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REDISCOVERING *CORFIELD V. CORYELL*

Gerard N. Magliocca*

“[T]he citizens of each State shall be entitled to all privileges [and] immunities of citizens in the several States.” Is the right which a citizen has to enjoy the common property belonging to the citizens of the State a privilege or immunity? . . . I am inclined to think that it is a privilege within the meaning of this article of the Constitution.

—Justice Bushrod Washington¹

INTRODUCTION

Justice Bushrod Washington’s 1825 circuit opinion in *Corfield v. Coryell*² is probably the most famous constitutional decision not issued by the Supreme Court.³ *Corfield* is chiefly known for its enigmatic dicta on the privileges and immunities of citizens secured against state denial by Article IV, Section 2 of the Constitution.⁴ This dicta became a focal point for the debate in the Thirty-Ninth Congress on the Civil Rights Act of 1866 and the

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1 This quote comes from Justice Washington’s notes on *Corfield v. Coryell*, which will be described hereinafter as “Washington Notebook” (on file with author). See *infra* text accompanying notes 9, 86–97, 111–15.

2 *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230). There is some confusion about the proper way to cite *Corfield*. Many cases and secondary sources use 1823 as the date, because the case was formally from the April 1823 Term of the circuit court. The final opinion, though, was not issued until 1825 (as the case report explains). See *id.* at 550. The most recent Supreme Court opinion citing *Corfield* gives 1825 as the date. See *McBurney v. Young*, 569 U.S. 221, 229 (2013). I shall use 1825 in this Article.

3 See, e.g., Chester James Antieau, *Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 12 (1967) (“[I]t would be almost impossible to overestimate the importance of the [*Corfield* privileges-and-immunities] quotation upon American law.”); David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1485 (2005) (“*Corfield v. Coryell* remains a famous, important, but largely unexamined constitutional case.”).

4 See U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *Corfield*, 6 F. Cas. at 551–52; *infra* text accompanying note 58.

Privileges or Immunities Clause of the Fourteenth Amendment.⁵ Many commentators contend that *Corfield*'s privileges-and-immunities passage should be read as a guarantee of only equal access for out-of-state citizens to some rights granted by state law.⁶ Others argue that Justice Washington was saying that the Constitution secured certain fundamental rights to all national citizens in spite of state law.⁷ Since Reconstruction, the latter point has been made on behalf of unenumerated liberties including women's suffrage (prior to the ratification of the Nineteenth Amendment), the right to travel between the states, and the right to pursue a profession.⁸

This Article reveals new details about *Corfield* based on archival research. In 2017, the author found Justice Washington's original notes on *Corfield* in the Chicago History Museum.⁹ The most important revelation about *Corfield* is that the Justice was initially inclined to hold that the state law his decision upheld was, in fact, unconstitutional under the Privileges and Immunities

5 See 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 . . ."); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2012)) (guaranteeing some common-law rights to all Americans); KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 27 (2014) ("It is because *Corfield* plays such an important role in the debates over the Privileges or Immunities Clause of the Fourteenth Amendment that it is important to take a close look at the key section of Justice Washington's opinion."); *infra* text accompanying notes 67–71; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 29 (1980) (stating that the Fourteenth Amendment's "framers repeatedly adverted to the *Corfield* discussion as the key to what they were writing").

6 See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1416 (1992); cf. *McDonald v. City of Chicago*, 561 U.S. 742, 821 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("Justice Washington did not indicate [in *Corfield*] whether Article IV, § 2, *required* States to recognize these fundamental rights in their own citizens and thus in sojourning citizens alike, or whether the Clause simply prohibited the States from discriminating against sojourning citizens with respect to whatever fundamental rights state law happened to recognize.").

7 See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939) (opinion of Roberts, J.) ("At one time it was thought that [the Privileges and Immunities Clause] recognized a group of rights which, according to the jurisprudence of the day, were classed as '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 [in *Corfield*].").

8 See A.G. Riddle, Speech in Support of the Woodhull Memorial, Before the Judiciary Committee of the House of Representatives, in 2 *HISTORY OF WOMAN SUFFRAGE* 448, 453 (Elizabeth Cady Stanton et al. eds., Rochester, N.Y., Charles Mann Printing Co. 1881); see also *Zobel v. Williams*, 457 U.S. 55, 80 (1982) (O'Connor, J., concurring) (quoting *Corfield* in support of the "right to travel or migrate interstate"); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 97 (1873) (Field, J., dissenting) (citing *Corfield* to support "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons").

9 See Washington Notebook, *supra* note 1. The notes are in a journal held by the Chicago Historical Society, whose collection is housed in the Chicago History Museum. Part II describes some of the journal's contents. See *infra* text accompanying notes 86–92.

Clause.¹⁰ The notes also say that he saw *Livingston v. Van Ingen*¹¹ as the leading precedent on the Privileges and Immunities Clause and backed Chancellor Kent's view in that case that the Clause articulated a nondiscrimination rule for out-of-state citizens instead of a freestanding guarantee of fundamental rights.¹² Even more important may be the disclosure from the notes that Justice Washington wrestled with the Commerce Clause issue in *Corfield* prior to the Supreme Court's ruling in *Gibbons v. Ogden*¹³ in a way that probably influenced Chief Justice John Marshall's landmark opinion for the Court.¹⁴ In short, the *Corfield* notes provide a fascinating glimpse into the thinking of a key member of the Marshall Court at a crucial stage.

The discovery of Justice Washington's notes also provides an occasion to offer one reflection on *Corfield's* legacy. His opinion was the first notable legal authority to say that the right to vote is fundamental.¹⁵ This idea was so radical in the nineteenth century that even the strongest supporters of Reconstruction shied away from *Corfield's* implications for African American and female voting.¹⁶ Indeed, not until the 1960s did the Supreme Court and Congress accept *Corfield's* wisdom that "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised," is an essential right of citizenship,¹⁷ though the United States still struggles to reconcile that right with the reality of state and local regulation of election administration.¹⁸

Part I gives a detailed account of *Corfield* and explores how the case was subsequently understood. Part II examines Justice Washington's notes on

10 See *supra* text accompanying note 1; *infra* text accompanying note 114.

11 *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812).

12 See Washington Notebook, *supra* note 1; *infra* text accompanying notes 114–21; see also *Livingston*, 9 Johns. at 577 (opinion of Kent, C.J.) (stating that Article IV "means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights").

13 22 U.S. (9 Wheat.) 1 (1824); see U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have power "[t]o regulate Commerce . . . among the several States").

14 *Corfield* was almost certainly the first circuit case to apply *Gibbons*. See Richard A. Epstein, *Rediscovering the Classical Liberal Constitution: A Reply to Professor Hovenkamp*, 101 IOWA L. REV. 55, 69 (2015).

15 See *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3230).

16 See U.S. CONST. amend. XIV, § 2; see also *Woman Suffrage*, N.Y. TIMES, Jan. 31, 1871, at 1 (reprinting the Report of the House Judiciary Committee rejecting the argument that *Corfield* supported women's suffrage).

17 *Corfield*, 6 F. Cas. at 552; see *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); see also Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 & 52 U.S.C.).

18 See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (invalidating portions of the Voting Rights Act).

the case and shows how they expand our understanding of *Gibbons* and *Corfield*. Part III explores *Corfield*'s revolutionary reference to voting rights.

I. UNDERSTANDING THE OPINION

This Part explains *Corfield* and the way in which the case was cited afterwards. My narrative will go beyond the standard one by discussing the Commerce Clause issue and the Privileges and Immunities Clause in the case. In part, that decision is motivated by Justice Washington's ideas about the Commerce Clause in his notes, but another factor is that *Corfield* contains vital clues about how *Gibbons* was decided in the Supreme Court.

