am also indebted to Professors Richard Dougherty and Thomas West of the University of Dallas for their invaluable guidance through the dissertation process, and to the editors and members of the Texas Law Review for their excellent suggestions and editing.

1. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).
2. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").
3. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 10 (1949).
4. See Adam J. Rosen, *Slaughtering Sovereignty: How Congress Can Abrogate State Sovereign Immunity to Enforce the Privileges or Immunities Clause of the Fourteenth Amendment*, 11 TEMP. POL. & CIV. RTS. L. REV. 111, 130 n.102 (2001) (characterizing *Corfield* as the "premier case of the antebellum period" explaining privileges and immunities); Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1158 (2002) (referring to the *Corfield* opinion as the "most widely-cited enumeration" of privileges and immunities at the time of the Fourteenth Amendment's adoption); see also Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 1001–02 (2002) (arguing that modern cases reaffirm Justice Washington's interpretation of privileges and immunities).
5. George W. Goble, *Bushrod Washington*, in 10 DICTIONARY OF AMERICAN BIOGRAPHY pt. 1, 508–09 (Dumas Malone ed., 1964). [hereinafter DICTIONARY OF AMERICAN BIOGRAPHY].
6. Although Alexander Hamilton stated that the Privileges and Immunities Clause might be the very "basis of the Union," THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961), the Founders generally refrained from providing any detailed exposition of this provision, even during the framing and ratification of the Constitution. The only exceptions with which I am familiar are Hamilton's remarks in the Federalist Papers, *id.*; James Madison's brief

Washington's *Corfield* opinion not only served as a leading interpretive authority for the Privileges and Immunities Clause, but also greatly influenced the drafting of the later Privileges *or* Immunities Clause of the Fourteenth Amendment.⁷ In the minds of the drafters of that Amendment, *Corfield* provided the most authoritative interpretation of the expression "privileges and immunities of citizens."⁸ Indeed, Washington's pronouncement was the legal authority to which the congressional framers most frequently appealed in describing the constitutional privileges of citizenship.⁹ Most notably, while introducing the proposed Amendment to the Senate, Jacob Howard explained the import of the "privileges and immunities of citizens" secured therein by means of a lengthy quotation from *Corfield*.¹⁰

Washington's exposition of "privileges and immunities of citizens" is, therefore, essential to American constitutional studies, for it provides evidence crucial to any inquiry into the roots of two different clauses of the Constitution: the Privileges *and* Immunities Clause of Article IV and the Privileges *or* Immunities Clause of the Fourteenth Amendment. Through *Corfield*, Washington both became the leading judicial expounder of the former provision and posthumously influenced the drafting of the latter. Surely, if one is to understand the history of the privileges of citizenship, as guaranteed in both the original and the amended Constitution, one must understand *Corfield*.

Despite the compelling significance of the case, legal scholars have largely failed to give *Corfield* much attention. Even in studies devoted to the Privileges and Immunities Clause, discussions of the case generally cover no

discussion in the same, THE FEDERALIST NO. 42, at 269–70 (James Madison) (Clinton Rossiter ed., 1961); claims by two Anti-Federalists that the clause would, in conjunction with Article III, Section 2, render the federal courts' jurisdiction limitless, FEDERAL FARMER NO. 18 (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 346–47 (Herbert J. Storing ed., 1981) and BRUTUS NO. 12 (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 427; Samuel Chase's opinion in *Campbell v. Morris*, 3 H. & McH. 535, 553–54 (Md. 1797) (discussed *infra* text accompanying notes 68–82); and Washington's *Corfield* opinion (discussed *infra* Part V).

7. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV, § 1.

8. See Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 228 (2003) (explaining that Senators Howard and Trumbull, two of the amendment's framers, referred to Justice Washington's discussion of privileges and immunities when explaining that clause); Smith, *supra* note 4, at 1158–59 (noting that many commentators have pointed out that Senator Howard's extensive quotation from *Corfield* in introducing the Fourteenth Amendment indicates the opinion's relevance).

9. See, e.g., *Index to THE RECONSTRUCTION AMENDMENTS' DEBATES* 754–56 (Alfred Avins ed., 1967) [hereinafter DEBATES] (indicating that, in this compilation of congressional debates, *Corfield* was one of the most frequently cited cases).

10. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). In introducing the excerpt from *Corfield*, Howard remarked that "[i]t would be a curious question to solve what are the privileges and immunities of citizens of each of the States But we may gather some intimation . . . by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington" *Id.*

more than a few pages.¹¹ In sum, *Corfield v. Coryell* remains a famous, important, but largely unexamined constitutional case.

It is the purpose of this Note to provide, for the first time, a close analysis of Justice Washington's famous remarks. After surveying the scholarly treatment of *Corfield* in Part I, I begin the study with a sketch of the understanding of the Privileges and Immunities Clause that prevailed before *Corfield*. In Part II, I briefly examine the Framers' understanding of the provision; in Part III, I discuss some of the important questions that the Framers left unanswered; and, in Part IV, I survey the ways in which courts grappled with the clause prior to the *Corfield* decision. In Part V, the longest part, I present a detailed analysis of Justice Washington's opinion. In the concluding part, I consider in what way this opinion sheds light on the original understanding of the Privileges or Immunities Clause of the Fourteenth Amendment.

I. The Limited Scholarship on *Corfield*

In large part, the failure by scholars to give *Corfield* any careful attention is due to the fact that, for the courts, Washington's pronouncement no longer carries the authority that it once enjoyed. Writing in 1823, he seems to have interpreted the Privileges and Immunities Clause in light of the now-abandoned, but then-prevalent, natural-rights theory. Accordingly, he sought the meaning of "privileges" and "immunities," not simply in the positive law of the states, but also in certain purportedly universal principles: he ruled that the privileges to which citizens were entitled under the clause were those which were "in their nature, fundamental; which belong[ed], of right, to the citizens of all free governments."¹² Yet in the decades following the Civil War, the Supreme Court abandoned this natural-rights reading and replaced it with a strictly anti-discriminatory construction. Beginning in

11. See, e.g., W. J. Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 MICH. L. REV. 286, 290–92 (1903) (noting that Judge Washington's "statement of the rights comprehended by the terms 'privileges and immunities'" did not have "considerable influence upon the subsequent decisions of the courts"); ROGER HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP 18–20 (Johns Hopkins Univ. Studies in Historical and Political Science, Series 36, no. 3, 1918) (noting that all of the privileges discussed in the *Corfield* opinion were "since held to be secured to the citizens of the several States" because the individual States granted those rights to their own citizens); Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1335–37 (1960) (criticizing Judge Washington's discussion of the Privileges and Immunities Clause in *Corfield*); Johathan Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 512 n.101 (1981) (confining the discussion of *Corfield* to a footnote although the study of the provision is over one hundred pages). For somewhat longer treatments, see L. H. LARUE, LIBERTY, EQUALITY, PRIVILEGES, IMMUNITIES: LOST KNOWLEDGE 32–38 (Washington & Lee Public Law and Legal Theory Research Paper Series, Working Paper No. 00-4, 2000), available at http://papers.ssrn.com/abstract_id=247655; DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 23–27 (2003).

12. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).