

**ARTICLE IV**  
**RELATIONSHIPS BETWEEN THE STATES**

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**ARTICLE IV**  
**RELATIONSHIPS BETWEEN THE STATES**

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## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### ArtIV.1 Overview of Article IV, Relationships Between the States

Article IV of the U.S. Constitution is sometimes called the “States’ Relations Article.”<sup>1</sup> It contains several provisions concerning the federalist structure of government established by the Constitution, which divides sovereignty between the states and the National Government.<sup>2</sup>

Sections 1 and 2 concern the states’ relationships with each other. Section 1 is referred to as the Full Faith and Credit Clause, and requires states to recognize the public acts, records, and judicial proceedings of other states;<sup>3</sup> for example, states must generally give effect to judgments issued by an out-of-state court.<sup>4</sup> Section 2 addresses interstate comity, that is, harmony and cooperation among the states. Its first clause grants the citizens of each state the privileges and immunities of the citizens of other states, preventing states from discriminating against non-residents in favor of their own citizens.<sup>5</sup> Its second clause addresses when a person accused of a crime flees from one state to another, requiring the state where the fugitive is found to return him to the state where he has been charged with a crime, upon proper demand.<sup>6</sup>

Sections 3 and 4 concern the states’ relationships to the National Government. Section 3 grants Congress two important powers: to admit new states into the union,<sup>7</sup> and to govern federal territories and property.<sup>8</sup> Through Section 4, known as the Guarantee Clause, the United States promises to protect the states against foreign invasion and domestic insurrection, and to ensure that each state has “a Republican Form of Government.”<sup>9</sup>

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<sup>1</sup> *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 379 (1978).

<sup>2</sup> *See generally* *Gregory v. Ashcroft*, 501 U.S. 452, 457–60 (1991) (describing the “federalist structure of joint sovereigns” established under the Constitution).

<sup>3</sup> U.S. CONST. art. IV, § 1.

<sup>4</sup> *See* ArtIV.S1.1 Overview of Full Faith and Credit Clause.

<sup>5</sup> *See* ArtIV.S1.1 Overview of Full Faith and Credit Clause.

<sup>6</sup> *See* ArtIV.S2.C2.1 Overview of Extradition (Interstate Rendition) Clause. The third clause of Section 2 envisioned an analogous process for enslaved persons who escaped to another state, but it was nullified in 1865 by the Thirteenth Amendment.

<sup>7</sup> *See* ArtIV.S3.C1.1 Overview of Admissions (New States) Clause.

<sup>8</sup> *See* ArtIV.S3.C2.1 Property Clause Generally.

<sup>9</sup> U.S. CONST. art. IV, § 4, cl. 1. The Supreme Court has generally refused to hear cases on the Guarantee Clause based on the political question doctrine. ArtIII.S2.C1.9.1 Overview of Political Question Doctrine; ArtIV.S4.2 Guarantee Clause Generally.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause

ArtIV.S1.1

Overview of Full Faith and Credit Clause

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## SECTION 1—FULL FAITH AND CREDIT CLAUSE

### ArtIV.S1.1 Overview of Full Faith and Credit Clause

Article IV, Section 1:

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

The Constitution’s federalist structure allows each state to maintain its own government.<sup>1</sup> This structure creates a risk that multiple states will exercise their powers over the same issue or dispute, leading to confusion and uncertainty.<sup>2</sup> The Constitution’s Full Faith and Credit Clause mitigates that risk by adjusting the states’ interrelationships.<sup>3</sup> The Clause requires each state to give “Full Faith and Credit” to “the public Acts” of “every other State,” such as other states’ statutes.<sup>4</sup> The Clause also requires states to give “Full Faith and Credit” to the “Records[ ] and judicial Proceedings of every other State.”<sup>5</sup>

The Supreme Court’s interpretation of the Clause has shifted over time.<sup>6</sup> The Court has settled on a doctrinal framework that treats out-of-state court judgments differently from out-of-state laws.<sup>7</sup> Whereas the modern Court generally requires states to give out-of-state judgments conclusive effect, states have more freedom to apply their own laws in their own courts, so long as they do not close their courts completely to claims based on other states’ laws.<sup>8</sup>

The Clause also authorizes Congress to enact “general Laws” that “prescribe the Manner in which [states’] Acts, Records and Proceedings shall be proved, and the Effect thereof.”<sup>9</sup> Congress has invoked this authority several times, such as to require federal and territorial

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<sup>1</sup> See Intro.7.3 Federalism and the Constitution. See also, e.g., *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 703–04 (1982) (“Ours is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it.”).

<sup>2</sup> See, e.g., *Underwriters Nat’l Assurance*, 455 U.S. at 704 (“[T]here is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue.”).

<sup>3</sup> See, e.g., *V.L. v. E.L.*, 577 U.S. 404, 407 (2016) (per curiam) (explaining that the Full Faith and Credit Clause “alter[s] the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation”) (quoting *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

<sup>4</sup> U.S. CONST. art. IV, § 1. See also, e.g., *Franchise Tax Bd. v. Hyatt*, No. 14-1175, slip op. at 4 (U.S. Apr. 19, 2016) (“A statute is a ‘public Act’ within the meaning of the Full Faith and Credit Clause.”).

<sup>5</sup> U.S. CONST. art. IV, § 1.

<sup>6</sup> See generally ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause.

<sup>7</sup> See, e.g., *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003) (“[O]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”) (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998)).

<sup>8</sup> See, e.g., *id.* (“Whereas the full faith and credit command ‘is exacting’ with respect to ‘[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment,’ it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’”) (internal citations omitted; alterations in original). Compare ArtIV.S1.3.1 Early Precedent on Full Faith and Credit Clause and ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause, with ArtIV.S1.4.1 Early Doctrine on State Law on Full Faith and Credit Clause and ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause.

<sup>9</sup> U.S. CONST. art. IV, § 1.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause

ArtIV.S1.1

#### Overview of Full Faith and Credit Clause

courts to apply the same full faith and credit principles as state courts.<sup>10</sup> However, the Supreme Court has not yet considered where the outer boundaries of that power lie.<sup>11</sup>

Litigants frequently ask state judges to enforce judgments entered by other states' courts, such as judgments for monetary damages.<sup>12</sup> Those judges must decide whether to honor that judgment—and, if so, what legal effect the judgment will have. In addition, the Full Faith and Credit Clause requires states to recognize other states' "public Acts," such as statutes.<sup>13</sup> This language has raised questions regarding how state courts must treat other states' laws. Besides the question of *which* state's laws a court must apply when two statutes conflict, the Court has also considered *whether* a state court must entertain causes of action based on other states' laws. The Court has interpreted the Clause to require states to open their courts to claims based on other states' laws under various circumstances.<sup>14</sup>

Whereas the Full Faith and Credit Clause's first sentence mandates that "Full Faith and Credit . . . be given in each State to the public Acts, Records, and judicial Proceedings of every other State," its second sentence authorizes Congress to "prescribe . . . the Effect" of "such Acts, Records, and Proceedings."<sup>15</sup> The relationship between these two sentences raises interpretive questions. Because the first sentence already requires states to give out-of-state acts and proceedings full faith and credit, the Framers' reasons for authorizing Congress to specify the effect of those acts and proceedings are unclear.<sup>16</sup> Nor is it clear whether the Clause's second sentence empowers Congress to enact legislation allowing states to *refuse* to give effect to particular categories of acts, records, and proceedings.<sup>17</sup> Congress has seldom invoked its legislative authority under the Clause and thus has rarely tested that power's potential limits.<sup>18</sup> As a result, the scope of Congress's powers under the Clause remains unsettled.<sup>19</sup>

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<sup>10</sup> See generally ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause to ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause.

<sup>11</sup> See generally ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause to ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause.

<sup>12</sup> See, e.g., 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4467 (5th ed. 2019) (describing "enforcement of money judgments" as "[t]he most familiar application" of full faith and credit principles).

<sup>13</sup> U.S. CONST. art. IV, § 1. See also *Franchise Tax Bd. v. Hyatt*, No. 14-1175, slip op. at 4 (U.S. Apr. 19, 2016) ("A statute is a 'public Act' within the meaning of the Full Faith and Credit Clause.").

<sup>14</sup> See ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause.

<sup>15</sup> U.S. CONST. art. IV, § 1.

<sup>16</sup> See, e.g., Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 485 (2013) ("The Constitution commands that 'Full Faith and Credit shall be given' to state acts, records, and judgments. Although this clause appears to create a self-executing constitutional directive, the very next sentence provides that Congress 'may' prescribe the manner in which state acts and judgments 'shall be proved, and the Effect thereof.' Paradoxically, the Full Faith and Credit Clause thus arguably seems to give Congress the power to nullify the command that full faith and credit be given. Any plausible interpretation of the Clause must reconcile this apparent conflict.") (footnotes omitted).

<sup>17</sup> See, e.g., Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 126 (2011) ("The apparent inconsistency in the language of the Full Faith and Credit Clause becomes a concrete legal issue . . . if Congress chooses to pass a law that appears to violate the mandate of the first sentence of the Clause.").

<sup>18</sup> See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2005 (1997) (describing Congress's power under the Clause's second sentence as "untested and practically unexercised").

<sup>19</sup> See, e.g., Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 485 (2013) ("[T]he Court has not yet ruled on the second portion of the Clause—that is, it has not addressed the contours of Congress's full faith and credit power.").

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause

ArtIV.S1.2

Historical Background on Full Faith and Credit Clause

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#### ArtIV.S1.2 Historical Background on Full Faith and Credit Clause

Article IV, Section 1:

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

Before the Constitution’s ratification, English and colonial courts struggled with how to treat judgments from other sovereigns’ courts.<sup>1</sup> While some courts held that judgments from other jurisdictions should have *conclusive* effect in other courts, others held that such judgments were only *presumptively* binding.<sup>2</sup> The Articles of Confederation attempted to address this uncertainty by providing that “[f]ull faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.”<sup>3</sup> Nevertheless, it remained unclear whether the Articles of Confederation merely required courts to accept other states’ records as *evidence*, or if it instead required courts to afford such records *conclusive effect*.<sup>4</sup>

When the Framers decided to include a full faith and credit provision in the Constitution, they debated whether and how it should differ from the Articles of Confederation. For instance, whereas the Articles only granted full faith and credit to the “records, acts, and judicial proceedings” of “*courts and magistrates*,”<sup>5</sup> the Framers decided to extend full faith and credit to *legislative* acts as well.<sup>6</sup>

The Framers also debated whether to empower Congress to pass legislation governing the authentication, execution, and effect of out-of-state acts.<sup>7</sup> While some Framers advocated

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<sup>1</sup> See, e.g., *Thompson v. Whitman*, 85 U.S. (8 Wall.) 457, 465 (1873) (describing “the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be [c]onclusive of the matters adjudged, and others that they should be regarded as only *prima facie* binding”); *M’Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839) (“[W]e need not doubt what the framers of the Constitution intended to accomplish by [the Full Faith and Credit Clause], if we reflect how unsettled the doctrine was upon the effect of foreign judgments, or the effect, *rei judicatae*, throughout Europe, in England, and in these States, when our first confederation was formed.”).

<sup>2</sup> *Thompson*, 85 U.S. (8 Wall.) at 465.

<sup>3</sup> ARTICLES OF CONFEDERATION, art. IV, § 3.

<sup>4</sup> See, e.g., Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1224–25 (2009) (“The divergence between ‘authentication’ and ‘effect’ interpretations of the [Articles of] Confederation’s [Full Faith and Credit] Clause soon appeared in contemporary state court decisions.”); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 282–88 (1998) (analyzing the “five reported decisions interpreting the Full Faith and Credit Clause of the Articles of Confederation” and concluding that “[t]he debate in the cases interpreting the Articles of Confederation Clause concerned whether the language of the Clause should be given an evidentiary meaning or should be understood as elevating state judgments to the status of domestic judgments in other states”). See also THE FEDERALIST NO. 42 (James Madison) (describing the Articles of Confederation’s full faith and credit provision as “extremely indeterminate”); Charles M. Yablon, *Madison’s Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 140 (2011) (maintaining that “the faith and credit clause in the Articles of Confederation had no clear and determinate meaning”).

<sup>5</sup> ARTICLES OF CONFEDERATION, art. IV, § 3 (emphasis added).

<sup>6</sup> Compare 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 188 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Committee of Detail draft proposing that “[f]ull faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State”) (emphasis added), with *id.* at 447 (reflecting that Hugh Williamson “moved to substitute in place of” the Committee of Detail’s full faith and credit provision “the words of the Articles of Confederation on the same subject” because “[h]e did (not) understand precisely the meaning of the article”). See also *id.* (noting that James Wilson and William Samuel Johnson “supposed the meaning” of the Committee of Detail’s provision “to be that Judgments in one State should be the ground of actions in other States, [and] that acts of the Legislatures should be included, for the sake of Acts of insolvency”). See also U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the *public Acts*, Records, and judicial Proceedings of every other State.”) (emphasis added).

<sup>7</sup> See 2 FARRAND’S RECORDS, *supra* note 6, at 448.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause

ArtIV.S1.2

#### Historical Background on Full Faith and Credit Clause

giving such acts, records, and proceedings binding effect as an unalterable constitutional command,<sup>8</sup> others supported letting Congress prescribe the effect that acts, records, and proceedings would have in other states.<sup>9</sup> The Framers ultimately chose the latter option.<sup>10</sup> The Framers also debated the scope of Congress's power to pass such laws. Some Framers proposed to authorize Congress to determine the effect of out-of-state *judgments* only, fearing that allowing Congress to prescribe the effect of out-of-state *statutes* would usurp states' authority.<sup>11</sup> Others argued that unless Congress could prescribe the effect of other states' nonjudicial acts, the Full Faith and Credit Clause would have no meaningful effect.<sup>12</sup> Over several dissenting votes, the Framers authorized Congress to prescribe the effect of states' legislative acts as well as states' judgments.<sup>13</sup>

The Framers also considered whether to *require* Congress to legislate regarding the authentication and effect of states' acts, records, and proceedings, or whether to merely *allow* Congress to pass such laws.<sup>14</sup> The Framers ultimately selected the latter option, though the Convention records do not explicitly specify why the Framers did so.<sup>15</sup>

Finally, the Framers deliberated whether to *require* states to give full faith and credit to other states' acts, records, and proceedings versus *encouraging* states to do so.<sup>16</sup> The Framers

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<sup>8</sup> See 2 FARRAND'S RECORDS, *supra* note 6, at 448 ("Mr. Randolph said there was no instance of one nation executing judgments of the Courts of another nation. He moved the following proposition. 'Whenever the Act of any State, whether Legislative Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done.'").

<sup>9</sup> See 2 FARRAND'S RECORDS, *supra* note 6, at 448 (noting that James Madison "wished the [federal] Legislature might be authorized to provide for the execution of Judgments in other States, under such regulations as might be expedient"); 2 FARRAND'S RECORDS, *supra* note 6, at 448 (Gouverneur Morris's proposal to require Congress to "determine the proof and effect" of out-of-state "acts, records, and proceedings").

<sup>10</sup> See 2 FARRAND'S RECORDS, *supra* note 6, at 601; U.S. CONST. art. IV, § 1 ("[T]he Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

<sup>11</sup> See 2 FARRAND'S RECORDS, *supra* note 6, at 485 (September 1, 1787 draft providing that "the Legislature shall by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which *Judgments* obtained in one State, shall have in another") (emphasis added); 2 FARRAND'S RECORDS, *supra* note 6, at 488–89 ("Mr. Randolph considered it as strengthening the general objection agst. the plan, that its definition of the powers of the Government was so loose as to give it opportunities of usurping all the State powers. He was for not going farther than the Report, which enables the Legislature to provide for the effect of *Judgments*.").

<sup>12</sup> See 2 FARRAND'S RECORDS, *supra* note 6, at 488 ("Mr. Wilson remarked, that if the Legislature were not allowed to declare the effect the provision would amount to nothing more than what now takes place among all Independent Nations.").

<sup>13</sup> See 2 FARRAND'S RECORDS, *supra* note 6, at 488 ("Mr. Govr. Morris moved to amend the Report concerning the respect to be paid to Acts Records &c of one State, in other States (see Sepr. 1.) by striking out 'judgments obtained in one State shall have in another' and to insert the word 'thereof' after the word 'effect[.]'"); 2 FARRAND'S RECORDS, *supra* note 6, at 489 ("On the amendment as moved by Mr[.] Govr. Morris[.] Mas. ay. Ct ay. N. J. ay. Pa. ay. Md. no. Va no. N. C. ay. S. C. ay. Geo. no. [Ayes—6; noes—3.]"). See also 2 FARRAND'S RECORDS, *supra* note 6, at 488 ("Docr. Johnson thought the amendment as worded would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State.").

<sup>14</sup> Compare 2 FARRAND'S RECORDS, *supra* note 6, at 485 ("[T]he Legislature shall by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved . . .") (emphasis added), with 2 FARRAND'S RECORDS, *supra* note 6, at 489 (James Madison's motion to replace "shall" with "may.").

<sup>15</sup> See 2 FARRAND'S RECORDS, *supra* note 6, at 489 ("On motion of Mr. Madison . . . 'shall' between 'Legislature' & 'by general laws' [was] struck out, and 'may' inserted. . . ."); U.S. CONST. art. IV, § 1 ("[T]he Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.") (emphasis added). But see David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1626–27 (2009) (suggesting that James Madison proposed this change to address Edmund Randolph's concern that the Full Faith and Credit Clause gave Congress too much power).

<sup>16</sup> Compare 2 FARRAND'S RECORDS, *supra* note 6, at 485 (draft providing that "Full faith and credit ought to be given in each State to the public acts, records, and Judicial proceedings of every other State. . . .") (emphasis added), with 2 FARRAND'S RECORDS, *supra* note 6, at 489 (James Madison's motion to replace "ought to" with "shall").

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 1—Full Faith and Credit Clause

ArtIV.S1.2

Historical Background on Full Faith and Credit Clause

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ultimately selected the former option.<sup>17</sup> The Convention records do not reveal why the Framers made that choice, and scholars have debated whether the Framers intended that choice to have any substantive effect.<sup>18</sup>

The Full Faith and Credit Clause provoked little to no opposition or discussion during the ratification debates.<sup>19</sup> In the *Federalist Papers*, James Madison described the Clause’s grant of congressional authority to legislate regarding out-of-state acts, records, and judicial proceedings’ authentication and effect as “an evident and valuable improvement on” the Articles of Confederation’s full faith and credit provision.<sup>20</sup> Madison thus maintained that Congress’s authority under the Clause would amount to “a very convenient instrument of justice” that would “be particularly beneficial on the borders of contiguous States.”<sup>21</sup>

**ArtIV.S1.3 Judicial Proceedings**

**ArtIV.S1.3.1 Early Precedent on Full Faith and Credit Clause**

Article IV, Section 1:

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

After the Full Faith and Credit Clause’s ratification, jurists debated whether states only needed to accept out-of-state judgments as *evidence* in judicial proceedings, or if they needed to give out-of-state judgments *conclusive effect* instead.<sup>1</sup> The Supreme Court reached the latter conclusion in *Mills v. Duryee*, holding that states ordinarily cannot reexamine an out-of-state judgment’s merits.<sup>2</sup> The Court reasoned that if “judgments of the state Courts” were “considered *prima facie* evidence only,” the Full Faith and Credit Clause “would be utterly unimportant and illusory,” as “[t]he common law would give such judgments precisely the same effect.”<sup>3</sup>

The legal basis for the *Mills* Court’s ruling was not self-evident. As another chapter of this treatise explains, the First Congress passed a statute requiring “every court within the United

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<sup>17</sup> See 2 FARRAND’S RECORDS, *supra* note 6, at 489 (“On motion of Mr. Madison, ‘ought to’ was struck out, and ‘shall’ inserted. . . .”); U.S. CONST. art. IV, § 1 (“Full Faith and Credit *shall* be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”) (emphasis added).

<sup>18</sup> See 2 FARRAND’S RECORDS, *supra* note 6, at 489.

<sup>19</sup> See, e.g., James D. Sumner, Jr., *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 OR. L. REV. 224, 235 (1955) (“Little attention was given the full-faith-and-credit provision before and during ratification . . . It is interesting to note that not a single debate arose on this provision of the Constitution in the ratifying conventions of the various states.”); Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 9 (1944) (“There is almost no reference to [the Full Faith and Credit Clause] in the debates in the various states on adopting the Constitution.”).

<sup>20</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>21</sup> *Id.*

<sup>1</sup> See Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1232 (2009).

<sup>2</sup> 11 U.S. (7 Cranch) 481, 484 (1813) (“Congress ha[s] therefore declared the *effect* of the record by declaring what faith and credit shall be given to it.”); *id.* (“[I]t is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also.”). See also *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 302–03 & n.14 (1866) (interpreting *Mills* as holding that a judicial record, “when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the State court from whence it was taken,” and that “it is not competent for any other State to authorize its courts to open the merits and review the cause”).

<sup>3</sup> 11 U.S. (7 Cranch) at 485. See also *Hampton v. M’Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818) (explaining that *Mills* held “that the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced”).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: Judicial Proceedings

ArtIV.S1.3.1

Early Precedent on Full Faith and Credit Clause

States” to give “faith and credit” to properly authenticated judicial records and proceedings.<sup>4</sup> It is unclear whether the *Mills* Court meant that the *Constitution itself* requires state courts to give conclusive effect to out-of-state judgments, or that the full faith and credit *statute* mandated that result instead.<sup>5</sup> The answer to that question has significant practical consequences: If the *Constitution itself* requires states to give out-of-state judgments conclusive effect, then Congress may lack the power to modify that rule legislatively.<sup>6</sup> Although *Mills* contains language supporting either interpretation,<sup>7</sup> the Court apparently construed *Mills* as an interpretation of the full faith and credit *statute* from 1813 to 1887.<sup>8</sup>

The early Court nonetheless recognized limited circumstances in which states could disregard out-of-state judgments. In *M’Elmoyle v. Cohen*, the Court held that a state need not enforce another state’s judgment if the first state’s statute of limitations has expired.<sup>9</sup> In *D’Arcy v. Ketchum*, the Court ruled that if a state court renders a judgment against a defendant whom the plaintiff did not properly serve with process, other states need not give that judgment full faith and credit.<sup>10</sup> And in *Thompson v. Whitman*, the Court held that a state need not honor an out-of-state judgment from a court that lacked jurisdiction to issue it.<sup>11</sup>

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<sup>4</sup> See Act of May 26, 1790, ch. 11, 1 Stat. 122. See also ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause.

<sup>5</sup> See Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 521 (2013) (“While *Mills* holds that conclusive effect must be given to state judgments, it is unclear whether this holding was derived from the 1790 Act, the Constitution, or both.”) (footnotes omitted).

<sup>6</sup> See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1590 (2009) (arguing that the Supreme Court’s later decision to cast *Mills*’s holding “as constitutional rather than statutory in origin entirely changed the perceived allocation of power between the legislative and judicial branches”). See also ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause and ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause.