A. *The Factual and Procedural Background*

Corfield is best understood as presenting a "tragedy-of-the-commons" problem.¹⁹ In 1820, New Jersey enacted a statute restricting the harvesting of oysters within state waters to prevent exhaustion of a natural resource.²⁰ Oyster harvesting was barred from May until September, and during the rest of the year only state residents were allowed to take oysters from state waters.²¹ The plaintiff in *Corfield*, who was not a New Jersey resident, was the owner of a vessel that conducted oyster harvesting in state waters and was manned by crew who were also not state residents.²² The vessel and its contents were seized by state authorities and auctioned off.²³

Plaintiff brought a trespass action in federal court and made four constitutional claims in alleging that his ship was wrongfully seized and sold.²⁴ First, the state statute on oyster harvesting was "contrary to the second section of the fourth article of the constitution of the United States, by denying to the citizens of other states, rights and privileges enjoyed by those of New Jersey."²⁵ Second, the state statute was "contrary to that part of the constitution which vests in congress the power to regulate trade and commerce between the states."²⁶ Third, the statute violated "the second section of the third article, which extends the judicial authority to all cases of admiralty and

19 See generally ELINOR OSTROM, GOVERNING THE COMMONS 1–23 (1990) (describing the tragedy-of-the-commons problem and possible solutions).

20 See *Corfield*, 6 F. Cas. at 550.

21 *Id.*

22 See *id.* There was a dispute over whether the oyster harvesting occurred in New Jersey waters. See *id.* at 553. *Corfield* examined the royal charters setting the state's boundaries and some relevant colonial compacts before ruling that New Jersey did have jurisdiction over plaintiff's vessel. See *id.* at 553–55. The court also rejected the argument that the state proceeding was invalid for being held in the wrong county. See *id.* at 555.

23 See *id.* at 550.

24 *Corfield* ruled that plaintiff could not maintain a trespass action because the vessel was operating under a charter at the time of seizure. See *id.* at 555. Plaintiff's "only remedy is an action on the case for consequential damages," though the point was moot once the constitutionality of the New Jersey statute was upheld. See *id.*

25 See *id.* at 549.

26 *Id.*

maritime jurisdiction.”²⁷ Fourth, the state proceedings “were contrary to the fourth article of the amendments to the constitution; the seizure having been made without a warrant.”²⁸

Corfield came before the Circuit Court of the Eastern District of Pennsylvania and was heard by Justice Bushrod Washington.²⁹ In this era, the Supreme Court Justices were required to “ride circuit” and hold civil and criminal trials in designated areas of the country.³⁰ A trial was held and the Justice, “after stating to the jury the great importance of many of the questions involved in this cause, recommended to them to find for the plaintiff, and assess the damages.”³¹ Trial courts possessed more discretion to comment on the evidence and influence a jury’s verdict in the nineteenth century than they do now, and in *Corfield* the jury took the court’s advice and found for plaintiff in the amount of \$560.³²

At this point, scholars familiar with the constitutional analysis in *Corfield* might sit up and take notice. Justice Washington’s opinion in the case held for the defendant.³³ Why, then, did he ask the jury to find for the plaintiff? The official case report says only that the “case was argued, on the points of law agreed by the counsel to arise on the facts, at the October term 1824, and was taken under advisement until April term 1825, when the following opinion was delivered.”³⁴ In other words, well after the trial ended in the plaintiff’s favor, legal arguments were heard and resolved by the court in the defendant’s favor. There are two possible explanations for this about-face. Either Justice Washington changed his mind, or some new case came down that changed the correct result.

One possible answer is that *Gibbons* was decided in March 1824 and required Justice Washington to consider new arguments on the Commerce

27 *Id.* The maritime claim was rejected on the ground that “the power to regulate the fisheries belonging to the several states, and to punish those who should transgress those regulations, was exclusively vested in the states, respectively, at the time when the present constitution was adopted, and that it was not surrendered to the United States, by the mere grant of admiralty and maritime jurisdiction to the judicial branch.” *Id.* at 553. In other words, an act of Congress was needed to create exclusive federal jurisdiction over the state’s seizure of the vessel. *See id.*

28 *Id.* at 549. The Fourth Amendment claim was apparently abandoned, as the court never addressed the issue. In the 1820s, there was no Supreme Court decision on whether any portion of what we call the Bill of Rights applied to state governments. *See Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 243 (1833) (rejecting the incorporation of the first set of amendments).

29 *See Corfield*, 6 F. Cas. at 546. There is no indication that Judge Richard Peters, who often sat with Justice Washington on the circuit court, participated in *Corfield*.

30 *See generally* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003) (describing the evolution of that practice).

31 *See Corfield*, 6 F. Cas. at 549.

32 *See id.* at 550. *See generally* Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195 (2000) (discussing the prevalence of judicial commentary on evidence and the practice’s decline by the twentieth century).

33 *See Corfield*, 6 F. Cas. at 555.

34 *Id.* at 550.

Clause issue in *Corfield*.³⁵ *Gibbons*, of course, was the Supreme Court's first case discussing the Commerce Clause in detail and held that a New York statute granting a monopoly for steamboat traffic in that state's waters was contrary to multiple acts of Congress.³⁶ Chief Justice Marshall's opinion explained: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations . . . in all its branches, and is regulated by prescribing rules for carrying on that intercourse."³⁷ Marshall added that the commerce power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."³⁸ Nevertheless, the Court wrote that there were many state statutes with "a remote and considerable influence on commerce" that were permissible.³⁹ Examples included "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c."⁴⁰ Justice Washington joined the Court's opinion in *Gibbons* knowing full well that *Corfield* raised the question of whether a state statute restricting oyster harvesting in navigable waters came within the category of legislation that *Gibbons* said fell outside of the commerce power.⁴¹

B. *The Commerce Clause Analysis*

When the Justice gave his opinion in *Corfield*, he began the discussion of the merits by asking whether the New Jersey oyster law "is repugnant to the power granted to congress to regulate commerce."⁴² Citing *Gibbons*, he wrote that the commerce power "does by no means impair the right of the state government to legislate upon all subjects of internal police within their territorial limits . . . even although such legislation may indirectly and remotely affect commerce."⁴³ Washington also quoted the Chief Justice's opinion almost verbatim in stating that "inspection, quarantine, and health laws; laws regulating the internal commerce of the state; laws establishing and

35 See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 186 (1824) (listing the date of decision as March 2).

36 See *id.* at 239–40. See generally Richard Primus, *The Gibbons Fallacy*, 19 U. PA. J. CONST. L. 567 (2017) (offering a comprehensive account of the decision). Justice William Johnson concurred in the result on the ground that the commerce power was vested exclusively in Congress. See *Gibbons*, 22 U.S. (9 Wheat.) at 227 (Johnson, J., concurring).

37 *Gibbons*, 22 U.S. (9 Wheat.) at 189–90.

38 *Id.* at 196.

39 *Id.* at 203.

40 *Id.*

41 We know that Justice Story saw a draft opinion of *Corfield* while the Supreme Court was in session, as Washington said as much in a letter written after *Corfield* was decided. See Letter from Bushrod Washington to Joseph Story (June 8, 1825) (on file with author) ("I send you the report of the case of *Corfield v. Coryell* as you perused the opinion at large during the last session of the Supreme Court.").

42 *Corfield v. Coryell*, 6 F. Cas. 546, 550 (C.C.E.D. Pa. 1825) (No. 3230).

43 *Id.*

regulating turnpike roads, ferries, canals, and the like” were instances of valid state legislation.⁴⁴ The Justice then made his main point, which was that

if the power which congress possesses to regulate commerce does not interfere with that of the state to regulate its internal trade, although the latter may remotely affect external commerce, . . . much less can that power impair the right of the state governments to legislate, in such manner as in their wisdom may seem best, over the public property of the state.⁴⁵

He noted that the state law imposed no restrictions on the use of state waters “for purposes of navigation and commercial intercourse” nor the “slightest restraint imposed upon any to buy and sell, or in any manner to trade within the limits of the state.”⁴⁶

Corfield next addressed whether the fact that oysters were articles of commerce meant that a state law regulating their harvest by out-of-state citizens came within Congress’s commerce power.⁴⁷ Washington rejected this reasoning because “[t]he law does not inhibit the buying and selling of oysters after they are lawfully gathered, and have become articles of trade; but it forbids the removal of them from the beds in which they grow, (in which situation they cannot be considered articles of trade[]).”⁴⁸ The Justice based his distinction between potential and actual articles of trade on a statement in *Gibbons* that said state inspection laws were not commercial regulations because “[t]hey act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.”⁴⁹ “Is this not,” *Corfield* asked, “precisely the nature of those laws which prescribe the seasons when, and the manner in which, the taking of oysters is permitted?”⁵⁰ After all, “[p]aving stones, sand, and many other things, are as clearly articles of trade as oysters; but can it be contended, that the laws of a state, which treat as tortfeasors those who shall take them away without the permission of the owner of them, are commercial regulations?”⁵¹ Justice Washington concluded that “[w]e deem it superfluous to pursue this subject further,”⁵² evidently because the notion that tort law could be part of Congress’s commerce power (in spite of its indirect effect on commerce) was viewed as preposterous.

44 *Id.*

45 *Id.* at 550–51. On this score, *Corfield* observed that federal jurisdiction over the nation’s navigable waters implied no cession of state property interests in those waters. *See id.* at 551.

46 *Id.*

47 *See id.* (“It was insisted by the plaintiff’s counsel, that, as oysters constituted an article of trade, a law which abridges the right of the citizens of other states to take them, except in particular vessels, amounts to a regulation of the external commerce of the state.”).

48 *Id.*

49 *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)).

50 *Id.*

51 *Id.* This passage is notable because it closely tracks a statement in Justice Washington’s notes on *Corfield*. *See infra* text accompanying note 113.

52 *Corfield*, 6 F. Cas. at 551.

C. *The Privileges and Immunities Clause Analysis*

After disposing of the Commerce Clause issue, *Corfield* stated:

The next question is, whether this act infringes that section of the constitution which declares that “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?” The inquiry is, what are the privileges and immunities of citizens in the several states?⁵³

On this issue, there was no Supreme Court authority and nothing had changed since the trial in *Corfield*. Justice Washington held:

[W]e cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens⁵⁴

Furthermore, the Justice rejected the view that “in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.”⁵⁵ “[I]t would,” the court explained, “be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the state, to the citizens of all the other states.”⁵⁶ To do so “would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted.”⁵⁷

The portion of *Corfield* that became controversial, though, was the dicta on privileges and immunities that preceded the holding. Here is the passage defining the privileges and immunities in the several states:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to

53 *Id.*

54 *Id.* at 552.

55 *Id.*

56 *Id.*

57 *Id.* The tragedy-of-the-commons problem in *Corfield* was then restated:

The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.

Id.

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 in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”⁵⁸

As members of the Thirty-Ninth Congress quoted part or all of this passage in the debate on the Civil Rights Act of 1866 and on the Fourteenth Amendment, some comments about *Corfield's* dicta are appropriate.⁵⁹

The first observation about Justice Washington's definition of privileges and immunities is that he was speaking in aspirational terms.⁶⁰ History does not support the notion that the rights in *Corfield* had “at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” When the Justice said that certain privileges “belong, of right, to the citizens of all free governments,” he was setting a standard for evaluating whether a government was free instead of describing a free government's practices. Indeed, part of his statement closely corresponds to the ideal set forth in the Virginia Declaration of Rights that all men possess certain basic rights; “namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”⁶¹

A second point that is often made about *Corfield* is that Justice Washington drew his list of rights mainly from the common law rather than from the

58 *Id.* at 551–52; *see also* ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1.

59 The critical exception was John Bingham, who drafted the Privileges or Immunities Clause and never referred to *Corfield* during the Thirty-Ninth Congress. *See* GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* 117–18 (2013).

60 *See* JACK M. BALKIN, *LIVING ORIGINALISM* 406 n.84 (2011) (“Washington's statement that these rights ‘have at all times been enjoyed’ must be taken as aspirational rather than as an accurate account of history; the comity [or Privileges and Immunities] clause was necessary precisely because states had not always respected these rights and might not in the future.”).

61 VA. DECLARATION OF RIGHTS OF 1776, art. I; *see* RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 107 (2016).

Constitution.⁶² The right of citizens to travel, to dispose of property, to bring civil actions, and to seek the writ of habeas corpus were well settled at common law.⁶³ While some of these rights can be inferred from the Constitution, *Corfield* does not suggest that the 1787 text was the source of rights that belonged to citizens of all free governments and dated back to independence. The exception to Washington's common-law approach was the right to vote, which was not then classified as a right of citizenship in the United States.⁶⁴

The final (and most important) insight is that *Corfield's* dicta did not make clear whether states were required by the Privileges and Immunities Clause to give certain fundamental rights to all citizens or just give out-of-state citizens any such rights granted by state law. One take on the opinion is that the rights Justice Washington listed as fundamental were recognized in every state. Under this reading, *Corfield* was saying only that these well-established rights could not be denied to out-of-state citizens. Another reading, though, is that the opinion's list of fundamental rights must be given by all states to all of their citizens because they were privileges and immunities of *national* citizenship. To some extent, the confusion results from the lack of citations in *Corfield's* famous passage. Moreover, dicta is frequently ambiguous precisely because the discussion is not necessary to decide a case and is not given the same level of scrutiny as a holding. This raises yet another question about Justice Washington's opinion: Why did he include this list of rights in *Corfield* at all?

D. *Corfield* in the Thirty-Ninth Congress and Beyond

Prior to 1866, courts read *Corfield* as supporting a nondiscrimination rule against out-of-state citizens,⁶⁵ but in the Thirty-Ninth Congress several Republicans cited *Corfield's* privileges-and-immunities dicta as guidance for how fundamental rights should be understood for the freed slaves.⁶⁶ For instance, during the debate on the Civil Rights Act of 1866, Senator Lyman Trumbull of Illinois quoted *Corfield* and said that the opinion "enumerates the very rights belonging to a citizen of the United States which are set forth in the first section of this bill."⁶⁷ Likewise, Representative James Wilson of Iowa quoted from *Corfield* to support the proposition that the Civil Rights Act

62 See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 177 (1998) ("Washington seemed to be following a quintessentially common-law approach in deducing 'fundamental' rights.").

63 See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *134-42 (discussing these basic liberties of English subjects). The right against unequal taxation is more complex, though there was precedent concluding that this was a privilege and immunity of citizenship. See *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797); Upham, *supra* note 3, at 1499-1502.

64 See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 1-52 (2000).

65 See LASH, *supra* note 5, at 29-37.

66 See, e.g., BALKIN, *supra* note 60, at 196-97, 208-09.

67 CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull); see also *id.* at 1835-36 (statement of Rep. Lawrence).

“merely affirms existing law” on the rights of citizens notwithstanding state law.⁶⁸ Some critics replied that Justice Washington’s “views were uttered in reference alone to white citizens” and hence did not authorize the Act.⁶⁹

When the discussion turned to the Fourteenth Amendment, other members of Congress looked to *Corfield* as inspiration for the Privileges or Immunities Clause. Most notably, Senator Jacob Howard’s introduction of the proposed amendment quoted at length from “what that very learned and excellent judge” said about the privileges and immunities of citizens in describing what the equivalent provision in Section 1 meant.⁷⁰ Likewise, when Congress tried to enforce Section 1 of the Fourteenth Amendment against the Ku Klux Klan, Republicans continued to cite *Corfield* as a pillar of citizenship. For example, Senator Arthur Boreman quoted the dicta and told his colleagues: “The rights, immunities, and privileges described by Judge Washington have, in numerous instances . . . been invaded and trampled upon and outraged.”⁷¹

When the Supreme Court decided the *Slaughter-House Cases* in 1873, though, the *Corfield* dicta was quoted only in part and was given a more limited construction.⁷² The Court omitted the specific rights contained in Justice Washington’s list and stated that the sole purpose of Article IV’s Privileges and Immunities Clause

was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.⁷³

Put another way, *Slaughter-House* gave *Corfield* its antebellum reading as an antidiscrimination case instead of a decision about fundamental rights secured against states.⁷⁴ Justice Field’s dissent rejected this view, included

68 See *id.* at 1117–18 (statement of Rep. Wilson).

69 See *id.* at 1269 (statement of Rep. Kerr).

70 See *id.* at 2765 (statement of Sen. Howard). Senator Howard’s speech is discussed in two companion articles and a reply in this issue of the *Notre Dame Law Review* that discuss the best reading of the Privileges or Immunities Clause. Compare Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 499–502, 551–54 (2019) (relying in part on Howard’s speech to argue against an enumerated-rights reading of the Privileges or Immunities Clause), and Randy E. Barnett & Evan D. Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 NOTRE DAME L. REV. 679, 690–92 (2019), with Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591, 650–57 (2019) (contesting the significance of Howard’s remarks).