<sup>7</sup> Compare 11 U.S. (7 Cranch) at 484 (“The *act* declares that the record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken . . . Congress ha[s] therefore declared the *effect* of the record by declaring what faith and credit shall be given to it.”) (first and second emphases added), and *id.* at 485 (“[T]he [C]onstitution contemplated a *power in [C]ongress* to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the [A]ct of [C]ongress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision.”) (emphases added), with *id.* (“Were the construction contended for by the Plaintiff in error to prevail, . . . *this clause in the constitution* would be utterly unimportant and illusory.”) (emphasis added), and Schmitt, *supra* note 5, at 512 n.155 (“[I]f Justice Story were referring only to the 1790 Act [in *Mills*], he would have said that such a construction would render the Act, rather than the Constitution, illusory.”).

<sup>8</sup> See, e.g., *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 175–76 (1850) (suggesting that *Mills* involved the “construction of the *act of 1790*”) (emphasis added); *Christmas*, 72 U.S. (5 Wall.) at 302 (stating that *Mills* involved “the construction of th[e] *act of Congress*”) (emphasis added); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 462 (1873) (“The court in [*Mills*] held that the *act* gave to the judgments of each State the same conclusive effect, as records, in all the States, as they had at home . . .”) (emphasis added). But see ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause (explaining how the Court’s interpretation of *Mills* shifted in 1887).

<sup>9</sup> See 38 U.S. (13 Pet.) 312, 328 (1839) (“[T]he statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina.”).

<sup>10</sup> 52 U.S. at 165–68, 172–76. See also *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406 (1855) (“[W]henver an action is brought in one State on a judgment recovered in another, it is not enough to show it to be valid in the State where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the State, or had legal notice of the suit . . .”).

<sup>11</sup> 85 U.S. (18 Wall.) at 469 (holding that “the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the” Full Faith and Credit Clause).

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 1—Full Faith and Credit Clause: Judicial Proceedings

ArtIV.S1.3.2

Modern Doctrine on Full Faith and Credit Clause

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**ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause**

Article IV, Section 1:

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

The Supreme Court reinterpreted the Full Faith and Credit Clause in *Chicago & Alton Railroad v. Wiggins Ferry Co.*, in which the Court indicated that the *Clause itself*, not just the statute Congress passed to implement the Clause, compelled its holding in *Mills* requiring states to give out-of-state judgments conclusive effect.<sup>1</sup> Cases following *Chicago & Alton Railroad* similarly characterized the Clause itself as imposing this requirement, often without mentioning the full faith and credit statute.<sup>2</sup> The Court did not explain why it reconceptualized *Mills*'s holding as a constitutional command rather than a legislative mandate.<sup>3</sup>

Thus, under the Court's current interpretation of the Clause, courts ordinarily must give an out-of-state judgment the same effect it would have in the state that issued it.<sup>4</sup> A court may not disregard an out-of-state judgment merely "because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits"; the Clause "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based."<sup>5</sup> Nor may state courts decline to enforce other states' judgments for public policy reasons.<sup>6</sup>

Still, the modern Court recognizes limited circumstances in which a state may refuse to enforce an out-of-state judgment.<sup>7</sup> For example, a state need not honor a judgment if the

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<sup>1</sup> See 119 U.S. 615, 622 (1887) ("Without doubt the *constitutional requirement* (article 4, § 1) that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' implies that the public acts of every state shall be given the same *effect* by the courts of another state that they have by law and usage at home. *This is clearly the logical result of the principles announced as early as 1813, in Mills v. Duryee, . . . and steadily adhered to ever since.*") (emphasis added).

<sup>2</sup> See, e.g., *Harris v. Balk*, 198 U.S. 215, 221 (1905) ("The state court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the Federal question is whether it did not thereby refuse the full faith and credit to such judgment which is *required by the Federal Constitution*. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.") (emphasis added); *Clarke v. Clarke*, 178 U.S. 186, 195 (1900) (discussing "the *constitutional requirement* that full faith and credit must be given in one state to the judgments and decrees of the courts of another state") (emphasis added). See also Ann Woolhandler & Michael G. Collins, *Jurisdictional Discrimination and Full Faith and Credit*, 63 EMORY L.J. 1023, 1034 (2014) ("It was only in the late nineteenth and early twentieth century that the Court began to indicate that the Constitution on its own might require the enforcement of sister-state judgments.")

<sup>3</sup> See Woolhandler & Collins, *supra* note 2, at 1034 ("The Court provided no explanation for its move . . ."). See also *Chi. & A. R.*, 119 U.S. at 622; *Clarke*, 178 U.S. at 195; *Harris*, 198 U.S. at 221.

<sup>4</sup> See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 180 (1988) (holding that the Clause requires states "to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered"); *V.L. v. E.L.*, 577 U.S. 404, 407 (2016) (per curiam) ("With respect to judgments, 'the full faith and credit obligation is exacting.' . . . 'A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.'") (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)); *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982) ("[T]he judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.") (citation omitted).

<sup>5</sup> *V.L.*, 577 U.S. at 407 (quoting *Milliken v. Meyer*, 311 U.S. 457, 462 (1940)).

<sup>6</sup> See, e.g., *Baker*, 522 U.S. at 233 ("[O]ur decisions support no roving 'public policy exception' to the full faith and credit due judgments.") (emphasis omitted); *Estin v. Estin*, 334 U.S. 541, 546 (1948) (explaining that the Full Faith and Credit Clause "order[s] submission by one State even to hostile policies reflected in the judgment of another State").

<sup>7</sup> See, e.g., *Nelson v. George*, 399 U.S. 224, 229 (1970) ("[T]he Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment . . ."); *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 276 (1935) (suggesting that courts need not honor a judgment "procured by fraud").

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: State Public Acts and Records

ArtIV.S1.4.1

Early Doctrine on State Law on Full Faith and Credit Clause

rendering court lacked jurisdiction to enter it.<sup>8</sup> A court's power to scrutinize another court's jurisdiction is limited, however.<sup>9</sup> The court must ordinarily presume that the issuing court had jurisdiction unless the judicial record or other evidence reveals a jurisdictional defect.<sup>10</sup> If the parties in the first action litigated whether the rendering court had jurisdiction, and the first court answered that question affirmatively, the second court must accept that conclusion.<sup>11</sup>

Because the Full Faith and Credit Clause ordinarily requires states to give out-of-state judgments the same effect as the states that issued them,<sup>12</sup> whether a judgment has conclusive effect depends on whether the issuing court would regard the judgment as “final.” While some states hold that a judgment is final for full faith and credit purposes even when it is pending on appeal, other states hold that a judgment is not final until the appellate process has concluded.<sup>13</sup>

#### ArtIV.S1.4 State Public Acts and Records

##### ArtIV.S1.4.1 Early Doctrine on State Law on Full Faith and Credit Clause

Article IV, Section 1:

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

While the Supreme Court considered the Full Faith and Credit Clause's applicability to public acts several times during the early twentieth century,<sup>1</sup> its opinion in *Bradford Electric Light Co. v. Clapper* proved especially significant.<sup>2</sup> In *Clapper*, a Vermont resident who worked

<sup>8</sup> See, e.g., *V.L.*, 577 U.S. at 407 (“A State is not required, however, to afford full faith and credit to a judgment rendered by a court that ‘did not have jurisdiction over the subject matter or the relevant parties.’”) (quoting *Underwriters Nat'l Assurance*, 455 U.S. at 705); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (“[A] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere . . .”).

<sup>9</sup> See, e.g., *V.L.*, 577 U.S. at 407 (“That jurisdictional inquiry, however, is a limited one.”).

<sup>10</sup> *Id.* (“[I]f the judgment on its face appears to be a ‘record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.’”) (quoting *Milliken*, 311 U.S. at 462).

<sup>11</sup> See *Underwriters Nat'l Assurance*, 455 U.S. at 706 (“[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.”) (quoting *Durfee v. Duke*, 375 U.S. 106, 111 (1963)).

<sup>12</sup> See *supra* note 4 and accompanying text.

<sup>13</sup> Compare, e.g., *Brinker v. Superior Ct.*, 1 Cal. Rptr. 2d 358, 360 (Cal. Ct. App. 1991) (“Under New Jersey law, a judgment is ‘final’ for res judicata purposes, even though it is pending on appeal. Accordingly, the New Jersey judgment . . . was entitled to full faith and credit.”) (internal citations omitted), with, e.g., *Andre v. Morrow*, 680 P.2d 1355, 1362 (Idaho 1984) (“The second main element for recognition under principles of full faith and credit is a final judgment. Under the law of California, ‘a judgment does not become final so long as the action in which it is rendered is pending . . . and an action is deemed pending until it is finally determined on appeal or until the time for an appeal has passed.’”) (ellipses in original) (quoting *Pac. Gas & Elec. Co. v. Nakano*, 87 P.2d 700, 702 (Cal. 1939)).

<sup>1</sup> See, e.g., *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 544 (1915) (concluding that a New York court violated the Full Faith and Credit Clause by failing to give Massachusetts law “controlling effect”); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (asserting that a “foundation[all]” principle of the Full Faith and Credit Clause is that one state may not enact statutes that “operate beyond the jurisdiction of that State” to “destroy freedom of contract” in another state); *Converse v. Hamilton*, 224 U.S. 243, 261 (1912) (holding that “the laws of Minnesota . . . were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States”); *Olmsted v. Olmsted*, 216 U.S. 386, 395 (1910) (concluding that the Full Faith and Credit Clause did not “requir[e] the courts of the state of New York to give force and effect to the statute of the state of Michigan, so as to control the devolution of title to lands in New York”).

<sup>2</sup> See 286 U.S. 145 (1932), *overruled in part by* *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: State Public Acts and Records

#### ArtIV.S1.4.1

#### Early Doctrine on State Law on Full Faith and Credit Clause

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for a Vermont company died while working in New Hampshire.<sup>3</sup> His widow sued his employer in a New Hampshire court under New Hampshire’s employers’ liability statute.<sup>4</sup> The employer argued that the Full Faith and Credit Clause required the New Hampshire court to apply Vermont’s worker’s compensation law.<sup>5</sup> The Supreme Court explained that the Clause leaves “room for some play of conflicting policies,” and “does not require the enforcement of every right conferred by a statute of another state.”<sup>6</sup> The Court thus indicated that courts should balance each state’s interests when determining which of two competing state statutes to apply.<sup>7</sup> Because Vermont had stronger interests in the dispute than New Hampshire, the Court ruled that Vermont law applied.<sup>8</sup>

The Supreme Court refined *Clapper*’s balancing approach in *Alaska Packers Ass’n v. Industrial Accident Commission of California*.<sup>9</sup> In that case, a California company executed an employment contract in California with a nonresident alien from Mexico.<sup>10</sup> The contract provided that the company would transport the worker to Alaska to perform seasonal work, and then return him to California to be paid.<sup>11</sup> The parties agreed in their contract to be bound by Alaska’s worker’s compensation law in the event the worker was injured.<sup>12</sup> After the worker was injured in Alaska, California’s Industrial Accident Commission awarded him compensation under California’s worker’s compensation statute.<sup>13</sup> The employer argued that, by applying California law, the Commission had denied Alaska law full faith and credit.<sup>14</sup> Noting that requiring courts to apply other states’ statutes whenever they conflict with the home state’s laws would produce the “absurd result” that no state could apply its own laws in its own courts, the *Alaska Packers* Court rejected the employer’s argument.<sup>15</sup> Although the Court reaffirmed *Clapper*’s holding that courts should balance states’ competing interests when deciding which of two states’ laws to apply, it added a new presumption in favor of states

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<sup>3</sup> *Id.* at 151.

<sup>4</sup> *Id.* at 150.

<sup>5</sup> *See id.* at 151, 159.

<sup>6</sup> *See id.* at 160.

<sup>7</sup> *See id.* at 159–62. *See also* Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 495 (2003) (explaining that *Clapper* held that courts should “appraise[] and balance[] state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States”).

<sup>8</sup> *See* 286 U.S. at 161–63 (“[T]he mere fact that the Vermont legislation does not conform to that of New Hampshire does not establish that it would be obnoxious to the latter’s public policy to give effect to the Vermont statute in cases involving only the rights of residents of that state incident to the relation of employer and employee created there. . . . The interest of New Hampshire was only casual. Leon Clapper was not a resident there. He was not continuously employed there. So far as it appears, he had no dependent there. It is difficult to see how the state’s interest would be subserved, under such circumstances, by burdening its courts with this litigation. . . . [T]he rights as between the company and Leon Clapper or his representative are to be determined according to the Vermont act.”).

<sup>9</sup> 294 U.S. 532 (1935).

<sup>10</sup> *Id.* at 538, 542.

<sup>11</sup> *Id.* at 538.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.* at 537–39.

<sup>14</sup> *Id.* at 539. Alaska was a territory rather than a state at this time, but the court assumed—and the parties conceded—that the federal full faith and credit statute made full faith and credit principles equally applicable to territorial laws. *See id.* at 546. *See also* ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause (discussing this statute).

<sup>15</sup> *See* 294 U.S. at 547 (“A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another.”).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: State Public Acts and Records

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applying their own laws.<sup>16</sup> Reasoning that California had a strong interest in providing a remedy for injured workers within its borders,<sup>17</sup> the Court let California apply its own laws to the dispute.<sup>18</sup>

That same year, the Court considered whether the Clause required states to entertain causes of action based on other states' laws. In *Broderick v. Rosner*, New York's Superintendent of Banks sued various stockholders in New Jersey under New York's shareholder liability statute.<sup>19</sup> The New Jersey courts ruled that the Superintendent could not maintain a lawsuit in New Jersey based on another state's shareholder liability laws.<sup>20</sup> The Supreme Court held that the Full Faith and Credit Clause required the New Jersey courts to entertain the suit.<sup>21</sup> The Court reasoned that permitting states to deny jurisdiction to hear cases based on other states' laws would allow states to "escape [their] constitutional obligations" to give other states' public acts full faith and credit.<sup>22</sup>

The Court again considered the Clause's application to out-of-state statutes in *John Hancock Mutual Life Insurance Co. v. Yates*.<sup>23</sup> In *Yates*, a man bought a life insurance contract in New York, where he resided with his wife.<sup>24</sup> After he died, his widow moved to Georgia and sued to enforce the insurance policy in a Georgia court.<sup>25</sup> The Georgia courts refused to apply a New York law that gave the insurance company a meritorious defense to the widow's claim.<sup>26</sup> The Supreme Court ruled that the Georgia courts needed to give the New York law full faith and credit.<sup>27</sup> Notably, the Court did not mention or apply *Alaska Packers'* holding that courts must balance states' competing interests when deciding whether to apply another state's

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<sup>16</sup> See *id.* at 547–48 (“[T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight. . . . Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.”). See also J. Stephen Clark, *Conflicts Originalism: The “Original Content” of the Full Faith and Credit Clause and the Compulsory Choice of Marriage Law*, 118 W. VA. L. REV. 547, 553 (2015) (opining that *Alaska Packers'* “weakened [Clapper’s] balancing approach by adding a strong presumption that a forum state’s choice to disregard sibling law and apply its own law is constitutional”); *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 40 (1965) (describing *Alaska Packers'* as “mark[ing] a break with the *Clapper* philosophy”).

<sup>17</sup> See 294 U.S. at 542–43 (“The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation. Without a remedy in California, they would be remediless, and there was a danger that they might become public charges, both matters of grave public concern to the state. California, therefore, had a legitimate public interest in . . . providing a remedy available to [the injured worker] in California.”).

<sup>18</sup> See *id.* at 549–50 (“[California’s] interest is sufficient to justify its legislation and is greater than that of Alaska, of which the employee was never a resident and to which he may never return. Nor should the fact that the employment was wholly to be performed in Alaska, although temporary in character, lead to any different result.”).

<sup>19</sup> 294 U.S. 629, 637–38 (1935).

<sup>20</sup> See *id.* at 638–39.

<sup>21</sup> *Id.* at 647.

<sup>22</sup> See *id.* at 642–43 (“The power of a state to determine the limits of the jurisdiction of its courts and the character of controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution. . . . A State cannot escape its constitutional obligations (under the full faith and credit clause) by the simple device of denying jurisdiction in such cases to Courts otherwise competent.”) (quoting *Kenney v. Supreme Lodge of the World*, 252 U.S. 411, 415 (1920)); *id.* at 643 (holding that a state “may not . . . deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject-matter and the parties”).

<sup>23</sup> 299 U.S. 178 (1936).

<sup>24</sup> *Id.* at 179.

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

<sup>26</sup> See *id.* at 179–82.

<sup>27</sup> *Id.* at 183.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: State Public Acts and Records

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#### Early Doctrine on State Law on Full Faith and Credit Clause

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statute.<sup>28</sup> Instead, the Court reasoned that the case presented “no occurrence, nothing done, to which the law of Georgia could apply” because “[t]he contract of insurance was made, and the death of the insured occurred in,” New York.<sup>29</sup>

#### ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause

##### Article IV, Section 1:

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

The Court reinterpreted the Full Faith and Credit Clause in *Pacific Employers Insurance Co. v. Industrial Accident Commission*.<sup>1</sup> In that case, a Massachusetts resident was injured while working for a Massachusetts company in California.<sup>2</sup> The California Industrial Accident Commission awarded the employee compensation under California’s worker’s compensation law.<sup>3</sup> The employer’s insurer challenged the award, claiming that California violated the Clause by applying its own law instead of Massachusetts’.<sup>4</sup> The *Pacific Employers* Court opined that “the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”<sup>5</sup> Quoting *Alaska Packers*, the Court explained that rigidly requiring states to apply other states’ statutes in the event of a conflict would create “the absurd result” that a state’s laws would apply in *other* states’ courts, but not its *own* courts.<sup>6</sup> However, unlike in *Clapper* and *Alaska Packers*, the Court did not balance the states’ competing interests to determine which law applied.<sup>7</sup> Instead, the Court declared that the Full Faith and Credit Clause does not “enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.”<sup>8</sup> The Court thus upheld the California award.<sup>9</sup>

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<sup>28</sup> See *id.* at 179–83.

<sup>29</sup> See *id.* at 182. See also *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310–11 (1981) (plurality opinion) (interpreting *Yates* to “stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional,” and that “a postoccurrence change of residence to the forum State—standing alone—was insufficient to justify application of forum law”).

<sup>1</sup> 306 U.S. 493 (1939).

<sup>2</sup> *Id.* at 497–98.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 497.

<sup>5</sup> *Id.* at 501.

<sup>6</sup> *Id.* (“A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”) (quoting *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935)). See also *id.* at 501–02 (“[I]n cases like the present[, a rigid interpretation of the Full Faith and Credit Clause] would create an impasse which would often leave the employee remediless. Full faith and credit would deny to California the right to apply its own remedy, and its administrative machinery may well not be adapted to giving the remedy afforded by Massachusetts. Similarly, the full faith and credit demanded for the California Act would deny to Massachusetts the right to apply its own remedy, and its Department of Industrial Accidents may well be without statutory authority to afford the remedy provided by the California statute.”).

<sup>7</sup> See *id.* at 497–505. See also *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965) (describing *Pacific Employers* as “mark[ing] a break with the *Clapper* philosophy”); *Carroll v. Lanza*, 349 U.S. 408, 412 (1955) (stating that *Pacific Employers* “departed . . . from the *Clapper* decision”); J. Stephen Clark, *Conflicts Originalism: The “Original Content” of the Full Faith and Credit Clause and the Compulsory Choice of Marriage Law*, 118 W. VA. L. REV. 547, 553 (2015) (observing that “in *Pacific Employers* . . . the Court abandoned the balancing method altogether”).

<sup>8</sup> 306 U.S. at 504–05.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: State Public Acts and Records

ArtIV.S1.4.2

Modern Doctrine on State Law on Full Faith and Credit Clause

Since *Pacific Employers*, the Court has repeatedly reaffirmed that courts should no longer balance states' interests when evaluating whether to apply another state's laws.<sup>10</sup> The Court has stated that it abandoned the interest-balancing approach because there are no clear standards for assessing which state's interest is weightier in a particular case.<sup>11</sup> Thus, subject to the exceptions discussed below, "a State need not 'substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"<sup>12</sup> For instance, the Court ruled in *Sun Oil Co. v. Wortman* that a state may apply its own statute of limitations to claims governed by another state's laws, because states are "competent to legislate" procedural rules to govern suits in their own courts.<sup>13</sup>

Nonetheless, the Court has recognized limits on a state's discretion to apply its own law. For example, in *Franchise Tax Board v. Hyatt (Franchise Tax Board II)*, a Nevada court awarded damages against a California agency that exceeded the damages Nevada would award in a similar suit against its own agencies.<sup>14</sup> The Court explained that the Full Faith and Credit Clause forbids states from applying "a special rule of law that evinces a 'policy of hostility'" towards other states.<sup>15</sup> Because the Nevada court did not "appl[y] the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies," but instead "applied a special rule of law applicable only in lawsuits against its sister States, such as California," the Supreme Court held that the Nevada court's decision "reflect[ed] a constitutionally impermissible 'policy of hostility'" toward other states and thus violated the Clause.<sup>16</sup> While the Court suggested that policy considerations might "justify the application of a special rule of Nevada law that discriminate[d] against its sister States" in a different case, Nevada had not offered "sufficient policy considerations" in *Franchise Tax Board II*.<sup>17</sup>

Nor may states close their courts to claims based on other states' laws. For instance, in *Hughes v. Fetter*, a Wisconsin resident died in an automobile collision with another Wisconsin resident that occurred in Illinois.<sup>18</sup> The decedent's administrator—who was also a Wisconsin resident—sued the other driver and his insurer in a Wisconsin state court, asserting claims

<sup>9</sup> See *id.* at 497, 505.

<sup>10</sup> See, e.g., *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496 (2003) [hereinafter *Franchise Tax Bd. I*] (explaining that the Court has "abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause"); *Franchise Tax Bd. v. Hyatt*, No. 14-1175, slip op. at 7–8 (U.S. Apr. 19, 2016) [hereinafter *Franchise Tax Bd. II*] (similar).

<sup>11</sup> See, e.g., *Franchise Tax Bd. I*, 538 U.S. at 498 ("[T]he question of which sovereign interest should be deemed more weighty is not one that can be easily answered."); *id.* at 496 ("As Justice Robert H. Jackson . . . aptly observed, 'it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution.'") (quoting Justice Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945)); *Franchise Tax Bd. II*, slip op. at 8 (conceding that the interest-balancing approach "led to results that seemed to differ depending, for example, upon whether the case involved commercial law, a shareholders' action, insurance claims, or workman's compensation statutes").

<sup>12</sup> *Franchise Tax Bd. I*, 538 U.S. at 496 (quoting *Pac. Emp'rs Ins.*, 306 U.S. at 501). See also, e.g., *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941) (holding that the Full Faith and Credit Clause "is not an inexorable and unqualified command," but rather "leaves some scope for state control within its borders of affairs which are peculiarly its own"); *Nevada v. Hall*, 440 U.S. 410, 422 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."), *overruled on other grounds by Franchise Tax Bd. v. Hyatt*, No. 17-1299, slip op. at 1–18 (U.S. May 13, 2019).