71 CONG. GLOBE, 42d Cong., 1st Sess. app. at 228 (1871) (statement of Sen. Boreman); see *id.* at 69 (statement of Rep. Shellabarger).

72 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75–76 (1873).

73 *Id.* at 77; see *id.* at 76.

74 Nonetheless, the Court said that the Privileges or Immunities Clause of the Fourteenth Amendment protected “the privilege of the writ of *habeas corpus*,” which was one of the rights listed in *Corfield*. See *id.* at 79; *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3230). I need not address that point in this Article.

most of the specific rights that *Corfield* described, and said that Justice Washington was describing privileges and immunities that by “right belong to the citizens of all free governments.”⁷⁵ Similarly, Justice Bradley’s dissent gave *Corfield*’s dicta the broad reading supported by the Thirty-Ninth Congress as part of an analysis that gave the Fourteenth Amendment a more generous interpretation.⁷⁶

In sum, *Corfield* is a fascinating constitutional opinion with weighty implications for construing the Fourteenth Amendment. Let us now go on an archaeological expedition and see what Justice Washington’s case notes reveal about his thinking in the case.

II. JUSTICE WASHINGTON’S WORK PRODUCT

This Part describes the journal that contains Justice Washington’s notes on *Corfield* and examines what the journal can tell us about how he arrived at his decision. The first takeaway is that the Justice was already grappling with the question resolved by *Gibbons* before that decision was made and that his notes contain important clues about the reasoning that was ultimately used in *Gibbons*.⁷⁷ Next, Washington’s notes state that he was initially inclined to hold the New Jersey law unconstitutional under the Privileges and Immunities Clause because he thought that the right of citizens to use navigable waters could not be distinguished from the right to harvest oysters in those waters.⁷⁸ For reasons unknown he changed his mind, but the Justice’s doubts might explain why he felt compelled to spell out some of the constitutional privileges and immunities of citizens. Lastly, the notes indicate that Washington saw a New York case upholding that state’s steamboat monopoly as the leading authority on the Privileges and Immunities Clause and endorsed that decision’s view that the Clause was about only equal treatment of out-of-state citizens.⁷⁹ This final point squares with the antebellum equal-treatment reading of *Corfield*, rather than the fundamental-rights interpretation given during Reconstruction.

⁷⁵ See *Slaughter-House*, 83 U.S. (16 Wall.) at 97 (Field, J., dissenting) (emphasis omitted).

⁷⁶ See *id.* at 117–18 (Bradley, J., dissenting) (“It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens *in* a State; not of citizens *of* a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State; or, as Justice Washington says, ‘privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.’”).

⁷⁷ See *infra* text accompanying notes 97–110.

⁷⁸ See *infra* text accompanying notes 114–17.

⁷⁹ See *infra* text accompanying notes 118–21; see also *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812).

A. *The Provenance of the Journal*

In October 2017, I discovered Justice Washington's *Corfield* notes while conducting research for his biography.⁸⁰ Bushrod Washington was George Washington's nephew and inherited Mount Vernon and George Washington's papers after Martha Washington's death.⁸¹ He studied law with James Wilson in Philadelphia and then served in Virginia's ratifying convention for the Constitution,⁸² where James Madison described him as "a young Gentleman of talents" in a letter to Thomas Jefferson.⁸³ After over a decade in private practice, President John Adams appointed Washington to the Supreme Court, where he remained until his death in 1829.⁸⁴ Though overshadowed by his uncle and by his friend and colleague Chief Justice Marshall,⁸⁵ my research indicates that Washington is an underrated figure who made significant contributions to the law beyond *Corfield*.

The *Corfield* notes are in a journal held by the Chicago History Museum, which houses the collection of the Chicago Historical Society.⁸⁶ The journal contains fragments of Justice Washington's letters, records on illnesses among the slaves and family members at Mount Vernon, his work product on other cases and subjects, and draft opinions.⁸⁷ Perhaps the most important of the Supreme Court draft opinions in the journal is *Green v. Biddle*,⁸⁸ in which Justice Washington invalidated a Kentucky debt-relief statute and essentially rewrote Justice Joseph Story's prior opinion for the Court because Story's opinion was considered too hostile to states' rights.⁸⁹ The precise date range of the journal is hard to ascertain, but one of the circuit court

80 See GERARD N. MAGLIOCCA, *WASHINGTON'S HEIR: THE LIFE OF JUSTICE BUSHROD WASHINGTON* (forthcoming).

81 See RON CHERNOW, *WASHINGTON: A LIFE* 803 (2010).

82 See SCOTT E. CASPER, *SARAH JOHNSON'S MOUNT VERNON: THE FORGOTTEN HISTORY OF AN AMERICAN SHRINE* 10 (2008).

83 Letter from James Madison to Thomas Jefferson (Apr. 22, 1788) (providing an overview of the convention delegates), in 5 *THE WRITINGS OF JAMES MADISON* 120, 121 (Gaillard Hunt ed., 1904).

84 The best law review article on Justice Washington's career is Herbert A. Johnson, *Bushrod Washington*, 62 *VAND. L. REV.* 447 (2009).

85 See, e.g., JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 290 (1996) (describing Marshall and Washington's professional and personal relationship).

86 General information about the Chicago History Museum can be found at www.chicagohistory.org.

87 My characterization of the journal is based on my personal review of the document along with photos that I took with the permission of the Chicago History Museum that are on file with the author.

88 21 U.S. (8 Wheat.) 1 (1823).

89 See Johnson, *supra* note 84, at 473–75. In the draft opinion, Justice Washington closed by using the singular to describe his conclusion: "I hold myself answerable to God, my conscience and my country to decide the question according to the dictates of my best judgment, be the consequences of the decision what they may." See Washington Notebook, *supra* note 1. In the final opinion, he used the plural: "[W]e hold ourselves answerable to God, our consciences, and our country, to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may." *Biddle*, 21 U.S. (8

opinions is from 1820,⁹⁰ and there are notes on the Justice's thinking on the Supreme Court's decision in *Ogden v. Saunders*,⁹¹ which was announced in 1827.⁹²

The journal's authenticity is not in doubt. Acquired by the Chicago Historical Society in 1920, the journal came from the estate of Charles Gunther, a candy magnate and political memorabilia collector, who gave the society many items, such as the table upon which Ulysses S. Grant and Robert E. Lee signed the surrender ending the Civil War.⁹³ Furthermore, there is no reason to think that anyone prior to 1920 would have forged a Bushrod Washington journal. First, the journal contains esoteric material of interest only to scholars, though as far as I can determine no scholar took notice of those contents until now.⁹⁴ Second, the journal has a rough quality (with many cross-outs and marginal notes) that is inconsistent with a forgery.⁹⁵ Third, Justice Washington was not a well-known figure such that there would have been a lucrative market for fakes of his work.⁹⁶ Finally, the journal does not change constitutional law in any way, which could have been the motive of a dedicated forger.

B. *The Contents of the Journal—The Commerce Clause*

Proceeding on the assumption that the journal is real, we can turn to what the *Corfield* notes say. The relevant section begins with the heading "Corfield v. Coryell" and then states the following:

Governor Wolcott's reasons ag[ainst] the Connecticut Bill[:] The Constitution of the U.S. vests in Cong[ress] the right to regulate commerce between the States[.] This right is necessarily exclusive. If then N.Y. can constitutionally forbid the navigation of her waters for commercial or other purposes, by steam boats, she may equally forbid it to all vessels of any description. This power to regulate includes a right to make regulations regarding the use of

Wheat.) at 93. This distinction tells us something about how drafts were prepared in the Marshall Court and modified as Justices joined the opinions.

90 See *Le Tigre*, 15 F. Cas. 404 (C.C.D.N.J. 1820) (No. 8281); Washington Notebook, *supra* note 1. The notes may have been kept to help the Justice create published reports on his cases, for at this time there was no independent service that did that work for circuit courts.

91 25 U.S. (12 Wheat.) 213 (1827); Washington Notebook, *supra* note 1.

92 See *Ogden*, 25 U.S.(12 Wheat.) at 254–270 (opinion of Washington, J.).

93 The information about Gunther and his items that are now in the Chicago History Museum comes from the Museum exhibits and from an email by Leslie Martin, a reference librarian at the Museum, dated September 12, 2018 (on file with author).

94 I have been unable to find any references to the journal by any published work, though there could be an unpublished dissertation that cites the contents.

95 A clever forger could have foreseen that writing in this fashion would more readily fool people, but that probably overstates how clever forgers are and begs the question of why such an elaborate deception would be undertaken.

96 I am no handwriting expert, but I can say that the script in the journal looks the same as the handwriting in other letters and documents that I have examined that were clearly drafted by Justice Washington.

navigable waters[,] not the objects of commerce [that] may be attained. A state may make regulations respecting ferries, bridges, etc. and take tolls for the use of them for this is in furtherance of the power vested in Congress. The grant by a State of the exclusive right to use them does not interfere with the right vested in Cong[ress]. But the exclusive right to the use of navigable waters for all purposes does. By this grant to Cong[ress] the navigable waters of the U.S. are thrown open to all its citizens for navigation [and] commerce [and] no State can prohibit the use of them to any citizen. The N.Y. law equally interferes with the collection of the revenue by imports etc.

As Congress has passed laws regulating the commercial intercourse between the States, as these are bottomed upon the principle that such intercourse may be carried on without interruption by all the citizens of the U.S. The above law would be void even tho[ugh] the power was concurrent.⁹⁷

To unpack this passage, the starting point is that Justice Washington was reflecting on the Commerce Clause issue in *Corfield*. The most logical view is that these notes predate *Gibbons*, as there is no reference to that decision anywhere in the notes or anywhere else in the journal. Instead of relying on *Gibbons*, Washington cited for himself a veto that Governor Oliver Wolcott Jr. of Connecticut issued in May 1822 against a bill that barred steamboat navigation in state waters by anyone licensed to operate steamboats in New York.⁹⁸ The bill was designed to retaliate for a New York law that granted a steamboat monopoly in that state's waters to Robert Fulton and Robert Livingston.⁹⁹ (The New York statute was the one later invalidated by *Gibbons*.)¹⁰⁰ Wolcott's veto is an obscure text that has not been subjected to a detailed examination until now.¹⁰¹

97 Washington Notebook, *supra* note 1.

98 Governor Wolcott's entire veto message can be found in the *Columbian Register* (New Haven) of June 1, 1822 [hereinafter Wolcott Veto] (on file with author). The veto was promptly overridden. See *id.*; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 4 (1824) (argument of Daniel Webster) (mentioning the Connecticut Act); cf. Primus, *supra* note 36, at 611 (discussing the statute that was enacted). Wolcott's father signed the Declaration of Independence, while Wolcott himself was Alexander Hamilton's principal deputy in the Treasury Department before serving as Treasury Secretary for George Washington and John Adams. See RON CHERNOW, *ALEXANDER HAMILTON* 292, 479, 620 (2004).

99 See *Gibbons*, 22 U.S. (9 Wheat.) at 1; Wolcott Veto, *supra* note 987 ("The Bill is professedly retaliatory The object of this Bill is, not to create a right in our citizens to the use of the waters of New-York, but to prohibit the use of our waters, until that right is surrendered to us.").

100 Shortly I will explain that the same New York statute was upheld in state court by *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812), which was the precedent on the Privileges and Immunities Clause that Justice Washington carefully considered in his *Corfield* notes. See *infra* text accompanying notes 114–21.

101 I do not know what drew Justice Washington's attention to Governor Wolcott's veto, though my research does show that the Justice corresponded with Wolcott when the latter was the Secretary of the Treasury. See Letter from Bushrod Washington to Oliver Wolcott, Jr. (Nov. 1, 1800) (on file with author).

Wolcott argued that New York lacked the authority to pass its steamboat law under the Commerce Clause (standing on its own or as applied by Congress in various statutes) and thus Connecticut lacked the authority to respond in kind.¹⁰² The only proper remedy, he wrote, lay in a constitutional challenge to the New York law in the U.S. Supreme Court.¹⁰³ A comparison of the *Corfield* notes and Wolcott's veto shows that Justice Washington was quoting or summarizing the veto. Accordingly, one inference that can be drawn from this part of the notes is that Governor Wolcott's veto of the Connecticut bill influenced the Supreme Court's opinion in *Gibbons* through Justice Washington. Almost nothing is known about how *Gibbons* was decided, but the notes tell us that one Justice was thinking deeply about the constitutional issue presented by *Gibbons* before the Court heard that case.

There are two important similarities between the main source that Justice Washington consulted—Governor Wolcott's veto—and Chief Justice Marshall's subsequent opinion. First, Wolcott repeatedly used the word "intercourse" to define or describe commerce (as Washington jotted down twice in his notes).¹⁰⁴ This sweeping characterization of commerce was, of course, a cornerstone of the Commerce Clause dicta in *Gibbons*.¹⁰⁵ Second, Governor Wolcott made a point (also noted by Washington) that stated the holding in *Gibbons*, which was that a state steamboat monopoly was invalid on preemption grounds even if Congress lacked the exclusive authority to regulate commerce.¹⁰⁶ These commonalities could be a coincidence, but the fact that Justice Washington noted these aspects of Wolcott's veto prior to *Gibbons* suggests that they are not.

In this respect, the *Corfield* notes indicate that the Marshall Court should probably be understood as a group effort not unlike the Warren Court.¹⁰⁷

102 See Wolcott Veto, *supra* note 98 ("If our citizens are unlawfully excluded from the waters of the State of New-York, by the operation of their acts, it creates no right in us to deprive their citizens of the use of our waters . . ."). Wolcott discussed the Commerce Clause and the Privileges and Immunities Clause in his veto, but Justice Washington took notes on only the Commerce Clause discussion.

103 See *id.* ("I cannot believe that our National Constitution is so defective, that the questions cannot be fairly and speedily presented, or that the enlightened tribunal created to decide them, either has refused or would refuse, or delay a decision, upon a case regularly presented for their adjudication.").

104 See *id.* ("[I]t may be assumed as an axiom, that all regulations by the states, which relate either to ferries, bridges, or roads, or other public improvements, which facilitate the intercourse between different parts of our Country, are clearly constitutional . . ."); *id.* (referring to "free and unconstrained commercial intercourse"); see also *supra* text accompanying note 95.

105 See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824).

106 See *id.* at 96; Wolcott Veto, *supra* note 98 ("[I]f it were admitted, that the powers are concurrent, it may be observed, that Congress have already passed numerous acts relating to the commercial intercourse between the different States, all of which are necessarily founded on the admitted principle, that such intercourse may be carried on *freely and without interruption, by all the citizens of the United States.*"); *supra* text accompanying note 97.

107 Scholars of the Warren Court understand that Chief Justice Warren relied on Justice William Brennan or Justice Hugo Black in thinking through some of the great opin-

The Marshall Court is often depicted as the achievement of one superhero,¹⁰⁸ in part because Marshall is the named author of most of that Court's opinions and because there is hardly any evidence about how those opinions were written.¹⁰⁹ The reality is that the unanimity of the Marshall Court probably reflected the hard work by the Justices to reach a consensus and bring their particular skills to the problems that they confronted.¹¹⁰ In *Gibbons*, we see a sign that Justice Washington provided assistance to the Chief Justice, even if that meant only referring him to a helpful analysis.