<sup>13</sup> See 486 U.S. 717, 722 (1988).

<sup>14</sup> *Franchise Tax Bd. II*, slip op. at 3–4.

<sup>15</sup> *Id.* at 4 (quoting *Franchise Tax Bd. I*, 538 U.S. at 499).

<sup>16</sup> *Id.* at 6–7.

<sup>17</sup> See *id.* at 7 (quoting *Carroll*, 349 U.S. at 413).

<sup>18</sup> 341 U.S. 609, 610, 613 (1951).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: State Public Acts and Records

ArtIV.S1.4.2

Modern Doctrine on State Law on Full Faith and Credit Clause

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based on Illinois' wrongful death statute.<sup>19</sup> The Wisconsin court ruled that Wisconsin's wrongful death statute—which only provided a cause of action for deaths occurring in Wisconsin—established a public policy barring Wisconsin courts from hearing lawsuits based on other states' wrongful death laws.<sup>20</sup> Building on its earlier decision in *Broderick v. Rosner*,<sup>21</sup> the Supreme Court reversed, holding that Wisconsin violated the Full Faith and Credit Clause by refusing to hear the administrator's claim.<sup>22</sup> The Court emphasized that Wisconsin had not merely opted to apply its own wrongful death statute to the plaintiff's claims, which likely would be permissible.<sup>23</sup> Rather, Wisconsin had wholly “close[d] the doors of its courts to the cause of action created by the Illinois wrongful death act.”<sup>24</sup> By doing so, Wisconsin contravened “the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states.”<sup>25</sup>

### ArtIV.S1.5 Congressional Enforcement

#### ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause

Article IV, Section 1:

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

Congress first invoked the Clause in 1790 to pass legislation establishing methods for authenticating other states' acts, records, and proceedings.<sup>1</sup> The 1790 Act provided that if a litigant duly authenticated a judicial record or proceeding, then “every court within the United States” would have to grant that record or proceeding the same “faith and credit” as it would “have by law or usage in the courts of the state from whence the said records” were taken.<sup>2</sup> By applying this command to “every court within the United States,” Congress required *federal* courts to give state judgments full faith and credit, even though the Full Faith and Credit

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

<sup>20</sup> *See id.* at 610 & n.2.

<sup>21</sup> 294 U.S. 629 (1935). *See also supra* ArtIV.S1.4.1 Early Doctrine on State Law on Full Faith and Credit Clause (discussing *Broderick*).

<sup>22</sup> *See* 341 U.S. at 613–14.

<sup>23</sup> *See id.* at 612 n.10 (“The present case is not one where Wisconsin, having entertained appellant’s lawsuit, chose to apply its own instead of Illinois’ statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that ‘Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted.’”) (quoting *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935)).

<sup>24</sup> *Id.* at 611.

<sup>25</sup> *Id.* at 612. *See also Carroll*, 349 U.S. at 413 (explaining that *Hughes* “held that Wisconsin could not refuse to entertain a wrongful death action under an Illinois statute for an injury occurring in Illinois, since [the Court] found no sufficient policy considerations to warrant such refusal”); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518 (1953) (stating that “[t]he crucial factor” in *Hughes* “was that the forum laid an uneven hand on causes of action arising within and without the forum state”); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 381 (1990) (citing *Hughes* for the proposition “that a court of otherwise competent jurisdiction may not avoid its parallel obligation under the Full Faith and Credit Clause to entertain another State’s cause of action by invocation of the term ‘jurisdiction’”).

<sup>1</sup> *See* Act of May 26, 1790, ch. 11, 1 Stat. 122 (“[T]he acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto . . .”); *id.* (“[T]he records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form.”). *See also San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 336 (2005) (“In 1790, Congress responded to the Constitution’s invitation by enacting the first version of the full faith and credit statute.”).

<sup>2</sup> Act of May 26, 1790, ch. 11, 1 Stat. 122.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: Congressional Enforcement

ArtIV.S1.5.1

Generally Applicable Federal Law on Full Faith and Credit Clause

Clause only applies to states.<sup>3</sup> The 1790 Act, however, only purported to grant “faith and credit” to “records and *judicial* proceedings;” it did not list *legislative* acts among the legal documents entitled to full faith and credit.<sup>4</sup>

Congress amended the 1790 Act in 1804.<sup>5</sup> The 1804 Act added provisions governing the authentication and effect of “records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court.”<sup>6</sup> Additionally, whereas the 1790 Act only applied to *state* acts, records, and proceedings, the 1804 Act expanded the statute to also apply to *U.S. territories’* acts, records, and proceedings.<sup>7</sup> However, like the 1790 Act, the 1804 Act did not explicitly require states to give faith and credit to other states’ *legislative* acts.<sup>8</sup>

The full faith and credit statute remained essentially unchanged until 1948, when Congress enacted the current Full Faith and Credit Act.<sup>9</sup> Like its predecessors, the Full Faith and Credit Act prescribes methods by which one may authenticate an act, record, or proceeding of a state, territory, or possession.<sup>10</sup> But unlike its predecessors, the Full Faith and Credit Act requires state and territorial courts to give “full faith and credit” not only to other jurisdictions’ *judicial* records and proceedings, but also to *legislative* acts.<sup>11</sup> The Act’s legislative history suggests that Congress did not intend that change to alter the Supreme Court’s prevailing rule

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<sup>3</sup> Compare *id.* (emphasis added), with U.S. CONST. art. IV, § 1 (providing that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State”) (emphasis added). See also *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986) (“The Full Faith and Credit Clause is of course not binding on federal courts . . .”); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 462–63 (1982) (explaining that the 1790 Act “directed that all United States courts afford the same full faith and credit to state court judgments that would apply in the State’s own courts”).

<sup>4</sup> See Act of May 26, 1790, ch. 11, 1 Stat. 122 (emphasis added).

<sup>5</sup> See Act of Mar. 27, 1804, ch. 56, 2 Stat. 298.

<sup>6</sup> See *id.*

<sup>7</sup> Compare Act of May 26, 1790, ch. 11, 1 Stat. 122 (“[T]he acts of the legislatures of the several states shall be authenticated . . .”) (emphasis added), and *id.* (“[T]he records and judicial proceedings of the courts of any state, shall be proved or admitted . . .”) (emphasis added), with Act of Mar. 27, 1804, ch. 56, § 2, 2 Stat. 299 (“[A]ll the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states.”) (emphasis added). See also *Atchison, Topeka, & Santa Fe Ry. v. Sowers*, 213 U.S. 55, 64 (1909) (explaining that while the 1790 Act “did not include the territories,” the 1804 Act “extend[ed] the provisions of the former statute to the public acts, records, judicial proceedings, etc., of the territories”).

<sup>8</sup> See Act of Mar. 27, 1804, ch. 56, 2 Stat. 298. See also David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1633 (2009) (stating that the 1804 Act contained “no mention of any effect that ‘public acts’ must be given”).

<sup>9</sup> Act of June 25, 1948, ch. 646, § 1738, 62 Stat. 947 (codified at 28 U.S.C. § 1738). See also *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996) (referring to the 1948 Act as the “Full Faith and Credit Act”). But see Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 81 (1957) (noting that Congress made minor, non-substantive changes to the statute in 1875 and 1926).

<sup>10</sup> See 28 U.S.C. § 1738 (“The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.”); *id.* (“The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.”).

<sup>11</sup> See *id.* (“Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . .”) (emphasis added). See also Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 471 (2005) (“In the 1948 revision of the Judicial Code, the wording of the first implementing statute was amended to include state statutes . . .”).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: Congressional Enforcement

#### ArtIV.S1.5.1

##### Generally Applicable Federal Law on Full Faith and Credit Clause

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that states generally may apply their own laws in their own courts.<sup>12</sup> Read literally, however, the Act's text suggests that courts must give other states' laws conclusive effect, which would modify that rule substantially.<sup>13</sup> The Supreme Court has not adopted that literal interpretation of the Act, however.<sup>14</sup>

Congress has not amended the Full Faith and Credit Act since 1948.<sup>15</sup> Thus, under current law, "all courts" in the United States—including federal courts—must "treat a state court judgment with the same respect that it would receive in the courts of the rendering state."<sup>16</sup> Thus, the Act ordinarily precludes parties from relitigating issues that other courts have adjudicated.<sup>17</sup>

#### ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause

##### Article IV, Section 1:

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*

Congress has also passed full faith and credit statutes governing specific categories of acts, records, and proceedings.<sup>1</sup> For example, the Parental Kidnaping Prevention Act (PKPA)

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<sup>12</sup> See H.R. Rep. No. 80-308, at A150 (1947) (stating that the revisers changed the statutory language merely to "follow[ ] the language of Article IV, Section 1 of the Constitution"). See also ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause (analyzing how the modern Court treats out-of-state public acts).

<sup>13</sup> See Willis L.M. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 343 (1952) ("As part of the 1948 revision to the Judicial Code, the implementing statute was amended so as to provide that both statutes and judgments alike should be accorded the 'same full faith and credit' throughout the country 'as they have . . . in the courts of such State . . . from which they are taken.' What, if anything, was intended to be accomplished by this amendment is by no means clear, since, so far as it appears, it was enacted by Congress without discussion and the Revisers' Notes state simply that it 'follows the language' of the full faith and credit clause itself. Taken literally, however, the amendment would seem to constitute a clear mandate that the Supreme Court should henceforth interject itself more forcibly into the field of choice of law."); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 60–61 (1981) (surmising that the drafters of the 1948 amendment may not have appreciated or intended the consequences of affording full faith and credit to other states' legislative acts).

<sup>14</sup> See, e.g., *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003) (reaffirming "that the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate'" (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988))). See generally ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause. See also David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1620 (2009) (opining that the Supreme Court "has declined to take the 1948 Code's nominal prescription to replicate the effect of sister-state legislative acts seriously").

<sup>15</sup> Compare Act of June 25, 1948, ch. 646, § 1738, 62 Stat. 947, with 28 U.S.C. § 1738.

<sup>16</sup> *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996). See also *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982) ("Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged."); *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (same).

<sup>17</sup> See *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 336 (2005) (explaining that the Full Faith and Credit Act implements "[t]he general rule . . . that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction").

<sup>1</sup> See, e.g., 22 U.S.C. § 9003(g) ("Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the [Hague] Convention, in an action brought under [the International Child Abduction Remedies Act]."); 25 U.S.C. § 1911(d) ("The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.").

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 1—Full Faith and Credit Clause: Congressional Enforcement

ArtIV.S1.5.2

Specifically Applicable Federal Law on Full Faith and Credit Clause

extends full faith and credit to child custody determinations.<sup>2</sup> Section 40221(a) of the Violent Crime Control and Law Enforcement Act of 1994 requires states to give certain out-of-state protection orders full faith and credit.<sup>3</sup> And the Full Faith and Credit for Child Support Orders Act governs the enforcement of out-of-state child support orders.<sup>4</sup>

Notably, each of these statutes *requires* states to give full faith and credit to particular acts, records, or proceedings. Congress has rarely enacted legislation purporting to allow states to *not* honor out-of-state acts or judgments.<sup>5</sup> For instance, Section 2(a) of the Defense of Marriage Act provided that “no State, territory, or possession of the United States, or Indian tribe” would “be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”<sup>6</sup> Scholars debated whether the Full Faith and Credit Clause authorized Congress to allow states to disregard out-of-state marriages in this fashion.<sup>7</sup> The Supreme Court mooted this debate when it held in *Obergefell v. Hodges* “that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>8</sup> Because the *Obergefell* Court based its ruling on the Fourteenth Amendment, the Court left questions regarding Congress’s power under the Full Faith and Credit Clause unanswered.<sup>9</sup> Thus, the boundaries of Congress’s authority to prescribe the effect of state acts, records, and proceedings under the Clause remain unsettled.<sup>10</sup>

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<sup>2</sup> Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3566 (1980) (codified as amended at 28 U.S.C. § 1738A). *See also* Thompson v. Thompson, 484 U.S. 174, 180 (1988) (“At the time Congress passed the PKPA, custody orders held a peculiar status under the full faith and credit doctrine . . . The anomaly traces to the fact that custody orders characteristically are subject to modification as required by the best interests of the child. As a consequence, some courts doubted whether custody orders were sufficiently ‘final’ to trigger full faith and credit requirements, and this Court had declined expressly to settle the question. Even if custody orders were subject to full faith and credit requirements, the Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered. Because courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child’s best interest.”) (internal citations omitted).

<sup>3</sup> Pub. L. No. 103-322, § 40221(a), 108 Stat. 1796, 1926 (1994) (codified as amended at 18 U.S.C. § 2265).

<sup>4</sup> Pub. L. No. 103-383, 108 Stat. 4063 (1994) (codified as amended at 28 U.S.C. § 1738B).

<sup>5</sup> *See, e.g.*, Charles M. Yablon, *Madison’s Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 135–36 (2011) (observing that “[t]he republic had been in existence for over 200 years before Congress” passed legislation purporting to “abrogate [ ] the full faith and credit mandate”).

<sup>6</sup> *See* Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C).

<sup>7</sup> *Compare, e.g.*, Ralph U. Whitten, *Original Understanding*, 32 CREIGHTON L. REV. 255, 391 (1998) (arguing that Congress has “broad power to create statutes like DOMA under the Effects Clause”), *with, e.g.*, 142 CONG. REC. S5932 (daily ed. June 6, 1996) (letter from Professor Laurence H. Tribe to Sen. Edward M. Kennedy) (arguing that DOMA § 2(a) was “plainly unconstitutional” because “the congressional power to ‘prescribe . . . the effect’ of sister-state acts, records, and proceedings, within the context of the Full Faith and Credit Clause, includes no congressional power to prescribe that some acts, records and proceedings that would otherwise be entitled to full faith and credit . . . shall instead . . . be entitled to no faith or credit at all”) (first ellipses in original).

<sup>8</sup> 576 U.S. 644, 681 (2015). *See generally* Amdt14.S1.8.13.1 Overview of Fundamental Rights (analyzing *Obergefell*).

<sup>9</sup> *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221, 294 (2016).

<sup>10</sup> *See* Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 485 (2013) (“[T]he Court has not yet ruled on the second portion of the Clause—that is, it has not addressed the contours of Congress’s full faith and credit power.”); Mark D. Rosen, *Congress’s Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT’L L.J. 7, 11 (2010) (“As to precedent regarding congressional power to reduce the credit that . . . must be given to another state’s laws or judgments, all we have are equivocal and somewhat contradictory statements by less than a majority of the Court.”). *Compare* Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 n.18 (1980) (plurality opinion) (“[T]here is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.”), *with* Yarborough v. Yarborough, 290 U.S. 202, 215

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 2—Interstate Comity

ArtIV.S2.C1.1  
Overview of Privileges and Immunities Clause

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**SECTION 2—INTERSTATE COMITY**

**CLAUSE 1—PRIVILEGES AND IMMUNITIES**

**ArtIV.S2.C1.1 Overview of Privileges and Immunities Clause**

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

The first section of Article IV, Section 2 provides that the citizens of each state shall be “entitled to all Privileges and Immunities” of the citizens of other states. The provision is often called the “Privileges and Immunities Clause” or the “Comity Clause.”<sup>1</sup> This Clause, which is textually tied to state citizenship, should not be confused with the distinct provision in the Fourteenth Amendment—the “Privileges or Immunities Clause”—which protects the privileges or immunities of citizens of the *United States* against state invasion.<sup>2</sup>

The key purpose of the Privileges and Immunities Clause “was to help fuse into one Nation a collection of independent sovereign States.”<sup>3</sup> Under the prevailing view of the Clause, its central requirement is that “in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy.”<sup>4</sup> In other words, the Clause “prevents a state from discriminating against citizens of other states in favor of its own.”<sup>5</sup> The Clause’s concerns implicate not only individual rights to nondiscriminatory treatment, but also “the structural balance essential to the concept of federalism.”<sup>6</sup>

Most cases under the Privilege and Immunities Clause concern discriminatory state residency requirements or other preferences for state residents versus nonresidents. (For purposes of the Privileges and Immunities Clause, “the terms ‘citizen’ and ‘resident’ are ‘essentially interchangeable.’”<sup>7</sup>) The Clause’s prohibitions reach not only facial classifications based on state residency or citizenship, but also state or municipal laws<sup>8</sup> whose “practical

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n.2 (1933) (Stone, J., dissenting) (arguing that “[t]he mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, . . . contracted by Congress.”).

<sup>1</sup> See Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1122 (2009).

<sup>2</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the *United States*; . . .” (emphasis added)).

<sup>3</sup> *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). While the Privileges and Immunities Clause was “intended to create a national economic union,” the Court “has never held that [the Clause] protects only economic interests.” *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 280, 281 n.11 (1985) (citations omitted).

<sup>4</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939); see also *Slaughter-House Cases*, 83 U.S. 36, 77 (1872) (stating the “sole purpose” of the Privileges and Immunities Clause is “to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens . . . the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction”).

<sup>5</sup> *Hague*, 307 U.S. at 511; accord *United States v. Harris*, 106 U.S. 629, 643 (1883) (“[The Privileges and Immunities Clause’s] object is to place the citizens of each state upon the same footing with citizens of other states, and inhibit discriminative legislation against them by other states.”).

<sup>6</sup> *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975).

<sup>7</sup> *Hicklin v. Orbeck*, 437 U.S. 518, 524 n.8 (1978) (quoting *Austin*, 420 U.S. at 662 n.8).

<sup>8</sup> *United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor of Camden*, 465 U.S. 208, 214 (1984) (“The fact that the ordinance in question is a municipal, rather than a state, law does not somehow place it outside the scope of the Privileges and Immunities Clause.”). In applying the Privileges and Immunities Clause to municipal and local laws, *United Building* reasoned that the Clause should not permit states to exclude out-of-state residents from benefits through the simple expedient of delegating authority to political subdivisions. *Id.* at 217.

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Overview of Privileges and Immunities Clause

effect” is discriminatory against out-of-state residents.<sup>9</sup> Controversies between a state and its *own* citizens are not covered by the provision.<sup>10</sup>

Not all distinctions between state residents and nonresidents violate the Privileges and Immunities Clause.<sup>11</sup> States may, for example, limit voting rights to state residents or make state residency a qualification for elective office.<sup>12</sup> Nor must a state “always apply all its laws or all its services equally to anyone, resident or nonresident.”<sup>13</sup> Rather, discrimination only implicates the Clause when it relates to a right or activity that is sufficiently “fundamental.”<sup>14</sup> (Whether a right or activity is fundamental under the Privileges and Immunities Clause is doctrinally distinct from whether a right is fundamental under the Fourteenth Amendment’s Due Process or Equal Protection Clauses.<sup>15</sup>) For example, the right of nonresidents to “ply their trade, practice their occupation, or pursue a common calling” on substantially equal terms as state citizens is protected as fundamental under the Privileges and Immunities Clause.<sup>16</sup>

Even if a state law discriminates against nonresidents as to a fundamental right or activity, it may still be constitutional if the state can justify its action under a two-step test developed by the Supreme Court. First, the state must show there is “a substantial reason for the difference in treatment.”<sup>17</sup> Second, the discrimination must bear a “substantial relationship to the State’s objective.”<sup>18</sup> Under this form of intermediate scrutiny,<sup>19</sup> the Court has struck down, for example, state preferences for hiring in-state residents to work on oil and gas pipelines<sup>20</sup> and residency requirements for admission to a state bar.<sup>21</sup>

Beyond state discrimination against nonresidents<sup>22</sup> and the right to travel,<sup>23</sup> the Privileges and Immunities Clause’s significance has waned with the incorporation of most of the Bill of Rights against state invasion via the Fourteenth Amendment’s Due Process

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<sup>9</sup> *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67 (2003) (citing *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522, 527 (1919)).

<sup>10</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138 (1873); *Cove v. Cunningham*, 133 U.S. 107 (1890). *But see Zobel v. Williams*, 457 U.S. 55, 75 (1982) (O’Connor, J., concurring).

<sup>11</sup> *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 383 (1978).

<sup>12</sup> *Id.*

<sup>13</sup> *McBurney v. Young*, 569 U.S. 221, 226 (2013) (quoting *Baldwin*, 436 U.S. at 383).

<sup>14</sup> *United Bldg.*, 465 U.S. at 218 (citing *Baldwin*, 436 U.S. at 388); *see also Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823).

<sup>15</sup> *See* Amdt14.S1.8.13.1 Overview of Fundamental Rights.

<sup>16</sup> *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978); *accord* *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 280 (1985); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

<sup>17</sup> *Piper*, 470 U.S. at 284.

<sup>18</sup> *Id.*; *accord Toomer*, 334 U.S. at 396.

<sup>19</sup> *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 454 (1982) (likening the Privileges and Immunities Clause test to “intermediate scrutiny under contemporary equal protection jurisprudence”); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 *U. COLO. L. REV.* 293, 297 (1992) (same).

<sup>20</sup> *Hicklin*, 437 U.S. at 526–28.

<sup>21</sup> *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Supreme Ct. of Va. v. Friedman*, 487 U.S. 59 (1988); *Piper*, 470 U.S. at 288.

<sup>22</sup> State protectionism and discrimination against nonresidents may also implicate the Equal Protection Clause or the Dormant Commerce Clause. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 569 n.4 (1997) (challenge to discriminatory state tax exemption made under Dormant Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause).

<sup>23</sup> *See, e.g., Saenz v. Roe*, 526 U.S. 489, 501–02 (1999); *Doe v. Bolton*, 410 U.S. 179, 200 (1973), *abrogated on other grounds* by *Doobs v. Jackson Women’s Health Org.*, No. 19-1393 (U.S. June 24, 2022); *New York v. O’Neill*, 359 U.S. 1, 569 (1959).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

#### ArtIV.S2.C1.1

#### Overview of Privileges and Immunities Clause

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Clause.<sup>24</sup> Challenges to a state’s abridgement of enumerated constitutional rights are thus more often asserted under those constitutional amendments (as incorporated via the Fourteenth Amendment), instead of the Privileges and Immunities Clause.

#### ArtIV.S2.C1.2 Historical Background on Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

The notion of “privileges and immunities”—that is, particular legal benefits or exemptions—derives from concepts developed by English medieval law.<sup>1</sup> The Articles of Confederation contained a lengthier provision<sup>2</sup> that provided the direct precedent for the Privileges and Immunities Clause:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.<sup>3</sup>

Charles Pinckney of South Carolina claimed to have introduced the Privileges and Immunities Clause at the Constitutional Convention.<sup>4</sup> The Committee of Detail drafted and reported language identical to the final Clause, which passed the Convention without substantial debate.<sup>5</sup> Perhaps because the Privileges and Immunities Clause was drawn from the Articles of Confederation, it also “drew virtually no attention” in the ratification debates.<sup>6</sup> The Clause is discussed in the *Federalist* papers only as a means of support for other arguments.<sup>7</sup>

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<sup>24</sup> See *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 379 (1978) (“Historically, [the Privileges and Immunities Clause] has been overshadowed by the appearance in 1868 of similar language in § 1 of the Fourteenth Amendment, and by the continuing controversy and consequent litigation that attended that Amendment’s enactment and its meaning and application.”).

<sup>1</sup> For sources discussing the historical origins of privileges and immunities under English and colonial law, see, for example, Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 *CAMPBELL L. REV.* 7 (2011); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 *GA. L. REV.* 1117 (2009).

<sup>2</sup> James Madison also thought in the Articles’ longer version was somewhat unclear. *THE FEDERALIST* No. 42 (James Madison) (“There is a confusion of language [in the Articles’ Privileges and Immunities Clause], which is remarkable.”).

<sup>3</sup> *ARTICLES OF CONFEDERATION OF 1781 art. IV, § 1.*

<sup>4</sup> *2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 173–74 (Max Farrand ed., 1911).

<sup>5</sup> *Id.* at 187, 443. Ironically, the only noted objection came from Pinckney himself, who thought “some provision should be included in favor of property in slaves.” *Id.* at 443. (The South Carolinians—the only delegation to vote “no” on the Privileges and Immunities Clause—subsequently obtained a provision to that effect in the form of the Fugitive Slave Clause. *Id.* at 443, 446; U.S. CONST. art. IV, § 2, cl. 3.)

<sup>6</sup> David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 *CASE W. RES. L. REV.* 794, 840 (1986).

<sup>7</sup> See *THE FEDERALIST* No. 42 (James Madison); *THE FEDERALIST* No. 80 (Alexander Hamilton).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

ArtIV.S2.C1.3

#### Purpose of Privileges and Immunities Clause

Despite the textual differences between the Privileges and Immunities Clause and its predecessor in the Articles of Confederation, the Supreme Court has concluded that the Constitution’s briefer phrasing was intended to have the same meaning.<sup>8</sup> The privileges and immunities protected are thus the same under both the Articles and the Constitution.<sup>9</sup> Accordingly, the specific examples listed in the Articles’ version (for example, “free ingress and regress to and from any other State,” “all the privileges of trade and commerce”) may be used to “give some general idea of the class of civil rights meant by the phrase” in the Constitution.<sup>10</sup>

#### ArtIV.S2.C1.3 Purpose of Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

At least four theories have been proffered as to the purpose of the Privileges and Immunities Clause. First, the Clause could be read as a guarantee to the citizens of the different states of equal treatment by Congress, as a kind of equal protection clause binding on the federal government. Though this view received some recognition in Justice John Catron’s opinion in *Dred Scott v. Sandford*,<sup>1</sup> it has long been viewed as obsolete.<sup>2</sup>

Second, the Clause could be read to guarantee to the citizens of each state certain natural, fundamental rights inherent in the citizenship of people in a free society, which no state could deny to citizens of other states (and without regard to how it treats its own citizens). This theory found some expression in a few early state cases,<sup>3</sup> and best accords Justice Bushrod Washington’s famous dicta on the Clause in *Corfield v. Coryell*.<sup>4</sup> This theory might have endowed the Supreme Court with authority to review state legislation similar to that which it later came to exercise under the Fourteenth Amendment’s Due Process and Equal Protection Clauses, but it was firmly rejected by the Court.<sup>5</sup>

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<sup>8</sup> *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (“[Protection for privileges and immunities] was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the clause in fashioning a single nation.”).

<sup>9</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873).

<sup>10</sup> *Id.*

<sup>1</sup> 60 U.S. (19 How.) 393, 518, 527–29 (1857) (Catron, J., concurring), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

<sup>2</sup> Instead, the Court read the Fifth Amendment’s Due Process Clause to impose equal protection standards on the federal government. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Shapiro v. Thompson*, 394 U.S. 618, 641–42 (1969).

<sup>3</sup> *Campbell v. Morris*, 3 H. & McH. 288 (Md. 1797); *Murray v. McCarty*, 2 Munf. 373 (Va. 1811); *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812); *Douglas v. Stephens*, 1 Del. Ch. 465 (1821); *Smith v. Moody*, 26 Ind. 299 (1866).

<sup>4</sup> 6 F. Cas. 546, 550 (Washington, Circuit Justice, C.C.E.D. Pa. 1823); *see also* *Hague v. Comm. of Indus. Org.*, 307 U.S. 496, 511 (1939) (“At one time it was thought that [the Privileges and Immunities Clause] recognized a group of [natural] rights . . . and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.”).

Other notable proponents of the natural-rights view include Justices Stephen Johnson Field, Joseph Bradley, and Benjamin Robbins Curtis. *See* *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 97–98 (1873) (Field, J., dissenting); *id.* at 117–18 (Bradley, J., dissenting); *Dred Scott*, 60 U.S. at 580 (Curtis, J., dissenting). The natural rights concept of privileges and immunities was also strongly held by abolitionists and their congressional allies, who drafted the Privileges or Immunities Clause of the Fourteenth Amendment. Howard Jay Graham, *Our ‘Declaratory’ Fourteenth Amendment*, reprinted in HOWARD JAY GRAHAM, *EVERYMAN’S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE CONSPIRACY THEORY, AND AMERICAN CONSTITUTIONALISM* 295 (1968).

<sup>5</sup> *See, e.g.*, *McKane v. Durston*, 153 U.S. 684, 687 (1894).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

#### ArtIV.S2.C1.3

#### Purpose of Privileges and Immunities Clause

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Third, the Clause could be read to guarantee the citizen of any state the same rights that he enjoys at home, even when he is in another state. On this view, the Clause would enable a citizen to carry his rights of state citizenship with him throughout the United States, unaffected by state lines. The Court has also rejected this theory.<sup>6</sup>

The fourth theory—and the one the Court ultimately accepted—is that the Clause forbids any state to discriminate against citizens of other states in favor of its own. It is this narrow interpretation that has become the settled one. As the Court explained in the 1869 case *Paul v. Virginia*:

It was undoubtedly the object of [the Privileges and Immunities Clause] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.<sup>7</sup>

#### ArtIV.S2.C1.4 Self-Executing Nature of Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

In the nineteenth century, the Supreme Court held that the Privileges and Immunities Clause is self-executing. That is, Congress generally lacks power to enact enforcement legislation under the Clause, which is instead left to the states and the judicial process.<sup>1</sup> The Supreme Court has also held that, like the Fourteenth Amendment's protections, the Privileges and Immunities Clause protects only against state action, and not private conduct.<sup>2</sup> Federal statutes prohibiting private conspiracies to deprive any person of equal privileges and immunities secured by state laws,<sup>3</sup> or punishing the denial of the right of citizens to reside peacefully in the several states and to have free ingress into and egress from such states by non-state actors,<sup>4</sup> have been held unconstitutional for these reasons.

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<sup>6</sup> See, e.g., *City of Detroit v. Osborne*, 135 U.S. 492, 498 (1890).

<sup>7</sup> 75 U.S. (8 Wall.) 168, 180 (1869); see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77; *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142 (1907); *Whitfield v. Ohio*, 297 U.S. 431 (1936).

<sup>1</sup> *United States v. Harris*, 106 U.S. 629, 643–44 (1883); see also *Slaughter-House Cases*, 83 U.S. 36, 77 (1872) (“[T]he entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government.”); accord *THE FEDERALIST* No. 80 (Alexander Hamilton).

<sup>2</sup> *United States v. Wheeler*, 254 U.S. 281, 298 (1920), *disapproved of on other grounds*, *United States v. Guest*, 383 U.S. 745, 759 n.16 (1966). See also Amdt14.2 State Action Doctrine.

<sup>3</sup> *Harris*, 106 U.S. at 643. See also *Baldwin v. Franks*, 120 U.S. 678, 689–90 (1887).

<sup>4</sup> *Wheeler*, 254 U.S. at 298.

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

ArtIV.S2.C1.5

Citizenship Under Privileges and Immunities Clause

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**ArtIV.S2.C1.5 Citizenship Under Privileges and Immunities Clause**

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

Whether free Black Americans were protected as citizens under the Privileges and Immunities Clause (and other constitutional protections) was a contentious issue before the Civil War.<sup>1</sup> The unamended Constitution grants Congress power to “establish a uniform rule of naturalization” as to foreigners,<sup>2</sup> but did not otherwise speak directly to who is a “citizen” of a state or of the United States.<sup>3</sup> A common view at the time was that national citizenship was derivative of state citizenship, and that the latter could be conferred by birth within a jurisdiction, as under the English common law.<sup>4</sup>

Nonetheless, in the notorious *Dred Scott* case, the Supreme Court held that Black Americans, whether free or enslaved, could not be “citizens” under the Constitution.<sup>5</sup> “Citizens of each State,” Chief Justice Roger Taney concluded, meant citizens of the United States as understood when the Constitution was adopted; descendants of African slaves were not then regarded as capable of citizenship in Taney’s view.<sup>6</sup> Citing the Privileges and Immunities Clause, Chief Justice Taney argued that if free Black Americans could be made citizens of one state, the Constitution would grant them

the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.<sup>7</sup>

Such an outcome, Chief Justice Taney maintained, “the great men of the slaveholding States, who took so large a share in framing the Constitution” would not have permitted.<sup>8</sup> Because *Dred Scott* was not a “citizen” under this reasoning, the Court held that federal courts lacked jurisdiction over his suit for freedom because there was no diversity of state citizenship under Article III, Section 2.<sup>9</sup>

In dissent, Justice Benjamin Robbins Curtis denied the Chief Justice’s historically dubious assertion that there were no free Black Americans who were state citizens when the

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<sup>1</sup> See Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 505–20 (2013) (summarizing the debates over the citizenship status of free Black Americans prior to the *Dred Scott* decision).

<sup>2</sup> U.S. CONST. art. I, § 8, cl. 4; see also ArtI.S8.C4.1.1 Overview of Naturalization Clause.

<sup>3</sup> The Constitution uses the phrase “citizen of the United States” in several places, including the qualifications for Members of Congress, see U.S. CONST. art. I, § 2, cl. 2; § 3, cl. 3, and for the Presidency (which additionally requires the person to be a “natural born” citizen), see U.S. CONST. art. II, § 1, cl. 5. State citizenship is referenced in the Privileges and Immunities Clause and Article III’s provisions for federal jurisdiction, see U.S. CONST. art. III, § 2, cl. 1.

<sup>4</sup> Williams, *supra* note 1, at 507 (citing JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 287 (1978)).

<sup>5</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–27 (1857) (Taney, C.J.), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

<sup>6</sup> *Id.* at 402–05.

<sup>7</sup> *Id.* at 417.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 427.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

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Citizenship Under Privileges and Immunities Clause

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Constitution was ratified.<sup>10</sup> Justice Curtis further argued that the states retained the right to extend citizenship to classes of persons born within their borders, and that a person upon whom state citizenship was conferred became a citizen of that state *and* the United States under the Constitution.<sup>11</sup>

*Dred Scott's* holding was superseded by the first section of the Fourteenth Amendment, which declares: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>12</sup> Thus, after 1868, the “citizens of each State” under the Privileges and Immunities Clause include at least all persons born in the United States, or naturalized U.S. citizens, who reside in that state.

### ArtIV.S2.C1.6 Corporations and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

A long line of Supreme Court cases has found the Privileges and Immunities Clause to be “inapplicable” to corporations (as opposed to natural persons).<sup>1</sup> As early as 1839, the Court reasoned that a corporation, as a discretionary creation of state law, could not claim “the rights which belong to its members as citizens of a state.”<sup>2</sup> The Court reached a similar conclusion in 1869 in *Paul v. Virginia*.<sup>3</sup> By 1898, the Court declared it “well settled” that “a corporation is not a citizen within the meaning of the [Privileges and Immunities Clause].”<sup>4</sup> The Court has extended this rule to state law trusts because of their similarity to the corporate form.<sup>5</sup>

The Court has continued to adhere to its settled view that the Privileges and Immunities Clause does not protect corporations,<sup>6</sup> despite later holdings that other constitutional protections—such as the Equal Protection Clause,<sup>7</sup> First Amendment,<sup>8</sup> and Fourth Amendment<sup>9</sup>—apply to corporations. As a result, challenges to state protectionism and discrimination against out-of-state corporations are typically brought under the “dormant” Commerce Clause,<sup>10</sup> and not the Privileges and Immunities Clause.<sup>11</sup>

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<sup>10</sup> *Id.* at 573–76 (Curtis, J., dissenting). On the contrary, Justice Curtis asserted that there was “no doubt” that free native-born Black residents were citizens of states such as New Hampshire, Massachusetts, New York, North Carolina, and New Jersey, and had the right to vote in some of them. *Id.*

<sup>11</sup> *Id.* at 576–90.

<sup>12</sup> U.S. CONST. amend. XIV, § 1.

<sup>1</sup> *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 656 (1981) (citing *Hemphill v. Orloff*, 277 U.S. 537, 548–50 (1928)).

<sup>2</sup> *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586–87 (1839) (Taney, C.J.).

<sup>3</sup> 75 U.S. (8 Wall.) 168, 180–81 (1869) (Field, J.).

<sup>4</sup> *Blake v. McClung*, 172 U.S. 239, 259 (1898). *See also, e.g.*, *Anglo-Am. Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 374 (1903) (Holmes, J.); *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 45 (1900).

<sup>5</sup> *Hemphill*, 277 U.S. at 548–50.

<sup>6</sup> *See Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 8 (U.S. June 26, 2019); *Asbury Hosp. v. Cass Cnty., N.D.*, 326 U.S. 207, 211 (1945).

<sup>7</sup> *Santa Clara Cnty. v. S. Pac. R. Co.*, 118 U.S. 394 (1886).

<sup>8</sup> *See generally Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342 (2010) (collecting cases).

<sup>9</sup> *See Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311 (1978).

<sup>10</sup> *See, e.g., Tenn. Wine & Spirits*, No. 18-96, slip op. at 10; *see generally* ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause; ArtI.S8.C3.7.5 General Prohibition on Facial Discrimination.

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

ArtIV.S2.C1.7  
Privileges and Immunities of Citizens Defined

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**ArtIV.S2.C1.7 Privileges and Immunities of Citizens Defined**

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

The classical judicial exposition of the meaning of “privileges and immunities” is that of Justice Bushrod Washington in 1823 in *Corfield v. Coryell*.<sup>1</sup> The question at issue was the validity of a New Jersey statute that prohibited “any person who is not, at the time, an actual inhabitant and resident in this State” from raking or gathering clams, oysters, or shells in any of the state’s waters on board any vessel not owned by state residents.<sup>2</sup> In *Corfield*, Justice Washington described the privileges and immunities under the Clause as “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 the several States which compose this Union.”<sup>3</sup> Although a full list would be “tedious,” Justice Washington opined that they include:

Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state . . . .<sup>4</sup>

After so defining the private and personal rights that were protected, Justice Washington distinguished them from a right to share in a state’s public property. In particular, *Corfield* held that the right of a state to the clams and oysters within its waters to be in the nature of a property right, held by the state “for the use of the citizens thereof.”<sup>5</sup> The statute at issue was thus upheld because New Jersey need not grant “cotenancy in the common property of the State, to the citizens of all the other States.”<sup>6</sup>

Following *Corfield*, the Court has held that for an activity to be protected by the Privileges and Immunities Clause as “fundamental,” it must be so “basic and essential” that “interference

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<sup>11</sup> *But see* Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue, 483 U.S. 232, 264–65 (1987) (Scalia, J., concurring in part and dissenting in part) (criticizing Dormant Commerce Clause doctrine as textually and historically unjustified and noting that “discrimination against citizens of other States” is more properly regulated by the Privileges and Immunities Clause).

<sup>1</sup> 6 F. Cas. 546 (Washington, Circuit Justice, C.C.E.D. Pa. 1823); Austin v. New Hampshire, 420 U.S. 656, 661 (1975) (characterizing *Corfield* as “the first, and long the leading, explication of the [Privileges and Immunities] Clause”).

<sup>2</sup> *Corfield*, 6 F. Cas. at 550.

<sup>3</sup> *Id.* at 551.

<sup>4</sup> *Id.* at 551–52.

<sup>5</sup> *Id.* at 552.

<sup>6</sup> *Id.*

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

ArtIV.S2.C1.7  
Privileges and Immunities of Citizens Defined

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with [it] would frustrate the purposes of the formation of the Union.”<sup>7</sup> Activities such as the pursuit of occupations or common callings within the state<sup>8</sup> (including the right to practice law<sup>9</sup>), the right to seek employment on public contracts,<sup>10</sup> the ownership and disposition of property within the state,<sup>11</sup> and access to state courts,<sup>12</sup> have all been recognized as fundamental and protected under the Privileges and Immunities Clause. In contrast, recreational fishing and hunting (that is, not tied to one’s commercial livelihood<sup>13</sup>) has been held not a fundamental activity.<sup>14</sup> Accessing public records through a state freedom of information act has also been held not to be a fundamental activity; a state may therefore limit such access to its own citizens.<sup>15</sup>

**ArtIV.S2.C1.8 Valid Residency Distinctions under Privileges and Immunities Clause**

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

Universal practice has established a political exception to the Privilege and Immunities Clause. A state may thus “require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office.”<sup>1</sup>

In addition, purely private and personal rights are not in all cases beyond the reach of state legislation that differentiates between citizens and noncitizens. Broadly speaking, these rights may be reasonably regulated by a state under its police power. The Court has recognized cases in which a state may reasonably resort to discrimination against nonresidents in aid of its own public health, safety, and welfare. For example, a state may reserve the right to sell insurance to persons who have resided within the state for a prescribed period.<sup>2</sup> A state may also require a nonresident who does business within the state<sup>3</sup> or who uses the state’s highways<sup>4</sup> to consent, expressly or by implication, to service of process on an agent within the state. A state

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<sup>7</sup> *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 387 (1978).

<sup>8</sup> *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978); *Toomer v. Witsell*, 334 U.S. 385, 403 (1948); *Ward v. Maryland*, 79 U.S. 418, 430 (1870).

<sup>9</sup> *See, e.g., Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985).

<sup>10</sup> *See United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984).

<sup>11</sup> *See, e.g., Blake v. McClung*, 172 U.S. 239, 258 (1898); *see also Williams v. Bruffy*, 96 U.S. 176, 184 (1878).

<sup>12</sup> *See, e.g., Can. N. Ry. v. Eggen*, 252 U.S. 553, 560 (1920).

<sup>13</sup> *See, e.g., Toomer*, 334 U.S. at 403; *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952).

<sup>14</sup> *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 388 (1978); *McCready v. Virginia*, 94 U.S. 391, 395 (1876).

<sup>15</sup> *McBurney v. Young*, 569 U.S. 221, 228–29 (2013). The Court further found that any incidental burden on a nonresident’s ability to earn a living, own property, or exercise another fundamental activity could largely be ameliorated by using other available authorities, emphasizing that the primary purpose of the state freedom of information act was to provide state citizens with a means to obtain an accounting of their public officials. *Id.*

<sup>1</sup> *Blake v. McClung*, 172 U.S. 239, 256 (1898). As to voting rights, *see Dunn v. Blumstein*, 405 U.S. 330 (1972), but not as to candidacy, this exception is qualified by the Fourteenth Amendment’s Equal Protection Clause. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 383 (1978) (citing *Kanapaux v. Ellisor*, 419 U.S. 891 (1974); *Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H. 1973), *aff’d*, 414 U.S. 802 (1973)).

<sup>2</sup> *La Tourette v. McMaster*, 248 U.S. 465 (1919).

<sup>3</sup> *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

<sup>4</sup> *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

ArtIV.S2.C1.9

State Natural Resources and Privileges and Immunities Clause

may also limit a nonresident's dower rights<sup>5</sup> or may treat the community property rights of nonresident married persons as governed by the laws of their domicile, rather than by the laws it promulgates for its own residents.<sup>6</sup>

#### ArtIV.S2.C1.9 State Natural Resources and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

In *Corfield v. Coryell*,<sup>1</sup> Justice Bushrod Washington (while riding circuit) held that a state could discriminate against nonresidents who sought to harvest oysters and clams in state waters, despite the Privileges and Immunities Clause.<sup>2</sup> The precise holding of *Corfield* was confirmed by the Supreme Court fifty years later in the 1877 case *McCready v. Virginia*, which upheld a Virginia law permitting only Virginians to catch or plant oysters in state rivers.<sup>3</sup> In cases blending Commerce Clause and Privileges and Immunities challenges, *Geer v. Connecticut* extended the same rule to wild game,<sup>4</sup> while *Hudson Water Co. v. McCarter* applied it to water rights.<sup>5</sup>

The virtual demise of the state ownership theory of animals and natural resources in the Commerce Clause context<sup>6</sup> compelled the Court to review its precedents on distinctions between residents and nonresidents related to natural resources. In *Baldwin v. Fish & Game Commission of Montana*, the Court addressed a challenge to Montana's laws for elk-hunting licenses, which charged nonresidents higher fees than residents.<sup>7</sup> The Court was asked to overrule the Privileges and Immunities Clause holdings of *Corfield*, *Geer*, and *McCready* as having "no remaining vitality."<sup>8</sup> *Baldwin* declined to do so, holding that while state control over wildlife is "not exclusive and absolute," recreational hunting was not a fundamental right under the Privileges and Immunities Clause.<sup>9</sup> Because recreational activity—in contrast to "common callings"<sup>10</sup>—was not "a means to the nonresident's livelihood," the state could distinguish between residents and nonresidents consistently with the Privileges and Immunities Clause.<sup>11</sup>

<sup>5</sup> *Ferry v. Spokane, P. & S. Ry.*, 258 U.S. 314 (1922); accord *Ferry v. Corbett*, 258 U.S. 609 (1922).

<sup>6</sup> *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1856).

<sup>1</sup> See ArtIV.S2.C1.7 Privileges and Immunities of Citizens Defined.

<sup>2</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 552 (Washington, Circuit Justice, C.C.E.D. Pa. 1823).

<sup>3</sup> 94 U.S. 391, 395–96 (1877).

<sup>4</sup> 161 U.S. 519 (1896), overruled by *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

<sup>5</sup> 209 U.S. 349, 357 (1908), overruled by *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

<sup>6</sup> See *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977) ("The 'ownership' language of cases such as [*Geer* and *McCready*] must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" (citing *Toomer v. Witsell*, 344 U.S. 385, 402 (1948)).

<sup>7</sup> 436 U.S. 371, 372–74 (1978).

<sup>8</sup> *Id.* at 386.

<sup>9</sup> *Id.* at 386–88.

<sup>10</sup> See ArtIV.S2.C1.10 Occupations and Privileges and Immunities Clause.

<sup>11</sup> *Baldwin*, 436 U.S. at 388; cf. *Toomer v. Witsell*, 344 U.S. 385, 403 (1948) (holding that commercial shrimping "like other common callings, is within the purview of the privileges and immunities clause").