* * *

In the next part of the *Corfield* notes, Justice Washington tried to reason from the Wolcott Veto to the New Jersey law on oyster harvesting. He wrote the following to himself:

[D]oes the article of the Constitution above mentioned apply to this case[?] The law merely forbids the taking of oysters. Cannot a law be made to prevent citizens of other states from taking sand, stones, wood or anything belonging to individuals, to the state, or to the citizens of N.J. in common? What has that to do with commerce, which consists in bartering, buying [and] selling[?] The prohibition is not of the use of the waters for navigation [and] trade, but of the taking of oysters within the waters. Could not a law forbid the citizens of other states from taking the fish or oysters from a several fishery? Or from a free fishery? If she could why not forbid the same act in relation to a common fishery?¹¹¹

One point about this passage is that the Justice was unsympathetic to the claim that the New Jersey statute violated the Commerce Clause. Thus, his

ions that bear his name. See SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 237–38 (2010) (discussing Justice Brennan's role in the editing of Chief Justice Warren's opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966)); see also JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 348–49 (2006) (summarizing the Chief Justice's relationships with Justice Black and Justice Brennan).

108 See, e.g., CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 212 (1996) ("More than anyone else, John Marshall invented American constitutional law . . .").

109 One obvious reason for this lack of evidence is that during the Marshall Court the Justices lived together when the Court was in session. See SMITH, *supra* note 85, at 377–78. As a result, virtually all of their deliberations were oral rather than written.

110 In my biography of Justice Washington, I plan to explore at least one other instance in which circumstantial evidence points to the conclusion that he made a substantial contribution to an opinion written by someone else. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815) (invalidating a Virginia statute that divested the Episcopal Church of its property in an opinion by Justice Story that closely tracked the reasoning given by Justice Washington about the same statute when he was in private practice).

111 Washington Notebook, *supra* note 1. After this paragraph, the notes summarize some cases (including a few from England) that may have been discussed by counsel. See *id.* The fact that Justice Washington was concentrating on a case challenging a state law that indirectly regulated commerce may have also had an impact on *Gibbons* insofar as the Court made clear that many comparable state statutes were valid. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 75 (1824). There is, though, no proof of that connection.

change of heart from the trial in *Corfield*, where he asked the jury to rule for the plaintiff, and his opinion ruling for the defendant, probably cannot be attributed to *Gibbons*.¹¹² Indeed, the lines from the notes dovetail with this statement in *Corfield*:

Paving stones, sand, and many other things, are as clearly articles of trade as oysters; but can it be contended, that the laws of a state, which treat as tortfeasors those who shall take them away without the permission of the owner of them, are commercial regulations?¹¹³

And he probably thought that the state statute was valid even if the commerce power was exclusive, as he was familiar with that claim from the Wolcott veto but made no distinction on that basis in his notes. If *Gibbons* was not the cause of Justice Washington's about-face in *Corfield*, then what was?

C. *The Content of the Journal—Privileges and Immunities*

The answer to the mysterious switch in *Corfield* is hiding in plain sight within the *Corfield* notes. When the Justice turned his attention to the Privileges and Immunities Clause claim, he scribbled the following:

As to [Article IV, Section 2] of the Constitution, "the citizens of each State shall be entitled to all privileges [and] immunities of citizens in the several States." Is the right which a citizen has to enjoy the common property belonging to the citizens of the State a privilege or immunity? See *infra* A[.]

. . . .

A[.] I am inclined to think that it is a privilege within the meaning of this article of the Constitution. If it be not, then the rights to navigate the waters would not be, because they also are common property, and yet it would look to violate this article to make a law forbidding citizens of other states to navigate the waters of that State. I am inclined to the opinion of the [court] in *Livingston v. Van Ingen*, that the meaning of this article is that the citizens of each State shall within every other State have *equal* privileges or rights as the citizens of such State have[,] the words *all privileges of citizens* being equivalent to equal privileges.¹¹⁴

The surprise here is that Justice Washington initially believed that the New Jersey statute did violate the Constitution. This probably explains why he asked the jury to find for the plaintiff at trial.

112 See *supra* text accompanying notes 33–35. *Gibbons* did make a brief reference to the Privileges and Immunities Clause in stating that the Constitution "only protects the personal rights of the citizens of one State, when within the jurisdiction of another, by securing to them 'all the privileges and immunities of a citizen' of that other, which they hold subject to the laws of the State as its own citizens." *Gibbons*, 22 U.S. (9 Wheat.) at 69. Justice Washington quoted *Gibbons* in the Commerce Clause portion of *Corfield* but did not do so in the privileges-and-immunities portion, thus it is hard to know what he thought about this line or whether his consideration of *Corfield* shaped the statement.

113 *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3230).

114 Washington Notebook, *supra* note 1. The Justice also wrote that a "[p]rivilege in law is some peculiar benefit granted to certain persons or places contrary to the usual course of the law. Immunity is an exemption from some official duty or imposition." *Id.*

While there is no indication of why the Justice changed his stance,¹¹⁵ his tentative reasoning was clear enough. Washington took for granted that one of the privileges and immunities of citizens was the use of navigable waters in any state.¹¹⁶ With that premise, he could not see how the right to harvest oysters from those waters could be distinguished. In the *Corfield* opinion, the Justice appeared to answer his own question by stating that a citizen's right "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise," which included using navigable waters for travel, was not analogous to the right to fish in those waters.¹¹⁷ More broadly, Justice Washington's view that *Corfield* was a close case on the privileges-and-immunities question could explain why he felt the need to discuss those liberties in dicta before coming down on the side that oyster harvesting was not among them. Put another way, the view that *Corfield*'s privileges-and-immunities dicta was unnecessary rests in part on an assumption that the conclusion was clear-cut, but the notes demonstrate that this was not how Justice Washington saw the case.

A second point about this section of the notes is that they state the source that Justice Washington relied on for his privileges-and-immunities analysis. *Livingston* was the New York decision that upheld the steamboat law invalidated by *Gibbons*.¹¹⁸ On the Privileges and Immunities Clause, one of the seriatim opinions in *Livingston* declared that "[t]he constitution of the *United States* intends that the same immunities and privileges shall be extended to all the citizens equally, for the wise purpose of preventing local jealousies, which discriminations (always deemed odious) might otherwise produce."¹¹⁹ Chancellor Kent's separate opinion was even more emphatic:

The provision that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, has nothing to do with this case. It means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights.¹²⁰

In endorsing these views, Justice Washington's notes say that, at least initially, he viewed the Privileges and Immunities Clause as a rule of equal treatment and not as a guarantee of fundamental rights. This means that he

115 The section of the notes following this paragraph contains another summary of the cases (some English) that were probably raised by counsel. *See id.*

116 Even the abbreviated list of national privileges or immunities in *Slaughter-House* included the right to use navigable waterways. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

117 *See Corfield*, 6 F. Cas. at 552. One explanation for this distinction given what Justice Washington said in his *Corfield* opinion is that the use of navigable waters for transportation cannot be exhausted in the way that a fishery can. *See id.*

118 *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812). The Justice took notes on *Livingston* later in the *Corfield* section of his journal, but he focused on its discussion of the Privileges and Immunities Clause instead of on its analysis of the Commerce Clause. *See Washington Notebook*, *supra* note 1.

119 *Livingston*, 9 Johns. at 561 (opinion of Yates, J.).