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

ArtIV.S2.C1.10

Occupations and Privileges and Immunities Clause

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#### **ArtIV.S2.C1.10 Occupations and Privileges and Immunities Clause**

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

The Supreme Court has long held that the right of nonresidents “to ply their trade, practice their occupation, or pursue a common calling” is a fundamental right protected by the Privileges and Immunities Clause.<sup>1</sup> Indeed, “privileges of trade and commerce” were explicitly included among the privileges and immunities listed in the Articles of Confederation.<sup>2</sup> The Clause therefore “guarantees to citizens of State A” the right of “doing business in State B on terms of substantial equality with the citizens of that State.”<sup>3</sup>

In *Toomer v. Witsell*, the Court held that “commercial shrimping . . . like other common callings, is within the purview of the privileges and immunities clause.”<sup>4</sup> Discriminatory fees exacted from nonresidents for a license to shrimp were thus unconstitutional.<sup>5</sup> The Court has similarly struck down discrimination against nonresidents in licenses for commercial fishing<sup>6</sup> and in hiring for work on oil and gas pipelines.<sup>7</sup>

The Court held in *Supreme Court of New Hampshire v. Piper* that the right to practice law, like the right to pursue other occupations, is protected under the Privileges and Immunities Clause.<sup>8</sup> As a result, although a state may generally regulate the practice of law in its jurisdiction, it may not exclude nonresidents from state bar admission without a substantial reason.<sup>9</sup> Nor may a federal court, without substantial reason, require an attorney to have an office within the state as a condition of admission to practice.<sup>10</sup>

#### **ArtIV.S2.C1.11 Access to Courts and Privileges and Immunities Clause**

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each state to the citizens of all other states to the same extent that it is allowed to its own citizens.<sup>1</sup> The constitutional requirement is satisfied if nonresidents are given access to the state’s courts upon terms that, in themselves, are

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<sup>1</sup> See, e.g., *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978).

<sup>2</sup> ARTICLES OF CONFEDERATION OF 1781 art. IV, § 1. The Supreme Court has interpreted the constitutional provision to have “no change of substance or intent” from the Articles’ version. *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975).

<sup>3</sup> *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

<sup>4</sup> *Id.* at 403.

<sup>5</sup> *Id.*

<sup>6</sup> *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952).

<sup>7</sup> *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978).

<sup>8</sup> 470 U.S. 274, 283 (1985).

<sup>9</sup> *Id.* at 288; accord *Supreme Ct. of Va. v. Friedman*, 487 U.S. 59, 61 (1988); *Barnard v. Thorstenn*, 489 U.S. 546, 558–59 (1989).

<sup>10</sup> *Frazier v. Heebe*, 482 U.S. 641, 649 (1987). Although it drew upon *Piper*, *Frazier* was decided under the Court’s inherent supervisory authority, rather than on constitutional grounds. *Id.* at 645.

<sup>1</sup> *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233 (1934); see also *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (noting that the Supreme Court has at various times grounded “the right of access to courts” in the Privileges and Immunities Clause, the First Amendment, the Fifth Amendment, and the Fourteenth Amendment).

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

ArtIV.S2.C1.12  
Taxation and Privileges and Immunities Clause

reasonable and adequate for enforcing any rights they may have, even though they may not be precisely the same as those accorded to resident citizens.<sup>2</sup>

On this basis, the Supreme Court upheld a state statute of limitations that prevented a nonresident from suing in the state's courts after expiration of the time for suit in the place where the cause of action arose.<sup>3</sup> The Court also upheld a statute that suspended its operation as to resident plaintiffs, but not as to nonresidents, during the defendant's absence from the state.<sup>4</sup> A state law making it discretionary for courts to entertain an action by a nonresident of the state against a foreign corporation doing business in the state was sustained because it applied equally to citizens and noncitizens residing out of the state.<sup>5</sup> A statute permitting a suit in the state's courts for wrongful death occurring outside the state, only if the decedent was a resident of the state, was sustained because it operated equally upon representatives of the deceased whether citizens or noncitizens.<sup>6</sup> Being nondiscriminatory, a Uniform Reciprocal State Law to secure the attendance of witnesses from within or without a state in criminal proceedings does not violate this Clause.<sup>7</sup>

**ArtIV.S2.C1.12 Taxation and Privileges and Immunities Clause**

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

In the exercise of its taxing power, a state may not discriminate substantially between residents and nonresidents without violating the Privileges and Immunities Clause.<sup>1</sup> In the 1871 case *Ward v. Maryland*, the Court invalidated a state law that imposed taxes only upon nonresidents who sold within the state goods that were produced in other states.<sup>2</sup> The Court similarly held unconstitutional a Tennessee license tax that varied based on whether the person taxed had his chief office within the state or outside it.<sup>3</sup> In *Travis v. Yale & Towne Mfg. Co.*,<sup>4</sup> the Court, while sustaining a state's right to tax income accruing within its borders to nonresidents, held the particular tax void because it denied to nonresidents exemptions that were allowed to residents.<sup>5</sup> In contrast, because it did not discriminate between citizens and noncitizens, the Court sustained a state statute taxing businesses hiring persons within the state for labor outside the state.<sup>6</sup>

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<sup>2</sup> *Can. N. Ry. v. Eggen*, 252 U.S. 553 (1920).

<sup>3</sup> *Id.* at 563.

<sup>4</sup> *Chemung Canal Bank v. Lowery*, 93 U.S. 72, 76 (1876).

<sup>5</sup> *Douglas v. N.Y., New Haven & Hartford R.R.*, 279 U.S. 377 (1929).

<sup>6</sup> *Chambers*, 207 U.S. 142.

<sup>7</sup> *New York v. O'Neill*, 359 U.S. 1 (1959).

<sup>1</sup> A territorial government, if authorized by Congress, may impose a discriminatory license tax on nonresident fishermen operating within its waters consistent with the Privileges and Immunities Clause. See *Haavik v. Alaska Packers Ass'n*, 263 U.S. 510 (1924). The Court in *Haavik* reasoned that "citizens of every state are treated alike" under the tax because "[o]nly residents of the territory are preferred." *Id.*

<sup>2</sup> 79 U.S. (12 Wall.) 418, 424 (1871); see also *Downham v. Alexandria Council*, 77 U.S. (10 Wall.) 173, 175 (1870).

<sup>3</sup> *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919).

<sup>4</sup> 252 U.S. 60 (1920).

<sup>5</sup> *Id.* at 62–64; see also *Shaffer v. Carter*, 252 U.S. 37 (1920). In *Austin v. New Hampshire*, 420 U.S. 656 (1975), the Court held void a state commuter income tax because the State imposed no income tax on its own residents; thus, the tax fell exclusively on nonresidents' income and was not offset even approximately by other taxes imposed upon residents alone. *Id.* at 665–66.

<sup>6</sup> *Williams v. Fears*, 179 U.S. 270, 274 (1900).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 1—Interstate Comity, Privileges and Immunities

ArtIV.S2.C1.12

Taxation and Privileges and Immunities Clause

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In *Lunding v. New York Tax Appeals Tribunal*, the Court addressed a New York law denying nonresidents any deduction from taxable income for alimony payments, although it permitted residents to deduct such payments.<sup>7</sup> Although the Court observed that “the Privileges and Immunities Clause affords no assurance of precise equality in taxation between residents and nonresidents,”<sup>8</sup> the state must show a “substantial reason” for the disparity, and the discrimination must bear a “substantial relationship” to that reason.<sup>9</sup> Under this analysis, the Court read its precedents to prohibit a state from denying nonresidents a general tax exemption provided to residents, but permitting limits on “nonresidents’ deductions of business expenses and nonbusiness deductions based on the relationship between those expenses and in-state property or income.”<sup>10</sup> In *Lunding*, as the state flatly denied the deduction to nonresidents, the Court found that New York had “not presented a substantial justification for the categorical denial of alimony deductions to nonresidents.”<sup>11</sup>

What at first glance may appear to be a discrimination may turn out not to be when a state’s entire system of taxation is considered. On the basis of overall fairness, the Court has sustained a Connecticut statute that required nonresident stockholders to pay a state tax measured by the full market value of their stock while resident stockholders were subject to local taxation on the market value of that stock reduced by the value of the real estate owned by the corporation.<sup>12</sup> Moreover, occasional or accidental inequality to a nonresident taxpayer is not sufficient to defeat a scheme of taxation whose operation is generally equitable.<sup>13</sup> In an early case the Court dismissed the contention that a state violated the Privileges and Immunities Clause by subjecting its own citizens to a property tax on a debt due from a nonresident secured by real estate situated where the debtor resided.<sup>14</sup>

### ArtIV.S2.C1.13 Right to Travel and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*

The Supreme Court has long recognized the right to travel from one state to another under the Privileges and Immunities Clause,<sup>1</sup> as well as other constitutional provisions.<sup>2</sup> For

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<sup>7</sup> 522 U.S. 287 (1998).

<sup>8</sup> *Id.* at 297.

<sup>9</sup> *Id.* at 298.

<sup>10</sup> *Id.* at 302.

<sup>11</sup> *Id.* at 315.

<sup>12</sup> *Travellers’ Ins. Co. v. Connecticut*, 185 U.S. 364, 371 (1902).

<sup>13</sup> *Maxwell v. Bugbee*, 250 U.S. 525 (1919).

<sup>14</sup> *Kirtland v. Hotchkiss*, 100 U.S. 491, 499 (1879).

<sup>1</sup> See, e.g., *Ward v. Maryland*, 79 U.S. 418, 430 (1870) (“[The Privileges and Immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union . . . .”); *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (stating that the Privileges and Immunities Clause includes “the right of free ingress into other States, and egress from them”), *overruled on other grounds by* *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533 (1944); see generally *United States v. Guest*, 383 U.S. 745, 762–67 (1966) (Harlan, J., concurring in part and dissenting in part) (surveying cases).

<sup>2</sup> See *Guest*, 383 U.S. at 759 (“Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.”).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 2—Interstate Comity, Interstate Extradition

ArtIV.S2.C2.1

#### Overview of Extradition (Interstate Rendition) Clause

example, the Court held that a state could not constitutionally limit access to medical care to its own residents, and deny access to nonresidents, without interfering with the right to travel.<sup>3</sup>

In *Saenz v. Roe*, the Court characterized the constitutional “right to travel” as having “at least three different components”:

It protects [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.<sup>4</sup>

While the Court did not expressly identify the constitutional basis of the first component, it noted that the Articles of Confederation’s privileges and immunities clause explicitly protected the “free ingress and regress to and from any other State.”<sup>5</sup> As for the second component of the right to travel, the Court found it to be “expressly protected by the text of the Constitution” through the Privileges and Immunities Clause.<sup>6</sup> *Saenz* connected the third component of the right to travel to the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>7</sup>

## CLAUSE 2—INTERSTATE EXTRADITION

### ArtIV.S2.C2.1 Overview of Extradition (Interstate Rendition) Clause

Article IV, Section 2, Clause 2:

*A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.*

The Extradition Clause,<sup>1</sup> which is also referred to as the Interstate Rendition Clause,<sup>2</sup> applies to a person accused of a crime in one state who flees to another state. The Extradition Clause “preclude[s] any state from becoming a sanctuary for fugitives from justice” and “enable[s] each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed.”<sup>3</sup> To fulfill those ends, the Extradition Clause contemplates that the Governor of the state from which the accused has fled (the demanding state) may seek his return from the state to which the accused has fled (the asylum state). Interstate rendition was “intended to be a summary and mandatory executive proceeding derived from” the

<sup>3</sup> *Doe v. Bolton*, 410 U.S. 179, 200 (1973), *abrogated on other grounds by* *Dobbs v. Jackson Women’s Health Org.*, No. 19-1393 (U.S. June 24, 2022).

<sup>4</sup> 526 U.S. 489, 500 (1999) (numbering added).

<sup>5</sup> *Id.* at 501 (citing ARTICLES OF CONFEDERATION OF 1781 art. IV, § 1).

<sup>6</sup> *Id.* at 501–502.

<sup>7</sup> *Id.* at 502–03 (citing U.S. CONST. amend. XIV, § 1). The Commerce Clause is another potential textual basis for the right to travel. *See Guest*, 383 U.S. at 758 (citing *Edwards v. California*, 314 U.S. 160, 173 (1941)).

<sup>1</sup> *See, e.g.*, *Pierce v. Creecy*, 210 U.S. 387, 393 (1908); *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 379 (1978).

<sup>2</sup> *See, e.g.*, *Pollack v. Duff*, 793 F.3d 34, 44 (D.C. Cir. 2015).

<sup>3</sup> *Michigan v. Doran*, 439 U.S. 282, 287 (1978).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 2—Interstate Comity, Interstate Extradition

#### ArtIV.S2.C2.1

#### Overview of Extradition (Interstate Rendition) Clause

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Extradition Clause.<sup>4</sup> The Extradition Clause is nearly unchanged in substance from the analogous provision in the Articles of Confederation<sup>5</sup> and was approved unanimously at the Constitutional Convention with little debate.<sup>6</sup>

The Extradition Clause is not self-executing, and the Constitution provides Congress no express grant of power to implement it. Yet the Second Congress passed a law, the current iteration of which is known as the Extradition Act, requiring the governor of each state to deliver up fugitives from justice found in their state, upon lawful demand from another state.<sup>7</sup> The Supreme Court accepted this “contemporaneous construction” as establishing the constitutional validity of the legislation.<sup>8</sup> In *Kentucky v. Dennison*,<sup>9</sup> however, the Court held that this statute was merely “declaratory” of a *moral* duty of state and that the federal government “has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.”<sup>10</sup> Because of *Dennison*, a federal court could not issue a writ of mandamus to compel the Governor of one state to surrender a fugitive to another state.<sup>11</sup> Long considered a constitutional derelict, *Dennison* was finally formally overruled by the Court in 1987.<sup>12</sup>

Currently, states and territories may invoke the power of federal courts to enforce the Extradition Act against asylum state officers, including seeking equitable relief to compel performance of federally imposed duties.<sup>13</sup> The duty of one state to surrender a fugitive to another is not absolute and unqualified, however—if the fugitive is imprisoned in the asylum state, for example, the asylum state may satisfy its own laws before returning the fugitive to the demanding state.<sup>14</sup>

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<sup>4</sup> *Id.* at 288 (citing *Biddinger v. Comm’r of Police*, 245 U.S. 128, 132 (1917)).

<sup>5</sup> ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 2, (“If any Person guilty of, or charged with, treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power of the state from which he fled, be delivered up, and removed to the state having jurisdiction of his offence.”).

<sup>6</sup> See 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (Max Farrand ed., 1911). The Convention replaced the term “high misdemeanor” with “other Crime” because “high misdemeanor” (which was used in the Articles of Confederation’s version) had a technical meaning thought to be “too limited.” *Id.*

<sup>7</sup> 1 Stat. 302 (1793). The current interstate Extradition Act is codified at 18 U.S.C. § 3182. The Act requires rendition of fugitives at the request of a demanding territory, as well as of a state, thus extending beyond the terms of the Extradition Clause. In *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909), the Court held that this legislative extension was permissible. See *Puerto Rico v. Branstad*, 483 U.S. 219, 229–30 (1987).

<sup>8</sup> *Roberts v. Reilly*, 116 U.S. 80, 94 (1885); see also *Innes v. Tobin*, 240 U.S. 127 (1916). As Justice Story wrote in *Prigg v. Pennsylvania*: “[T]he natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution . . . . [I]t has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby.” 41 U.S. (16 Pet.) 539, 616, 619–20 (1842).

<sup>9</sup> 65 U.S. (24 How.) 66 (1861). Cf. *Prigg*, 41 U.S. (16 Pet.) at 612.

<sup>10</sup> *Dennison*, 65 U.S. (24 How.) at 107.

<sup>11</sup> *Id.* at 109–10. In 1934, Congress plugged the loophole created by *Dennison* by making it a federal crime for any person to flee from one state to another to avoid prosecution in certain cases. 48 Stat. 782 (1934); 18 U.S.C. § 1073.

<sup>12</sup> *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987) (“*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development.”); accord *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 155 (1998).

<sup>13</sup> *Branstad*, 483 U.S. at 230.

<sup>14</sup> *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371 (1873).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 2—Interstate Comity, Interstate Extradition

ArtIV.S2.C2.3

Extradition (Interstate Rendition) Procedures

#### ArtIV.S2.C2.2 Meaning of Fugitive from Justice

Article IV, Section 2, Clause 2:

*A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.*

Although a person must be charged with a crime to be a fugitive from justice under the Extradition Clause, the Extradition Clause does not require the state demanding extradition (the “demanding state”) to have charged the fugitive *before* he left the state. Instead, the Extradition Clause only requires the accused to be located in a state different from the one in which he is charged.<sup>1</sup> Moreover, the accused may have left the state for reasons other than avoiding justice because the reason the accused departed is immaterial.<sup>2</sup>

A demanding state that has received a fugitive from another state may be required to surrender him to a third state upon an extradition warrant.<sup>3</sup> A person indicted a second time for the same offense is still considered a fugitive under the Extradition Clause, even if, after dismissal of the first indictment, he left the demanding state with the knowledge of and without objection by state authorities.<sup>4</sup> But a defendant cannot be extradited if he was only constructively present in the demanding state when the crime with which he is charged was alleged to have been committed.<sup>5</sup>

The words “treason, felony or other crime,” as used in the Extradition Clause, embrace every criminal offense forbidden and made punishable by state law,<sup>6</sup> including misdemeanors.<sup>7</sup>

#### ArtIV.S2.C2.3 Extradition (Interstate Rendition) Procedures

Article IV, Section 2, Clause 2:

*A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.*

A person must be charged with a crime in the regular course of judicial proceedings before the state’s Governor may demand his return from another state.<sup>1</sup> The accused has no constitutional right to a hearing before the Governor of the asylum state (the state where the fugitive is located) on whether he has been substantially charged with a crime and is a fugitive from justice.<sup>2</sup> Nor may courts inquire into the motives of the Governors of the demanding and surrendering states.<sup>3</sup>

<sup>1</sup> Roberts v. Reilly, 116 U.S. 80, 95 (1885); *see also* Strassheim v. Daily, 221 U.S. 280 (1911); Appleyard v. Massachusetts, 203 U.S. 222 (1906); *Ex parte Reggel*, 114 U.S. 642, 650 (1885).

<sup>2</sup> Drew v. Thaw, 235 U.S. 432, 439 (1914).

<sup>3</sup> Innes v. Tobin, 240 U.S. 127 (1916).

<sup>4</sup> Bassing v. Cady, 208 U.S. 386 (1908).

<sup>5</sup> Hyatt v. People *ex rel.* Corkran, 188 U.S. 691 (1903).

<sup>6</sup> Kentucky v. Dennison, 65 U.S. (24 How.) 66, 103 (1861).

<sup>7</sup> Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 375 (1873).

<sup>1</sup> Kentucky v. Dennison, 65 U.S. (24 How.) 66, 104 (1861); Pierce v. Creecy, 210 U.S. 387 (1908); *see also In re of Strauss*, 197 U.S. 324, 325 (1905); Marbles v. Creecy, 215 U.S. 63 (1909); Strassheim v. Daily, 221 U.S. 280 (1911).

<sup>2</sup> Munsey v. Clough, 196 U.S. 364, 372 (1905); Pettibone v. Nichols, 203 U.S. 192 (1906).

<sup>3</sup> *Pettibone*, 203 U.S. at 203.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 2, Cl. 2—Interstate Comity, Interstate Extradition

#### ArtIV.S2.C2.3

#### Extradition (Interstate Rendition) Procedures

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The asylum state's courts cannot use habeas corpus to refuse to surrender the accused based on speculations about the accused's trial in the demanding state.<sup>4</sup> Likewise the asylum state's courts cannot hear the accused's arguments that the statute of limitations has expired,<sup>5</sup> or that confinement in the demanding state's prison would constitute cruel and unjust punishment,<sup>6</sup> although the accused may make such arguments in the demanding state's courts. An accused will, however, be discharged on habeas corpus if he shows by clear and satisfactory evidence that he was outside the demanding state when the crime occurred.<sup>7</sup> If, however, the evidence is conflicting, habeas corpus is not the proper proceeding to try the question of alibi.<sup>8</sup>

The role of habeas corpus in interstate rendition cases is, therefore, very limited.<sup>9</sup> Once the asylum state's governor grants extradition, a court considering releasing the accused on habeas grounds can only decide: "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."<sup>10</sup>

Nothing in the Constitution exempts an offender from trial and punishment following extradition, even though he was brought from another state by unlawful violence,<sup>11</sup> or by abuse of legal process.<sup>12</sup> A fugitive lawfully extradited from another state may be tried for an offense other than that for which he was surrendered.<sup>13</sup> The rule is different, however, for fugitives surrendered by a foreign government, pursuant to treaty. In that case, the fugitive may only be tried "for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."<sup>14</sup>

## CLAUSE 3—SLAVERY

### ArtIV.S2.C3.1 Fugitive Slave Clause

Article IV, Section 2, Clause 3:

*No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour; but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*

This Clause, effectively nullified by the Thirteenth Amendment's abolition of slavery,<sup>1</sup> contemplated the existence of a right on the part of a slaveholder to reclaim an enslaved person

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<sup>4</sup> *Drew v. Thaw*, 235 U.S. 432, 440 (1914).

<sup>5</sup> *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917); *see also* *Rodman v. Pothier*, 264 U.S. 399 (1924).

<sup>6</sup> *Sweeney v. Woodall*, 344 U.S. 86, 89–90 (1952).

<sup>7</sup> *Hyatt v. People ex rel. Corkran*, 188 U.S. 691 (1903); *see also* *South Carolina v. Bailey*, 289 U.S. 412 (1933).

<sup>8</sup> *Munsey v. Clough*, 196 U.S. 364, 375 (1905).

<sup>9</sup> *Michigan v. Doran*, 439 U.S. 282, 289 (1978). In *California v. Superior Court*, 482 U.S. 400, 407 (1987), the Court reiterated that extradition is a "summary procedure."

<sup>10</sup> *Doran*, 439 U.S. at 289.

<sup>11</sup> *Ker v. Illinois*, 119 U.S. 436, 444 (1886); *Mahon v. Justice*, 127 U.S. 700, 707, 712, 714 (1888).

<sup>12</sup> *Cook v. Hart*, 146 U.S. 183, 193 (1892); *Pettibone v. Nichols*, 203 U.S. 192, 215 (1906).

<sup>13</sup> *Lascelles v. Georgia*, 148 U.S. 537, 543 (1893).

<sup>14</sup> *United States v. Rauscher*, 119 U.S. 407, 430 (1886).

<sup>1</sup> U.S. CONST. amend. XIII.

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 3, Cl. 1—New States and Federal Property, Admissions

ArtIV.S3.C1.1

Overview of Admissions (New States) Clause

who had escaped to another state.<sup>2</sup> Following the debate on the constitutional provision requiring states to return felons who had fled from one state to another,<sup>3</sup> Pierce Butler and Charles Pinckney of South Carolina moved “to require fugitive slaves and servants to be delivered up like criminals.”<sup>4</sup> Although James Wilson and Roger Sherman objected that this “would oblige the executive of the State to [seize fugitive slaves], at the public expense,” the provision was approved by the Convention unanimously without further debate.<sup>5</sup>

Congress had the power to enact legislation enforcing the Clause,<sup>6</sup> which it first did in 1793.<sup>7</sup> Under the Supreme Court’s interpretation of the Fugitive Slave Clause, the owner of an enslaved person had the same right to seize and repossess him in another state as the local laws of his own state granted to him, and state laws that penalized such a seizure were unconstitutional.<sup>8</sup> Moreover, states had no concurrent power to legislate on the subject.<sup>9</sup> However, a state statute providing a penalty for harboring an escaped slave was held not to conflict with the Clause because it did not affect the right or remedy of the slaveholder, but rather a rule of conduct for its own citizens in the exercise of states’ police power.<sup>10</sup>

## SECTION 3—NEW STATES AND FEDERAL PROPERTY

### CLAUSE 1—ADMISSIONS

#### ArtIV.S3.C1.1 Overview of Admissions (New States) Clause

Article IV, Section 3, Clause 1:

*New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*

The first clause of Article IV, Section 3 authorizes Congress to admit new states into the union. It is sometimes called the Admissions Clause, the Admission Clause, or the New States Clause.<sup>1</sup>

The Admissions Clause contains two main limitations on congressional power to admit new states. The first limitation is based on the constitutional text: when a proposed new state

<sup>2</sup> See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1804–1805 (1833).

<sup>3</sup> U.S. CONST. art. IV, § 2, cl. 2.

<sup>4</sup> 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (Max Farrand, ed. 1911).

<sup>5</sup> *Id.* at 446. Although the Articles of Confederation lacked an analogous provision, see 3 STORY’S COMMENTARIES, *supra* note 2, at § 1805, the Northwest Ordinance of 1787, even as it abolished slavery in the Territory, provided for the return of fugitive slaves who escaped there. See Ordinance of 1787 art. VI (“Provided, always, That any person escaping into the [territory], from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.”).

<sup>6</sup> Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229 (1847).

<sup>7</sup> 1 Stat. 302 (1793). The enforcement provisions of Fugitive Slave Act of 1793 were strengthened as part of the Compromise of 1850. See 9 Stat. 462 (1850).

<sup>8</sup> Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

<sup>9</sup> Prigg, 41 U.S. at 625.

<sup>10</sup> Moore v. Illinois, 55 U.S. (14 How.) 13, 17 (1853).

<sup>1</sup> See, e.g., Ralph H. Brock, *The Ultimate Gerrymander: Dividing Texas into Four New States*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 651, 662 (2008) (using the term “Admissions Clause” to refer to this provision); Robert Barrett, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761, 767 (1997) (using the term “New States Clause” to refer to this provision); Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 167 (1991) (using the term “Admission Clause” to refer to this provision).

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 3, Cl. 1—New States and Federal Property, Admissions

ArtIV.S3.C1.1

Overview of Admissions (New States) Clause

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is formed from territory in the jurisdiction of an existing state or states, the consent of the affected state legislatures is required (in addition to congressional approval).<sup>2</sup> For example, Virginia’s consent was given to the admission of the state of Kentucky, formed out of Virginia’s western regions in 1792.<sup>3</sup>

Because the Clause uses a semicolon instead of a comma after the phrase “no new State shall be formed or erected within the Jurisdiction of any other State,” a literal reading of the text might incorrectly suggest that the Constitution categorically forbids forming a new state out of the territory of an existing state.<sup>4</sup> The drafting history of the Admissions Clause shows, however, that the Framers contemplated that new states could be formed from the territory of an existing state, if that state consented.<sup>5</sup> In practice, Congress—beginning with the First Congress<sup>6</sup>—has several times admitted new states formed out of the territory of a consenting existing state without constitutional controversy.<sup>7</sup>

The second limitation, known as the “equal footing doctrine”<sup>8</sup> is rooted in long-standing congressional practice<sup>9</sup> and judicial interpretations of the Admissions Clause. Under the equal footing doctrine, new states must be admitted on equal terms “with all of the powers of sovereignty and jurisdiction which pertain to the original states.”<sup>10</sup> In particular, Congress may not impose conditions on a state’s admission that would diminish the equal sovereignty of the states.<sup>11</sup>

Thirty-seven states have been admitted to the United States under the Admissions Clause. Vermont was the first in 1791,<sup>12</sup> and Hawaii the most recent in 1959.<sup>13</sup> Beyond requiring at least one act of Congress for admission (and, if applicable, the consent of affected state legislatures), the Admissions Clause leaves the details of the admission process to congressional determination. Most states were first organized by Congress as federal

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<sup>2</sup> U.S. CONST. art IV, § 3, cl. 2.

<sup>3</sup> 1 Stat. 189 (1791). The circumstances surrounding the admission of Vermont, the first new state following the Constitution’s ratification, are somewhat ambiguous. Although New York claimed Vermont as part of its territory, Vermont declared independence from New York in 1777 and functioned as an independent republic until its admission in 1791. *See generally* Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 371–75 (2002). Although the New York legislature did consent to the admission of Vermont, it is not clear whether consent was constitutionally required, because Vermont was (arguably) not within New York’s jurisdiction. *Id.* In fact, records from the Convention show that the Framers carefully worded the Admissions Clause to allow Vermont’s admission as a state without “a dependence on the consent of N[ew] York.” *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 463 (Max Farrand, ed. 1911) [hereinafter FARRAND’S RECORDS].

<sup>4</sup> *See* Kesavan & Paulsen, *supra* note 3, at 332–82 (examining this so-called “semicolon problem” at length). Sources as authoritative as the Supreme Court and Justice Story have misquoted the Admissions Clause with the ambiguous second semicolon replaced by a comma. *See* Pollard’s Lessee v. Hagan, 44 U.S. 212, 223 (1845); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1308 (1833).

<sup>5</sup> *See* 2 FARRAND’S RECORDS, *supra* note 3, at 455, 464. This intended meaning is clear from earlier drafts of the Clause; the ambiguous semicolon was added only by the Committee of Style late in the Convention. *Id.* at 602.

<sup>6</sup> *See* Marsh v. Chambers, 463 U.S. 783, 790 (1983) (actions of the First Congress provide “contemporaneous and weighty evidence” of Constitution’s meaning) (quotations and citations omitted).

<sup>7</sup> *See, e.g.*, 1 Stat. 189 (1791) (admission of Kentucky, with the consent of Virginia); 3 Stat. 544 (1820) (admission of Maine, with the consent of Massachusetts).

<sup>8</sup> *See* ArtIV.S3.C1.3 Equal Footing Doctrine Generally.

<sup>9</sup> In its acts of admission (or in enabling acts setting out a process for state admission), Congress has consistently specified that the new state is admitted “on an equal footing with the original states, in all respects whatever.” *See, e.g.*, 1 Stat. 491–92 (1796) (Tennessee); 2 Stat. 173 (1802) (Ohio); 5 Stat. 144 (1837) (Michigan); 9 Stat. 452 (1850) (California); 36 Stat. 557 (1910) (New Mexico and Arizona).

<sup>10</sup> *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

<sup>11</sup> *Id.* at 567–68, 573.

<sup>12</sup> 1 Stat. 191 (1791).

<sup>13</sup> 73 Stat. 4 (1959).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 3, Cl. 1—New States and Federal Property, Admissions

ArtIV.S3.C1.2

#### Historical Background on Admissions Clause

territories before their admission as states,<sup>14</sup> but that is not constitutionally required. Texas, for example, was an independent republic before it was annexed by the United States and admitted as state in 1845.<sup>15</sup>

#### ArtIV.S3.C1.2 Historical Background on Admissions Clause

Article IV, Section 3, Clause 1:

*New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*

The Articles of Confederation did not provide for any general process to admit new states.<sup>1</sup> Instead, the Articles stated that Canada (referring to what was then the British Province of Quebec) could join the Confederation as of right, but “no other colony shall be admitted” without the consent of nine states.<sup>2</sup> Despite this deficiency, the Confederation Congress enacted laws—most notably the Northwest Ordinance of 1787—which organized the territories of the United States, establishing a system of territorial government and a process for admitting new states from federal territory.<sup>3</sup>

At the Constitutional Convention, a provision for congressional authority to admit new states was one of the original resolutions in the Virginia Plan presented by Edmund Randolph.<sup>4</sup> The Convention rejected a proposal by Elbridge Gerry to limit the number of western states so that they should “never be able to outnumber the Atlantic states.”<sup>5</sup> The Committee of Detail’s early draft of the Clause required a supermajority (two-thirds) of Congress to admit a new state and explicitly required that admission be “on the same terms with the original States.”<sup>6</sup> Gouverneur Morris, however, successfully moved to remove the “same terms” language, over James Madison’s objection,<sup>7</sup> arguing that Congress should be able

<sup>14</sup> See U.S. CONST. art. IV, § 3, cl. 2; ArtIV.S3.C2.3 Power of Congress over Territories.

<sup>15</sup> 5 Stat. 797 (1845); see also *United States v. Texas*, 143 U.S. 621, 634 (1892).

<sup>1</sup> See THE FEDERALIST No. 43 (James Madison).

<sup>2</sup> ARTICLES OF CONFEDERATION of 1781, art. XI. (“Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.”).

<sup>3</sup> See NORTHWEST ORDINANCE OF 1787, art. V. The Ordinance followed Virginia’s 1784 cessation to the United States of its territory northwest of the Ohio river (and similar cessations by other states claiming the territory), upon the condition that new states should be formed from the territory and admitted to the union on an equal footing with the original states. See *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221–22 (1845). The First Congress reenacted the Northwest Ordinance after the Constitution’s ratification. 1 Stat. 50 (1789).

<sup>4</sup> See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand, ed. 1911) [hereinafter FARRAND’S RECORDS] (“Resolvd. that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a ‘voluntary junction of Government & Territory or otherwise, with the consent of a number of voices in the National legislature less than the whole.’”) & 121 (approval of the resolution).

<sup>5</sup> 2 FARRAND’S RECORDS, *supra* note 4, at 3.

<sup>6</sup> *Id.* at 188. This language echoed the Northwest Ordinance’s provision that new states from the territory would be admitted “on an equal footing with the original States in all respects whatever.” NORTHWEST ORDINANCE OF 1787, art. V.

<sup>7</sup> 2 FARRAND’S RECORDS, *supra* note 4, at 454 (Madison argued that “the Western States neither would nor ought to submit to a Union which degraded them from an equal rank with the other States.”).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 3, Cl. 1—New States and Federal Property, Admissions

#### ArtIV.S3.C1.2

#### Historical Background on Admissions Clause

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to set the terms for state admission to limit the power of new western states.<sup>8</sup> Morris, joined by Luther Martin, also successfully moved to strike out the congressional supermajority requirement for admission.<sup>9</sup>

The remaining debates focused on whether the consent of an affected state should be required when a new state is formed from its territory. Luther Martin repeatedly argued that a consent requirement would give “large States claiming the Western lands” (such as Virginia and North Carolina) an effective veto over the admission of new states.<sup>10</sup> The prevailing view at the Convention, however, was that Congress should not have the power to “dismember a State without its consent.”<sup>11</sup> After some minor changes intended to facilitate the admission of Vermont,<sup>12</sup> Gouverneur Morris and John Dickinson proposed language substantially similar to the final Admissions Clause, which passed the Convention.<sup>13</sup>

#### ArtIV.S3.C1.3 Equal Footing Doctrine Generally

#### Article IV, Section 3, Clause 1:

*New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*

Despite the Constitutional Convention’s rejection of explicit language guaranteeing the equality of newly admitted states, Congress has provided in state admission acts that the new state enters the union “on an equal footing with the original States in all respects whatever.”<sup>1</sup> With the admission of Louisiana in 1812, the principle of equality was extended to states created out of territory not possessed by the United States at the time of the Constitution’s ratification.<sup>2</sup>

The equal footing doctrine is a constitutional requirement and not merely a statutory interpretation of Congress’s acts of admission.<sup>3</sup> The Supreme Court has held the sovereign equality of states to be an inherent attribute of the “Union” envisioned in the Constitution.<sup>4</sup> The constitutional basis for the doctrine was clear at least by the 1845 decision in *Pollard’s Lessee v. Hagan*, if not before.<sup>5</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 454.

<sup>10</sup> *Id.* at 455; *see also id.* at 463–64.

<sup>11</sup> *Id.* at 455 (statement of Roger Sherman); *see also id.* at 462.

<sup>12</sup> *Id.* at 463.

<sup>13</sup> *See id.* at 464 (“New States may be admitted by the Legislature into the Union: but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States without the consent of the Legislature of such State as well as of the General Legislature.”) & 465 (“Nor shall any State be formed by the junction of two or more States or parts thereof, without the consent of the Legislatures of such States, as well as of the Legislature of the U. States.”). The Committee of Style merged these two clauses and edited this language into its final form. *Id.* at 578, 602.

<sup>1</sup> *See, e.g.*, 1 Stat. 491 (1796) (Tennessee); *see generally* *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845). Vermont and Kentucky were admitted using somewhat different terminology. 1 Stat. 191 (1791); 1 Stat. 189 (1791).

<sup>2</sup> 2 Stat. 701, 703 (1812).

<sup>3</sup> *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

<sup>4</sup> *Id.*; *accord* *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 434 (1892); *Knight v. U.S. Land Ass’n*, 142 U.S. 161, 183 (1891); *Weber v. Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65 (1873).

<sup>5</sup> 44 U.S. (3 How.) 212 (1845); *see also* *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836); *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589 (1845).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 3, Cl. 1—New States and Federal Property, Admissions

ArtIV.S3.C1.3

Equal Footing Doctrine Generally

*Pollard's Lessee* involved conflicting claims to certain partially inundated lands covered by the Mobile River in the city of Mobile, Alabama.<sup>6</sup> The enabling act for the admission of Alabama had contained both a declaration of equal footing and an explicit reservation to the United States of these lands, as covered by “navigable waters.”<sup>7</sup> The plaintiff in *Pollard's Lessee* derived his claim from a grant by the United States after Alabama’s admission as state.<sup>8</sup> The key question in the case was thus whether the United States could convey valid title to the property. Because the original states had sovereignty and jurisdiction over their navigable waters and the soil beneath them, the Court reasoned that retention by the United States of title to such lands, as a condition of statehood, would put Alabama on an unequal footing with the original states.<sup>9</sup> Thus, at its admission, Alabama acquired sovereignty over its “navigable waters and soils under them . . . and no compact that might be made between her and the United States could diminish or enlarge these rights.”<sup>10</sup>

In the 1911 decision *Coyle v. Smith*, the Court invalidated a restriction imposed by Congress in the enabling act for the admission of Oklahoma, which purported to require that the new state’s capital be located at Guthrie until 1913.<sup>11</sup> The Court held that Congress could not use conditions on admission to “restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power.”<sup>12</sup> To diminish state sovereignty in this way would violate the Constitution by creating “a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission.”<sup>13</sup>

Broadly speaking, every new state may exercise all the powers of government which belong to the original thirteen states.<sup>14</sup> It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its territory, except on lands the United States has reserved as its property.<sup>15</sup> Conditions of territorial government, such as the Northwest Ordinance of 1787 and similar acts, are no longer operative once a state is admitted, except when adopted by state law.<sup>16</sup> It also follows from the equal footing doctrine that the citizens of a territory, upon admission, “became citizens of the United States and of the [admitted] state.”<sup>17</sup>

Historically, the equal footing doctrine has been applied almost exclusively in the context of conditions on the admission of new states.<sup>18</sup> More recently, the Supreme Court in the 2000s

<sup>6</sup> *Pollard's Lessee*, 44 U.S. at 219–20.

<sup>7</sup> 3 Stat. 489, 492 (1819).

<sup>8</sup> *Pollard's Lessee*, 44 U.S. at 219.

<sup>9</sup> *Id.* at 228–29.

<sup>10</sup> *Id.*; see also *id.* at 222–23.

<sup>11</sup> *Coyle v. Smith*, 221 U.S. 559, 579 (1911); 34 Stat. 267, 269 (1906).

<sup>12</sup> *Coyle*, 221 U.S. at 568.

<sup>13</sup> *Id.* at 567.

<sup>14</sup> *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845); *McCabe v. Atchison T. & S.F. Ry.*, 235 U.S. 151 (1914).

<sup>15</sup> *Van Brocklin v. Tennessee*, 117 U.S. 151, 167 (1886).

<sup>16</sup> *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845); *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 689 (1883); *Sands v. Manistee River Imp. Co.*, 123 U.S. 288, 296 (1887); see also *Withers v. Buckley*, 61 U.S. (20 How.) 84, 92 (1858); *Huse v. Glover*, 119 U.S. 543 (1886); *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 9 (1888); *Cincinnati v. Louisville & Nashville R.R.*, 223 U.S. 390 (1912).

<sup>17</sup> *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 176 (1892).

<sup>18</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (“The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.” (citations omitted)).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 3, Cl. 1—New States and Federal Property, Admissions

#### ArtIV.S3.C1.3

#### Equal Footing Doctrine Generally

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and 2010s has relied on the general principle of equality sovereignty among the states to strike down both federal and state laws outside the state admission context.<sup>19</sup>

#### ArtIV.S3.C1.4 Permissible Conditions on State Admissions

Article IV, Section 3, Clause 1:

*New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*

The equal footing doctrine does not mean that Congress may not place any conditions in legislation admitting new states. Rather, Congress has broad power to impose conditions under its authority over federal territories,<sup>1</sup> its enumerated powers,<sup>2</sup> and the Admissions Clause itself. The equal footing doctrine only prohibits conditions which limit state sovereignty after admission, in areas that are “exclusively within the sphere of state power.”<sup>3</sup> It follows that at least two broad categories of admission conditions are constitutional notwithstanding the equal footing doctrine.

First, Congress may impose “provisions which are fulfilled by the admission of the state.”<sup>4</sup> For example, Congress may require the population of a territory to have a certain number of inhabitants before it seeks admission<sup>5</sup> or that proposed state laws or constitutions meet congressional standards (and be ratified by the people of the state) to qualify for admission.<sup>6</sup> As the Supreme Court has stated, the Admissions Clause “is not a mandate, but a power to be exercised with discretion.”<sup>7</sup> Congressional prerequisites for admission do not violate the equal footing doctrine because they do not bind the newly sovereign state after admission.<sup>8</sup>

Second, Congress may impose post-statehood requirements in state admission acts that would be a valid exercise of congressional power if they were subject of federal legislation after admission.<sup>9</sup> Thus, Congress may include in an admission or enabling act regulations of interstate commerce or commerce with Indian Tribes, or regulations of federal lands within a state.<sup>10</sup> Such provisions derive force not from their acceptance as a term of admission but from the Supremacy Clause<sup>11</sup> and “the power of Congress extended to the subject.”<sup>12</sup> Because

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<sup>19</sup> See, e.g., *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1282 (2016); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)); see also *Amdt10.4.3 Equal Sovereignty Doctrine*.

<sup>1</sup> See ArtIV.S3.C2.3 Power of Congress over Territories.

<sup>2</sup> See U.S. CONST. art. I, § 8.

<sup>3</sup> *Coyle v. Smith*, 221 U.S. 559, 568 (1911).

<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., 1 Stat. 50, 53 (1798).

<sup>6</sup> See, e.g., 13 Stat. 30, 31 (1864) (conditions for Nevada’s constitution); 2 Stat. 173, 174 (1802) (conditions for Ohio’s constitution); see generally *Permoli v. Municipality No. 1 of City of New Orleans*, 44 U.S. 589 (1845).

<sup>7</sup> *Coyle*, 221 U.S. at 568.

<sup>8</sup> See *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900).

<sup>9</sup> *Coyle*, 221 U.S. at 573–74.

<sup>10</sup> See, e.g., *Stearns v. Minnesota*, 179 U.S. 223 (1900) (regulation of federal lands); *United States v. Sandoval*, 231 U.S. 28 (1913) (regulating commerce with Indian tribes); *United States v. Chavez*, 290 U.S. 357 (1933) (same); *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 9–10 (1888) (prevention of interference with navigability of waterways under the interstate Commerce Clause).

<sup>11</sup> U.S. CONST. art. VI, cl. 2; see ArtVI.C2.1 Overview of Supremacy Clause.

<sup>12</sup> *Coyle*, 221 U.S. at 574.

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 3, Cl. 1—New States and Federal Property, Admissions

ArtIV.S3.C1.5  
Equal Footing and Property Rights in Submerged Lands

Congress’s power in these areas extends equally to the original states, such legislation is not invalid under the equal footing doctrine just because it is part of an act of state admission.

**ArtIV.S3.C1.5 Equal Footing and Property Rights in Submerged Lands**

Article IV, Section 3, Clause 1:

*New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*

The equal footing doctrine has great significance for the property rights to land under navigable waters<sup>1</sup> and tidally influenced waters.<sup>2</sup> In *Pollard’s Lessee v. Hagan*, the Supreme Court held that the equal footing doctrine requires that the title to lands beneath navigable waters generally passes to a new state upon its admission.<sup>3</sup> The principle of this case supplies the rule of decision for many property disputes decided by the Court.<sup>4</sup> The Court has summarized title consequences of the equal footing doctrine as follows:

Upon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced). It may allocate and govern those lands according to state law subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses.<sup>5</sup>

Beginning with the 1894 case *Shively v. Bowlby*, the Court has recognized the authority of the United States, while territorial status continues, to transfer title to land below navigable waters when necessary for “public purposes appropriate to the objects for which the United States hold the territory.”<sup>6</sup> Thus, despite the rule of *Pollard’s Lessee*, the United States may “defeat a prospective State’s title to land under navigable waters by a prestatehood conveyance of the land to a private party for a public purpose appropriate to the Territory.”<sup>7</sup> The United

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<sup>1</sup> “Navigable waters,” for equal footing purposes, are those waters used, or susceptible to use, for trade and travel at the time of statehood. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590–92 (2012). Navigability of rivers is determined on a segment-by-segment basis, and lands under portions of a stream that were impassable at statehood were not conveyed by force of the doctrine. *Id.* at 594–60; see also *United States v. Utah*, 283 U.S. 64 (1931).

<sup>2</sup> See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988); *Knight v. U.S. Land Ass’n*, 142 U.S. 161, 183 (1891).

<sup>3</sup> 44 U.S. (3 How.) 212, 223 (1845); see also *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

<sup>4</sup> See, e.g., *PPL Montana, LLC*, 565 U.S. 576; *Phillips Petroleum Co.*, 484 U.S. 469; *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Texas v. Louisiana*, 410 U.S. 702 (1973); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), *overruled by Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Utah v. United States*, 403 U.S. 9 (1971); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Hallett v. Beebe*, 54 U.S. (13 How.) 25 (1851); *Pollard v. Kibbe*, 50 U.S. (9 How.) 471 (1850).

<sup>5</sup> *PPL Montana LLC*, 565 U.S. at 591 (citations and quotations omitted).

<sup>6</sup> *Shively v. Bowlby*, 152 U.S. 1, 48 (1894); see also *Joy v. St. Louis*, 201 U.S. 332 (1906). *Shively* explained that the United States might make such transfers “whenever it becomes necessary to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states” or “in case of some international duty or public exigency.” 152 U.S. at 48, 50.

<sup>7</sup> *Utah Div. of State Lands*, 482 U.S. at 197; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634–35 (1970).