120 *Id.* at 577 (opinion of Kent, C.J.).

probably was not advancing the broader interpretation given to *Corfield* by members of the Thirty-Ninth Congress.¹²¹ In a sense, this fact is irrelevant. Judicial opinions are capable of growth in the common-law tradition and are not read in an originalist sense, as a statute or a constitutional provision may be. Moreover, Justice Washington might have changed his mind (just as he did on the validity of the New Jersey law)¹²² and written the privileges-and-immunities dicta as he did to support a fundamental-rights view. In another sense, however, the notes give *Corfield's* dicta an entirely new spin in “the court of history.”¹²³

Accordingly, the *Corfield* notes contain details that challenge the received wisdom about that case and about *Gibbons*. The discovery of the notes proves the adage that “I’d rather be lucky than good,” but hopefully my luck will redound to the benefit to other scholars who now know about and can consult Bushrod Washington’s lost journal.

III. DESIGNING THE RIGHT TO VOTE

This Part goes beyond the *Corfield* notes to consider the enduring significance of Justice Washington’s opinion. The eye-opening part of *Corfield's* privileges-and-immunities dicta was its inclusion of “the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised,” among the fundamental rights.¹²⁴ Until well into the twentieth century, *Corfield* was the only legal authority that called the right to vote fundamental. As a result, advocates for women’s suffrage often invoked Washington’s opinion during Reconstruction.¹²⁵ Acknowledging *Corfield's* role in the development of voting rights is long overdue, especially given that its dicta exemplifies the tension created by leaving such a fundamental right to state regulation.¹²⁶

A. Searching for an Ideal

To say that voting eligibility in the United States was not universal in practice comes as no surprise, but what may be startling is the realization that until fairly recently there were no powerful aspirational statements on the

121 See *supra* notes 67–69 and accompanying text.

122 See *supra* text accompanying notes 33–41.

123 Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (stating that *Korematsu v. United States*, 323 U.S. 214 (1944), “has been overruled in the court of history”).

124 *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3230). In fairness, *Corfield* said that voting “may be added” to the list of fundamental rights, *id.*, but that qualification does not undercut the significance of the statement.

125 See *infra* notes 137–38, 143–46 and accompanying text.

126 See *Oregon v. Mitchell*, 400 U.S. 112, 264 (1970) (opinion of Brennan, White & Marshall, JJ., concurring in part and dissenting in part) (making this observation about *Corfield*); cf. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 216 (Cornell Univ. Press 1966) (1867) (“The primary element in a free government—the determination [of] how many people shall have a share in it—in America depends not on the [federal] [g]overnment but on certain subordinate local, and sometimes, as in the South now, hostile bodies.”).

right to vote. None of the Framers proclaimed that all citizens had an inherent right to vote, and they proposed a Constitution that left suffrage regulation entirely to the states.¹²⁷ A careful search through the rhetoric of the legal and political heavyweights during the nineteenth and much of the twentieth century comes up empty in finding stirring statements about the right to vote as fundamental.¹²⁸ Only in the 1960s did that ideal emerge in Supreme Court opinions and in public speeches, such as President Lyndon B. Johnson's address to the nation after the violence in Selma.¹²⁹

While longstanding resistance to voting for women, African Americans, and the poor helps explain the absence of suffrage from the rights considered self-evident or vital, a conceptual vacuum was also to blame. Voting could not be understood as a natural right that existed in a society without government or as a common-law right that was backed by custom or tradition. Treating voting as a fundamental right requires some theory of the representation necessary in a constitutional democracy. And that sort of theory took a long time to work itself pure. *Corfield* was the first case to anticipate that development, if only in passing.¹³⁰

The voting-rights language in *Corfield* lay dormant until the Thirty-Ninth Congress, when the power of Justice Washington's statement bent the text of

127 See THE FEDERALIST NO. 52, at 354 (James Madison) (Jacob E. Cooke ed., 1961) (justifying the Convention's decision to leave suffrage qualifications to the states). Bushrod Washington could be understood as a Framers given that he voted for the Constitution's ratification in Virginia, see CASPER, *supra* note 82, at 10, but I daresay that most people do not think of delegates to the state ratifying conventions as being among the Framers.

128 The closest example is from *Yick Wo v. Hopkins*, where the Supreme Court described voting as "not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). A decade later, however, the Court affirmed that a woman was a United States citizen "although not entitled to vote, the right to the elective franchise not being essential to citizenship." *United States v. Wong Kim Ark*, 169 U.S. 649, 680 (1898).

129 See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."); Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965, at 281, 282 (1966) ("The most basic right of all was the right to choose your own leaders. The history of this country, in large measure, is the history of the expansion of that right to all of our people. . . . Every American citizen must have an equal right to vote."). Article 21 of the Universal Declaration of Human Rights marked the start of the modern trend in stating: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 21 (Dec. 10, 1948).

130 New Jersey gave women the right to vote until 1807. See KEYSSAR, *supra* note 64, at 54. As *Corfield* was about a New Jersey statute, one wonders if Washington thought about that fact in making an aspirational statement about voting as a privilege and immunity of citizenship.

the Fourteenth Amendment itself. In discussing the Civil Rights Act of 1866, Senator Trumbull said that in *Corfield*:

Th[e] judge goes further than the bill under consideration, and he lays it down as his opinion that under this clause of the Constitution, securing to the citizen of each State all the privileges and immunities of citizens of the several States of the United States, a person who is a citizen in one State and goes to another is even entitled to the elective franchise¹³¹

Opponents of the Civil Rights Act, realizing that African American male voting was politically unpopular, seized upon *Corfield* as proof that the Act would give many of the freed slaves voting rights even though voting was not listed in the statute. As Congressman Andrew Rogers of New Jersey said:

This bill, then, would prevent a State from refusing negro suffrage under the broad acceptance of the term “civil rights or immunities.” In fact, it has been decided by the circuit court of the United States, in the case of *Corfield vs. Coryell* . . . that the elective franchise is included in the words privileges and immunities.¹³²

B. The Fourteenth Amendment and Women’s Suffrage

In response, the Fourteenth Amendment was drafted to make clear that the guarantee of “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” did not cover the suffrage right listed in *Corfield*.¹³³ First, Section 2 of the Fourteenth Amendment spelled out in detail how voting rights were to be addressed with the word “male” inserted into the final text to indicate that women did not have a constitutional right to vote.¹³⁴ Second, the wording of the Privileges or Immunities Clause is not identical to the wording of the Privileges and Immunities Clause. Why are they different? One possibility is that this change was meant to disassociate the Fourteenth Amendment from Justice Washington’s interpretation of the older provision, either *in toto* or just with respect to voting rights. There is no direct evidence for this interpretation,

131 CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull).

132 *Id.* at 1122 (statement of Rep. Rogers).

133 U.S. CONST. amend. XIV, § 1. In his introductory speech, Senator Howard explained: “The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [sic].” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard). Howard did not attempt to reconcile this view with his quotation of the *Corfield* dicta earlier in the same speech. *See id.* at 2765.

134 *See* U.S. CONST. amend. XIV, § 2 (defining the potential voter pool as “any of the male inhabitants” of a state “being twenty-one years of age, and citizens of the United States” excepting those who participated “in rebellion, or other crime”). For more on Section 2, see Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 783–90 (2018).

but the strong aversion in 1866 to extending universal male suffrage offers contextual support for that reading.¹³⁵

Nevertheless, friends of women's suffrage continued citing *Corfield* for the proposition that, as citizens, women were entitled to vote. In 1871, Victoria Woodhull petitioned the House of Representatives and claimed that the Privileges or Immunities Clause of the Fourteenth Amendment gave women a suffrage right.¹³⁶ Albert Riddle, Woodhull's attorney, told the National Women's Suffrage Convention that her petition was backed by *Corfield* and observed that "Bushrod Washington, the favorite nephew of our Washington, made the decision, ladies. He was the Washington who got all of the brains of the family outside of its great chief; and he put them to a most admirable use."¹³⁷ Riddle further argued that Chancellor Kent's quotation of *Corfield's* line on the "elective franchise" in his famed treatise amounted to a "canonization" of the decision on that point.¹³⁸

The House Judiciary Committee, in an opinion by John Bingham, rejected the Woodhull Memorial while quoting from *Corfield*.¹³⁹ Bingham was the drafter of the Privileges or Immunities Clause and reasoned that the Fourteenth Amendment did not give women the right to vote in part because Section 2 of the Amendment made clear that only men were presumptively eligible voters.¹⁴⁰ Prior to giving that explanation, though, Bingham reproduced all of *Corfield's* dicta on the privileges and immunities of citizens without comment.¹⁴¹ One inference that can be drawn is that he was saying that *Corfield's* comment that voting rights were subject to state regulation meant that states could prohibit women from voting.