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 3, Cl. 1—New States and Federal Property, Admissions

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Equal Footing and Property Rights in Submerged Lands

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States may also defeat a prospective state’s title through a clear intention to reserve submerged lands to itself as part of a federal reservation, such as a wildlife refuge, or an Indian reservation.<sup>8</sup>

That said, because control over property underlying navigable waters is so closely tied to state sovereignty,<sup>9</sup> states enjoy a strong “presumption of title” to submerged lands beneath inland navigable waters within their boundaries.<sup>10</sup> To determine whether that presumption is overcome, courts apply a two-step test: (1) “whether the United States clearly intended to include submerged lands within the reservation”; and (2) “whether the United States expressed its intent to retain federal title to [the] submerged lands.”<sup>11</sup> Intent by the United States to defeat state title must be “definitely declared or otherwise made very plain.”<sup>12</sup>

In 1947, the Court in *United States v. California* refused to extend *Pollard’s Lessee’s* rule for land under inland navigable waters to submerged lands in the three-mile marginal belt under the ocean along a state’s coast.<sup>13</sup> Whether the states or the federal government had rights to these lands “became of great potential importance at the beginning of [the twentieth] century when oil was discovered there.”<sup>14</sup> Examining the historical evidence, the Court held that, unlike inland navigable waters, the thirteen original colonies did not acquire ownership of the land under their marginal seas upon independence and that therefore “national rights are paramount.”<sup>15</sup>

Indeed, the Court applied the *Pollard’s Lessee* principle in reverse for lands under marginal seas in *United States v. Texas*.<sup>16</sup> Although Texas was an independent republic with conceded sovereignty over the submerged lands of its marginal sea before its annexation to the United States, Texas was held to have implicitly surrendered its sovereignty over these submerged lands upon admission.<sup>17</sup> Congress responded to the *California* and *Texas* decisions in 1953 through the Submerged Lands Act<sup>18</sup> and Outer Continental Shelf Lands Act.<sup>19</sup> These laws divided jurisdiction over the continental shelf, with Congress generally ceding to the coastal states title to submerged lands at a specified distance from their coasts (generally three geographical miles).<sup>20</sup> For its part, the United States confirmed its exclusive control over the outer continental shelf, meaning all submerged lands beyond those reserved to states and up the edge of the United States’ jurisdiction and control.<sup>21</sup> The result of these laws is that,

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<sup>8</sup> See, e.g., *Alaska v. United States*, 545 U.S. 75, 100 (2005) (United States reserved title to submerged lands under Glacier Bay); *Idaho v. United States*, 533 U.S. 262, 280–81 (2001) (United States reserved title to submerged lands under Lake Coeur d’Alene, in trust for the Coeur d’Alene Tribe); *United States v. Alaska*, 521 U.S. 1, 62 (1997) (United States reserved title to submerged lands beneath tidally influenced waters within the Arctic National Wildlife Refuge).

<sup>9</sup> *Montana v. United States*, 450 U.S. 544, 552 (1981).

<sup>10</sup> *Alaska*, 545 U.S. at 78–79.

<sup>11</sup> *Id.* at 100.

<sup>12</sup> *Alaska*, 521 U.S. at 34 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

<sup>13</sup> *United States v. California*, 332 U.S. 19, 38 (1947); accord *United States v. Louisiana*, 339 U.S. 699 (1950).

<sup>14</sup> *California*, 332 U.S. at 38.

<sup>15</sup> *Id.* at 31, 36.

<sup>16</sup> 339 U.S. 707, 716 (1950); see also *United States v. Maine*, 420 U.S. 515 (1975) (reaffirming the *California*, *Louisiana*, and *Texas* cases).

<sup>17</sup> *Texas*, 339 U.S. at 718.

<sup>18</sup> 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301–1315). The Court upheld the constitutionality of the Submerged Lands Act in *Alabama v. Texas*, 347 U.S. 272 (1954).

<sup>19</sup> 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331–1356b).

<sup>20</sup> 43 U.S.C. §§ 1301(a)(1), 1311; see generally *United States v. Alaska*, 521 U.S. 1, 5–6 (1997); *United States v. Louisiana*, 363 U.S. 1, 6–10 (1960).

<sup>21</sup> 43 U.S.C. §§ 1331–32; see generally *Parker Drilling Mgmt. Servs. v. Newton*, No. 18-389, slip op. at 3–4 (U.S. June 10, 2019).

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
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ArtIV.S3.C1.6  
Equal Footing and Rights of Indian Tribes

despite the Court’s decision in *California*, state claims to submerged lands beneath waters within three nautical miles of their coasts are analyzed under the *Pollard’s Lessee* framework.<sup>22</sup>

**ArtIV.S3.C1.6 Equal Footing and Rights of Indian Tribes**

Article IV, Section 3, Clause 1:

*New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*

The constitutional authority of Congress to regulate commerce with Indian Tribes,<sup>1</sup> and of the United States to make treaties with them,<sup>2</sup> are not inconsistent with the equality of new states.<sup>3</sup> Congress may therefore impose conditions in an enabling act that regulate commerce with Indian Tribes, such as a condition forbidding the introduction of liquor into Indian territory, and those conditions remain valid after statehood.<sup>4</sup>

Similarly, treaties entered into between the United States Indian Tribes during a territorial period—which may, for example, grant the Tribe rights to fish in designated waters, or hunt and gather on lands ceded by a tribe to the United States—are not automatically extinguished by statehood.<sup>5</sup> Such treaty rights are valid unless Congress clearly indicates its intent to abrogate them in its act of admission, or the treaty itself makes clear that the parties intended the rights to terminate at statehood.<sup>6</sup> The United States may also transfer title in territorial lands to Indian Tribes by treaty, which is not extinguished by statehood; but title to property underlying navigable waters must be reserved or conveyed by a clear statement or it will pass to the state upon admission under the rule of *Pollard’s Lessee v. Hagan*.<sup>7</sup>

Under the 1882 decision *United States v. McBratney*, when a state admission or enabling act contains no clear provision excluding state jurisdiction, state courts are vested with jurisdiction over crimes committed on Indian reservations by non-Indians against non-Indians upon statehood.<sup>8</sup> However, Congress may explicitly preempt state jurisdiction in Indian

<sup>22</sup> See *Alaska v. United States*, 545 U.S. 75, 78–79 (2005).

<sup>1</sup> U.S. CONST. art. I, § 8, cl. 3; see ArtI.S8.C3.9.1 Scope of Commerce Clause Authority and Indian Tribes.

<sup>2</sup> U.S. CONST. art. II, §2, cl. 2; see ArtII.S2.C2.1.3 Scope of Treaty-Making Power.

<sup>3</sup> See *Dick v. United States*, 208 U.S. 340, 405–06 (1908); accord *Johnson v. Gearlds*, 234 U.S. 422, 439 (1914); *United States v. Sandoval*, 231 U.S. 28, 47 (1913); *Ex parte Webb*, 225 U.S. 663 (1912).

<sup>4</sup> *Sandoval*, 231 U.S. at 49.

<sup>5</sup> See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999); *United States v. Winans*, 198 U.S. 371, 378 (1905). The Supreme Court formerly held to the contrary in *Ward v. Race Horse*, which had applied the equal footing doctrine to find that a treaty granting hunting rights to certain tribes was implicitly extinguished by Wyoming’s admission as a state. 163 U.S. 504, 515–16 (1896), overruled by *Herrera v. Wyoming*, No. 17-532 (U.S. May 20, 2019). The Court later explained that *Race Horse* “rested on a false premise” that state sovereignty over natural resources was an area of exclusive state jurisdiction. *Mille Lacs*, 526 U.S. at 204. Rather, “[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.” *Id.* In *Herrera v. Wyoming*, the Court definitively overruled the equal footing holding of *Race Horse*. See *Herrera*, slip op. at 11.

<sup>6</sup> *Herrera*, slip op. at 13–14; see also *Mille Lacs*, 526 U.S. at 206–07.

<sup>7</sup> See *Idaho v. United States*, 533 U.S. 262, 272–74 (2001); *Montana v. United States*, 450 U.S. 544, 551–52 (1981); see also *United States v. State of Oregon*, 295 U.S. 1, 14 (1935); *United States v. Holt State Bank*, 270 U.S. 49, 54–55 (1926).

<sup>8</sup> *United States v. McBratney*, 104 U.S. 621, 623–24 (1882); accord *Draper v. United States*, 164 U.S. 240, 245–247 (1896).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 3, Cl. 1—New States and Federal Property, Admissions

#### ArtIV.S3.C1.6

#### Equal Footing and Rights of Indian Tribes

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country by federal law, and state jurisdiction is implicitly preempted “when the exercise of state jurisdiction would unlawfully infringe on tribal self-government.”<sup>9</sup> In *Oklahoma v. Castro-Huerta*, the Court extended *McBratney*’s presumption of state criminal jurisdiction to crimes committed by non-Indians against Indians on Indian reservations, absent congressional preemption.<sup>10</sup> Because divesting a state of jurisdiction over crimes within its territory affects its sovereignty under the equal footing doctrine, the Court required “clear statutory language” in a state enabling act or another act of Congress to preclude state criminal jurisdiction over crimes by non-Indians.<sup>11</sup>

#### ArtIV.S3.C1.7 Effect of State Admission on Pending Judicial Proceedings

Article IV, Section 3, Clause 1:

*New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*

In its acts of admission, Congress may explicitly provide for the transfer and disposition of civil and criminal cases pending in the territorial courts following statehood, consistently with the Constitution.<sup>1</sup> Territorial courts are generally “legislative courts” not subject to Article III.<sup>2</sup> Because the federal government has plenary authority in a territory, there is no distinction between federal and state jurisdiction while the territory exists.<sup>3</sup>

After statehood, cases pending in the territorial courts of exclusive federal cognizance are generally transferred to the federal court having jurisdiction over the area.<sup>4</sup> Cases not cognizable in the federal courts are transferred to the tribunals of the new state, and those over which federal and state courts have concurrent jurisdiction may be transferred either to the state or federal courts by the party possessing the option under existing law.<sup>5</sup> When a formerly territorial case is transferred to a state court under the operation of the enabling act and the state constitution, the appellate procedure is governed by the state law.<sup>6</sup>

Without action from Congress, the Supreme Court may not directly review the decision of a territorial court of appeals after that court has ceased to exist following statehood.<sup>7</sup> But Congress may by law provide for Supreme Court appellate review of such cases or for their transfer to an appropriate federal court.<sup>8</sup> When Congress neglected to make provision for

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<sup>9</sup> *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 7 (U.S. June 29, 2022).

<sup>10</sup> *Id.* at 6–7, 25.

<sup>11</sup> *Id.* at 23 (citing *Draper*, 164 U.S. at 242–43).

<sup>1</sup> *See, e.g.*, 36 Stat. 557, 565–65 (1910) (treatment of cases pending in New Mexican territorial courts after state admission).

<sup>2</sup> *See* ArtIV.S3.C2.3 Power of Congress over Territories. The federal courts of the District of Columbia and territory of Puerto Rico, however, are Article III courts. *See* ArtIII.S1.9.4 District of Columbia and Territorial Courts.

<sup>3</sup> *Benner v. Porter*, 50 U.S. 235, 242 (1850); *see generally* ArtIII.S1.6.1 Overview of Relationship Between Federal and State Courts; ArtIII.S1.6.3 Doctrine on Federal and State Courts.

<sup>4</sup> *Baker v. Morton*, 79 U.S. (12 Wall.) 150, 153 (1871).

<sup>5</sup> *Id.*

<sup>6</sup> *John v. Paullin*, 231 U.S. 583 (1913).

<sup>7</sup> *Hunt v. Palao*, 45 U.S. (4 How.) 589 (1846).

<sup>8</sup> *Benner*, 50 U.S. (9 How.) at 245–46.

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disposition of certain pending cases in an enabling act for the admission of a state, a subsequent act addressing the omission was held valid.<sup>9</sup>

## **CLAUSE 2—TERRITORY AND OTHER PROPERTY**

### **ArtIV.S3.C2.1 Property Clause Generally**

Article IV, Section 3, Clause 2:

*The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.*

Section 3, Clause 2 of Article IV empowers Congress to dispose of and regulate constitutionally acquired federal property.<sup>1</sup> The Supreme Court has explained that “[t]he occasion for the grant was the obvious necessity of making provision for the government of the vast territory acquired by the United States.”<sup>2</sup> The Supreme Court continued “[t]he grant was made in broad terms, and the power of regulation and disposition was not confined to territory, but extended to ‘other property belonging to the United States,’ so that the power may be applied . . . ‘to the due regulation of all other personal and real property rightfully belonging to the United States.’”<sup>3</sup>

The Constitution does not address how the government may exercise this power, but the Supreme Court historically has described Congress’s authority under the Property Clause as “plenary”<sup>4</sup> and “without limitations.”<sup>5</sup> The Court has summarized Congress’s authority, stating:

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it . . . .<sup>6</sup>

Consequently, the Court has generally been deferential to congressional uses of Property Clause authority. In the 1840 decision *United States v. Gratiot*,<sup>7</sup> for instance, the Supreme Court interpreted the Property Clause as applying to a lease of a lead mine on government land. The defendants in that case argued that the phrase “dispose of” should be interpreted narrowly to apply to the *sale* but not the *leasing* of property, and that, therefore, Congress lacks

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<sup>9</sup> *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160 (1865).

<sup>1</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 537–38 (1976); *Kansas v. Colorado*, 206 U.S. 46, 89 (1907); see *Camfield v. United States*, 167 U.S. 518, 524 (1897) (holding that “the government has, with respect to its own lands, the rights of an ordinary proprietor”).

<sup>2</sup> *Ashwander v. TVA*, 297 U.S. 288, 331 (1936).

<sup>3</sup> *Id.* (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1325–26 (1833)).

<sup>4</sup> *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 594 (1987).

<sup>5</sup> *Id.* (quoting *United States v. City of San Francisco*, 310 U.S. 16, 29–30 (1940)). See also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294–95 (1958); *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *FPC v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); *United States v. California*, 332 U.S. 19, 27 (1947); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840).

<sup>6</sup> *Gibson*, 80 U.S. (13 Wall.) at 99.

<sup>7</sup> 39 U.S. (14 Pet.) 526 (1840).

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the power “to give or authorize leases of the public lands.”<sup>8</sup> In upholding the lease, the Court rejected such a narrow interpretation, stating that “disposal must be left to the discretion of Congress.”<sup>9</sup> Nearly a century later, the Court similarly rejected a narrow interpretation of the Property Clause in a challenge over a statutorily authorized contract through which the federal agency, the Tennessee Valley Authority, agreed to purchase power lines and real property for the construction of a dam. In that case, the Court held that the Clause extended to the disposal of potential electrical energy made available by the construction of a dam, as well as the transmission lines and other equipment necessary to generate the energy.<sup>10</sup>

**ArtIV.S3.C2.2 Federal and State Power Over Public Lands**

Article IV, Section 3, Clause 2:

*The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.*

The Property Clause provides that public lands may only be disposed of with congressional authorization.<sup>1</sup> The Supreme Court has held “that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired.”<sup>2</sup> However, the Court held that, by being aware of and doing nothing to halt the long-time practice of presidents withdrawing land from the public domain by Executive Orders, Congress had acquiesced to the practice.<sup>3</sup> In 1976, Congress reversed course by passing legislation establishing procedures for land withdrawals and explicitly repealing congressional acquiescence to the practice, as well as any implicit executive withdrawal authority.<sup>4</sup>

Congress may dispose of public property in a manner that furthers public policy, as determined exclusively by Congress.<sup>5</sup> The Court has likened congressional authority over federal land within states to that of states’ police power.<sup>6</sup> The Court has explained that “[t]he general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.”<sup>7</sup> In its 1976 *Kleppe v. New Mexico* decision, the Court restated the applicable principles governing Congress’s power under the Property

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<sup>8</sup> *Id.* at 533.

<sup>9</sup> *Id.* at 538. *See also* *Kleppe v. New Mexico*, 426 U.S. 529, 541 (1976) (“In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain.”) (citing *Alabama v. Texas*, 347 U.S. at 273; *Sinclair v. United States*, 279 U.S. 263, 297 (1929) (repudiated on other grounds by *United States v. Gaudin*, 515 U.S. 506, 519–20 (1995)); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

<sup>10</sup> *Ashwander v. TVA*, 297 U.S. 288, 335–40 (1936). *See also* *Ala. Power Co. v. Ickes*, 302 U.S. 464 (1938).

<sup>1</sup> *United States v. Fitzgerald*, 40 U.S. (15 Pet.) 407, 421 (1841). *See also* *Utah Power & Light Co. v. United States*, 243 U.S. 389, 403–04 (1917).

<sup>2</sup> *Utah Power & Light Co.*, 243 U.S. at 404.

<sup>3</sup> *Sioux Tribe v. United States*, 316 U.S. 317, 324–25 (1942); *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915).

<sup>4</sup> Pub. L. No. 94–579, § 704(a), 90 Stat. 2792 (1976).

<sup>5</sup> *United States v. City of San Francisco*, 310 U.S. 16, 30 (1940) (“The power over the public land thus entrusted to Congress is without limitations. And it is not for the courts to say how that trust shall be administered. That it for Congress. Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.” (internal citations omitted)). *See also* *Light v. United States*, 220 U.S. 523, 535–36 (1911).

<sup>6</sup> *Camfield v. United States*, 167 U.S. 518, 525 (1897).

<sup>7</sup> *Id.*

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Clause unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands.<sup>8</sup> The Court explained that the Property Clause, in broad terms, gives Congress the power to determine what are “‘needful’ rules ‘respecting’ the public lands.”<sup>9</sup> The Court continued that, while the outer limits of this authority is unsettled, “we have repeatedly observed that ‘[t]he power over the public land thus entrusted to Congress is without limitations.’”<sup>10</sup>

Over the course of the Nation’s history, the Court has held that Congress’s authority over public land includes: the right “to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made”<sup>11</sup>; “to declare the dignity and effect of titles emanating from the United States”<sup>12</sup>; to determine the validity of grants which precede the government’s acquisition of the property<sup>13</sup>; to exempt lands privately acquired under the homestead laws from previously contracted debts<sup>14</sup>; to withdraw land from settlement and to prohibit grazing thereon<sup>15</sup>; to restrict the construction of fencing on private land that abuts public land to prevent the unlawful occupation of public property<sup>16</sup>; to limit destruction of federal property<sup>17</sup>; to define and abate nuisances that affect the property<sup>18</sup>; to prohibit the introduction of liquor on lands purchased by the federal government for an Indian reservation<sup>19</sup>; and to protect wildlife located on public land.<sup>20</sup>

In *Kleppe*, the Court recognized that Congress’s power over federal lands includes power to regulate the lands, stating “Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant the Property Clause.”<sup>21</sup> No state may tax federal property pursuant to state authority,<sup>22</sup> nor may state legislation interfere with the power of Congress under the Property Clause or embarrass its exercise.<sup>23</sup> Moreover, when Congress acts with respect to lands covered by the Clause, its legislation preempts conflicting state

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<sup>8</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (quoting *City of San Francisco*, 310 U.S. at 29–30). See also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294–295 (1958); *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *FPC v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); *United States v. California*, 332 U.S. 19, 27 (1947); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840).

<sup>11</sup> *Gibson*, 80 U.S. (13 Wall.) at 99. See also *Emblem v. Lincoln Land Co.*, 184 U.S. 660, 664 (1902); *Irvine v. Marshall*, 61 U.S. (20 How.) 558, 566–67 (1858).

<sup>12</sup> *Bagnell v. Broderick*, 38 U.S. (13 Pet.) 436, 450 (1839). See also *Field v. Seabury*, 60 U.S. (19 How.) 323, 332 (1857).

<sup>13</sup> *Tameling v. U.S. Freehold & Immigr. Co.*, 93 U.S. 644, 663 (1877). See also *Maxwell Land-Grant Case*, 121 U.S. 325, 365–66 (1887).

<sup>14</sup> *Ruddy v. Rossi*, 248 U.S. 104, 107 (1918).

<sup>15</sup> *Light v. United States*, 220 U.S. 523, 535–36 (1911). See also *The Yosemite Valley Case*, 82 U.S. (15 Wall.) 77, 93–94 (1873).

<sup>16</sup> *Id.* See also *United States v. Waddell*, 112 U.S. 76, 79–80 (1884); *Jourdan v. Barrett*, 45 U.S. (4 How.) 169 (1846).

<sup>17</sup> *Hunt v. United States*, 278 U.S. 96, 101 (1928).

<sup>18</sup> *Camfield v. United States*, 167 U.S. 518, 525 (1897).

<sup>19</sup> *United States v. McGowan*, 302 U.S. 535, 539 (1938).

<sup>20</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976); *McKelvey v. United States*, 260 U.S. 353, 359 (1922).

<sup>21</sup> *Kleppe*, 426 U.S. at 543 (citing *Mason Co. v. Tax Comm’n of Wash.*, 302 U.S. 186, 197 (1937); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 403–405 (1917); *Ohio v. Thomas*, 173 U.S. 276, 283 (1899)). See also *Wilson v. Cook*, 327 U.S. 474, 487–88 (1946); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930).

<sup>22</sup> *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886).

<sup>23</sup> *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872). See also *Emblem v. Lincoln Land Co.*, 184 U.S. 660, 664 (1902); *Irvine v. Marshall*, 61 U.S. (20 How.) 558 (1858).

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laws.<sup>24</sup> Thus, by virtue of the Treaty of 1868 through which the federal government agreed to allow an Indian tribe living on a reservation in Arizona to engage in self-governance, the tribal court, rather than Arizona state courts, had jurisdiction over a suit for a debt owed by a tribal resident to a non-Indian operating a federally licensed store on the reservation.<sup>25</sup>

Federal law resolves questions of whether title to land formerly owned by the United States has been conveyed to another.<sup>26</sup> After title has passed from the United States, however, “that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.”<sup>27</sup> Courts also will look to state law to address questions of precisely what property the federal government conveyed to a grantee.<sup>28</sup> However, a state statute enacted after a federal grant of property cannot operate to vest in the state rights that either remained in the United States or passed to its grantee.<sup>29</sup>

**ArtIV.S3.C2.3 Power of Congress over Territories**

Article IV, Section 3, Clause 2:

*The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.*

Congress holds broad authority over territories of the United States.<sup>1</sup> The Court has held that, with regard to territories, “Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state.”<sup>2</sup> Congress may legislate directly with respect to the local affairs of a territory, or it may delegate that power to the territories,<sup>3</sup> except as limited by the Constitution.<sup>4</sup> Pursuant to this authority, for example, Congress has

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<sup>24</sup> *Kleppe*, 426 U.S. 529; *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 593–94 (1987) (applying traditional preemption analysis to a question of whether state environmental laws apply to a private company utilizing an unpatented mining permit on federal land).

<sup>25</sup> *Williams v. Lee*, 358 U.S. 217, 223 (1959).

<sup>26</sup> *United States v. Oregon*, 295 U.S. 1, 28 (1935) (“The laws of the United States alone control the disposition of title to its lands. The states are powerless to place any limitation or restriction on that control.”).

<sup>27</sup> *Wilcox v. McConnell*, 38 U.S. (13 Pet.) 498, 517 (1839).