135 The Fifteenth Amendment, ratified in 1870, brought the nation closer to universal male suffrage by barring racial discrimination in voting. See U.S. CONST. amend. XV.

136 See MAGLIOCCA, *supra* note 59, at 159–60; see also Victoria C. Woodhull, Address to the Judiciary Committee of the House of Representatives (Jan. 11, 1871), in 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 8, at 444, 444–48.

137 Riddle, *supra* note 8, at 453; see LASH, *supra* note 5, at 235 (describing the speech). Riddle repeated this argument in a losing effort to invalidate the District of Columbia's bar on women voting. See *id.* at 235 n.13.

138 See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 35–36 (New York, William Kent 8th ed. 1854) (1827); Riddle, *supra* note 8, at 453.

139 See *Woman Suffrage*, *supra* note 16, at 1 (reproducing the House Judiciary Committee Report). The Supreme Court reached the same conclusion three years later, see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 162 (1875), though the Court did not refer to *Corfield* in its opinion. The plaintiff in *Minor* who was challenging the exclusion of women from voting in Missouri did cite the *Corfield* dicta. See Virginia L. Minor's Petition in the Circuit Court of St. Louis County, December Term, 1872, *reprinted* in 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 8, at 715, 725–26.

140 See *Woman Suffrage*, *supra* note 16, at 1; see also MAGLIOCCA, *supra* note 59, at 108, 112–19, 121–23 (describing Bingham's drafting of Section 1 of the Fourteenth Amendment).

141 See *Woman Suffrage*, *supra* note 16, at 1.

At least that was the inference drawn by the two dissenting members of the House Judiciary Committee, who issued their own opinion.¹⁴² After quoting from *Corfield's* dicta, the dissent stated: "This case is cited by the majority of the Committee, as sustaining their view of the law, but we are unable so to understand it. It is for them an exceedingly unfortunate citation."¹⁴³ In *Corfield*,

the court enumerated some of the "privileges of citizens," such as are "*in their nature fundamental and belong of right to the citizens of all free governments*" (mark the language), and among those rights, place the "right of the elective franchise" in the same category with those great rights of *life, liberty, and property*. And yet the Committee cite this case to show that this right is not a fundamental right of the citizen!¹⁴⁴

The dissent conceded that *Corfield* explained that suffrage "is to be enjoyed as regulated and established by the State in which it is to be exercised," but rejected the argument that "[t]hese words are supposed to qualify the right, or rather take it out of the list of fundamental rights, where the Court had just placed it."¹⁴⁵ A right was either fundamental or was not; *Corfield* could not be read to say that something is

a "fundamental right of the citizen," but it does not exist, unless the laws of the State give it. A singular species of "fundamental rights!" Is there not a clear distinction between the regulation of a right and its destruction? The State may regulate the right, but it may not destroy it.¹⁴⁶

The House Judiciary Committee dissent restated the problem with voting rights that *Corfield* had recognized fifty years earlier. Suffrage is a fundamental right, but the regulation of that right remains principally with the states. The constitutional amendments that bar states from engaging in particular types of voting discrimination have narrowed but not eliminated that gap. Voting rights remain dependent on state and local governments because they control the drawing of district boundaries, the allocation of presidential electors, whether ex-felons are eligible to vote, the counting of disputed ballots, and the implementation of election procedures.¹⁴⁷ What,

142 See WILLIAM LOUGHRIDGE & BENJAMIN F. BUTLER, MINORITY REPORT OF THE HOUSE COMMITTEE ON THE JUDICIARY ON THE SUBJECT OF THE WOODHULL MEMORIAL H.R. REP. NO. 41-5, pt. 2 (1871) [hereinafter LOUGHRIDGE & BUTLER], reprinted in 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 8, at 464, 464–82. One of the dissenters, Representative Benjamin Butler, was Bingham's nemesis in the House of Representatives during Reconstruction. See MAGLIOCCA, *supra* note 59, at 104–06 (discussing their rivalry).

143 See LOUGHRIDGE & BUTLER, *supra* note 142, at 470.

144 *Id.* at 470–71 (emphasis added).

145 *Id.* at 471 (internal quotation marks omitted).

146 *Id.* *But cf.* CONG. GLOBE, 40th Cong., 2d Sess. 2054 (1868) (statement of Rep. Woodward) (citing *Corfield* for the proposition that "suffrage is one of the reserved rights of the States and that the Federal Government has no power to confer or take it away").

147 See, e.g., U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"); *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the

then, does calling voting a fundamental right mean when states are given significant latitude in enforcement? We still struggle with the paradox that *Corfield* identified in cases involving the validity of aspects of the Voting Rights Act or state photo identification requirements for voting.¹⁴⁸

As a postscript, consider how the Supreme Court read *Corfield*'s voting dicta. Until 1898, the Court shunned the "elective franchise" phrase when quoting the rest of *Corfield*'s privileges-and-immunities language.¹⁴⁹ Two years later, voters in St. Louis brought an equal protection challenge against a voter registration statute in Missouri that singled out the city's voters for special treatment.¹⁵⁰ The Justices unanimously rejected this claim and stated: "[T]he elective franchise, if one of the fundamental privileges and immunities of the citizens of St. Louis, as citizens of Missouri and of the United States, is clearly such franchise 'as regulated and established by the laws or Constitution of the State in which it is to be exercised.'"¹⁵¹ The quoted language, of course, came from *Corfield*.

Accordingly, Justice Washington's statement that voting was a fundamental right of citizens was the first step on the long road toward recognizing that right as part of our constitutional heritage. Why or how he had this epiphany remains a mystery, as in this instance he decided not to record his thinking in the *Corfield* notes.

CONCLUSION

Corfield v. Coryell is constitutional law's greatest fossil. Justice Bushrod Washington's dicta on the privileges and immunities of citizens is a fragment that provides tantalizing clues on our unwritten rights, which remains a significant concern for the twenty-first century. *Corfield*'s dicta was then exhumed following the Civil War and put on display during the debates on the Civil Rights Act of 1866 and on the Fourteenth Amendment in a way that many believe is still relevant for interpreting those rights. If only judges and scholars knew more about this relic.

Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ."); *Gill v. Whitford*, 138 S. Ct. 1916, 1926–29 (2018) (discussing the history of constitutional challenges to partisan gerrymandering by states); *Richardson v. Ramirez*, 418 U.S. 24, 25 (1974) (upholding state authority to disenfranchise ex-felons). Though Congress has the power under Article I to draw congressional district boundaries and to resolve disputed elections to that body, in practice these matters are now left to the states.

148 See *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

149 See *Blake v. McClung*, 172 U.S. 239, 248–49 (1898) (quoting for the first time all of the privileges-and-immunities dicta in *Corfield*). For example, none of the opinions in *Slaughter-House* included *Corfield*'s voting-rights language. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75–76 (1873); *id.* at 97 (Field, J., dissenting); *id.* at 117 (Bradley, J., dissenting); see also *Williams v. Bruffy*, 96 U.S. 176, 183 (1878) (citing *Corfield* but without the voting-rights language); *McCready v. Virginia*, 94 U.S. 391, 395 (1877) (same).

150 See *Mason v. Missouri*, 179 U.S. 328, 328–330 (1900).

151 *Id.* at 335 (quoting *Blake v. McClung*, 172 U.S. at 249) (citing *Corfield*).

This Article supplies some context for *Corfield* with the help of Justice Washington's rough notes on the cases. While these notes do not answer all of the outstanding questions about his ruling or definitely resolve what the dicta should mean now, they do shed important light about *Corfield* and on the Supreme Court's opinion in *Gibbons v. Ogden*. It is my hope that other scholars will benefit from examining this new piece of the historical record.