<sup>28</sup> *Oklahoma v. Texas*, 258 U.S. 574, 595 (1922) (“if its [i.e., a federal treaty or statute conveying federal property] intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies.”).

<sup>29</sup> *United States v. Oregon*, 295 U.S. at 29 (“In construing a conveyance by the United States of land within a state, the settled and reasonable rule of construction of the state affords a guide in determining what impliedly passes to the grantee as an incident to land expressly granted.”).

<sup>1</sup> *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 673–74 (1945); *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922); *Dorr v. United States*, 195 U.S. 138, 149 (1904); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840); *Sere & Laralde v. Pitot*, 10 U.S. (6 Cranch) 332, 336–37 (1810). *See also* *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948); *United States v. Vaello Madero*, No. 20-303, slip op. at 2 (U.S. Apr. 21, 2022) (explaining that the Territory Clause “affords Congress broad authority to legislate with respect to the U.S. Territories” and that, in “[e]xercising that authority, Congress sometimes legislates differently with respect to the Territories . . . that it does with respect to the States.”).

<sup>2</sup> *Simms v. Simms*, 175 U.S. 162, 168 (1899). *See also* *El Paso & Ne. Ry. v. Gutierrez*, 215 U.S. 87 (1909); *United States v. McMillan*, 165 U.S. 504, 510 (1897); *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890); *First Nat’l Bank v. County of Yankton*, 101 U.S. 129, 133 (1880).

<sup>3</sup> *Binns v. United States*, 194 U.S. 486, 491 (1904). *See also* *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885); *Sere & Laralde*, 10 U.S. (6 Cr.) at 336.

<sup>4</sup> *Simms*, 175 U.S. at 163; *Wagoner v. Evans*, 170 U.S. 588, 591 (1898); *Walker v. New Mexico & S. Pac. R.R.*, 165 U.S. 593, 604 (1897)

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prohibited territorial legislatures from enacting local or special laws on enumerated subjects.<sup>5</sup> Further, Congress has extended the full range of constitutional protections enjoyed by United States residents in territories that have been incorporated as a part of the country by congressional action,<sup>6</sup> but has not done so in “unincorporated” territories (that is, those territories not clearly on the pathway to U.S. statehood).<sup>7</sup> Congress may establish, either directly or indirectly through authorization to a territorial legislature, “legislative courts” pursuant to the Property Clause rather than “constitutional courts” established by Article III.<sup>8</sup> These legislative courts also may exercise admiralty jurisdiction despite the fact that admiralty jurisdiction may be exercised in the states only by Article III courts.<sup>9</sup> Congress also may establish non-judicial territorial offices,<sup>10</sup> and if the powers and duties assigned to these offices are “primarily local” in nature, then the manner of appointment for officials to these offices does not have to comply with Article II’s Appointments Clause.<sup>11</sup>

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<sup>5</sup> *Binns*, 194 U.S. at 491. See also *Murphy*, 114 U.S. at 44; *Sere & Laralde*, 10 U.S. (6 Cranch) at 336.

<sup>6</sup> *Simms*, 175 U.S. at 163; *Wagoner*, 170 U.S. at 591; *Walker*, 165 U.S. at 604.

<sup>7</sup> *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901) (collectively, the *Insular Cases*). The Court stated: “The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law,” apply to persons in Puerto Rico. *Balzac*, 258 U.S. at 312. However, the full scope of constitutional provisions that are applicable in Puerto Rico and the other territories is unsettled. *Id.* (“The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.”). See also *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 331 n.1 (1986) (equality of voting rights applicable in Puerto Rico); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7–8 (1982) (First Amendment speech applicable in Puerto Rico); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (procedural due process applicable in Puerto Rico); *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (search and seizure applicable in Puerto Rico); *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976) (equal protection principles applicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Sixth Amendment jury trial applicable in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (grand jury indictment and trial by jury applicable in Hawaii). See also *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (right to travel assumed). The vitality of the *Insular Cases* has been questioned by some Justices (see, e.g., *Harris v. Rosario*, 446 U.S. 651, 652–53 (1980); *Torres v. Puerto Rico*, 442 U.S. 465, 474, 475 (1979) (concurring opinion of four justices)) *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion), but the Court adheres to it (*United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990)). See also *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020) (describing the *Insular Cases* as “much-criticized,” but declining to overrule them “whatever their continued validity.”).

<sup>8</sup> *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828). See also *Romeu v. Todd*, 206 U.S. 358, 368–69 (1907); *United States v. McMillan*, 165 U.S. 504, 510 (1897); *McAllister v. United States*, 141 U.S. 174, 180 (1891); *The City of Panama*, 101 U.S. 453, 460 (1880); *Reynolds v. United States*, 98 U.S. 145, 154 (1879); *Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 648, 655 (1874); *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 447 (1872); *Benner v. Porter* 9 (How.) 235, 236 (1850).

<sup>9</sup> *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) at 545 (“Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories.”); *The City of Panama*, 101 U.S. at 460.

<sup>10</sup> *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1654–55.

<sup>11</sup> *Id.* at 1665. See ArtII.S2.C2.3.4 Ambassadors, Ministers, and Consuls Appointments.

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 4—Republican Form of Government

ArtIV.S4.1

Historical Background on Guarantee of Republican Form of Government

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**SECTION 4—REPUBLICAN FORM OF GOVERNMENT**

**ArtIV.S4.1 Historical Background on Guarantee of Republican Form of Government**

Article IV, Section 4:

*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*

Article IV, Section 4 is generally known as the “Guarantee Clause.”<sup>1</sup> Through its terms, the United States makes three related assurances to the states: (1) a guarantee of a republican form of government; (2) protection against foreign invasion; and (3) upon request by the state, protection against internal insurrection or rebellion.<sup>2</sup>

An early version of the Guarantee Clause was among the resolutions of the Virginia Plan introduced at the Constitutional Convention by Edmund Randolph and attributed to James Madison.<sup>3</sup> The resolution went through several formulations during the debates at the Convention.<sup>4</sup> During a key debate, Gouverneur Morris objected to the resolution because “[h]e should be very unwilling that such laws as exist in R[hode] Island ought to be guaranteed.”<sup>5</sup> Randolph explained that, rather than cementing the existing laws of the states, the resolution had two objects: “1. to secure Republican Government[;] 2. to suppress domestic commotions.”<sup>6</sup> Along with concerns about rebellions, delegates expressed fears that a monarchy might arise in a particular state and “establish a tyranny over the whole [United States].”<sup>7</sup>

Answering Morris’s objection, Madison moved to substitute language that “the Constitutional authority of the States shall be guarant[eed] to them respectively [against] domestic as well as foreign violence,”<sup>8</sup> with Randolph then moving to add language that “no State shall be at liberty to form any other than a Republican [Government].”<sup>9</sup> James Wilson

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<sup>1</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 183 (1992); *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 379 (1978). At times, particularly in older cases, the term is spelled “Guaranty Clause.” See, e.g., *Baker v. Carr*, 369 U.S. 186, 209 (1962); *Texas v. White*, 74 U.S. 700, 729 (1868).

<sup>2</sup> U.S. CONST. art. IV, § 4. The Clause uses the term “domestic violence” in the now-archaic sense of “[i]nsurrection or unlawful force fomented from within a country,” and not the modern usage meaning violence between romantic partners or within a household. See *Domestic Violence*, BLACK’S LAW DICTIONARY (11th ed. 2022); THE FEDERALIST No. 21 (Alexander Hamilton).

<sup>3</sup> See 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand, ed. 1911) [hereinafter FARRAND’S RECORDS] (“Resd. that a Republican government & the territory of each State . . . ought to be guaranteed by the United States to each State.”). In an April 1787 letter to Randolph, Madison suggested that “an article ought to be inserted expressly guaranteeing the tranquility of the states against internal as well as external danger. . . . Unless the Union be organized efficiently on republican principles innovations of a much more objectionable form may be obtruded.” 2 WRITINGS OF JAMES MADISON 336 (G. Hunt ed., 1900). For background on the origins of the Guarantee Clause, see W. WIECEK, THE GUARANTEE/ADMIT A NEW STATE CLAUSE OF THE U.S. CONSTITUTION ch. 1 (1972).

<sup>4</sup> On June 11, 1787, the original resolution was amended to read “Resolved that a republican constitution and its existing laws ought to be guaranteed to each state by the United States.” 1 FARRAND’S RECORDS, *supra* note 3, at 193–94.

<sup>5</sup> See 2 *id.* at 47; see also 2 *id.* at 48 (delegates expressing worry about “perpetuating the existing Constitutions of states” and the difficulty of having the federal government decide between competing state governments).

<sup>6</sup> *Id.* This statement echoed Randolph’s earlier argument that “a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy.” See 1 *id.* at 206.

<sup>7</sup> 2 *id.* at 48.

<sup>8</sup> 2 *id.* at 47–48

<sup>9</sup> 2 *id.* at 48.

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then introduced, as a “better expression of the idea,” language substantially similar to the final form of the Guarantee Clause, which the Convention approved unanimously.<sup>10</sup>

In light of its text and framing, the Guarantee Clause was intended to be more than an authorization for the federal government to protect states against foreign invasion or internal insurrection,<sup>11</sup> a power already conferred elsewhere in the Constitution.<sup>12</sup> While the precise contours of what constitutes a “republican form of government” are debatable,<sup>13</sup> an additional object of the Guarantee Clause was to prevent states from establishing monarchical or despotic governments.<sup>14</sup>

Except for a brief period during Reconstruction, the authority granted by the Guarantee Clause has been largely unexplored.<sup>15</sup> The Supreme Court and other federal courts have largely declined to hear legal challenges based on the Guarantee Clause because they present nonjusticiable political questions.<sup>16</sup>

### **ArtIV.S4.2 Guarantee Clause Generally**

Article IV, Section 4:

*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*

In *Luther v. Borden*,<sup>1</sup> the Supreme Court in 1849 held that questions arising under the Guarantee Clause are generally political, and not judicial, in character.<sup>2</sup> *Luther* was formally an action for damages for trespass, but under the rather “unusual” circumstances of Dorr’s Rebellion, a pro-suffrage revolt that led to two competing claimants for Rhode Island’s lawful government.<sup>3</sup> The defendants in *Luther* justified their breaking and entering into the plaintiff’s home under a declaration of martial law and based on the plaintiff’s alleged

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<sup>10</sup> *2 id.* at 48–49 (resolving “that a Republican [form of Government shall] be guaranteed to each State & that each State shall be protected agst. foreign & domestic violence”). The Committee of Detail added the language providing that state legislatures must first ask for protection against domestic violence. *2 id.* at 144, 148, 159, 174. Later motions to strike that proviso failed, *2 id.* at 466–67, and during that debate the word “foreign” before “invasion” was deleted as superfluous. *Id.*

<sup>11</sup> See generally THE FEDERALIST NO. 21 (Alexander Hamilton); THE FEDERALIST NO. 43 (James Madison).

<sup>12</sup> See U.S. CONST. art. I, § 8, cl. 15 (granting Congress power to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); see generally ArtI.S8.C15.1 Congress’s Power to Call Militias.

<sup>13</sup> See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988) (“Even today, the outer boundaries of the guarantee clause remain murky; no single scholarly work can capture the full meaning of ‘republican government.’”); ArtIV.S4.3 Meaning of a Republican Form of Government.

<sup>14</sup> See 3 STORY’S COMMENTARIES § 1808 (“The want of a [Guarantee Clause] was felt, as a capital defect in the plan of the confederation . . . . If a despotic or monarchical government were established in one state, it would bring on the ruin of the whole republic.”); THE FEDERALIST NO. 21 (Alexander Hamilton).

<sup>15</sup> See generally WIECEK, *supra* note 3, at chs. 5–7; *Texas v. White*, 74 U.S. 700, 728–29 (1868) (Chase, C.J.) (grounding the establishment of Reconstruction governments in the former Confederate states as an “exercise of the power conferred by the guaranty clause” to the United States).

<sup>16</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186, 223–28 (1962) (reviewing cases); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 148–51 (1912); *Luther v. Borden*, 48 U.S. 1, 42–47 (1849). *But see* *New York v. United States*, 505 U.S. 144, 185 (1992) (“More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.” (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964))).

<sup>1</sup> 48 U.S. (7 How.) 1 (1849); see also ArtIII.S2.C1.9.3 *Luther v. Borden* and Guarantee Clause.

<sup>2</sup> *Id.* at 42.

<sup>3</sup> *Id.* at 29–30; see also *Baker v. Carr*, 369 U.S. 186, 218–219 (1962) (summarizing facts and holding of *Luther*).

## ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

### Sec. 4—Republican Form of Government

ArtIV.S4.2

Guarantee Clause Generally

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participation in insurrection. The plaintiff questioned the authority and republican character of the state government, alleging the defendants to be the insurrectionists.<sup>4</sup> Thus, to adjudicate the trespass claim in *Luther* was in effect to decide “which of two rival governments was the legitimate government of Rhode Island.”<sup>5</sup>

Chief Justice Roger Taney held that the political branches of government, and not the federal courts, should decide such questions: “it rests with Congress to decide what government is the established one in a State . . . as well as its republican character.”<sup>6</sup>

*Luther* further held that it rested with Congress to determine the proper means to fulfill the guarantee of protection to the states against insurrection.<sup>7</sup> Although the Court suggested that Congress might have empowered the Judiciary to decide whether the federal government should intervene, Congress had instead authorized the President to call out the militia in the case of insurrection against a state’s government.<sup>8</sup> It followed, reasoned Chief Justice Taney, that the President “must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress”; this political determination is not subject to judicial review.<sup>9</sup>

During Reconstruction, the Court in *Texas v. White* posited that the President’s actions in establishing temporary state governments in the defeated Confederate states at the end of the Civil War was justified as an exercise of his powers as Commander in Chief.<sup>10</sup> Because “the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress,” however, those arrangements were necessarily provisional.<sup>11</sup> It was generally up to Congress to organize and recognize new republican governments in these states.<sup>12</sup>

The next major controversies under the Guarantee Clause arose in the Progressive Era, where various state popular democratic reforms were alleged to destroy the republican form of government ensured by the Clause. In *Pacific States Telephone & Telegraph Co. v. Oregon*, the Supreme Court in 1912 declined to address a claim that the popular initiative and referendum provisions of Oregon’s Constitution violated the Guarantee Clause.<sup>13</sup> Relying on *Luther v. Borden*, the Court dismissed the case for lack of jurisdiction as a political question “conferred upon Congress and not, therefore, within the reach of judicial power.”<sup>14</sup>

In later cases summarily dismissing similar challenges, *Pacific States* and *Luther* came to stand for the proposition that Guarantee Clause questions are never justiciable.<sup>15</sup> *Baker v.*

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<sup>4</sup> *Luther*, 48 U.S. at 34–35.

<sup>5</sup> *New York v. United States*, 505 U.S. 144, 184 (1992).

<sup>6</sup> *Luther*, 48 U.S. at 42.

<sup>7</sup> *Id.* at 42–43.

<sup>8</sup> 1 Stat. 424 (1795); 10 U.S.C. § 251.

<sup>9</sup> *Luther*, 48 U.S. at 43.

<sup>10</sup> 74 U.S. (7 Wall.) 700, 729–30 (1869) (Chase, C.J.).

<sup>11</sup> *Id.* at 730–31.

<sup>12</sup> *Id.* Similarly, in *Georgia v. Stanton*, when the state challenged Reconstruction legislation on the premise that Georgia already had a republican form of government (and thus Congress could not act), the Court viewed the act of Congress as determinative and declined to address the question as a political matter. 73 U.S. 50, 76–77 (1867); *see also* *Taylor v. Beckham*, 178 U.S. 548, 578–79 (1900).

<sup>13</sup> 223 U.S. 118, 133–34, 140 (1912).

<sup>14</sup> *Id.* at 151.

<sup>15</sup> *See* *Kiernan v. City of Portland*, 223 U.S. 151 (1912); *Marshall v. Dye*, 231 U.S. 250, 256–57 (1913); *City of Denver v. N.Y. Tr. Co.*, 229 U.S. 123, 141 (1913); *Davis v. Ohio*, 241 U.S. 565 (1916); *O’Neill v. Leamer*, 239 U.S. 244, 247–48 (1915); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569–70 (1916); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79–80 (1930); *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 374 (1930); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 4—Republican Form of Government

ArtIV.S4.3  
Meaning of a Republican Form of Government

*Carr*, despite its general curbing of the political-question doctrine, left these Guarantee Clause precedents intact.<sup>16</sup> The Supreme Court continued to follow them through the 1980s.<sup>17</sup>

In the 1990s, however, the Court in dicta raised the possibility that “perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”<sup>18</sup> In *Gregory v. Ashcroft*, the Court suggested that the Guarantee Clause might operate as a constraint upon Congress’s power to regulate the activities of the states.<sup>19</sup> More recently, however, the Court has continued to find Guarantee Clause questions nonjusticiable despite opportunities to revive the Clause.<sup>20</sup>

**ArtIV.S4.3 Meaning of a Republican Form of Government**

Article IV, Section 4:

*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*

Although the Supreme Court has generally avoided addressing Guarantee Clause questions because of their political character,<sup>1</sup> it has occasionally ruled on the merits of such challenges. These decisions, as well as contemporaneous sources, shed some light on the meaning of the “Republican Form of Government” guaranteed by the Clause.<sup>2</sup> For example, in the *Federalist No. 39*, James Madison emphasizes popular sovereignty and majoritarian control as among “the distinctive characters of the republican form”:

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In a few nineteenth century cases, however, the Court disposed of Guarantee Clause questions on the merits, despite *Luther*. See *Forsyth v. City of Hammond*, 166 U.S. 506, 519 (1897); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175–78 (1874).

<sup>16</sup> 369 U.S. 186, 218–32 (1962). *Baker* found that Guarantee Clause questions were nonjusticiable not because they involved matters of state governmental structure but because they lacked “judicially manageable standards which a court could utilize independently in order to identify a State’s lawful government.” *Id.* at 218, 222–23. *Baker* therefore held that the Guarantee Clause precedents “have no bearing” of the justiciability of a challenge to state legislative apportionment based on the Equal Protection Clause. *Id.* at 228.

<sup>17</sup> See *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980); *Quinn v. Millsap*, 491 U.S. 95, 102 (1989).

<sup>18</sup> *New York v. United States*, 505 U.S. 144, 185 (1992) (citing *Reynolds v. Sims*, 377, 533, 582 (1964)).

<sup>19</sup> 501 U.S. 452, 463 (1991) (“[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause].” (citations omitted)). Both *New York* and *Gregory* cite the argument set out in Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

<sup>20</sup> See *Rucho v. Common Cause*, No. 18–422, slip op. at 30 (U.S. June 27, 2019) (“This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.”); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 795 n.3 (2015) (“The people’s sovereign right to incorporate themselves into a State’s lawmaking apparatus . . . is one this Court has ranked a nonjusticiable political matter.” (citing *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912))).

<sup>1</sup> See ArtIV.S4.2 Guarantee Clause Generally.

<sup>2</sup> For scholarly examinations of this issue, see, for example, W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION ch. 1 (1972); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 22–25 (1988) (finding “widespread agreement” among scholars that the “core” of republican government is “one in which the people control their rulers”); Akhil Reed Amar, *The Central Meaning of a Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 786 (1994) (concluding that the “central meaning” of the republican government in the Founding Era was “popular sovereignty, majority rule, and the people’s right to alter or abolish [the government]”); Robert G. Natelson, *A Republic, Not a Democracy—Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 814–15 (2002) (surveying historical sources to conclude that “republican form of government,” as used in the Guarantee Clause, had three core features: majority rule, the absence of monarchy, and the rule of law).

**ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES**  
Sec. 4—Republican Form of Government

ArtIV.S4.3

Meaning of a Republican Form of Government

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[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; . . . It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified[.]<sup>3</sup>

The 1874 case of *Minor v. Happersett* represents a rare instance of the Supreme Court directly deciding a Guarantee Clause issue. In *Minor*, the Court addressed whether Missouri’s denial of the right to vote to women complied with the Constitution.<sup>4</sup> The Court stated that the Guarantee Clause leaves room for states to structure their governments in various ways yet remain “republican.”<sup>5</sup> Relying on historical practice as dispositive of the matter, the Court held that the Guarantee Clause did not require women’s suffrage because at the time of ratification, women “were excluded from suffrage in nearly all the States,” with the franchise “only bestowed upon men and not upon all of them.”<sup>6</sup> Later, the Court held in *Forsyth v. City of Hammond* that the Guarantee Clause did not prevent a state from determining municipal boundaries through its courts instead of the state legislature.<sup>7</sup>

In other cases, the Court found occasions to opine on the nature of a republican government guaranteed by the Clause in dicta. For example, *In re Duncan* observes:

By the constitution, a republican form of government is guarant[eed] to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves . . . .<sup>8</sup>

Similarly, the Court in *United States v. Cruikshank*, while adopting a narrow construction of the rights secured by the Fourteenth Amendment’s Privileges or Immunities Clause,<sup>9</sup> stated that a republican form of government includes “a right on the part of its citizens to meet

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<sup>3</sup> See, e.g., THE FEDERALIST NO. 39 (James Madison); see also THE FEDERALIST NO. 22 (Alexander Hamilton) “[T]he fundamental maxim of republican government . . . requires that the sense of the majority should prevail.”); THE FEDERALIST NO. 57 (James Madison) (“The elective mode of obtaining rulers is the characteristic policy of republican government.”).

<sup>4</sup> 88 U.S. 162 (1874), *superseded by constitutional amendment*, U.S. CONST. amend. XIX. See also Amdt19.1 Overview of Nineteenth Amendment, Women’s Voting Rights. The primary constitutional basis for the claim in *Minor* was the Fourteenth Amendment’s Privileges or Immunities Clause. *Minor*, 88 U.S. at 165.

<sup>5</sup> *Minor*, 88 U.S. at 175 (“No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated.”).

<sup>6</sup> *Id.* Continuing in this vein, the Court reasoned that the Guarantee Clause could not secure women the right to vote because “[n]o new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission” and “the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it.” *Id.* at 177–78.

<sup>7</sup> 166 U.S. 506, 519 (1897) (“[L]egislative control in such matters is not one of the essential elements of a republican form of government [under the Guarantee Clause].”).

<sup>8</sup> 139 U.S. 449, 461 (1891). The Court paraphrased Daniel Webster’s “masterly statement of the American system of government” as one where “the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage.” *Id.* at 461–62.

<sup>9</sup> *United States v. Cruikshank*, 92 U.S. 542, 551–57 (1875) (holding that First and Second Amendment rights were not a privilege of U.S. citizenship secured against state invasion by the Fourteenth Amendment); see also *Slaughter-House Cases*, 83 U.S. 36 (1872); Amdt14.S1.2.1 Privileges or Immunities of Citizens and the

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peaceably for consultation in respect to public affairs and to petition for a redress of grievances” as well as the “equality of the rights of citizens.”<sup>10</sup>

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Slaughter-House Cases. The Court later held those rights were incorporated against the states through the Due Process Clause. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010); De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

<sup>10</sup> *Cruikshank*, 92 U.S. at 552, 555.

